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THE
SOUTHWESTERN REPORTER,
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CONTAINING ALL THE CURRENT DECISIONS OF THE

SUPREME AND APPELLATE COURTS OF ARKANSAS,
KENTUCKY, MISSOURI, TENNESSEE, TEXAS,
AND INDIAN TERRITORY.

PERMANENT EDITION.

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WITH TABLE OF SOUTHWESTERN CASES IN WHICH REHEARINGS HAVE BEEN DENIED.

ALSO, TABLES OF SOUTHWESTERN CASES PUBLISHED IN VOLS. 108, 109, KENTUCKY REPORTS; 170-172, MISSOURI REPORTS; 96, MISSOURI APPEALS REPORTS; 95, TEXAS REPORTS; 25-27, TEXAS CIVIL APPEALS REPORTS.

ALSO, ADDITIONAL TABLES FOR VOLS. 108, 109, KENTUCKY REPORTS; 170-172, MISSOURI REPORTS; 96, MISSOURI APPEALS REPORTS; 95, TEXAS REPORTS; 25-27, TEXAS CIVIL APPEALS REPORTS.

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COURT RULES.

COURT OF APPEALS OF KENTUCKY.

In Force September Term, 1903.

I. In accordance with section 118 of the Constitution, this court after January 1, 1895, will be divided into two departments, each one of which shall consist of three judges, besides the Chief Justice, who shall preside over each department. Each division shall sit on alternate days during each week, when not in joint session, to hear arguments and motions and deliver opinions. Opinions shall be delivered as the judgment of the court without reference to the department delivering them. When the Chief Justice is absent, or, if present, from any cause fails to preside, the judge next oldest in commission shall preside with each department, and shall require the presence of a judge from either department when necessary to constitute a majority of the entire body. The cases, when submitted, shall be assigned by the Chief Justice to each department, and in such a manner as to equalize the burden.

II. Whenever a case involves a constitutional question, either federal or state, or in any case where, in the opinion of the Chief Justice, the importance of the case requires, both departments shall hear the argument, whether oral or written, and pass on the questions involved; and in cases where the judges composing one department do not concur, it shall be the duty of the Chief Justice to notify the other department, and have the question at issue disposed of in joint session.

When a majority of either department, including the Chief Justice, shall desire a joint session for the purpose of passing on any question or hearing any cause, the entire board shall be assembled for that purpose.

III. That in all cases or appeals hereafter filed, or now filed and not submitted, it shall be the duty of the appellant to file his brief twenty days prior to the day the case is set for hearing, and the appellee to file his brief ten days prior to that time, and a failure to do so by the appellant shall cause a dismissal of the appeal without prejudice, and upon the part of appellee, he will, if in default, be required to pay the costs up to the date of filing his brief. No oral argument will be ordered or heard on the part of the party in default unless his brief is filed as herein

provided. When the briefs are in, or the brief of the party not in default, an oral argument will be ordered if desired, and a time fixed for the hearing.

All cases will be decided as nearly as practicable in the order of their submission.

IV. But two oral arguments on each side will be allowed in any case and every such argument will be limited to one hour.

V. Records not made out in a legible handwriting, or not indexed, are to be condemned, and the clerk making out such record to be prohibited from collecting anything therefor; and the clerk of this court will disregard the expense thereof in taxing cost without any special order in the case.

VI. When two members of a department desire it, a rehearing shall be granted.

VII. When the record of a former appeal in the same cause is necessary to the decision of a subsequent appeal, or when a record already in this court is made part of a record in another case, and not copied into the transcript, the attorney for the appellant must see to it, on pain of having the appeal dismissed, that such old record is placed with the new record before the cause is submitted.

VIII. A party intending to move that the clerk of the inferior court or the adverse party shall be adjudged to pay the costs resulting from a violation by such clerk or party of subsection 11 of section 737 of the Civil Code, shall make such motion at or before the submission of the cause, and not thereafter; and such motion shall indicate the portions of the record claimed to have been improperly copied, and the pages of the transcript where they may be found.

IX. If the motion is against the clerk, he must be served with a copy of the written motion at least five days before the cause is submitted.

X. If an appellant or his attorney, or an appellee with a cross-appeal, or his attorney, shall, for any purpose, withdraw the record from the clerk's custody without the special order of the court, and fail or neglect to produce it in court on call of the case for

submission or argument. the appeal or cross-appeal, on motion of the adverse party, shall be dismissed for want of proper prosecution.

XI. Ten days' notice of a motion to affirm as a delay case must be given appellant or his attorney, otherwise such motion will not be heard until the case is called for trial on the day it is set on the docket.

XII. Where time is extended to file a petition for rehearing, and the time expires during vacation, or where the court adjourns before the time for filing a petition for rehearing has expired, the filing of the petition with the clerk in the clerk's office within the time shall be held sufficient. The clerk, however, has no right to extend the time for filing, and this can only be done by an order from one of the judges.

XIII. Petitions for rehearing shall be considered by a judge other than the one who delivered the opinion in the case.

XIV. Ordered, that there be held three terms of the Court of Appeals in each year as follows:

September term, beginning third Monday in September, and ending the second Saturday in December.

January term, beginning first Monday in January, and ending the last Saturday in March.

April term, beginning second Monday in April, and ending the first Saturday in July.

XV. Ordered, that no extension of time for filing a petition for rehearing will be granted except upon the affidavit or statement of the attorney or client stating sufficient cause therefor.

XVI. Cases once adjudicated by this court, and again brought up by appeal may be advanced by leave of the court on motion of either party.

XVII. There shall accompany every brief a classification of the question discussed. The classification may be indicated by a "word" which suggests a subject, or by a brief synopsis of it.

The authorities relied upon shall be cited under the appropriate heading.

XVIII. No case on the appearance docket will be passed for oral argument unless there be filed by counsel a statement showing the legal questions involved, and the court shall deem them new and of sufficient importance to require oral argument.

XIX. Unless for special reasons it is otherwise ordered, cases passed for oral argument will not be set for hearing until the court is ready to take them up in their regular turn on the docket, and will not then be heard until the briefs are filed and the cause is ready for submission. When submitted they will be sent out immediately to the judges in rotation and taken up by the court

as soon thereafter as practicable in preference to other cases.

XX. Except in cases presenting novel questions, opinions of the court will, for the present, be delivered without elaboration.

Adopted March 7, 1901, by Kentucky Court of Appeals.

XXI. When a circuit court clerk makes a typewritten transcript for use in the Court of Appeals he shall use a record ribbon (black); when he makes a manuscript transcript for the same purpose he shall use only one side of the paper.

For a clerk to disregard either of the foregoing requirements is to take the risk of having the transcript condemned.

XXII. Where a case is orally argued additional time for filing supplemental briefs will not be given beyond ten days.

XXIII. Notice to the adverse party must be given of all motions made in this court, where it can reasonably be done: Provided, however, that this rule shall not apply to motions made on the regular calling of the cases.

XXIV. In all cases hitherto submitted with leave to brief such leave shall expire on the 1st day of February, 1903; and in cases hereafter submitted the brief must be filed in thirty days after the leave is given, unless further time is allowed by the court. After submission brief must be filed in open court.

XXV. No person holding the position of clerical assistant to a judge of this court shall practice as attorney in the court or be employed or act in any way as such in any case pending therein.

XXVI. In any case where only a question of law is relied on, the parties being all *sui juris* may file in the clerk's office an agreed statement of the facts shown by the evidence, also of the question or questions of law raised; and in such case the clerk shall copy into the transcript such agreed statement of facts in lieu of a copy of the evidence, and the transcript shall be treated as a complete record.

XXVII. Hereafter this court will conclusively presume, after submission, that records brought up to this court on schedule filed in the clerk's office of the inferior court, as prescribed by section 737 of the Code of Practice, is the complete record, and that all parties interested have consented to try the appeal on such record. Before submission the court will, in its discretion, allow a transcript of other parts of the record to be filed when deemed necessary in furtherance of justice.

XXVIII. Counsel for appellant or appellee, if he wishes the record printed, may, within thirty days after a record has been

filed in the clerk's office, file a statement with the clerk of this court indicating the parts of the record he thinks are essential to the hearing of the appeal, and, if filed by the appellant, stating concisely the grounds of reversal relied on; and thereupon the clerk shall send to the counsel for the opposing side a copy of the statement thus filed, and if said opposing counsel does not, within thirty days, file with said clerk a statement of other parts of the record deemed essential by him, the parts indicated, as before stated, shall be deemed and treated as the complete record, and the adverse party shall be deemed to have consented to a hearing on the parts indicated. If such notice shall be sent to counsel for appellee, and he wishes to pray a cross-appeal, and he thinks other parts of the record not indicated are necessary to illustrate his cross-appeal, he shall in the statement filed by him state that he expects to pray a cross-appeal, also concisely the grounds of reversal relied on by him, and indicate not only the additional parts of the record necessary to illustrate the appeal, but the cross-appeal; and in the event a cross-appeal is to be prayed the clerk shall send a copy of said statement to the counsel for appellant, who shall, if he wishes other parts than those mentioned in the statement filed by counsel for appellee, within thirty days so indicate by a statement filed with the clerk, and if he shall not do so within the time named the appellant shall be deemed to have consented to a trial on the cross-appeal on the parts of the record indicated. In the event the appeal shall be docketed prior to the time when this rule may be executed, the case shall be continued to a subsequent day in the term, or, if necessary, to the next term of the court, upon a statement duly

signed and filed by the counsel for one side or the other that he intends to avail himself of this rule. The clerk shall cause to be printed such parts as shall be thus indicated and for his services required by this rule shall be allowed such sum as may be indicated by this court, to be taxed as costs against the unsuccessful party. Whoever shall designate parts of the record to be printed shall deposit with the clerk such sum as he may estimate will be necessary to meet the cost of printing. If counsel for either party shall cause unnecessary parts of the record to be printed, such order as to the costs may be made as the court shall think proper. If either party shall willfully omit any part of the record essential to the proper decision of the case, the printed transcript will be rejected and the cost of printing will be adjudged against him.

This rule shall not take effect until the September term, 1903, and shall not apply to any case where the amount involved is less than \$5,000, nor where the appeal is docketed prior to that term. Where the recovery is other thing than money, the party asking the record printed shall file his affidavit and the statement of his attorney that it is of value \$5,000.

NOTE

Tax on Appeals. The tax on appeals is one dollar, and in all cases must be paid to the clerk of the Court of Appeals before the cases will be filed.

The clerks of the lower courts and attorneys are requested not to write anything on the back of the transcripts.

Counsel, in writing briefs, are requested by the court to write only on one side of the paper.

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WALTON v. STATE.

Supreme Court of Arkansas. June 8, 1903.)

SEDUCTION—CHASTITY—INDICTMENT—PRE-
SUMPTION—PROMISE OF MARRIAGE—REA-
SONABLE DOUBT—INSTRUCTIONS.

1. On a prosecution for seduction through a false promise of marriage, an instruction to acquit if the jury have reasonable doubt whether prosecutrix had actual personal chastity at the time of the intercourse should be given.

2. In a requested instruction, on a prosecution for seduction, that the burden is on the state to show beyond a reasonable doubt "that such carnal knowledge was had by virtue of an express promise of marriage made to her by defendant, and that she would not have yielded to his embraces without such promise of marriage," the last clause is covered by the preceding one, and so is properly struck out.

3. Though Sand. & H. Dig. § 1900, merely provides that one who shall be convicted of obtaining carnal knowledge of a female by virtue of a false expressed promise of marriage shall be punished, previous chaste character of the female is an essential of the crime, and must be alleged in the indictment.

4. While on a prosecution for seduction the previous chaste character of the female is presumed, such presumption is overcome by the presumption of defendant's innocence.

Appeal from Circuit Court, Pulaski County; Robt. J. Lea, Judge.

Jas. Walton was convicted of seduction, and appeals. Reversed.

The indictment is as follows (after omitting formal part): "The said James Walton, in the county and state aforesaid, on the 15th day of May, 1901, being a single and unmarried man, unlawfully and feloniously did obtain carnal knowledge of one Julia Robinson, a single and unmarried female, by virtue of a false expressed promise of marriage, to her previously made by said James Walton, against the peace," etc. Appellant demurred to the indictment. His demurrer being overruled, exceptions were saved. After conviction, appellant filed a motion in arrest of judgment; upon the overruling of which, appellant saved exceptions. He was tried upon his plea of not guilty, convicted, and appealed to this court. After conviction the appellant filed a motion in arrest of judgment, which was by the court overruled, to which he excepted. Before the case was submitted to the jury,

the defendant's counsel moved the court to give to the jury the following instruction, to wit: "Instruction No. 2. While Julia Robinson is presumed to have been virtuous at the time of the alleged intercourse, if the jury believe from the evidence or circumstances that she was not chaste and virtuous and did not possess actual personal chastity, or if the jury have reasonable doubt about this, they should acquit." The only other instruction on reasonable doubt in the case was instruction No. 1, which, as given by the court, is as follows: "Instruction No. 1. The burden is on the state to show beyond reasonable doubt: (1) That the crime was committed in Pulaski county, Ark.; (2) that it occurred within three years before the finding of the indictment; (3) that the defendant had carnal knowledge of Julia Robinson; and (4) that such carnal knowledge was had by virtue of an express promise of marriage made to her by the defendant, and that she would not have yielded to his embraces without such promise of marriage." The court refused to give this as asked, but modified it by striking out the words "and she would not have yielded to his embraces without such promise of marriage," to which the defendant excepted. This was not an instruction that if the jury had a reasonable doubt on the whole case, which would have included the part of instruction No. 2 refused by the court, "that she (the woman) did not possess actual personal chastity, or if the jury have reasonable doubt about this, they should acquit." There were other instructions asked and refused, and various questions raised and discussed, some of which are questions for a jury should the appellant be tried again on this charge, and others of which it is unnecessary for us to discuss.

F. T. Vaughan, for appellant. Geo. W. Murphy, Atty. Gen., for the State.

HUGHES, J. (after stating the facts). It seems to us so plain that the court erred in refusing to give the second instruction for the defendant that we deem it unnecessary to discuss it. This instruction is that.

"while Julia Robinson is presumed to have been virtuous at the time of the alleged intercourse, if the jury believe from the evidence or circumstances that she was not chaste and virtuous, and did not possess actual personal chastity, or if the jury have reasonable doubt about this, they should acquit." Actual personal chastity on the part of the woman was necessary to make out the crime of the defendant, and if the jury had a reasonable doubt that she possessed this they were bound to acquit the defendant. Actual personal chastity on her part was a material element of the crime. *Polk v. State*, 40 Ark. 486, 48 Am. Rep. 17.

It seems equally clear to this court that there was no prejudicial error committed by the court below in striking out and refusing to give the last clause of instruction No. 1, asked for by the defendant, which is as follows: "And she would not have yielded to defendant's embraces without such promise of marriage." The court had instructed the jury by instruction No. 3 that before they could convict the defendant they must find that such intercourse was had by reason and on account of defendant's promising to marry the girl, who, at the time she yielded to his embraces, was in possession of actual personal chastity. The last clause of instruction 1 was covered in effect by the first clause of same, and the court properly struck it out. There was no necessity to repeat what had been given.

Was the indictment sufficient, which is as follows (leaving out the formal parts), to wit: "That said James Walton, in the county and state aforesaid, on the 15th day of May, 1901, being a single and unmarried man, unlawfully and feloniously did obtain carnal knowledge of one Julia Robinson, a single and unmarried female, by virtue of a false promise of marriage to her previously made by said James Walton, against the peace and dignity of the state of Arkansas?" Was the judgment of the court correct in refusing to arrest the judgment after conviction on this indictment? Did it state facts constituting a public offense under the laws of Arkansas? Seduction of a woman is made a crime in most states by statute. It consists in the act of seducing an unmarried female "of previous chaste character," and having sexual intercourse with her "by virtue of a feigned or pretended marriage or of any false or feigned express promise of marriage." These are the essential ingredients of seduction according to our statute. Section 1900, Sand. & H. Dig. Though the statute does not mention that the woman must be "of previous chaste character," it plainly implies it, said this court in *Polk v. State*, in which case the opinion was delivered by Mr. Associate Justice Smith. "The Legislature never intended to send a man to the penitentiary for having illicit

connection with a prostitute or woman of easy virtue, where she had consented, even under a false promise of marriage. The statute of Michigan also omits the words 'of previous chaste character,' but it has received the same construction, as if they had been there." *Polk v. State*, 40 Ark. 486, 48 Am. Rep. 17.

It is held that the previous chaste character of the woman before seduction is an element of the crime, and it should be alleged in an indictment for that offense, and unless it is shown the defendant cannot be convicted. The elements constituting the offense must be alleged in the indictment. If the statute does not sufficiently set out the facts which constituted the offense, the indictment must do so, and if it fails to do so it is insufficient, though the offense be alleged in the language of the statute itself, which in ordinary cases is sufficient. 10 Ency. Plead. & Prac. 487; *Eubanks v. State*, 17 Ala. 183; 1 Bishop, Cr. Proc. §§ 77, 88; *Biggs v. State*, 104 Ind. 261, 262, 3 N. E. 886; *Clark, Cr. Proc.* pp. 153, 163; *Wharton, Cr. Law*, 1757; *Com. v. Filburn*, 119 Mass. 208; *Com. v. Hampton*, 3 Gratt. 590; *State v. Henderson*, 1 Rich. Law, 179; *Com. v. Slack*, 19 Pick. 305.

The chastity of the woman before seduction is presumed, but the presumption of chastity may be rebutted, and the presumption of innocence of the defendant overcomes the presumption of chastity. In *McArthur v. The State*, 59 Ark. 431, 27 S. W. 628, it was said by Mr. Associate Justice Riddick, delivering the opinion of the court: "We think the court erred also in telling the jury that the presumption was in favor of the chastity of the prosecuting witness. The presumption of virtue in one citizen cannot work the condemnation of another. In whose favor, when charged with crime, the law raises the presumption of innocence." It was held in *West v. State*, 1 Wis. 209, that the court did not presume, in the absence of testimony, the previous chaste character of the female; such presumption being incompatible with the presumption of innocence of the accused, and said, "These presumptions are always to be used in the administration of justice as a weapon of defense, and not of assault." The chastity of the female is presumed, but may be impeached by proof of immorality or indecorum, or her general bad character before seduction, and in rebuttal the state may prove her previous purity by her own testimony or by her general reputation, as held in *Polk v. State*, supra. The court erred in overruling the motion in arrest of judgment.

The judgment is reversed, and the cause is remanded for further proceedings.

BUNN, C. J., did not participate.

CHOCTAW, O. & G. R. CO. v. INGRAM.

(Supreme Court of Arkansas. May 16, 1903.)

RAILROADS—KILLING HORSES—CONTRIBUTORY NEGLIGENCE.

1. The question of contributory negligence, in an action for death of a horse killed by a train at a crossing, should be submitted to the jury, where there is evidence that the person in charge of the horse, though he could hear or see the train coming, and knew the horse would probably cross the track, going to where it was usually fed, voluntarily turned it loose.

Appeal from Circuit Court, Perry County; Robert J. Lea, Judge.

Action by J. H. Ingram against the Choctaw, Oklahoma & Gulf Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

The complaint alleged that on the 28th day of June, 1900, in Perry county, Ark., the defendant's west-bound passenger train was so negligently and carelessly run that it ran over and killed one horse, of the value of \$125, the property of the plaintiff, and prayed judgment for that amount. The answer specifically denied the allegations of the complaint, and alleged that, if the plaintiff's horse was killed or injured, it was due to the carelessness and contributory negligence of plaintiff himself, or his servants and employees.

B. F. Ingram testified: He was present about the 28th of June, when the horse was hurt. It was hurt by the passenger train going west. The horse was worth \$100 or \$125. The horse was struck right at the railroad crossing at the depot at Ledwidge. The horse was going north across the track to the feed lot, and the train ran up there, hit the horse, and knocked him off the track. The train was running a good speed. It ran up too far, and backed up two or three car lengths. This was about 4 o'clock in the evening. The horse belonged to witness' brother, J. H. Ingram. On cross-examination he stated: There is a big hill there, and the horse was struck right at the foot of the hill. There is a bridge about 30 feet high, about 100 feet from the platform. Mr. Duke had been working the horse, and had turned the horse loose up on the hill. Witness did not know just where he turned the horse loose, but, if it had been at the top of the hill, it would have been 200 or 300 yards from where the accident happened. Witness saw the horse run onto the track, but did not see it struck. His view was shut off from the train when it struck the horse by the seed house, but he saw the horse going down the hill, and heard the train approaching. Witness did not know whether the horse ever got on the track or not, but he found a shoe where he thought it had been knocked off on the track. Witness did not hear the train whistle as it approached the station.

John Reed testified: The horse was worth \$90. Henry Duke had been using the horse to haul lumber. The horses were fed at the saloon across the track toward the river.

He did not know where Duke was at the time of the accident. The horse came onto the track from the left-hand side. The engineer was on the right-hand side of the engine. He did not know whether the fireman was on the seat on the left side or not. On cross-examination he stated: Duke was driving the team, and the wagon broke down at the foot of the hill, not very far from the railroad. From where the wagon broke down a person could see up the railroad track for some distance. He did not know what Duke did after the wagon broke down, but the last he noticed him he was at the wagon, just a few minutes before the train came up. Witness swore positively that the train blew for the station, and that Duke was at that time in charge of the horses, with the horses unhitched from the wagon. Duke could have seen the train up the track at that time. About the time the train whistled, Duke and the horses were right at the foot of the hill, about 75 or 80 yards from the track. One of the horses crossed the track immediately in front of the engine.

B. F. Conley testified: He was a locomotive engineer in the service of defendant company; was engineer of the train that struck the animal in question. The train was a passenger train going west. As witness approached the station of Ledwidge, he saw the horse standing on a little incline on the south side of the track, unhitched from the wagon, with a man holding him by the rein. He judged the horse was about 100 feet from the track at that time. He saw the horse until the front end of his engine obstructed his view. The horses were on the left and south side of the track, and he was on the right or north side of the engine, and the front end of the engine prevented him from seeing the horse as he got closer to it. Before he came to a stop the gray horse went across in front of the engine, dragging a part of the harness. At the time the horse passed out of his view, the man was still holding them, and had control of them. Witness did not see the sorrel horse (the one that was struck) until after the accident. The gray horse went right over the nose of the pilot, and got across in front of the engine. The fireman at the time of the accident was in the deck of the engine putting in a fire. The track was straight, so that witness could see it as well as the fireman could have seen it, and it was necessary for the fireman to be firing at that time. On account of the grade of coal they were using, it was necessary to build up the fire when the engine was not using steam, and the steam had been shut off from the engine in approaching the station.

The defendant asked the court to give the two following instructions, which the court refused to give, and defendant excepted: "(1) The jury are instructed to return a verdict for the defendant. (2) The jury is instructed that if they find that the man Duke, who was in charge of the horse in controversy

sy on the day the injury occurred, was familiar with the time said passenger train was due at Ledwidge, and knew that by turning said horse loose to go to the feed lot the horse must cross the railroad track at about the time of the arrival of the train which struck him, and did so turn said horse loose, and if you further find that said Duke was acting as an employé or agent or servant of the plaintiff in the management of said horse at the time of the injury, and that his so turning said horse loose at said time contributed to the injury, then you will return a verdict for the defendant."

The jury returned for the plaintiff a verdict for \$70. Saving all exceptions, the defendant appealed to this court.

J. W. McLoud and E. B. Peirce, for appellant. Sam Frauenthal, for appellee.

HUGHES, J. (after stating the facts). We are of the opinion that the court erred in refusing to give to the jury instruction No. 2 asked for by the defendant, which proposed to submit to them for determination the question whether the plaintiff had been guilty of contributory negligence. If the man Duke was in charge of the horses, and could hear or see the train coming to the depot, and knew that the horses would probably cross the track at the crossing leading to the place where they were usually fed, which the proof tends to show, and voluntarily turned them loose, and one of them was killed by the train in attempting to cross the track, this would be negligence contributing to the injury, and would bar recovery for it, although the railroad company was guilty of negligence. Whether the man Duke, who was in charge of the horses, voluntarily turned them loose, or whether they were frightened by the approach of the train, and he was obliged to let them go, the evidence does not plainly show. Duke did not testify in the case. There is evidence that tends to show he voluntarily turned them loose, and we are of the opinion that the question should have been submitted to the jury, and that instruction No. 2 asked for by the defendant was proper and should have been given. For error in refusing to give said instruction, the judgment is reversed, and the cause is remanded for a new trial.

TEXAS & P. RY. CO. v. BALL.

(Supreme Court of Texas. June 15, 1903.)

RAILROADS—PERSONAL INJURIES—DISCOVERED PERIL—EVIDENCE—SUFFICIENCY.

1. In an action against a railroad for injuries to plaintiff's infant boy, sustained while crossing the track at a point commonly used by him and other school children for that purpose, the evidence considered, and held insufficient to justify submission of the issue of discovered peril.

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by George P. Ball against the Texas & Pacific Railway Company. There was a judgment in the Court of Civil Appeals (73 S. W. 420) affirming a judgment for plaintiff, and defendant brings error. Reversed.

T. J. Freeman and Head & Dillard, for plaintiff in error. T. M. Barnes and R. B. Semple, for defendant in error.

BROWN, J. George P. Ball instituted this suit in the district court of Fannin county to recover from the Texas & Pacific Railway Company the damages alleged to have been occasioned by injuries inflicted through the negligence of the defendant upon Ashley Ball, a son of the plaintiff, aged about 11 years. The honorable Court of Civil Appeals did not make a statement of the facts found by it, except in connection with the argument of the case, and we make the following statement from the undisputed evidence and the findings of the said court:

Ashley Ball, the son of the plaintiff, George P. Ball, being about 11 years old, was attending the schools in the city of Bonham, Tex. His father lived on the opposite side of the railroad track from where the school was situated, and Ashley was on this occasion attempting to cross the track at a place where he was accustomed to cross it on his way to school, and at which point the school children and other citizens of Bonham had crossed over the track for a long time without objection on part of the railroad company. There was an engine with a tender attached in the railroad yards at Bonham at that time going westwards to Sherman Junction. The engine was running at the rate of not less than eight miles an hour, probably much more rapidly at the time of the injury, which occurred within the limits of the city of Bonham. There was at that time in force in that city an ordinance which prohibited railroad locomotives to run at a greater speed than six miles per hour within the corporate limits. Just as Ashley Ball was crossing the railroad track the engine struck him, inflicting upon him serious bodily injury. The Court of Civil Appeals concluded that the engineer on the locomotive saw Ashley Ball and knew his peril in time to have stopped the engine and to have prevented the injury to the boy. The judge of the trial court gave the jury this charge: "If Ashley Ball was in a position of imminent peril on the track, and if defendant's employé or employés in charge of its engine discovered his perilous position, and that he would probably not be able to escape, and if after such discovery said employés failed to exercise proper and reasonable care and diligence to use all reasonable means within their power to avoid injuring him, and if such failure was the direct cause of the injury, then the plaintiff is entitled to recover, even though you should find that Ashley

Ball and his parents were all guilty of negligence in the first instance."

Defendant assigns as error that there was no evidence to justify the trial court in giving that charge. The engineer who was in charge of the locomotive testified as follows: "I was engineer on the engine that struck Ashley Ball. The first time I saw him was when he passed over the pilot as the engine struck him. I had not noticed him on the track as we approached that place. I was on the right side of the engine. I began stopping after I struck him, and went probably across that bridge. I was going somewhere between .8 and 12 miles an hour. There was 18 or 20 feet of boiler out in front of where the engineer sits. I could not see an object in front of the engine on the left side at a distance from the engine of less than 20 or 25 feet. I was sitting down at the time of the accident. I was looking up the track at the time. It was my duty to look up there." Ashley Ball testified upon this point as follows: "I started to cross over the track from the south side, and before I got quite across my hat blew off back south, and fell in a little hole in the middle of the track, and as I stooped to pick it up the engine hit me. The wind was blowing pretty strong. I had not been on the track any time when I was hit; I had just started across." Earnest Scrivner, one of the boys with Ashley, testified as follows: "Will Fleming and a negro were fighting on the north side of the track, and we went over on the south side where some little negroes were fishing, and the fight began again, and I and Ashley tried to cross, and his hat blew off. I went back and got his hat and threw it to him, and, just about the time I got to where the switch was, he went across, and the engine hit him. I was standing there by the switch just south of the main track, about three feet south of Ashley when he was struck. The train was running pretty fast. He just started to step on the track when the engine hit him." Jim Bailey testified with regard to this matter as follows: "There were a number of boys there near the track where Ashley was hurt; there were three of them crossed over before him, one after another; and there were a number waiting to get across when he was hit. The boys first started to cross when the engine was about 50 yards from them." James Rotan testified: "The engine was 75 or 100 feet from the boy, to the best of my recollection, when he stepped on the track. The boy was walking pretty fast, it looked like. I was by the corner of the cotton factory. * * * The factory is further east than the east end of the coal chute." Will Fulghum testified that "where I was told the accident occurred is 15 or 20 feet east from the east end of the bridge. From the place of the accident to the west end of the coal chute is 320 steps. I suppose I would step something like three feet. I would suppose the coal

chute to be 150 or 200 feet long." George P. Ball testified that if the engine was going six miles per hour it could be stopped in 15 or 20 feet.

The question we are called upon to decide in this case is, "Was there sufficient evidence to authorize the court to submit to the jury the issue of discovered peril?" The engineer and fireman, who were upon and in control of the locomotive at the time of the accident, testified that neither of them saw Ashley Ball until after he had been struck by the engine; the engineer was sitting on the right side of his cab going westward, looking ahead up the track, as it was his duty to do, while the fireman was engaged in the work of putting coal into the furnace, and had no opportunity to discover the boy before he was injured. Notwithstanding the employes deny positively that they saw the boy before his injury, the court was authorized to submit the issue to the jury if there was testimony of such facts and circumstances as would prove that the engineer did in fact see the boy before he was injured. *Brown v. Griffin*, 71 Tex. 659, 9 S. W. 546. In examining this question, we must accept the phase of the testimony most favorable to the plaintiff.

The liability of the railroad company for the injury inflicted upon Ashley Ball, if negligently upon the track, depends upon whether the employé in charge of the locomotive did in fact see him in the perilous situation, and realized and understood the peril, and that he would not probably be able to extricate himself; whereupon the duty arose for the employé to use every means within his power and at hand to prevent injuring the boy. "The burden of proof was upon the plaintiff in this case, in order to recover for a breach of such duty, to establish, not that the employes might by the exercise of reasonable care have acquired such knowledge, but that they actually possessed it." *Railway Co. v. Bredow*, 90 Tex. 31, 36 S. W. 410. The plaintiff's testimony must be sufficient to show that Ashley Ball was at some point on or near to the railroad track, within the range of vision of the engineer while he was looking ahead in the discharge of his duty, in order to raise a presumption that the engineer did in fact see Ashley Ball in his perilous position in time to have given him warning, or to have stopped or checked the train, or by some means at hand to have prevented inflicting injury upon him. Looking to the testimony offered by the plaintiff, we find that the witness James Rotan placed the boy on the track in front of the engine at a distance from it of from 75 to 100 feet, "according to his recollection." This testimony places the boy further from the engine and more within the range of the engineer's vision than any other witness, and, if it has any probative force, the issue was properly submitted. The statement is but the opinion of the witness formed upon the instant, and

necessarily of little weight, but under proper conditions sufficient to support the court's action. However, when we look to the surroundings we find that this witness, at the time he made the observation of the relative situation of the engine and the boy upon the track, and estimated the distance between them, was at a point just south of the railroad track, and east from the place of the accident about 1,200 feet. The boy was farthest from the witness, and the locomotive in motion upon the track at a point between witness and the boy. Looking at the matter from the standpoint that a jury should, this estimate of the distance between two objects almost in line with each other, at a distance of a quarter of a mile from the witness, could not have any value at all in determining whether the engineer saw the boy; and when we take into consideration, in addition thereto, that the train was in motion and running almost directly from the witness, we know from common observation that it would be physically impossible for any man to make a reliable estimate of the intervening distance between two objects thus situated. A statement made by a witness, which the physical conditions condemn, cannot be regarded as more than a scintilla of evidence, and will not support a conclusion upon the issue involved. *Texas L. Agency v. Fleming*, 92 Tex. 463, 49 S. W. 1039, 44 L. R. A. 279. To entitle the facts detailed by this witness to be considered as evidence, the fact stated must be credible. *Whart. Ev. § 8*. We have no hesitancy in saying that the testimony of this witness did not tend to establish the proposition that Ashley Ball was at a point upon the track where the engineer in discharge of his duty, as testified to by him, would probably have seen him in time to have prevented the injury.

Jim Bailey, another witness, testified, in substance, that there were a number of boys crossing the track at the point where the accident occurred, three or four going ahead of Ashley Ball and some remaining behind him, and that when the boys started to go across the track the engine was about 50 yards (150 feet) east of the place of the accident. This evidence does not place Ashley Ball upon the track at that time; it only had reference to the time when the boys who were ahead of Ashley began to cross the track, therefore does not tend to show that the engineer would probably have seen the boy before the injury occurred and in time to have prevented the accident.

The testimony which is most definite and reliable upon this question was given by Ashley Ball himself, and Earnest Scrivner, who was with him at the time, and within three feet of him when he was struck by the engine. They testified, in substance, that Ashley Ball had just stepped upon the track when the engine struck him. No distance is given, but the conclusion from this testimony cannot be resisted that from some cause they

failed to know that the engine was approaching, and, standing on the south side of the track, Ashley Ball, after recovering his hat, stepped upon the track within a few feet of the front part of the engine, so near to it that, looking at the track in front of him, the engineer probably did not see Ashley in time to prevent the injury. The testimony of the engineer and of the plaintiff himself was that, from the right side of the locomotive, and with the boiler and smokestack projecting out in front of him about 20 feet, the engineer could not have seen an object near to the track on the south side, unless it had been at a distance of 20 or 25 feet in front of the engine. The evidence wholly fails to establish the facts which would make the railroad company liable for the injury if Ashley Ball was negligent in being upon the track, and the court below erred in giving the charge set out above.

It is therefore ordered that the judgments of the district court and the Court of Civil Appeals be reversed and this cause remanded.

GULF, C. & S. F. RY. CO. v. BLANCHARD.

(Supreme Court of Texas. June 15, 1903.)

NEW TRIAL—NEWLY DISCOVERED WITNESS—DILIGENCE—SUFFICIENCY.

1. On motion for a new trial on the ground of a newly discovered witness, it appeared that defendant, when searching for witnesses who had seen the accident which was the subject of the suit, found that the proprietor of a certain hotel had witnessed it from a front gallery of the building, and that the witness who was alleged to be newly discovered was a guest at the hotel, and was standing in front of the building in full view of the gallery at the time. The affidavits filed alleged diligence in general terms, the most specific one stating that affiant investigated the case as fully and thoroughly as possible, developed the source of information which came to his knowledge, and located and talked with all the witnesses he could hear of, but did not learn that the alleged newly discovered witness would testify to any material facts. There was, however, no statement that inquiry was made of the hotel proprietor as to his knowledge of the presence of other persons at the time of the accident, nor that affiant did not learn that the alleged newly discovered witness was present. *Held* not such a showing of diligence as to entitle the moving party to a new trial as a matter of law.

Certificate of Dissent from Court of Civil Appeals of Third Supreme Judicial District.

Action by L. F. Blanchard against the Gulf, Colorado & Santa Fé Railway Company. From a judgment for plaintiff, defendant appealed to the Court of Civil Appeals. Heard in the Supreme Court on certificate of dissent.

Chas. K. Lee and J. W. Terry, for appellant. Henderson, Streetman & Freeman, for appellee.

WILLIAMS, J. This case comes up on certificate of dissent from the Court of Civil Appeals for the Third District. The matter

about which the Justices differ is stated in the two opinions, the only question certified to this court being as to the sufficiency of the showing of diligence on the part of appellant to obtain the testimony for which the new trial was sought. That question, as presented, depends upon the legal effect of the affidavits offered in support of the motion, and is, we think, one which this court may consider so far as to decide whether or not the showing was such as to entitle appellant, as a matter of law, to the new trial. The trouble with the affidavits is the generality of their language and their failure to affirmatively meet and answer, by specific statements of fact, certain questions as to diligence naturally suggested by the circumstances appearing in the case. The agents for appellant, within a few days after the casualty, were engaged in seeking witnesses who knew facts concerning it. They found one Ruby, the keeper of the hotel at which Mrs. Mullen was stopping, whose testimony shows that from the front gallery of the hotel he witnessed the occurrence under investigation. It is not, we think, requiring more than ordinary diligence to expect a party seeking witnesses to such a transaction to inquire of an eyewitness, whom he has found, as to others who may have seen it. The affidavit of Mrs. Mullen states that she was standing in the front door of the same hotel upon the front gallery of which Ruby was at the same time. If Ruby knew of Mrs. Mullen's presence, inquiry of him would have put appellant's agents in possession of the fact, and it would have become their duty to make inquiry of her as to her knowledge of the occurrence; for, knowing of her presence, they could not be heard to say they did not know of her knowledge of the facts, which proper inquiry addressed to her would have developed. Here the questions at once suggest themselves: Was inquiry made of Ruby as to the presence of others? and, if so, did he inform the inquirer of Mrs. Mullen's presence? The affidavits do not answer, unless the general statements contained in them as to diligence are sufficient. The objection to all such statements is that they constitute the affiant the judge of facts which should be specifically stated in order that the court may judge of their sufficiency. *Hatchett v. Conner*, 80 Tex. 114. The affidavit of Mr. Ralston is of the most general, although comprehensive, character. That of Mr. Evans, in most of its statements, is equally so. He says: "I did investigate the same as fully and thoroughly as possible, and did develop all sources of information that came to my knowledge, and did locate and talk to all witnesses I could hear of," but did not learn that Mrs. Mullen knew and would testify to any material facts. There is no statement that he did or did not make inquiry as to Ruby's knowledge of the presence of other persons, or even that he did not learn of that of Mrs. Mullen. The facts

stated in the affidavit, as contradistinguished from the affiant's conclusions, are consistent with any answer that might be given to the questions before suggested. Ignorance of Mrs. Mullen's knowledge of material facts is ineffectual if information of her presence on the scene was received or ought to have been obtained by reasonable diligence. While appellant may not have known even of the existence of Mrs. Mullen, and therefore could not have been expected to make inquiries concerning her, it ought to have inquired of Ruby as to his knowledge of others who had opportunity to see the occurrence; and the affidavits leave the case open to either assumption, that its agents failed to inquire, or that they did inquire and learn that Mrs. Mullen was present. The affidavit of Mr. Evans does not cover this point by merely stating that he did not learn that the witness knew and would testify to the facts. The significant suggestion in the facts to be met and explained was that Ruby probably knew and could have told of Mrs. Mullen's opportunity to see the accident, and she could have disclosed her knowledge.

We answer that the showing of diligence was not such as to deprive the trial court and the Court of Civil Appeals of all discretion in the matter and to entitle appellant to a new trial as a matter of law. *Ables v. Donley*, 8 Tex. 335.

SCOTT et al. v. FARMERS' & MERCHANTS' NAT. BANK et al.

(Supreme Court of Texas. June 15, 1903.)

CORPORATIONS—DIRECTORS—OFFICIAL, ACTS—INTEREST—PRESIDENT—TRUSTEESHIP—ACQUISITION OF TITLE—RECEIVERS—SALES UNDER DECREE—INTERESTS CONVEYED—STREET RAILWAYS—ACQUISITION OF PARALLEL LINES.

1. Where bonds of a corporation intended to be secured by a mortgage were not sold, but were held by its secretary under resolution of the board of directors to secure certain obligations of the company to the directors, without the consent of all the stockholders, such pledge was void.

2. A sale, by decree of court, of property of a corporation in the hands of a receiver, passes the title free of the claims of all parties to the proceeding, except the particular claims which are declared in the decree not to be prejudiced thereby.

3. Property conveyed to the president and promoter of a street railway company in consideration of the company's extending its line of road to a tract of land owned by the grantor will be deemed to have been taken by him as trustee for the company, in the absence of a showing that a valid contract had been made between him and the corporation authorizing him to take full title to himself.

4. The president of a corporation cannot acquire title to the property of another corporation at a trustee's sale of such property, where the sale was a mere scheme to clear the title of the corporation of which he was president to that property, in pursuance of a contract between the two corporations.

5. A judgment creditor of the president of a corporation cannot, by purchase on execution sale of property held by him in trust for the corporation, defeat the corporation's title on the

ground that it was not authorized by its charter to acquire and hold such property.

6. Const. art. 10, § 5, forbidding the acquisition of railroad properties by parallel and competing lines, applies to railroads proper, and not to street railways.

7. A stipulation in a contract of sale of the properties of one street railway to another, whereby the purchasing company was to operate its lines for a period of five years to a tract of land owned by the directors of the selling company, did not give such directors a vendor's lien on the property for damages resulting from a breach of the contract.

8. The stipulation, being for the benefit of the directors, was void.

Error to Court of Civil Appeals of Third Supreme Judicial District.

Actions by the Farmers' & Merchants' National Bank and others against H. C. Scott and others, and by J. E. Parker and others against the Citizens' Railway Company and others. The cases were consolidated. There was a judgment of the Court of Civil Appeals affirming a judgment in favor of plaintiffs (for opinions, see 66 S. W. 485, affirmed on rehearing in 67 S. W. 343), and all the parties bring error. Reversed.

Clark & Bollinger, for Scott and Citizens' Ry. Co. L. W. Campbell and Eugene Williams, for J. E. Parker and associates. John W. Davis, for Farmers' & Merchants' Nat. Bank.

GAINES, C. J. This case, as tried, was the result of the consolidation of two suits. The first was brought by the Farmers' & Merchants' National Bank of Waco against H. C. Scott and the Citizens' Railway Company, a corporation operating street railways in the city of Waco, for the recovery of certain property in and near said city, known as the "Dummy Street Railway." The defendants in that suit filed a general demurrer, a general denial, a plea of not guilty, and also specially pleaded, asserting title to the property and setting forth the nature of its claim. The second suit was brought by J. E. Parker and others against the Farmers' & Merchants' National Bank for the recovery of the same property, or, in the alternative, to enforce a lien upon it. Upon motion of the plaintiffs in this case, the two suits were consolidated. The petitions and answers of the several parties fully set out the facts as subsequently developed by the evidence, and we deem it unnecessary to set them forth in detail here. The case was submitted to the jury upon special issues requested by the respective parties, and a verdict was returned in response thereto. Thereupon a judgment was rendered in favor of the Farmers' & Merchants' Bank for the recovery of the property in controversy, and for the recovery of certain sums of money against the Citizens' Railway Company for rent, damages, etc. Parker and his associates were also decreed to have a lien upon the property for a sum of money found by the jury to be due them. All parties having appealed, the judgment

was affirmed by the Court of Civil Appeals. Each of the parties has applied for a writ of error to this court, and all the applications have been granted.

For the sake of brevity in discussing the questions in the case, the Waco Dummy Street Railway Company will be designated as the "Dummy Company," the Waco Electric Railway & Light Company as the "Electric Company," and Parker and his coplaintiffs as "Parker and his associates."

The undisputed facts, as shown by the evidence introduced upon the trial, are as follows: The property is a suburban street railway, and was constructed by the Dummy Company, a corporation chartered under the general laws of the state. The company began to operate the railway in February, 1891, but in a few months it suspended the operation of the line, became insolvent, and ceased to be "a going concern." On April 15, 1891, the company, through its proper officers, executed a mortgage to the Citizens' National Bank to secure an issue of bonds amounting to \$50,000. There was a power of sale to the bank as trustee, and a power to substitute another trustee in case the bank failed or refused to act. This mortgage was duly recorded. One Sleeper, the secretary of the corporation, was authorized by resolution of the board of directors to sell the bonds at not less than par; but the resolution also provided, in effect, that, in the event he failed to make a sale, he should hold them as security to protect the directors against liability upon certain indorsements they had made for the company. In May, 1891, the Dummy Company inflicted personal injuries upon one J. H. Graves, and on March 7, 1893, he recovered in the district court of McLennan county a judgment for \$2,000 for such injuries. On the 5th day of November, 1891, the Dummy Company executed to R. H. Rogers a deed in trust with a power of sale upon its property, in order to secure an indebtedness due by it to the Citizens' National Bank of Waco amounting to \$8,813.37. On April 4, 1892, the Dummy Company, in pursuance of a resolution of its board of directors, and acting through its proper officers, conveyed the property in controversy to the Electric Company, a then existing corporation. On the 7th day of June of the same year, Rogers, as trustee, sold at public outcry the property mentioned in the mortgage to secure the Citizens' National Bank, and it was bid off by W. J. Hobson. Suit having been brought against the Electric Company, its property was placed in the hands of a receiver, and by order of the court its property, including that in controversy, was sold by a special master on the 7th day of May, 1895, and defendant Scott became the purchaser. The defendant the Citizens' Railway Company has Scott's title. On the 5th day of November, 1895, the property was sold under an execution issued on the Graves judgment, and the Farmers' & Merchants'

Bank, having become the owner of that judgment, bid off the property for the sum of \$270, and, having credited its bid upon the execution, received the sheriff's deed. On June 14, 1894, the Farmers' & Merchants' Bank recovered a judgment against the Electric Company and W. J. Hobson, and on the 7th day of May, 1895, at a sale by the sheriff under an execution issued upon that judgment, the bank became the purchaser of Hobson's interest in the property for \$1,000, crediting the amount of its bid, less the costs, upon the execution. On the 2d day of June, 1896, W. M. Sleeper, as substitute trustee under the mortgage of April 15, 1891, sold the property, and at the sale Parker and his associates became the purchasers. Other facts as shown by the undisputed evidence, or as established by the findings of the jury, will be stated in connection with the discussion of the questions in the case.

Parker and his associates claim title as purchasers at the sale by the substitute trustee under the mortgage of April 15, 1891, to secure the \$50,000 of bonds. They also claim, in the alternative, damages for the failure of the Electric Company to construct and maintain its line of electric railway to Alta Vista, as it agreed to do in the contract of sale by the Dummy Company to it; and also claim a vendor's lien upon the property to secure such damages. The Farmers' & Merchants' Bank claims title by virtue of its purchase at the sheriff's sale under the Graves judgment, and also by virtue of Hobson's purchase at the sale by Rogers, trustee, and its subsequent purchase of Hobson's title at the sheriff's sale by virtue of its judgment and execution against him. The Citizens' Railway Company asserts title by virtue of the conveyance by the Dummy Company of its property to the Electric Company, and of the purchase by Scott of the property of the latter at the sale by the special master, and of the conveyance by Scott to it.

If the bonds which were intended to be secured by the mortgage of April 15, 1891, had been disposed of so as to make them an existing obligation against the Dummy Company, then the mortgage to secure them would have constituted a first lien on the property, and the sale by virtue of the power given in that mortgage would have passed the title free of all other claims, save possibly that of the Graves judgment. Logically, therefore, the validity of that sale is the first question to be determined. The bonds intended to be secured by the mortgage were never sold. As we have seen, by a resolution of the board of directors of the corporation they were ordered to be held by the secretary to secure the directors against certain obligations incurred by them on behalf of the corporation. Each of the directors had indorsed the paper of the company for the different amounts, and these indorsements were antecedent to the attempted pledge of the bonds. In response to an issue

submitted at the request of the Farmers' & Merchants' Bank, the jury found that these bonds were not pledged with the concurrence of all the stockholders of the Dummy Company. A director of a corporation cannot act for it in a matter in which he has an adverse interest. *Tenison v. Patton*, 67 S. W. 92, 4 Tex. Ct. Rep. 463; *Id.*, 95 Tex. 284, 64 S. W. 810. All the directors being interested in the pledge of the bonds, there was no one to act for the company, and, the resolution that was passed not having been concurred in by all the stockholders, in our opinion the attempted pledge was void, and the sale under the power given in the mortgage was therefore of no effect.

This brings us next in order to the question of the title of the Farmers' & Merchants' Bank. We will first discuss the title claimed by virtue of its purchase under the execution against the property of the Dummy Company issued upon the Graves judgment. At the time of the sale under execution the property had been conveyed by the Dummy Company to the Electric Company; but the bank alleged in its pleadings, in effect, that that conveyance was made with the intent to defraud the creditors of the Dummy Company. If so, the conveyance was void as to the bank as the assignee of Graves, for the liability for which the judgment was rendered existed at the time the conveyance was made. The undisputed evidence showed that the directors of the Dummy Company, or at least some of them, owned lands near a locality known as Alta Vista, the terminus of the Dummy Company, and that a part of the consideration of the sale of the Dummy Company to the Electric Company was the promise on part of the purchaser to operate a street railway to that point for the term of five years. The jury found that this stipulation was made for the benefit of the directors of the Dummy Company; and they also found that at the time that corporation was insolvent. Clearly, a conveyance made by an insolvent corporation for the benefit, in whole or in part, of its directors, is fraudulent as against its creditors. It follows that the sale made by virtue of the execution upon the Graves judgment passed the title, subject to existing incumbrances, unless the sale by the special master to Scott passed the title to the property free of the claim against it of the Farmers' & Merchants' Bank as the assignee of the Graves judgment. If, at the time the decree was entered which ordered the sale of the property of the Electric Company, the bank had not been a party to the suit in which the receiver was appointed, the authorities seem to hold that the purchaser would have been in no better position with respect to that matter than was the Electric Company. *Foster v. Barnes*, 81 Pa. 377; *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548; *Dann Manufacturing Co. v. Parkhurst*, 125 Ind. 317, 25 N. E. 347. We are of

opinion that such holding is correct upon principle. It would follow, therefore, that, had the bank not become a party to the proceeding, it would, after the sale and conveyance by the special master, have been at liberty to proceed against the property as that of its judgment debtor, the Dummy Company, and to have caused it to be sold under execution, and, having purchased at that sale, to have contested with the purchaser at the sale under the receivership the validity of the conveyance from the Dummy Company to the Electric Company. The same result would have followed had the decree, the bank being a party, ordered the property to be sold subject to its claim. But as to the decree which was actually made, the statement of facts contains the following recital, only, with reference to the Farmers' & Merchants' Bank: "After sustaining a general demurrer to the pleadings of the Farmers' & Merchants' National Bank, and striking out its answer and cross-bill, without prejudice to the rights of said Farmers' & Merchants' National Bank as to its claim of lien upon the property and franchises of the Waco Dummy Street Railway, therein described as the property of W. J. Hobson, the suit was dismissed as to the defendant W. J. Hobson and A. Schuster, and the court proceeded," etc. The decree was of the date of April 6, 1895. The sale was made by a special master as commissioner of the court, and was reported and duly confirmed—all during the same year. The Farmers' & Merchants' Bank dismissed its intervention in October, 1897, and on December 20th next thereafter the final decree in the case was rendered. It was formally admitted upon the trial that the final decree did not affect the rights of the bank. What the bank's plea of intervention contained, the evidence does not show. Its claim as assignee of the Graves judgment is not mentioned in the decree; but we think it is to be presumed that it set up all its equities on that suit. At all events, we think that when property in the hands of a receiver has been sold by a decree of the court, which directs a sale without reservation as to the rights, legal or equitable, of any party to the suit, the sale pursuant to such order passes the title free of all claims of any party thereto. So, if, as in this case, the sale is ordered without prejudice as to a particular claim of one of the parties, the sale frees the title of all other claims by the same or any other party to the proceeding. In other words, the sale of property in the hands of a receiver in pursuance of a decree for such sale passes the title and claims of all parties to the suit which are not excepted or reserved by the terms of the decree. We conclude, therefore, that the Farmers' & Merchants' Bank took no title by virtue of its purchase at the sale by the sheriff under the Graves judgment.

The question then arises as to the claim of

title of the Farmers' & Merchants' Bank through its purchase under its judgment and execution against Hobson. In order to dispose of this question it becomes necessary that we shall give in some detail the facts in relation to that matter: Hobson was the promoter and principal stockholder of the Electric Company. That company was incorporated under the general laws of the state about February 26, 1891. On April 6, 1891, a contract was entered into between one Childress, as trustee, on behalf of himself and others, in which the Electric Company obligated itself to construct a line of street railway along certain streets of the city of Waco to the Waco Female College, through the lands of Childress and his associates, and to operate the same for the period of five years; and in consideration thereof Childress, in behalf of himself and associates, bound himself and them to convey to the company four blocks of lots in the University Heights addition to the city. The company at the same time gave two bonds to Childress as trustee, one with and one without sureties, to secure the performance of the contract on its part. On June 4, 1892, Childress and others filed a charter for the organization of the University Land Investment Company, and on the 14th day of the same month he conveyed the four blocks previously mentioned, in connection with a large body of other lands, to that corporation. August 1, 1892, the University Land Investment Company conveyed the four blocks of land to Hobson. The deed recited that it was made "in accordance with the contract of April 6, 1891, between A. M. Childress, as trustee for himself and associates, of the first part, and the Waco Electric Railway & Light Company of the second part." This shows the derivation of Hobson's title to the four blocks, which, as we shall hereafter see, was the sole consideration which passed from him in satisfaction of his bid for the property of the Dummy Company at the sale by Rogers as trustee.

The following are the facts which led up to the sale last mentioned: On March 3, 1891, Hobson in his own name entered into a contract with the Dummy Company by which the company agreed to sell him its property, except the rolling stock, and in consideration thereof he agreed to convey to the company the four blocks of land in the University Heights addition, hereinbefore mentioned, for the acquisition of which the Electric Company then had a contract with Childress and his associates. The contract was assented to in writing by all the stockholders of the Dummy Company, and contained other stipulations not necessary to mention in this connection. On April 4, 1892, the directors of the Dummy Company met and adopted a resolution authorizing a conveyance of its property to the Electric Company. On the same day its stockholders met and passed a similar resolution; and immediately there-

upon J. E. Parker, as president of the Dummy Company, executed to the Electric Company a deed conveying the property in accordance with the resolution. A copy of the deed is not set out in the statement of facts, but it does appear that the deed was made in accordance with a resolution approved by J. W. Johnson, one of the directors, and unanimously adopted by them. This resolution provided that the deed should obligate the Dummy Company to free the property from all incumbrances, and should "recite a cash consideration of \$7,500 and the obligation of said Electric Company and of said Hobson to operate said roads five years from date of equipment by making four round trips each day each way." The testimony shows that it was agreed by some of the officers of the Dummy Company that, in order to free the property of all incumbrances, it was best to have a sale made under the mortgage to the Citizens' Bank, in which Rogers was named as trustee; and one or more of the officers of the Dummy Company procured the property to be advertised for sale under the power contained in that mortgage. In reference to that matter John Sleeper testified: "I was a stockholder, director, and secretary of the Dummy Street Railway Company. The trustee's sale by Robert H. Rogers, trustee of the property of the Dummy Street Railway Company, including its line of railway, in June, 1892, was made for the Waco Electric Railway & Light Company, and the purpose of such sale was to clear the title under the original deed of trust. I know this by acting in that matter, and I did it in part. Myself and Mr. Parker, the president, did it. Mr. Hobson had nothing whatever to do with it until he went over with me and bought it. He (Hobson) bought it for the benefit of the Waco Electric Railway & Light Company under an agreement between us all. It occurred in this way: On the day Rogers, as trustee, was to make the sale, I went and got Mr. Hobson, and brought him here to the courthouse, and stood there as it was sold by Mr. Rogers, and Mr. Hobson bought it in. When I went to Mr. Hobson, I went for the purpose of getting him to carry out the original contract. I just said, 'Mr. Hobson, the railroad is going to be sold to-day, and you just go over and buy it in for the Waco Electric Railway & Light Company.' He said, 'All right,' and just walked over there with me, and the deed was made out by Rogers to Mr. Hobson, and Mr. Parker paid Mr. Rogers \$25 for executing the deed."

Hobson's testimony as given upon a former trial was read in evidence, and was as follows: "I was president and a director of the Waco Electric Railway & Light Company on the 7th day of June, 1892, and had been such president and director ever since its organization. It was incorporated on the 26th of February, 1891, and we organized shortly after that, but I don't know the day. I don't

think it was more than a month or two afterwards. It was certainly in the early part of 1891. I don't think I paid any money at the trustee's sale made by Robert H. Rogers on June 7, 1892. I paid some property—four blocks in University Heights addition. They belonged to me. How they came to be mine was that they were deeded to me by Mr. Childress—or the University Heights Company, rather—as a bonus for extending the street railway through their land. I made a contract with them. I made it in the name of the Waco Electric Railway & Light Company. (Here the contract in evidence was shown him and he identified it as a duplicate.) The signature to that contract, W. J. Hobson, president of the Waco Electric Railway & Light Company, and the signature of Sam Hobson as secretary, are genuine signatures, and the seal of the company is duly impressed thereon. Why I claimed these lots was because I earned them as promoter. This contract, however, was made after the company was incorporated. The contract shows that as president of the Waco Electric Railway & Light Company, and with the consent of the directors, I made this contract to run the electric road out there to that property and over that property, in consideration of a donation to the company of these four blocks. Yes; that is true. It would seem that those four blocks donated to the company, but that actually, as I understood it at the time and since, belongs to me. The consideration I paid for the four blocks was time and money. Yes; I was president of the company and a director, but I was not getting any salary. I did not get any pay for my time. I was also the main stockholder—owned most of the stock. I do not think anybody else owned any at that time, except there were some few shares held by parties here. Bart Moore was a director, and so was Mr. John Sleeper, and so was Judge Williams. It is a fact that the Waco Electric Railway & Light Company paid for constructing that road out there to the University Heights addition; that is, I paid for it, and charged it up to the company. It was built mostly with my money mainly up to that time. I built it in the name of the Waco Electric Railway & Light Company.' Asked if he had not used the funds of the Waco Electric Railway & Light Company in complying with the Childress contract, he said: 'Well, I don't know whether they had any funds. I could not tell without looking the thing up. At that time, I think not. I think I supplied individually about all the funds up to the time they commenced running the cars out there. I loaned this fund to the company, and the company built the track out there in accordance with the contract.' Here the witness was shown a deed from J. E. Parker, president of the Waco Dummy Street Railway Company to the Waco Electric Railway & Light Company, conveying the Waco Dummy Street Railway,

already in evidence, of date April 4, 1892, and he was asked, if those lots belonged to him individually, why he took that deed to the Waco Electric Railway & Light Company instead of to himself, to which he answered: 'Well, I expected it to become a part of the system at that time. I don't know whether I ever saw this deed or not. I could not tell. I don't know that I put it on record. I don't think I did. I don't know whether it was put upon record by anybody or not. If it is so certified, it must have been. I am speaking now of my own knowledge. I don't remember. I know there was such a deed. I heard about it, but I don't think I ever saw it. I don't remember whether I ever did or not. When I bought the property at Rogers' trustee sale in June, 1892, I never paid any cash. The consideration that I paid for that purchase was these four blocks of ground at University Heights—blocks 1, 39, 49, and 57.'"

As bearing upon the title to the four blocks which were conveyed by Hobson to Parker and his associates, and which were the sole consideration paid for the property at the trustee's sale, a contract between Hobson and one Moore was offered in evidence, which was made in the early part of the year 1891. The contract was as follows: "It is agreed between the parties hereto that they will subscribe the amounts respectively, W. J. Hobson \$150,000 and Bart Moore \$50,000 of stock of the Waco Electric Railway & Light Company under the conditions and agreements as follows: W. J. Hobson is to furnish the first money to start the building of said railroad and light plant and is to furnish all the capital needed to complete the plant as follows: An incandescent light plant of at least 2,000 lights and enough of the track and cars and power to run the cars to fill all the contracts made by the said railway company with parties who have made donations to secure the building of said road. The money and real estate received from donations and the proceeds of sales of real estate donations are to be used in constructions of the road and the balance is to be made up as aforesaid by said Hobson with the following exceptions, that is, Bart Moore is to furnish the sum or sums altogether of ten thousand dollars (\$10,000) as needed for the prosecution and completion of the work for which said Moore is to receive said (\$50,000) fifty thousand dollars of stock which he is to subscribe fully paid. It is further understood and agreed between said Hobson and Moore that Hobson is to manage the building of the road and light plant, without charge for his time, and Moore is to assist in the same until such time as the plant may be completed and in operation. The donations for building said electric railway are to be deeded to W. J. Hobson and Bart Moore personally as they may agree or part to each as their interests may appear to be sold at market prices for the use of the railway company as herein provided."

But the following testimony of Hobson given on a previous trial was then read: "This paper handed me, which purports to be an agreement between W. J. Hobson and Bart Moore, is in the handwriting of my son Sam—that is, S. A. Hobson. I made that agreement as stated in that contract. That is the contract, but it is not all there. There is an addendum to this contract that is not there—that is, an addendum made afterwards. This contract was made in 1891, about the time we commenced building the road. There was several things done after that that qualified that contract very materially. The addendum that I spoke of was rescinding that contract and releasing Mr. Moore from it. At that time I had already made contracts for the bonuses, and, as I understood it, I contracted with Mr. Moore with reference to the bonuses as my property. Mr. Moore didn't comply with this contract—that is, not fully. He had partially, and I released him from it and paid him up. Mr. Moore paid the first part of that money, and he got a note of the company for it. He gave me a note for \$2,500. He was to pay \$10,000. He paid a little over a fourth of it. I made a contract for these bonuses for myself as I understood it. What I mean is that, whilst I owned the bonuses, I made a contract with Mr. Moore that if he would do those things I would use those bonuses, if necessary, to help build the railroad. When I would sell land I would put it in the railroad, and charge it up. I put in other money at the same time. Most of the money was supplied from the outside, gotten by me, and if I sold some of the land and used the money on the road I charged the road with it. After I procured the charter for the Waco Electric Railway & Light Company, about the 26th of February, 1891, it was hardly a couple of months after that before I organized the company. I don't remember how long; it might not have been two weeks. The stock was not placed at the time I organized the company: the road had not been built at all anywhere—nothing done toward building it, except I was there inspecting and getting ready to build the road. When I was making the contract for bonuses, I made the proposition to Mr. Childress about as set forth in the contract in evidence. I proposed to sign the contract individually, like I had all the other bonuses up to that time. Mr. Childress said he would not sign in that way. I signed the railroad's name because Mr. Childress insisted it be signed that way. The deed was made to me for the land covered by said contract. I told Childress the deed was to be made to me—this was at the time the contract was signed. I told him the property was to be deeded to me. No one ever objected to me having the blocks of ground covered by the contract with Childress. It was known to the directors and stockholders generally that I was to have said blocks of ground. I had an un-

derstanding with the Dummy people that they would take these blocks as the consideration, and I afterwards conveyed the blocks to J. E. Parker. I do not think there were any shares of the Waco Electric Railway & Light Company issued to any one until May, 1891, except what I paid in after May 1, 1891. Mr. Schuster and myself owned most all the stock. I do not think, at the time of the donation of these four blocks by Childress and his associates, it was understood and agreed between me and my associates that said blocks were to be used for the benefit of the company. I don't think it was understood and agreed between the directors of the Waco Electric Railway & Light Company, including Bart Moore, John Sleeper, and Judge Williams, that said blocks of ground were to be used for the benefit of the company."

Bart Moore testified that the four blocks of lots were conveyed to Hobson for the benefit of the Electric Company. His testimony and that quoted is about all the testimony bearing upon the question of Hobson's title to these blocks.

The contract between Hobson and Moore shows the scheme under which the Electric Company's enterprise was inaugurated; and from that contract it appears that Hobson was to furnish the money for the building of the railway and the light plant, and that he was to manage the construction without charge for his time. It also appears therefrom that the bounties the company should acquire as inducements to the construction and operation of the railway were to be conveyed to either Hobson or Moore for the use of the company. It was under this contract that the corporation was organized and the work begun. In the contract between Childress and the Electric Company, Childress bound himself and his associates to convey to the company, or to such person as it might designate, two of the four blocks of lots, upon completion of the proposed railway from Ninth and Austin streets to the Waco Female College, and the other two when the road was completed from the public square to the same place. The construction and operation of the railway was to be the consideration of the conveyance, and it is to be presumed it had been constructed and was in operation on August 1, 1892, when the conveyance was made to Hobson. It is evident that the consideration proceeded from the company; and we think, therefore, that in order to show that Hobson, who was its president at the time the deed was made to him, did not take the title for the benefit of the company, it should have been made to appear that some contract had been legally made between them and the corporation, whereby he was authorized to take full title to himself to the property. A corporation may contract through a duly authorized agent, but the authority of the agent must ordinarily be derived from its board of directors acting as a

body. It may be that the whole body of the stockholders give such authority, or may at least estop themselves from denying that such authority has been given. There is no pretense whatever in this case that there was ever any resolution of the directors or any action whatever of the stockholders of the Electric Company which gave Hobson the right to claim the bonus given to the company for the construction and operation of its road. That Hobson may have changed his contract with Moore, or that the directors knew that he was claiming the bonus, as Hobson testified, can make no difference. The blocks were earned by the company under a contract in the name of the company, and became equitably the property of the company, unless properly authorized to be conveyed to Hobson for his own benefit. Under the contract with Moore it is very clear that he could not have claimed the blocks as his own; and while in his testimony he attempts to show that that contract was changed by a subsequent agreement between himself and Moore, he nowhere says that this change was made before the blocks were conveyed to him by the University Land Investment Company. But leaving that contract wholly out of view, we fail to see how, under the facts of this case, Hobson could claim the property as his own, in the absence of some corporate action on the part of the company which authorized him to take a conveyance of the property for his own use. If, without salary or other compensation, he rendered services in the advancement of the enterprise, and if he furnished his own money to construct the road, this may have entitled him to compensation by the company, but it did not entitle him to take and hold the property of the corporation as his own, unless authorized to do so by the corporation itself. We therefore conclude that when the four blocks of lots were conveyed by the University Land Investment Company to Hobson he held them in trust for the Electric Company.

We come next to the question as to the effect of the sale by Rogers, as trustee, at which the property of the Dummy Company was bid off by Hobson. In regard to this matter the first inquiry which suggests itself to our minds is, was this a sale which passed any title whatever? The property was mortgaged to the Citizens' National Bank to secure the payment of an indebtedness due to it by the Dummy Company. It seems—though the testimony is not direct upon the point—that at the time the property was advertised, and at the time it was sold, this indebtedness had not been paid. Therefore, the trustee was empowered to sell the property for cash to pay the indebtedness. The sale was made to clear out the title of the Electric Company, as the evidence showed, and as was found by the verdict of the jury. With the view to carry out the purpose of clearing out the title, a sale in form

was made, and the property was bid off by Hobson for the sum of \$7,500; but the money was never in fact paid. The bank, the mortgage creditor, recovered nothing. The only consideration of the deed which was executed was the conveyance of the four blocks of lots previously mentioned, not to the mortgagee, the bank, but to Parker, presumably as the representative of the Dummy Company or of its directors. The contract between the Dummy Company and the Electric Company bound the latter to convey the blocks upon compliance by the former with the terms of the agreement, and hence that conveyance could not constitute a consideration for another contract. We note just here that it is insisted on behalf of the Farmers' & Merchants' Bank that Hobson was entitled to the lots under his original contract with the Dummy Company, which was in his individual name, and, as is also insisted, for his own benefit. The answer to this claim is that he could never have acquired title to the lands except by complying with the terms of that contract. This he made no pretense of doing, but permitted the Electric Company, of which he was president, to take his place in the contract, and to accept the conveyance of the Dummy property. That he may not have been present when the deed was executed can make no difference. He admits that he knew of the deed, and does not testify that he made any objection to the transaction, or asserted at the time any claim as against the rights of the Electric Company under the conveyance. The testimony admits of no conclusion other than that the whole transaction was carried out by his consent, if not by his procurement. We think he and those who claim under him should be held estopped to deny that the Electric Company was properly substituted to his place under his original contract. It is worthy of note that in the transaction which resulted in the sale by Rogers as trustee, so far as we have been able to see from the testimony, the Citizens' National Bank, the mortgagee, does not appear. It did not order the sale, nor did it receive any money or any equivalent therefor upon the bid of Hobson. This is probably accounted for by the fact that the debts due to it from the Dummy Company were secured by the signatures of its directors or some of them. The only deduction from the testimony is that the sale was a mere scheme to clear the title, which had been conveyed by the Dummy Company to the Electric Company, and that this was done in pursuance of that provision in the contract between the two corporations that the title to the Electric Company was to be freed from incumbrances. Therefore, we fail to see how Hobson, the president of the latter company, could, by purchasing at such sale, acquire title as against that company.

So far we have treated the questions just

considered upon the facts which we think are shown by the undisputed evidence adduced upon the trial. The chief embarrassment in the determination of the questions grows out of the findings of the jury upon the special issues submitted to them. The Court of Civil Appeals held that, since the assignment to the action of the trial court in refusing to set aside the verdict was too general to be considered, the findings of the jury should be taken as established facts, and binding upon the appellate courts. 66 S. W. 485, 67 S. W. 342. Ordinarily, this is the true rule; but whether such rule is inflexible, and should be deemed to apply in a case like this, where the issues submitted were as to isolated facts, and some of the findings appear to be directly in conflict with the evidence, we need not determine.

We will briefly consider some of these findings, as to their effect upon the true issues in the case.

First. In response to an issue submitted by the Farmers' & Merchants' Bank the jury found, in effect, that the consideration of the conveyance of the four blocks to Hobson "moved from Hobson to the makers of the deed" "in money and services." As we think, this was not a controlling issue in the case. The evidence was probably sufficient to show that he furnished the money to construct the railway of the Electric Company and rendered service in its construction. It does not follow that he did not advance the money and render the service for the company. As we have already said, he may have had a claim against the company for the money and services, but could not claim the lots, which were the consideration for the construction of the road, which was built by and for the company, without some action on the part of the directors of the corporation which gave him that right.

Second. The jury also found, in response to an issue submitted by the bank, that it was the intention of the makers of the deed to Hobson, and of Hobson himself, to vest title in him for his own benefit. We think it immaterial that the parties to the deed may have intended to invest the title in Hobson for his own use. This intention exists in every case of a constructive trust.

Third. It was also found by the jury that Hobson "was owner" of the blocks. He was the owner in the sense that he held the legal title. It does not follow that he held the equitable title. Besides, the issue as to the ownership of the lots involved, under the evidence, questions of law and fact, and, there having been no instructions as to the law applicable to the issue, it is impossible to determine what were the facts found by them. They may have been mistaken as to the law, and this mistake may have led to the finding.

Fourth. We also think it immaterial, as

found by the jury, "that it was agreed between Parker and his associates, being directors of the Dummy Company on the one hand and Hobson on the other," that they accepted the four blocks in payment of his bid.

Fifth. The jury also found that Childress entered into the contract to build the Electric line with "Hobson as an individual." Since the contract was in writing, and was made with the Electric Company, it is difficult to conceive the meaning of this finding, unless it be that Hobson made the contract with the intention that it should inure to his own benefit. He testified himself that Childress refused to contract with him personally, but consented to contract and did contract with the company. That Hobson may have intended the contract for his own benefit can, as we think, make no difference. It was the contract of the company.

Sixth. In answer to an issue in substance whether Hobson paid any money for the four blocks, and, if so, when, how much, and to whom did he pay it? the jury found simply, "Yes, in completion of road; money and services; paid to A. W. Childress." This finding is incomplete, and for that reason should probably not be considered; but, if considered, it amounts to no more than a similar finding in response to an issue submitted at the request of the bank, the effect of which we have already discussed.

Seventh. The following issues were submitted as one at the request of Scott and the Citizens' Railway Company, and to them the accompanying answer was given: "Did W. J. Hobson pay out any money as a bidder at said sale? And did he give any consideration for the deed made to him by said Rogers as trustee?" Answer: "He did." In view of the fact that the undisputed testimony shows that no money was paid at that sale except \$25, which was paid by Parker to Rogers, trustee, for making the deed, and with money which he testified "belonged to the concern," it is incomprehensible to us that the jury should have intended to find the affirmative of the first question submitted in the issue. We therefore doubt whether it should be deemed a finding as to that matter at all. But whether deemed a finding or not, we think it unimportant. Not having found that Hobson paid \$7,500, the amount of his bid, it seems to us wholly irrelevant that he paid some money to some person.

But it is urged on behalf of the Farmers' & Merchants' Bank that, for the reason that the Electric Company was without power to acquire and hold lands for any other purpose save for that of operating its railway and light plant, it acquired no right to the blocks. On the other hand, it is contended that under our Revised Statutes the corporation was authorized to acquire the blocks of land to aid in the advancement of its enterprise. We do not find it necessary to decide the latter question. The case principally relied upon in

behalf of the bank is *Case v. Kelly*, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. Ed. 513. The point there decided is that, when a corporation is not empowered to take and hold lands, a court of equity will not aid it to enforce a trust, and thereby acquire the title to land. The position of the defendant in that case with reference to the lands there in controversy was very similar to that of Hobson with respect to the four blocks of lots, the title of which is in question in this suit. But the general rule is that only the state can take advantage of the want of power of a corporation to take and hold real estate. The Supreme Court of the United States so held in the case of *Fritts v. Palmer*, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317; and the same principle was announced by that court in the case of *National Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188. It was also followed by this court in the case of *Russell v. Railway Company*, 68 Tex. 646, 5 S. W. 686. In the case last cited, a railroad company was held entitled to maintain its action to remove a cloud from its title to land, although it may not have been empowered by its charter to acquire the lands. Judge Thompson says: "Another way of expressing the same doctrine is to say that whether a corporation has violated its charter or exceeded its powers in taking a conveyance of land will not be inquired into collaterally in an action between private parties contesting the title to the land." Thompson on Corporations, § 5799. The ruling in *Case v. Kelly*, above cited, does not appear to us quite consistent with the general rule recognized by the court which rendered it. But we need not inquire into its correctness. The Citizens' Railway is not in this case seeking to establish title to land which it could not acquire and hold, but to property, namely, that of a street railway company, which it had the power to acquire and hold. Its equity is not less potent because at one time during the transmutation of the title to the four blocks the Electric Company may not have been able to establish a trust in its favor against Hobson. We may remark just here, though out of the proper connection, that the doubt as to the corporation's power to take title to the blocks throws light upon the stipulation in the contract between Hobson and Moore, which provided that the title to the lands given as bounties should be taken in the name of one or the other of them, and that the lands so acquired should be sold, and the proceeds applied to the use of the railway company. We conclude upon this point that the Farmers' & Merchants' Bank cannot defeat the title of the Citizens' Railway Company on the ground that the Electric Company was not authorized by its charter to take and hold title to the four blocks. But, should we be in error in this, it can make no difference. Since we have concluded that Hobson could not claim title as against the company of which he was

the president, by virtue of the sale by Rogers, it is immaterial whether he had title to the blocks which he conveyed in satisfaction of his bid. If he had title to the four blocks, it may have given him a claim against the Electric Company for either their value or the amount of his bid.

The jury found that the Dummy Railway and the Electric Railway were parallel and competing lines; and the point is presented that therefore, under section 5 of article 10 of the Constitution, the latter (Electric Company) could not acquire the Dummy line. But we are of opinion that that section applies to railroads proper, and not to street railways. Section 7 of that article does apply to street railways, and there they are specifically named. Ordinarily, when we speak of a "railroad," we mean a railroad over which freight and passengers are transported from one town or city to another; when we speak of those roads on which passengers are transported over the streets of a town or city, we call them "street railways."

The next questions in order grow out of the claim of Parker and his associates for damages for the failure of the Electric Company to run its cars to Alta Vista for the term of five years. The claim is that that stipulation in the contract was placed in it for the benefit of Parker and other directors of the Dummy Company, who owned lands in the vicinity which were to be enhanced in value by the construction and operation of the line. They recovered a judgment for the damages, with a decree enforcing a lien in the nature of that of a vendor upon the property. It is maintained that this decree is justified by the decision of this court in the case of *Howe v. Harding*, 76 Tex. 17, 13 S. W. 41, 18 Am. St. Rep. 17, but we think the two cases may be readily distinguished. In *Howe v. Harding*, a right of way had been granted by deed to a railroad company over land, the consideration of the conveyance being a promise on part of the company to construct a water tank on the land to be supplied from a spring, and to pay appellee for the use of the water as much as it should pay other persons along its line for a like service. The tank was discontinued, and appellee sued for damages and for enforcement of a lien upon the right of way to secure the judgment. He was held entitled to his damages and lien. The nature of the contract appears from the following extracts from the opinion: "It was shown that in 1886 title to the entire tract of land over which right of way was granted was in Nancy S. James, but appellee was permitted, without objection, to state that she heard the contracts read, and that it was made for his benefit with her consent; the inference being that the promise was made directly to him, and that he had lived on the land and been in actual possession since 1854, claiming it; that his homestead of two hundred acres was nearly one thousand varas square, over which

the road ran more than one mile circuitously, and that on this was the elevated spring and water tank. Miss James was shown to be a near relative, who had been a member of appellee's family for more than fifty years, and the inference from the evidence is that while title to a part of the land—or, it may be, the whole—stood in her name, that the beneficial interest was in appellee. * * * If the appellee was the owner of the land over which the railway runs, under the uncontroverted facts the company has the right to it whether he signed the conveyance or not; but as compensation provided by the contract for water service was, in part at least, the consideration thereof, a lien on the right of way, though but an easement, exists to secure, in so far, its payment." It thus appears that in that case the promise to maintain the tank, etc., was made directly to the appellee. Now, this court has held that, in a transaction for the sale of land, a note given to a third person by the vendee as the consideration of the sale may carry with it a lien upon the land for its payment. *Pinchain v. Collard*, 13 Tex. 333. If it be so with a promise to pay money, why not with a contract to do some other thing as a consideration for the conveyance? But in this case there was no promise to Parker and his associates to give a lien, or in fact to do anything, and we think none should be implied. The benefits which were expected to accrue to them were remote and collateral to the transaction. Besides, as we think, it was incompetent for them, being directors of the company, to stipulate for their own benefit.

Another question suggests itself: The Dummy Corporation being insolvent, and the directors having transferred the property, in part at least, for their own benefit, can a court afford them relief by way of giving damages for a breach of the contract? *Eastham v. Roundtree*, 56 Tex. 110; *Davis v. Sittig*, 65 Tex. 497.

The evidence does not clearly show the time at which the Electric Company definitely abandoned the operation of its line to Alta Vista, and therefore we forbear the discussion of the question of the statute of limitations, which was pleaded as to the claim of Parker and associates for damages.

For the reasons given, we think that the judgment of the Court of Civil Appeals and that of the district court should be reversed, and the cause remanded; and it is accordingly so ordered.

DE CORDOVA et al. v. ROGERS.
(Special Supreme Court of Texas. June 16, 1903.)

GUARDIAN AND WARD—CLAIMS AGAINST ESTATE—APPROVAL—BILL OF REVIEW—EXPENDITURE FOR SUPPORT AND EDUCATION—INCOME.

1. Entry of approval, as provided by Rev. St. 1895, art. 2080, of a claim against a ward's estate, on the claim docket, which article 1847

expressly makes a record book of the court, is an entry on the "records of the court," required by article 1853. Entry on the minutes of the court is unnecessary.

2. Claims in favor of third persons against a ward's estate, which have been duly established as such by the county court, though not claims of the guardian, are excepted from Rev. St. 1895, art. 2799, relative to review of proceedings in matters of guardianship, providing that any person interested may, by a bill of review, have any decision, order, or judgment of the court or judge reviewed, as article 2717, providing that the order of approval or disapproval of a claim has the force and effect of a judgment, and article 2718, providing that one dissatisfied with the approval or disapproval of a claim may appeal as in case of any other judgment, give an exclusive remedy.

3. The clear income, within Rev. St. 1895, art. 2630, providing that without an order of court the guardian may expend for the education and maintenance of his ward only the clear income of the estate, is, in the case of rents, the money received, less expenditures for taxes, insurance, and repairs.

4. Interest charged against a guardian on money in his hands which he should have lent is to be added to the income of the estate.

5. Income and expenditures for education and support of the ward should run concurrently, so that, when the income for the period covered by the guardian's claim for such expenditure has been applied thereon, he may not be allowed the balance of the claim.

Error to Court of Civil Appeals of Third Supreme Judicial District.

Bill of review by John D. Rogers against S. D. De Cordova and others. Decree for plaintiff was affirmed by the Court of Civil Appeals (67 S. W. 1042), and defendants bring error. Reversed.

D. W. Doom, Brooks & Shelley, Faulk & Patterson, and Ashby S. James, for plaintiffs in error. Hamer & Gordon, for defendant in error

GAINES, C. J. This case had its origin in a bill of review filed in the county court of Travis county by John D. Rogers, in right of his wife, Emma Pearl Haegler Rogers, to review certain orders of that court made in the course of the proceedings in the matter of the estate of Emma Pearl Haegler, a minor. In the year 1895, letters of guardianship were granted to the appellant Cordova upon the estates of Morris B. Haegler, Ruth A. Haegler, and Emma Pearl Haegler, who were then minors, and who had inherited real property from their mother. On April 2d of that year, Cordova accepted the trust, and qualified as guardian of the estates of the minors. On December 28, 1898, Emma Pearl Haegler intermarried with the plaintiff, John D. Rogers. Some time subsequent to that date the defendant in error instituted this suit. When the original bill of review was filed, the record does not disclose; but after the case was appealed to the district court it does appear that on the 21st day of February, 1901, a fourth amended bill of review was filed, upon which the case was tried. This pleading was filed in lieu of a third amended bill of review, which was filed on the 12th day of December, 1900. It

75 S.W.—2

seems that when the original proceeding was instituted the guardian had filed his final account for the settlement of the estate of Mrs. Rogers in his hands as guardian. In the account of the guardian there were five claims allowed in favor of the father of the ward, mainly for her support and education, which had been transferred to third parties, who were made parties to the suit. All had been duly authenticated, allowed by the guardian, approved by the county court, and entered on the claim; and, as to claims 4 and 5, the order of approval was entered at large upon the minutes of the court. But no such order was made as to the other three. The bill sought to have the first three claims wholly disallowed, because of the failure to enter the order of their approval upon the minutes, and, in case that could not be done, that the action of the court in approving them, as well as its action in approving the other two, be reviewed, and that all of them be disallowed upon their merits. The bill also sought to charge the guardian with certain items, which need not be noticed in disposing of the writ of error. The trial judge in the district court held that claims 1, 2, and 3 were nullities, for the reason that the orders approving them had not been entered upon the minutes of the county court, and wholly disallowed them. He also held that claims 4 and 5 exceeded the sum which should have been allowed for the maintenance of the ward, and disallowed as to the excess. Judgment was entered restraining the account upon that basis, and also surcharging the guardian's account with certain debts claimed in the petition. The Court of Civil Appeals affirmed the judgment of the district court, and, to revise the action of the latter court, this writ of error was granted.

Were claims 1, 2, and 3 nullities, for the reason that the respective orders approving them were not entered on the minutes of the court? Article 1853 of the Revised Statutes of 1895 provides that "all such decisions, orders, decrees and judgments shall be entered on the records of the court, during the term at which the same are rendered, and any such decision, order, decree or judgment, shall be a nullity unless entered of record." It was held in the case of *Blackwood v. Blackwood's Estate*, 92 Tex. 478, 49 S. W. 1045, that this article applies as well to proceedings in the county court in guardianship matters as to proceedings in relation to the estates of deceased persons. However, the question involved in that case was an order allowing the guardian to expend for the education and maintenance of the ward more than the clear income of the estate, which order had not been entered of record. Article 2558 also provides: "The provisions, rules and regulations which govern estates of decedents shall apply to and govern such guardianships, whenever the same

are applicable and not inconsistent with any of the provisions of this title." Article 2555 declares that "the record book used for the business of estates of decedents shall also be used for the business of guardianships." It is also prescribed by article 2729 that "the claimdocket required to be kept in estates of decedents shall be used also for the estates of wards, and under the same rules as far as applicable." In speaking of the clerk of the county court, article 1847 provides that "said clerk shall also keep a record book to be styled 'Claim Docket,' in which shall be entered all claims presented against an estate for approval by the court. This docket shall be ruled at proper intervals from top to bottom, with a short note of the contents at the top of each column. One or more pages shall be assigned to each estate. In the first or marginal column shall be entered the names of the claimants in the order in which their claims are filed; in the second, the amount of the claim; in the third, its date; in the fourth, when due; in the fifth, the date from which it bears interest; in the sixth, the rate of interest; in the seventh, when allowed in whole or in part by the executor or administrator; in the eighth, the amount allowed; in the ninth, the date of rejection; in the tenth, the date of filing; in the eleventh, when approved; in the twelfth, the amount approved; in the thirteenth, when disapproved; in the fourteenth, the class to which the claim belongs; in the fifteenth, when established by judgment of a court; in the sixteenth, the amount of such judgment." Now, by referring back to article 1853, it will be seen that all orders must be "entered on the records" of the court; and, since the claim docket is expressly made a record book of the court, it would seem that, when the approval of a claim is so entered, the requirement of that article is strictly complied with. Indeed, the thought suggests itself that the words "records of the court" were employed to prevent a misapprehension which might otherwise arise, that the entry of the approval or disapproval of a claim upon the claim docket might not be sufficient. If, instead of the words "records of the court," the language had been "minutes of the court," the question would have been one of more difficulty. It is noteworthy that when a claim has been presented and entered on the claim docket, together with its approval, as required by article 1847, all the information in reference thereto is made of record as fully as if the order of approval had been spread upon the minutes in the form of an ordinary judgment. In view of this fact, we fail to see what useful purpose would have been subserved by requiring, in addition to the entry of approval on the claim docket, a formal entry of the order upon the minutes of the court. Furthermore, article 2714 provides that "at each regular term of the court all claims which

have been allowed and entered on the claim docket shall be examined by the court and approved or disapproved in the same manner as is provided for claims against the estates of decedents." Now article 2080 prescribes what shall be done when the county judge has approved a claim. It reads as follows: "When the court has acted upon a claim its action shall be entered upon the claim-docket and the date thereof, and the county judge shall also indorse upon such claim or annex thereto a memorandum in writing, signed by him officially and dated, stating the action of the court upon such claim, whether approved or disapproved, or if approved in part and rejected in part, stating the amount approved, and also stating the classification of such claim." It is reasonable to presume, in view of this particularity, that, if it had been intended to require the approval of a claim to be spread upon the minutes of the court, the Legislature would have expressly so declared. We therefore conclude that, since the claims now under consideration, after being authenticated, were presented to the guardian, allowed by him, and were thereafter approved by the county court, and the approval duly entered on the claim docket, they became established claims against the estate of the ward.

The next question which presents itself is, are claims in favor of third parties, which have been duly established as such by the county court, subject to be revised and disallowed either in whole or in part by a bill of review? The language of the statute with reference to the review of proceedings in matters of guardianship is as general as language can make it. The following is the provision of the Revised Statutes upon the subject: "Any person interested may, by a bill of review filed in the court in which the proceedings were had, have any decision, order or judgment rendered by such court, or by the judge thereof, revised and corrected on showing error therein. But no process or action under such decision, order or judgment shall be stayed except by writ of injunction." Article 2799. It would seem that this provision must of necessity be subject to some limitation. For example, it was hardly contemplated that the action of the court in appointing a guardian would be subject to be revised many years after the appointment has been made. We have not found that the statute prescribes any special limitation as to the time in which the suit may be brought. The general limitation of four years would probably apply, but minors are excepted during the period of their disability. Hence, if such an order can be revised by a bill of review, it would seem that after a lapse of many years the whole proceedings in the administration would be subject to be set aside by reversing the order appointing the guardian. But even if it should be held that the article is sub-

ject to no exceptions growing out of the nature of the order to be reviewed, we are of opinion that the provision of the statutes in reference to the allowance of claims conflicts with it and makes an exception. Articles 2717 and 2718 declare that:

"Art. 2717. The order of approval or disapproval of a claim has the force and effect of a judgment.

"Art. 2718. When a claimant or any person interested in a ward shall be dissatisfied with the action of the court in approving or disapproving a claim in whole or in part, he may appeal therefrom to the district court as in the case of any other judgment rendered by said court."

Now it seems to us that the mention of one remedy for the correction of the judgment excludes all others. Article 2789 gives to "any person who may consider himself aggrieved by any decision, order or judgment of the court, or by any order of the judge thereof," the right of appeal to the district court without bond. This is as general as the article which allows a bill of review. A right to a certiorari is given in terms equally broad. Rev. St. 1895, art. 2800. Now, if article 2799 gives the right to revise by a bill of review an order approving or disapproving a claim, or if article 2800 allows a writ of certiorari for the same purpose, it is clear that under article 2789 there would have been a right of appeal from such order, and the provision in article 2718, which specially provides for an appeal, was wholly unnecessary. Therefore we are of opinion that the Legislature considered that neither article 2789, 2799, or 2800 authorized the revision of the order of approval or disapproval of a claim by the several procedures therein mentioned, and that their intention, as manifested by article 2718, was to give the right of appeal only.

If it be urged that it is unjust to a minor not to have an opportunity to contest a claim after the removal of the disability, the answer is that the establishment of a claim as a finality is necessary to the interest of the minor and to the administration of the estate. Who would extend credit to a guardian for the support, education, or for other necessities of a minor, if, after the claim was established in the county court, its action was subject to be reviewed at some remote period? Besides, the right to a bill of review is given to "any person interested" in the decision of the court. Therefore, if article 2799 applies to the approval or disapproval of a claim, a claimant whose claim had been disapproved could bring a bill of review at any time within four years after the order was made. We do not think this was contemplated by the Legislature.

But we think this question is practically settled by the decision of this court in the case of *Eastland v. Williams*, 92 Tex. 113, 46 S. W. 32. In that case the minor sought

on final settlement to strike from the account of the guardian a claim for an attorney's fee which had been allowed by the guardian and approved by the court, and it was held, in effect, that the approval was a finality. In the opinion, Mr. Justice Brown, speaking for the court, says: "If parties were permitted to contest the justice of a demand against an estate which had been regularly probated under the law and paid by the administrator or guardian, there would be no security for administrators or guardians in the payment of claims against the estates they represent, but they would be liable, at any time after the payment had been made and before the final settlement was concluded, to have the judgments which they had obeyed set aside, and might be compelled to answer for the funds applied under the order of the court. Such a rule has never been in force in the courts of this state." The only distinction we discover between that case and the one now before us is that there the question was raised upon final settlement, and here it comes up under a bill of review. But it seems to us that that is a distinction without a difference. Upon the final settlement everything is reviewable that is subject to revision. The bill of review must be brought in the same court that renders the orders complained of; and we think a bill of review could be brought to revise the action of the court upon final settlement. But we fail to see how the court upon a bill of review would have more power than it had in the proceeding which was sought to be reviewed. The case of *Richardson v. Kennedy*, 74 Tex. 507, 12 S. W. 219, is authority for the proposition that some claims are reviewable upon the final settlement of an administrator. In that case the personal claim of the administrator which had been previously approved was disallowed, and such claims were distinguished from claims of third persons. In the opinion the court say: "The law plainly requires that claims for expenses of administration shall be docketed and acted upon by the court in like manner as other claims against the estate; but while the provisions with regard to the action of the court upon the claims of other parties expressly declare such action 'shall have the force and effect of a final judgment,' no such effect is declared in favor of claims for expenses of administration in favor of an executor or administrator. It seems to us that there are substantial reasons for a difference in this respect. When claims of third parties are being established, it must be done through the executor or administrator who represents the estate, and whose duty and interest it is to protect the estate. On the other hand, the establishment of claims belonging to the administrator or executor is an ex parte proceeding, had without notice to any person interested in the estate, and with regard to expenses of admin-

istration unlimited as to time, except we think that the claims should be presented and acted upon before the final account is filed." What is there said as to an administrator is equally applicable to a guardian.

It follows from what we have said that in our opinion the district court erred in holding that the approval of claims 1, 2, and 3 were nullities, and in reviewing and disallowing in part claims 4 and 5, and that therefore the judgment should be reversed, and the cause remanded with some general instructions as to the principles upon which the account should be restated.

Since it does not appear that, before the accounts were incurred for the education and support of the ward, an order had been made and entered upon the minutes of the court, which authorized the guardian to expend more than the income for that purpose, we think the approved claims, in so far as they are for the education and maintenance, can be charged only against the income. *Jones v. Parker*, 67 Tex. 76, 3 S. W. 222; *Blackwood v. Blackwood's Estate*, supra. It was so held both by the district court and the Court of Civil Appeals. Without such order the guardian cannot go beyond "the clear income," as the statute denominates it. Rev. St. 1899, art. 2630. The income in this case consisted of money received as rents upon the property. The clear or net income is that money, less expenditures for taxes, insurance, and repairs. By the judgment of the district court, which was approved by the Court of Civil Appeals, the guardian was charged with interest upon money in his hands which he should have lent. If he had so lent it, the interest received would have been income, and therefore whatever interest may be charged against the guardian on that score should be added to the income of the estate. The income and expenditures for education and support should run concurrently, and, when the income for the period covered by a claim of that nature has been applied to such claim, the balance appearing to be due upon it should be held of no effect, there being no fund belonging to the estate from which it can be paid. The claims for support and education which accrued previous to the appointment of the guardian were credited with the rents of the period for which support was charged. It not appearing that any rents for that period ever came into the hands of the guardian, there are no funds on hand which can be applied to their payment. Therefore, we think that, as the evidence now appears, no credit should be allowed upon the final account for such claims.

The judgment is accordingly reversed, and the cause remanded to the district court. The defendant in error will pay the costs of the appeal to the Court of Civil Appeals and of the writ of error to this court. The costs of the district court will abide the result of the suit in that court.

STORRIE v. SHAW et ux.

(Supreme Court of Texas. June 15, 1903.)

JUDGES—TERM OF OFFICE—EXPIRATION—SUBSEQUENT AUTHORITY.

1. A trial judge has authority, after the expiration of his term of office, and during the term of court at which trial was had, to make and file conclusions of fact and law.

Certified Questions from Court of Civil Appeals of First Supreme Judicial District.

Action by Robert C. Storrie against Benjamin W. Shaw and wife. From a judgment for defendants, plaintiff appealed to the Court of Civil Appeals, which certified certain questions to the Supreme Court.

Byers & Byers, for appellant. J. H. Davenport, for appellees.

BROWN, J. Certified questions from the Court of Civil Appeals for the First Supreme Judicial District, as follows:

"In the above styled and numbered cause, pending in this court on appeal from the district court of Harris county, the plaintiff sued to recover a one-third interest in two colts; the value of said one-third interest being alleged to be \$666.66. The petition alleged that the plaintiff owned the sire of said colts; that on or about June 1, 1899, he entered into a contract with the defendant Benjamin W. Shaw by which three mares belonging to defendant were bred to plaintiff's said stallion; that, of the progeny resulting from said breeding, plaintiff was to receive a colt, to be delivered to him by the defendant when it reached the age of six months; that as a result of said breeding there were only two foals, and defendant has failed and refused to recognize any interest of plaintiff therein. The prayer of the petition is for judgment fixing the one-third interest of plaintiff in said colts, and ordering the sale of same, and the payment of one-third of the proceeds of said sale to plaintiff.

"The defendant answered by general demurrer and general denial, and specially pleaded that, under the contract, plaintiff was to receive as compensation for the services of his stallion the colt of that particular one of the three mares of defendant bred to said stallion which was named and known as 'Grace,' and that said mare Grace did not produce a foal as the result of said breeding in the year 1899, but that, at plaintiff's request, defendant bred said mare to said stallion in the following year, and the colt which resulted from said second breeding was, when it became six months old, delivered to plaintiff, and accepted by him in full settlement and satisfaction of all claims against the defendant under said contract.

"The case was tried by the Honorable W. H. Wilson, judge of the court below, on the 22d day of November, 1902, without a jury, and judgment rendered in favor of defend-

ants. On November 24, 1902, plaintiff filed a motion for a new trial, which was heard and overruled by the court on November 29, 1902. At the time the motion for new trial was filed, plaintiff also filed a motion requesting the court to file his conclusion of fact and law in said cause. This motion was noted on the motion docket, and was called to the attention of the court on the 29th day of November, when the motion for new trial was overruled. The attention of Judge Wilson was not again called to said motion, and on December 16, 1902, Hon. W. P. Hamblen, who had been elected judge of said court at the general election in the preceding month, qualified as such judge, and assumed the duties of his office; and Hon. W. H. Wilson retired from the bench without having filed said conclusions of fact and law, the matter having escaped his attention in the press of other official duties. On December 23, 1902, the plaintiff filed a second motion for a new trial, basing said motion on the failure of Judge Wilson to file conclusions of fact and law in the case. When this motion was presented, Judge Hamblen requested Judge Wilson to take the bench, and hear and pass upon the motion. Judge Wilson acceded to this request, and, upon taking the bench, prepared and had filed conclusions of fact and law, and overruled plaintiff's motion for a new trial. These conclusions of fact and law, which appear in the transcript, were filed during the term of the court at which the case was tried, are signed by W. H. Wilson as presiding judge, and are also signed and approved by W. P. Hamblen as judge of the Fifty-Fifth Judicial District.

"There is an agreed statement of facts in the record, purporting to contain all of the material evidence adduced upon the trial of the cause. The evidence is directly conflicting. Plaintiff testifies to the contract as alleged in his petition, and denies that the colt of the mare Grace delivered to him by the defendant was accepted in settlement of his claim under the contract of 1899, but claimed that it was delivered to and accepted by him under a separate and independent contract from that sued on. Defendant testified that the original contract was as alleged by him, and that the breeding of his mare Grace the second year was at the request and for the benefit of the plaintiff, and that plaintiff accepted the colt of said mare which resulted from said breeding in full settlement and satisfaction of his claims under the original contract.

"Upon the foregoing statement, we respectfully certify for your decision the following questions:

"First. Was Hon. W. H. Wilson authorized to file his conclusions of fact and law in this case after the expiration of his term of office?

"Second. Are the conclusions of fact and law prepared and filed as hereinbefore stated a lawful compliance with appellant's demand for such conclusions?

"Third. If the conclusions of fact and law were prepared and filed without authority, and cannot be considered by us, was the failure of the plaintiff to make any effort to procure the filing of said conclusions, further than to call the attention of the court to the motion requesting same at the time the motion for a new trial was overruled, such want of diligence on his part as should estop him to complain of the failure of the court to file said conclusions?

"Fourth. There being a full statement of facts in the record, the evidence being conflicting, and it being manifest from the pleadings that the court could only have found for the defendant by determining the conflict in his favor, was the failure of the trial court to file his conclusions of fact and law such a deprivation of plaintiff's rights as to necessarily require a reversal of the judgment?"

Answer to the First Question. Judge Wilson, who presided at the trial, had authority, after the expiration of his term of office, and during the term of the court at which the trial was had, to make and file conclusions of fact and law in response to the motion of appellant. We have found no authority directly on the question submitted, but we regard the signing of bills of exceptions as being most analogous to the question before us. Whether the judge who presided at the trial, or he who succeeds him, should make up, sign, and complete bills of exception which were reserved during the trial, presents a question upon which the authorities are in conflict. In *Enc. of Pldg. & Pr.*, vol. 3, p. 456, it is said: "The prevailing doctrine in case of the removal, resignation, or expiration of the term of the trial judge is that the judicial function survives in him for the purpose of authenticating the bill, and he is accordingly the proper person to sign. His successor cannot allow the bill, as he is a stranger to the judicial proceeding related therein." This statement of the law is sustained by the following cases: *Hale v. Haselton*, 21 Wis. 322; *Stirling v. Wagner* (Wyo.) 31 Pac. 1032; *Ex parte Nelson & Kelly*, 62 Ala. 376; *Davis v. President and Trustee, etc.*, 20 Wis. 194; *Connelley v. Leslie*, 28 Mo. App. 551; *Quick v. Sachsse*, 31 Neb. 312, 47 N. W. 935; *State v. Barnes*, 16 Neb. 37, 19 N. W. 701. In some jurisdictions the courts have held that such conditions require that a new trial be granted. This view is supported by the decisions of Maryland and Michigan; also by the decisions of the English courts. 3 *Enc. Pl. & Pr.* 453, note 1. In other states it is held that the successor to the ex-judge is authorized and required to sign the bill of exceptions, which is supported by the following cases: *Smith v. Baugh*, 32 Ind. 163; *Railway Co. v. Rogers*, 48 Ind. 427; *Hays v. McNealy*, 16 Fla. 408. The weight of authority and the better reasoning support the answer that we have made to this question. It would be impossible for a judge who had not heard the testimony to express in the

form of conclusions of fact the impression which the conflicting evidence made upon the mind of one who heard it. Therefore it is especially important that the judge who tried the case should make the conclusions of fact. We fail to see any sound objection to the conclusion that upon the retirement of a judge the judicial function survives and continues so far as necessary for him to complete that which reflects the operation of his own mind or relates to his own conduct in the particular case.

The answer to the first rendered it unnecessary to reply to the other questions.

WISDOM v. STATE.

(Court of Criminal Appeals of Texas. June 17, 1903.)

CRIMINAL LAW—SEDUCTION—INDICTMENT—CORROBORATIVE TESTIMONY—INSTRUCTION.

1. An indictment charging that defendant did unlawfully seduce prosecutrix, and did unlawfully obtain carnal knowledge of her by means of a promise to marry her, sufficiently alleges that both the seduction and the carnal knowledge were obtained by means and in virtue of a promise of marriage.

2. Where in a prosecution for seduction the court first defined seduction as meaning "to lead away a female from the path of virtue, to entice or persuade her by means of a promise of marriage to surrender her chastity," and then charged that defendant was guilty if he accomplished his purpose by a promise of marriage and prosecutrix was unmarried at the time and relied on such promise, the two charges taken together sufficiently required the jury to find that defendant accomplished his purpose by seductive means and that prosecutrix was a virtuous female.

3. A charge in a prosecution for seduction that the testimony of prosecutrix would be sufficiently corroborated by facts tending to support her testimony and to satisfy the jury of her credibility was erroneous, as it authorized a conviction on corroborative testimony as to the credibility of the witness, without requiring that it connect defendant with the crime.

Henderson, J., dissenting.

Appeal from District Court, Fannin County; Ben H. Denton, Judge.

Gip Wisdom was convicted of seduction, and he appeals. Reversed.

F. P. Greover, R. B. Young, and Taylor & McGrady, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of seduction, and his punishment assessed at confinement in the penitentiary for a term of five years.

Appellant insists that the court erred in overruling his motion to quash the indictment, because the same fails to allege that defendant did by promise to marry seduce the injured female, Lavonia Smith. Appellant further insists that, in order to constitute the offense of seduction as found by our statute, the following facts must be alleged: First, that defendant promised to marry the un-

married female under 25 years of age; second, that by virtue of or under such promise he seduced her; third, that he had carnal knowledge of her. He contends that the indictment is fatally defective in that it fails to allege that defendant seduced prosecutrix by a promise to marry. The charging part of the indictment is as follows: That appellant "did then and there unlawfully seduce Lavonia Smith, an unmarried woman under the age of twenty-five years, and the said Gip Wisdom did then and there unlawfully obtain carnal knowledge of the said Lavonia Smith by means and in virtue of a promise of marriage to her, the said Lavonia Smith, previously made by him, the said Gip Wisdom," etc. In our opinion appellant's insistence is incorrect. The indictment follows the form prescribed in section 1686, White's Ann. Pen. Code, and, while it varies in one respect from form No. 523 prescribed by Judge Willson, they are in substance the same. As appellant insists, the prosecutrix must be seduced by the promise of marriage, and after such seduction carnal knowledge must take place. In other words, if there are no arts, wiles, or promises, except the mere fact that appellant told prosecutrix he would marry her, and after such contract, so to speak, secured carnal knowledge of her person, this would not be seduction. As held in Putman v. State, 29 Tex. App. 454, 16 S. W. 97, 25 Am. St. Rep. 738, appellant must seduce prosecutrix from the path of virtue, and then have carnal knowledge of her person. Now we take it that the indictment charges both facts. It alleges that appellant did unlawfully seduce Lavonia Smith, and did unlawfully obtain carnal knowledge of said Lavonia Smith by means and in virtue of a promise to marry her, and, under the allegations of the indictment, in order to accomplish the seduction and the carnal knowledge he used the promise of marriage to secure both. Judge Willson's form repeats the latter clause of the indictment, to wit, "by means and in virtue of a promise of marriage to her," before the seducing clause and before the carnal knowledge clause. This makes it more explicit, but the method adopted in this indictment of stating the offense is susceptible of but one construction, to wit, that it alleges that both seduction and carnal knowledge were obtained by means and in virtue of a promise of marriage. And, as appellant insists, these are the prerequisites of seduction. Accordingly, we hold the indictment is sufficient.

Appellant insists that the court erred in giving the following portion of the charge: "If you believe from the evidence beyond a reasonable doubt that defendant, Gip Wisdom, did in the county of Fannin and state of Texas, on or about the time charged in the indictment, and prior to the 23d day of August, 1901, have carnal knowledge of Lavonia Smith, and that at the time the said Lavonia Smith was an unmarried female under the

age of twenty-five years, and that such carnal knowledge, if any there was, was accomplished by defendant by means of a promise on his part to marry the said Lavonia Smith, made at the time of such illicit intercourse, if there was any, and that such promise, if any there was, of marriage was relied upon by her and induced the said Lavonia Smith to submit to such intercourse with defendant, then you will find defendant guilty as charged in the indictment," etc. The objections urged are that the same does not require such intercourse must have been accomplished by any seductive means, as required by law, but only a blunt contract of marriage; and because it required the jury to convict defendant, no matter whether they believe that prosecutrix at the time of the alleged intercourse was a virtuous female. This charge must be considered in connection with the previous charge defining seduction, which is as follows: "'Seduction' means to lead away a female from the path of virtue; to entice or persuade her, by means of a promise of marriage, to surrender her chastity, and have carnal intercourse with the man making such promise." And, when so considered, we take it that the charge presents the law applicable to the facts.

Appellant also complains of the following portion of the court's charge: "No conviction can be had on the testimony of Lavonia Smith, unless the same is corroborated by other evidence tending to connect defendant with the offense charged, and also corroborated by other evidence tending to show that defendant induced prosecutrix to have carnal intercourse with him by reason of his promise to marry her, if any promise was made; but the corroborative evidence need not be direct and positive, or such evidence as is sufficient to convict, independent of the testimony of Lavonia Smith, but simply such facts or circumstances as tend to support her testimony and satisfy you that she is worthy of credit." The latter clause, to wit, "but simply such facts or circumstances as tend to support her testimony and satisfy you that she is worthy of credit," is erroneous. Evidence might be introduced convincing the jury of the credibility of the witness, yet this would not corroborate her statement in such a way as tends to connect appellant with the commission of this crime. For instance, suppose testimony is introduced showing that prosecutrix has borne a uniformly good reputation for truth and veracity; clearly this would strengthen the credit of the witness and render credible her testimony. But such evidence would not be sufficient to warrant a jury in saying that the same corroborated her testimony. In other words, the corroboration must be independent of the accomplished witness, since the law says she cannot corroborate herself, and the evidence must be of such a character as shows with reasonable probability the testimony of the prosecutrix is corroborated. As stated in the

charge of the court, it is not necessary to prove the crime independent of the accomplice, nor prove it by positive evidence; but the facts or circumstances, as the case may be, must be of such cogency as tend clearly to connect defendant with the commission of the crime and corroborate the testimony of prosecutrix. In our opinion, the court's charge is erroneous.

The judgment is accordingly reversed, and the cause remanded.

HENDERSON, J. (dissenting). I agree with the majority of the court that this case should be reversed on the proposition announced, but I do not agree that the indictment is good. I understand the opinion to hold it is necessary that the indictment should follow the statute (White's Ann. Pen. Code, art. 967), and allege that the act of seduction, as well as the act of carnal intercourse, shall be obtained by a promise to marry. The indictment here alleges that appellant, Wisdom, did seduce the prosecutrix, and then in the succeeding clause proceeds to allege "that he did then and there by means of a promise of marriage obtain carnal knowledge" of said prosecutrix; clearly showing, as it seems to me, that the promise of marriage relates solely to the act of carnal intercourse. I know of no precedent that would authorize the transposition of this allegation of promise of marriage so as to make it enter into and qualify a preceding clause in the indictment. It is true that the indictment here is in accord with the form laid down by Judge White, but it is not in accordance with the form prescribed by Judge Willson, nor in accordance with the statute. I therefore disagree with the majority of the court in holding the indictment is good.

YOUNG v. STATE.

(Court of Criminal Appeals of Texas. June 3, 1903.)

CRIMINAL LAW—PLEAS IN BAR—STATE'S EVIDENCE—IMMUNITY AGREEMENT.

1. Defendant and another were jointly indicted for burglary and theft, the latter offense being punishable in either of two counties. Before trial in one county, the indictments were dismissed as to defendant, under an agreement with the district attorney, recognized by the trial judge, that he should turn state's evidence, and be given immunity from punishment. Held, that the dismissal under the agreement was binding on the state, and could be pleaded in bar to a prosecution for the theft in the other county.

Appeal from District Court, Brazos County; J. C. Scott, Judge.

Bill Young was convicted of theft of money in excess of \$50, and appeals. Reversed.

Lock McDaniel and Sam R. Henderson, for appellant. V. B. Hudson, Dist. Atty., M. Nagle, Co. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of theft of money in excess of \$50, the penalty assessed being six years in the penitentiary.

When the case was called for trial, appellant interposed what is termed a "plea in bar" of the prosecution. This is based upon an agreement had in Grimes county with the district attorney of that district, that county being in a different judicial district from Brazos county. This plea avers that appellant and one Dunlap were charged by the grand jury of Grimes county with burglary and theft, the theft being committed at the time of the burglary. The parties were jointly indicted for both offenses. When the case was called, the district attorney moved to dismiss the case as to appellant, as he had made a contract with him to testify against his codefendant, Dunlap, which contract carried with it appellant's immunity from punishment. The court entertained the motion to dismiss, and both cases against appellant were dismissed from the docket in Grimes county. The court stated, in substance, that, if they desired to dismiss the case as to Young in Grimes county, as that county had exclusive jurisdiction of the burglary case, he would permit the dismissal, and recognize the agreement of the district attorney as to the burglary case. He also dismissed the case as to the theft on same motion, but remanded appellant to the custody of the sheriff of Brazos county, because he stated Brazos county had concurrent jurisdiction with Grimes over the offense of theft. On the trial of the plea in Brazos county the district judge who presided at the trial in Grimes county took the stand as a witness, and stated, in substance, that he recognized the agreement as to the burglary case, and dismissed the case as to the theft, because he believed the district attorney intended to give appellant a verdict in Grimes county. The motion of the district attorney entered in the district court of Grimes county was the same in both cases, and based upon the same facts. In *Tullis v. State*, 41 Tex. Cr. R. 87, 52 S. W. 83, it was held that, in order to make this character of agreement valid, it must have the sanction of the trial judge. Agreements of the character under discussion have been recognized by the decisions of this state with unbroken uniformity, except in *Holmes v. State*, 20 Tex. App. 518. Where that case was in conflict with this line of decisions, it was expressly overruled in *Camron v. State*, 32 Tex. Cr. R. 180, 22 S. W. 682, 40 Am. St. Rep. 763. It is unquestionably true that Grimes county had jurisdiction of the burglary as well as of the theft, inasmuch as they were committed within the boundaries of said county. If, as a matter of fact, the stolen property was carried from Grimes into Brazos county, thereby giving that county jurisdiction of the offense of theft, it did not oust the

jurisdiction of Grimes county. It remained by virtue of the act having been committed in that county. Whatever may have been the mental reservation of the trial judge, or his purpose in dismissing the case in his court and sending it to Brazos county for trial, still the dismissal occurred upon the motion of the district attorney, which set up the agreement between himself and appellant, in which appellant was to testify against his codefendant, Dunlap, and for this to receive immunity from further prosecution. Appellant held himself ready to testify against Dunlap, and this seems to have induced Dunlap to enter his plea of guilty in both cases, burglary and theft. The district judge should have positively declined, if he did not intend to recognize this agreement, when the motion to dismiss based upon this ground was presented. This was the only ground upon which this motion to dismiss was based, or could have been granted. It was the only pretext for the dismissal; and this was recognized by the judge in granting the dismissal, because there was no other ground stated. His action in the matter was binding upon the state, and it would make no difference in the future as to where another prosecution would be commenced. The action of dismissal in Grimes county was final under this agreement, and one which appellant could plead in any court where an indictment charging the same offense was or could be presented against him. The action of the court granting the dismissal in Grimes county was a recognition of the agreement made by the district attorney with appellant, and was binding upon all parties concerned, and entitled him to immunity from further prosecution.

The other questions in the case are not noticed because this finally disposes of the case.

The judgment is reversed, and the prosecution ordered dismissed.

HAYNIE v. STATE.

(Court of Criminal Appeals of Texas. June 3, 1903.)

CRIMINAL LAW—MISCELLANEOUS DEFENSES—GATHERING PECAN NUTS—INFORMATION—SUFFICIENCY—CONSENT OF OWNER—CHARACTER OF INCLOSURE—INSTRUCTION—WEIGHT OF EVIDENCE.

1. An information drawn on Acts 25th Leg. p. 53, c. 55, § 1, making it a misdemeanor for a person to gather pecan nuts upon inclosed land not owned, leased, or controlled by him, unless it is made to appear in defense that it was by consent of the owner, lessor, or person in control, which alleges that it was without the consent of the owner, need not allege the want of consent of the lessor or person in control.

2. In a prosecution under Acts 25th Leg. p. 53, c. 55, § 1, making it a misdemeanor to gather pecan nuts on inclosed land of another without his consent, an instruction that it was not necessary that the land should be confined within an actual and sufficient fence, but any inclosure sufficient to protect the land from dep-

redation by artificial or natural means would be sufficient, was not upon the weight of the evidence.

3. The charge correctly defined inclosed land under the statute.

4. A mill dam is an inclosure within the meaning of the statute.

5. The fact that the fence was down or disconnected at some place would not constitute a defense.

Appeal from Llano County Court; F. J. Johnson, Judge.

Tom Haynie was convicted of gathering pecan nuts on the inclosed land of another, and appeals. Affirmed.

Wilburn Oatman, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted, and fined \$5, under an information charging that he "did then and there unlawfully gather pecan nuts upon inclosed lands not owned, leased, or controlled by him, the said Tom Haynie, being the inclosed lands of R. H. Moseley, and without the consent of the said R. H. Moseley," etc. Appellant filed a motion to quash the information, because the same failed to allege that the pecan nuts were gathered upon the inclosed lands without the consent of the lessor or person in control thereof. This prosecution is predicated upon section 1 of chapter 55, Acts 25th Leg. p. 53, which provides: "Any person who shall, hereafter, gather any pecan nuts upon the enclosed land not owned, leased or controlled by him, unless it be made to appear in defense that it was taken by the consent of the owner, lessor, or person in control, * * * shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than five dollars, and not more than three hundred dollars; or by imprisonment in the county jail not more than three months, or by both such fine and imprisonment." It will be noted that the information charged the land to have been the inclosed land of R. H. Moseley. It is not necessary to allege, as appellant insists, the want of consent of the lessor or person in control thereof, unless the person in possession is the lessor or simply in control. The information alleges that Moseley, the prosecuting witness, was the owner of the land. This is sufficient.

Appellant complains of the following portion of the court's charge: "Having instructed you the meaning of land actually inclosed, I further charge you that it is not necessary that such land should be confined within an actual and sufficient fence, but, if same is in any manner inclosed sufficient to protect the land from depredation by artificial or natural means, it would be sufficient under the law." Appellant insists that this charge is upon the weight of the evidence, in that it assumes the land was in fact actually controlled in some manner; and that the only question for the jury to determine was whether or not it was sufficiently inclosed within the meaning of the law. Such charge fails to indicate

to the jury what manner or character of depredation said land should be inclosed to protect it against in order to constitute it inclosed land. This charge is not upon the weight of the evidence, but, as we understand it, is a definition of what the statute means by inclosed land; and the court is correct in saying that such inclosure may be by natural or artificial means.

We also understand appellant to contend that, as a part of the fence alleged as inclosing the land from which appellant gathered the pecan nuts was a milldam across the Llano river, this would not constitute an inclosure in contemplation of the statute. We also understand him to insist that, if the fence happened to be down or disconnected at any particular place, this would constitute a defense. We do not so understand the law. The evidence supports the verdict of the jury.

The judgment is affirmed.

REYNA v. STATE.

(Court of Criminal Appeals of Texas. June 3, 1903.)

RAPE — CONTINUANCE — IMPANELING JURY — WITNESS — COMPETENCY — INSTRUCTIONS — DEATH PENALTY — EXCESSIVE PUNISHMENT.

1. Overruling a motion for continuance was not error where, aside from the question of diligence, which was doubtful, it did not seem probable that the absent witness would testify as alleged, and, even if he did, his testimony would have had no weight with the jury, and where, in addition, the application for a continuance did not state facts, but conclusions.

2. In a criminal case, while the jury was being formed, the judge, at defendant's instance, had a special jury, which was out trying another case, and on which were three of the veniremen, brought into court, and these veniremen were tendered to defendant. Two of them appeared to be disqualified, and the third was challenged by the state. The court explained that, if either of said jurors had been taken, he would have at once discharged the special jury, and have placed the jurors taken therefrom in the box to try defendant. *Held* no error.

3. In a prosecution for rape of a child seven years old, who stated that she knew it was wrong to tell a lie; that she would be punished if she did so; that her mother had told her about God; and whose answers showed that she was quite intelligent for her age, though she seemed to be frightened by the crowd, and was slow to testify—it was not error to permit her to testify.

4. Where there was no pretense that a rape was committed by threats or fraud, the court was not required to instruct in regard thereto.

5. Where there was no evidence that any of the witnesses were accomplices, failure to charge on accomplice testimony was not error.

6. Where defendant was convicted of rape of a child seven years old, the evidence showing that she was frightfully lacerated and injured, the death penalty was not out of proportion to the offense proven.

Appeal from District Court, Lavaca County; M. Kennon, Judge.

Margireta Reyna was convicted of rape, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of rape, and his punishment assessed at death.

Appellant excepted to the action of the court overruling his motion for continuance. Aside from the question of diligence, which is doubtful, it does not occur to us that the absent witness, Peter Roregas, would probably testify as alleged; and, if he did so, in the light of appellant's own evidence, as explained by the court, it would have no weight with the jury, and would not have changed the result. The court, in his explanation, says: "On the trial defendant testified that when the offense was committed he was at Will Irvin's, some distance from the place of the crime, and that the woman he kept, and the mother of the raped child, came there where defendant was, leaving the child alone at the camp; thus giving the opportunity for some one to commit the crime. He did not claim to have been with the absent witness, Roregas; nor did he mention him in his testimony." Besides this, the application for continuance does not state facts, but rather conclusions. It does not state where defendant was with said Roregas at the time of the commission of the offense, nor how far from the place of said offense. In the light of the testimony and the court's explanation, we do not believe the court erred in refusing a new trial based on the court's action in overruling the motion for continuance.

There was no error in the action of the court as to the impanelment of the jury. At the instance of appellant, while the jury was being formed, the judge had a special jury, which was out trying another case, and on which were three of the veniremen, brought in court, and these veniremen tendered to appellant. Two of these appeared to be disqualified, and the third was challenged by the state. The court explains that, if either of said jurors had been taken, he would have at once discharged the special jury, and have at once placed the jurors taken from same in the box to try appellant.

Nor did the court commit any error in authorizing the child alleged to have been raped to be placed on the stand and permit her to testify as a witness. True, she was only in her seventh year, and of tender age for a witness to be capacitated to give testimony in court. Yet the learned judge explains that he examined the child as to her competency to testify, and that he elicited from her that she knew it was wrong to tell a lie, that she would be punished if she did so, and that her mother had told her about God. While she seemed to be frightened by the crowd, and was slow to testify, still when she did so her answers showed that she was quite intelligent for her age.

The charge of the court is criticised in the general definition of rape in stating that "rape is the carnal knowledge of a female under the age of fifteen years, other than

the wife of the person, with or without her consent, and with or without the use of force." This was objected to because it did not also contain threats or fraud. There was no pretense in this case that the rape was committed by threats or fraud, and consequently the court was not required to instruct in regard thereto.

Nor did the court err in failing to charge on accomplice testimony. There is no evidence that any of the witnesses were accomplices.

We have examined the record carefully, and, although the verdict is a severe one—the highest penalty authorized by law—still we cannot say that it is out of proportion to the offense proven. The little girl was only seven years of age, and the evidence establishes beyond any reasonable doubt that appellant, who was her custodian, living at the time with the child's mother in illicit intercourse, when she was unprotected, and entirely within his power, seized her, and penetrated her private parts with his male organ, fearfully lacerating and injuring the child. The law was made to prevent such conduct—to protect the weak and helpless from the fiendish desires of the strong and brutal. We believe appellant has had a fair and impartial trial, and that the verdict of the jury is fully sustained by the evidence.

The judgment is affirmed.

HARKINS v. STATE.

(Court of Criminal Appeals of Texas. June 3, 1903.)

PEDDLING COOKING STOVES—INFORMATION—SUFFICIENCY—MANUFACTURER'S AGENT—INTERSTATE COMMERCE.

1. Under the act of 1899 (Gen. Laws 1899, p. 201, c. 116) providing that every person peddling cooking stoves or ranges shall pay an occupation tax, an information charging defendant with selling stoves without a license is defective, for failure to show that such stoves were cooking stoves or ranges.

2. Under the act of 1899 providing that every person peddling cooking stoves or ranges shall pay an occupation tax, a person acting as manufacturer's agent, taking orders for stoves to be shipped from the factory in another state in three separate parcels, and to be delivered and set up by another employé of the manufacturer, is not engaged in peddling stoves, within the statute.

3. Such an agent is within the protection of the interstate commerce clause of the federal Constitution.

Appeal from Limestone County Court; A. J. Harper, Judge.

C. L. Harkins was convicted of peddling cooking stoves or ranges without a license, and appeals. Reversed.

H. W. Williams and Frost, Neblett & Blanding, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

§ 2. See *Hawkers and Peddlers*; vol. 25, Cent. Dig. § 1.

BROOKS, J. The information charges that appellant did unlawfully engage in, pursue, and follow the occupation of a traveling person engaged in selling stoves—an occupation taxed by law—without first having obtained a license therefor. Upon conviction, his punishment was assessed at a fine of \$375.

The act of 1899 (Gen. Laws 1899, p. 201, c. 116), under which this prosecution was instituted, provides that every person peddling out "cooking stoves or ranges" shall pay an occupation tax of \$250 to the state. It will be observed that it is an offense to peddle "cooking stoves or ranges." In order to convict appellant, the information should charge, among other things, that he "peddled cooking stoves and ranges, or peddled cooking stoves or ranges." If he merely peddled stoves, as alleged in the information, he would not be guilty under this statute. We do not know why the Legislature merely made it an offense to peddle cooking stoves and ranges. Suffice it that they did so. Then, in order to constitute a valid information, it must correspond with the act of the Legislature defining the offense. The complaint and information did not do this, but merely alleged that appellant peddled stoves. It may not have been a cooking stove, and, without an allegation in conformity with the statute, no prosecution could be maintained. We apprehend that appellant might be prosecuted under other clauses of the peddling statutes for selling stoves, but we are not called upon to pass on this. The court erred in failing to quash the complaint and information.

The facts in this case are collated in appellant's able brief, and are as follows: "Defendant was a citizen and resident of the state of Georgia at the time of the commission of the offense and trial. He had been in the employ of the Wrought Iron Range Company since 1889 or 1890, and has been in the company's employ in Texas since April, 1901. His business as the agent of the Wrought Iron Range Company has been, and is, to take orders for wrought iron ranges or cooking stoves manufactured at St. Louis, Mo., from local customers, to be filled at the Wrought Iron Range factory in St. Louis, in the state of Missouri. The manner in which he performed his duties, and the manner in which he made sales in Limestone county, was that he, with a team and wagon and a sample range or cooking stove, all of which belonged to his employer, the Wrought Iron Range Company, drove around through the country, exhibiting the sample, which under no circumstances was ever sold, and solicited orders for ranges, like the sample exhibited, on the factory of the Wrought Iron Range Company at St. Louis. The ranges contracted for by customers were to be shipped according to agreement, and were in fact shipped from the factory at St. Louis to the purchasers. The orders were transmitted by defendant to the factory of the com-

pany at St. Louis, Mo., and were there filled by the company and shipped to the purchasers. At the time of the sale, or contract for the sale, of a range, it was agreed between the soliciting agent (defendant) and the purchaser that the range ordered and purchased by the customer should be delivered and put up in the house of the purchaser by the company, through one of its agents, who had directions so to do; defendant having never at any time delivered a range. The deliveries of the ranges solicited by orders through defendant were always done and made by another and different agent of the company. Defendant solicited orders only. When defendant took an order from a customer, he was authorized so to do, and did assure such purchaser that the range would be delivered and put up for him. Defendant, at the time he made a sale, always took a note for \$73. This note was made payable to the Wrought Iron Range Company, and was sent by defendant to the company, and was collected, usually, by the agent who put the cooking stove or range in place at the residence of the purchaser. Defendant never at any time collected any money on account of sales, or contracts for sales, made by him. Defendant received a salary for his work, with the addition of a commission on all sales made by him, where payment was made by the purchaser within thirty days—such sales being denominated, as between him and the company, as cash sales—or, if payment was made promptly by the customer when the note became due, defendant received, as soliciting agent, a small commission. Defendant had no property or interest whatever in the ranges sold by him. When an order was sent in to the company by defendant, it was filled at the factory in St. Louis, in the state of Missouri, and was there prepared for shipment; the order being made up for shipment in three separate packages, as follows: 'One range.' 'One range shelf.' 'One bundle of pipe.' Each of these packages was wired, crated, or tied together separately, and was marked with the name of the purchaser, and the name of the railroad station nearest to the purchaser, where the same should be delivered. The three packages were always shipped from the factory to the purchaser in care of some delivery agent of the company, who received the same from the carrier at the point of destination, and the agent took them to the purchaser in the unbroken packages, which were in the same condition as they were shipped from the factory, and in such condition delivered them, each range to the respective purchaser, who broke the original packages; and, if all of the pieces of the range were present, the delivery agent of the company at once proceeded to put the range in place, following the provisions of the agreement made between the soliciting agent (defendant) and the purchaser. The Wrought Iron Range Company has not now, and has at no time had, any warehouse or depository

in the state of Texas for the receiving and depositing of ranges or cooking stoves manufactured by it, and for which orders were solicited and sales made by defendant. The domicile and place of business of the Wrought Iron Range Company is St. Louis, Missouri, where it has a factory, and there manufactures ranges and cooking stoves such as are sold by its soliciting agents and by defendant in the state of Texas. Frequently orders sent in to the company solicited by defendant and other soliciting agents, which are passed through the superintendent, were by him held up until the amount of orders constituted a car load for shipment, when the ranges were sent out, each package marked with the purchaser's name, and the name of the railroad station where the same was to be delivered to the purchaser. In such case the car is shipped to the company in care of the general agent of the company, and consigned to the nearest station of delivery from St. Louis, where the agent receives the car and takes from it such ranges as had been sold to be delivered at that point, and then he reships the balance of the car load to the next station, where the ranges are to be delivered to purchasers. Every range or cooking stove which was sold by defendant in Limestone county was shipped from the factory of the Wrought Iron Range Company at St. Louis, and was shipped therefrom on an order taken by defendant, and each range was delivered to the purchaser in the original unbroken packages, as such packages were made up and shipped at the factory in St. Louis, to the point of destination (that is, to the nearest station on any railroad to the purchaser's residence), and each package was designated by a tag attached thereto, marked with the purchaser's name and the name of the railroad station nearest his place of residence. None of those packages were at any time broken by defendant or any agent of the Wrought Iron Range Company. These original packages were not broken at the depot or station where the same was received by the agent of the Wrought Iron Range Company, but were broken by the purchaser, in each instance, after delivery to him. Defendant did not sell any range in Limestone county which was at the time of the sale in the state of Texas, but each sale made by him was of a range or cooking stove which was at the time he took the order or made the contract of sale in the state of Missouri. The ranges sold by defendant in Limestone county were shipped from St. Louis to Jewett, Texas, as a part of a car load of ranges. At Jewett, a station on the International & Great Northern Railroad, the general agent or superintendent of the Wrought Iron Range Company received the car, broke the seals, and took from the car such ranges or cooking stoves as were destined to be delivered on orders from customers at that point. Then the ranges which were sold to persons in Lime-

stone county by defendant were reshipped over the I. & G. N. R. R. and the H. & T. C. R. R. to Kosse, in Limestone county. (One range, however, sold to Dr. Poindexter, at Kosse, was shipped through, consigned to him, on a single bill of lading from St. Louis, the place of the factory of the Wrought Iron Range Company.) At Kosse the balance of the car load of stoves was received by the delivery agent of the Wrought Iron Range Company, and by him was distributed to the purchasers from defendant; each range being marked and delivered to the respective purchasers in unbroken packages, three packages to each range, wired or tied together, and marked in the name of the respective purchasers, and delivery was made to the purchaser in each instance of the original unbroken packages constituting his entire purchase of the range or cooking stove, and which packages were in no instance broken by any agent of the Wrought Iron Range Company, for whom defendant was the soliciting or sales agent, but in each instance were broken by the purchaser after his receipt of the same."

The above and foregoing facts do not constitute appellant a peddler, within contemplation of the statute. See *Potts v. State* (decided at present term) 74 S. W. 31. On the other hand, it is interstate commerce. As laid down in the *Potts Case*, appellant is not a peddler. Then he must necessarily be a drummer or agent, and, being such, and representing a nonresident corporation soliciting orders for goods, comes within the protection of the interstate commerce clause of the Constitution of the United States. *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1, 32 L. Ed. 368; *Robbins' Case*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; *Hopkins v. U. S.*, 171 U. S. 602, 19 Sup. Ct. 40, 43 L. Ed. 290.

Because the information is not sufficient, the judgment is reversed, and the prosecution ordered dismissed.

HIPP v. STATE.

(Court of Criminal Appeals of Texas. June 3, 1903.)

GAMING—RESIDENCE—PRIVATE RESIDENCE—TENT—PLACE—PROXIMITY TO RESIDENCE.

1. Where one who has been divorced from his wife, and who has custody of one of the two children of the marriage, lives with such child in a tent, and the same is the only home that they have, it is a private residence occupied by a family, within Acts 1901, p. 26, arts. 379, 381, punishing all character of gaming at any place, except at a private residence occupied by a family.

2. A game of cards played just outside of the tent, used as a residence about 10 feet therefrom, was "at the residence."

Appeal from Coleman County Court; B. F. Rose, Judge.

Hugh Hipp was convicted of gaming, and he appeals. Reversed.

Woodward & Baker, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged with playing cards in a certain named pasture, and on his trial was convicted and fined \$10. The indictment is sufficient. *Russell v. State* (Cr. App.) 72 S. W. 190, 6 Tex. Ct. Rep. 784; *Hankins v. State* (Cr. App.) 72 S. W. 191, 6 Tex. Ct. Rep. 790.

Articles 379 and 381, Acts 1901, p. 26, punish all character of gaming "at any place except a private residence occupied by a family." Article 381 provides that it is not necessary to prove betting occurred upon any of these games where the card playing occurred at a house for retailing spirituous liquors, etc., or in any street, highway, or other public place, or in any outhouse where people resort, or at any place except a private residence occupied by a family; "provided that nothing in this title shall be so construed as to prevent the playing of any game for amusement at a private residence occupied by a family." Card playing at a private residence would not be a violation of the law, unless such residence is commonly resorted to for the purpose of gaming. Article 379, *supra*. It is contended the place where the card playing occurred, and which forms the basis of this conviction, was a private residence of a family within the meaning of the statutes above cited. On this phase of the case Scoggins, at whose camp the card playing occurred, testified: That he lived in the tent or under the wagon sheet, and this residence was thus constructed: "I put up a pole and stretched my wagon sheet across it. I then piled brush up at the back end and on each side to keep out the wind, and from this brush I made a brush fence in front to keep out the stock. My wagon constituted a part of this fence, and some cord wood constituted part of it. From the front of the wagon sheet to the fence was about 30 feet. The place where I made the fence was in front of the wagon sheet, and about 10 or 15 feet from the wagon sheet. My bedding and bedclothes were under the wagon sheet, and we slept under the wagon sheet. We cooked out at the fire. I have all my household and kitchen furniture at this camp. The cooking utensils were kept near the fire. I was camped in the pasture doing some grubbing. This camp was the only home I have at this time, and I do not own any house now. My boy, aged about 16 years, lived with me, and stayed with me at this camp, and was there the night spoken of. I have no other family with me. A few years ago my wife got a divorce from me, and she has one child with her. * * * I established this camp in November, 1901, a month or so before the playing." This camp was in what is known as the "John Roberts' Pasture," near Glen Cove, in Coleman county. Sam Scoggins, son of former witness, testified: "I lived with my father, in our camp near

Glen Cove, in December, 1901. This camp was all the home we had of any kind at the time of the playing; and all of our bedding and cooking utensils were at the camp." The state's contention is that this was not the residence of a private family within contemplation of the statute of 1901. The word "residence," as used in this article, is used in the sense of domicile; a place where the family resides; the domicile occupied as a habitation. And in our opinion, under the testimony, the camp occupied by Scoggins and his son was their private residence. It was all they had, as they testified; it was their home for the time being; and, under this evidence, we are of opinion this was sufficiently the private residence of Scoggins and his son to bring it within the term of "private residence" set out in the statute. We are further of the opinion that the evidence was sufficient to show that this was a private residence of a family. Scoggins and his son comprise the membership of his family under the facts stated. It seems that he and his wife had been divorced; he took one child and she the other; and of course since that divorce they had not lived together. This would have been a sufficient designation of the family under the homestead law, and this evidence sufficiently meets the definition of a family, as we understand it, under the laws of this state. The facts in regard to the playing are that it occurred just outside this tent or domicile, and not immediately under it, but within a very short distance, perhaps within 10 feet. The statute uses the expressions "at the residence of a private family" and "in the residence of a private family" interchangeably; and the fact that it was just outside the domicile, instead of on the inside, in our judgment would make no difference. It was at the residence, and, within contemplation of our statute, parties playing at that point were protected from punishment under this statute.

The judgment is reversed and the cause remanded.

WINGO v. STATE.

(Court of Criminal Appeals of Texas. June 8, 1903.)

HORSE THEFT—TRIAL—EVIDENCE—ADMISSIBILITY—REMARKS OF COUNSEL—INSTRUCTIONS.

1. On a prosecution for horse theft, the sheriff testified that shortly after the arrest of accused he stated to the witness that accused had been arrested for horse theft once, and hung for it. But immediately after such testimony the court withdrew the same from the jury, and told them not to consider it; instructing that defendant was on trial for no other offense than that of stealing the horse mentioned in the indictment. *Held*, that the court's action rendered the illegal testimony harmless.

2. On a prosecution for horse theft, a remark of the county attorney, in his argument, "There sits as guilty a man as ever was tried for stealing a horse, and why is there not some one here to deny these things?" was not susceptible

of the construction that it called the jury's attention to the fact that defendant did not take the stand and testify as a witness.

3. On a prosecution for horse theft, where the testimony of the prosecuting witness showed that he had the exclusive care and control of the animal, an instruction that, if the horse taken from prosecutor was at the time of the taking in the possession and control of a certain other person, defendant should be acquitted, was properly refused.

4. On a prosecution for horse theft, it was proper to charge on the law of principals; the evidence showing that accused was acting with two other parties in the theft.

5. On a prosecution for horse theft, the testimony of a certain witness having clearly shown that accused made an explanation of his possession of the animal in question at the time he was first found in possession thereof, it was proper to charge the jury on explanation of recently stolen property.

Appeal from District Court, Parker County; J. W. Patterson, Judge.

Bud Wingo was convicted of horse theft, and he appeals. Affirmed.

Preston Martin, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of horse theft, and his punishment assessed at confinement in the State Penitentiary for two years.

While the state's witness Sheriff Bratton was testifying, he stated that he had a conversation with defendant shortly after he was arrested in the Territory, and he stated to him that he (defendant) had been arrested for horse theft before, and that he had been hung for horse theft. Appellant objected to this testimony because incompetent and immaterial, and that the same was introduced for the purpose of creating prejudice in the minds of the jury against appellant. The court appends the qualification to the bill: "That said testimony was before the jury before any objection was or could be made, and before the court had an opportunity to prevent it. And immediately after the witness gave the evidence complained of, the court withdrew the same from the jury, and told them not to consider it." In addition, the court instructed the jury in his charge: "Defendant is on trial for theft of the horse mentioned in the indictment, and for no other offense, and you will not consider for any purpose the evidence of witness Bratton about what defendant said about his (defendant) being hung for horse theft, which testimony was by the court withdrawn from you at the time." Clearly, this action of the court renders harmless the illegal testimony complained of.

Appellant complains of the following argument of the county attorney: "Gentlemen of the jury, there sits as guilty a man as was ever tried for stealing a horse, and why is there not some one here to deny these things?" Appellant insists that this statement was made by the county attorney for the purpose of calling the jury's attention to the fact that defendant did not take the stand and testify

as a witness. We do not think this is a legitimate deduction from the argument of the county attorney, nor was there any error in the argument of counsel.

Appellant complains of the court's refusal to give the following requested charge: "You are further instructed, if you believe from the evidence that the horse as alleged to have been taken by defendant, if any was taken, from L. C. Brister, was at the time of the taking in the possession and control of one J. A. Brister, the father of said L. C. Brister, you will acquit defendant, and say by your verdict, 'Not guilty.'" The testimony of the prosecuting witness, L. C. Brister, shows that he had the exclusive care and control of the animal, and this charge was not required to be given.

Appellant also complains of the court's charge on principals. The evidence shows appellant was acting with two other parties in the theft of the animal, and it was proper for the court to charge on the law of principals.

Appellant also insists that the court erred in charging upon explanation of recently stolen property. In this there was no error. The testimony of the witness Whitmire clearly shows appellant made an explanation of his possession at the time he was first found in possession of the animal, and it was proper and germane to charge the jury thereof.

The evidence is sufficient to support the verdict of the jury. The judgment is affirmed.

PARKER v. STATE.

(Court of Criminal Appeals of Texas. May 13, 1903.)

INTOXICATING LIQUORS—LOCAL OPTION LAW—EVIDENCE.

1. In a prosecution for violating the local option law, the information charged a sale on July 5th. A witness for the state exhibited a bottle half full of some liquid, and testified that he bought it from defendant on July 14th. There was no evidence that the liquor was the same as that sold on the date charged. *Held*, that the jury should not have been permitted to smell or handle the liquor.

2. The evidence was inadmissible for purposes of comparison with the contents of the bottle sold on the date charged.

3. Testimony of an expert chemist as to his analysis of the contents of certain bottles of liquor was also inadmissible, there being no evidence to show where the bottles came from or from whom they were obtained, or that their contents were the same as that charged to have been sold by defendant, or that they contained the same kind of liquids.

4. Where a witness testified that the liquor sold by defendant affected him as an alcoholic stimulant, and made the purchaser drunk, these facts, if true, proved the sale of intoxicating liquor, and evidence of extraneous sales was inadmissible.

On Rehearing.

5. The jurisdiction of the Court of Criminal Appeals does not attach to an appeal where the recognizance does not set forth a binding allegation to abide the judgment of the court "in this case," as required by statute.

Appeal from Comanche County Court; W. C. Jackson, Judge.

Buck Parker was convicted of violating the local option law, and appeals. Reversed.

T. D. Webb and Joiner & McMillan, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Conviction for violating the local option law, the penalty assessed being a fine of \$25, and 20 days' confinement in the county jail.

While on the stand in behalf of the state, Southall exhibited a bottle on which was "cut in the glass the letters XXX," said bottle being about half full of some liquid. Witness testified that he bought said bottle and contents from defendant on July 14, 1902, and gave said bottle, with seal unbroken, to Tip Ross, who kept it until in October, 1902, when witness took it to Waco, and had E. E. Reid to analyze it, and that it contained 5 per cent. alcohol. The sale for which defendant was prosecuted occurred on July 5th, nine days prior to the transaction above mentioned. The witness Southall further testified that he did not know whether the liquid sold on the 5th was the same as that contained in the bottle purchased on the 14th; that he was not an expert; and the bottle sold on the 5th was not labeled or branded. Reid testified that he analyzed the contents of the bottle in Waco, and found it contained 5 per cent. alcohol. The bottle was sufficiently identified as the one bought by Southall on the 14th of July. The bottle was exhibited to the jury, and after the cork was drawn, and witness Southall tasted its contents, the jury were permitted to smell the contents of the bottle; and Southall testified that he did not think the contents tasted quite like the bottle sold on the 5th, as it did not taste quite as strong. Objection was urged to this, because of a want of evidence to show that the contents of this bottle was the same as that bought by Hicks on the 5th; and because there was no evidence introduced to show that the liquid contained in the bottle was the same kind, brand, or manufacture as that sold on July 5th, or that it contained the same percentage of alcohol; and because it is not permissible for the jury to examine the contents of the bottle or smell the same, and they had no proven liquor of the kind sold Hicks by which to compare with that introduced in evidence. And it was further claimed that all this testimony was inadmissible, irrelevant, and prejudicial to defendant. The court qualifies the bill with the statement: "The bottle of liquor was given the jury to smell, and before they were through smelling it defendant objected, and the court then instructed the jury that they would not consider the smell of the liquor as evidence for any purpose what-

ever." This testimony was inadmissible so far as it relates to being handled and smelled by the jury. *Dane v. State*, 38 Tex. Cr. R. 84, 35 S. W. 661. But the evidence was inadmissible on other grounds. In order to make a comparison or test under the circumstances stated, the liquors, or the contents of the two bottles, must be shown to be the same. On this question there was no evidence introduced. There was no basis for the comparison; and if we refer to the evidence of Southall, as found in the statement of facts, it was shown that the two liquors were dissimilar; the one introduced before the jury as having been bought on July 14th was a pint bottle, with an alcoholic strength of 5 per cent., while that bought by Hicks on July 5th was a pint bottle, which was drank by himself and Hicks, making him "dizzy and his eyes glassy," and Hicks "drunk." It would hardly be conjectured that a pint bottle of liquor, containing only 5 per cent. alcohol, would be sufficiently strong to make Southall's "head dizzy and his eyes glassy," and Hicks so drunk that he had to be assisted in getting on his horse.

Reid was placed on the stand as an expert chemist, and several bottles were submitted to him, subsequently introduced in evidence by the state. To questions propounded he stated that he had examined the contents of these on the previous day, "and found by analysis that the contents of said bottles contained 4½% and 5% alcohol. That one of the bottles was labeled 'Budweiser Beer,' the other bottles having no labels." Reid was not aware from whom or where these bottles were obtained. It was not shown by any evidence whence came the bottles nor from whom gotten, nor that their contents was the same as that charged to have been sold by defendant, nor were they in any way shown to contain the same kind of liquids. Various objections were urged to the introduction of this evidence. In his qualification the court states that at the time of the objections the county attorney stated he would trace these bottles and connect defendant with them, "or something of that kind," wherefore the objection was overruled, and the liquor given the jury to taste and smell. While one of the jurors had the bottle, the court instructed the jury as stated in the explanation attached to bill No. 2. This testimony was also inadmissible, for the reasons stated in the discussion of the previous bill.

Another question is suggested which perhaps may be necessary to notice; that is, the subsequent sale on July 14th was inadmissible. We believe the objection well taken. Southall testified to the sale which occurred July 5th, and the fact that the liquid bought affected him as an alcoholic stimulant, and made the purchaser Hicks drunk. Then there was no question, so far as the state's case is concerned, of a complete offense, if these facts be true. There was a

sale of intoxicating liquor by defendant to Hicks, as alleged in the information. And so there was no occasion for resorting to extraneous matters and sales to show system, develop the *res gestæ*, or connect defendant with the transaction charged to have been committed on July 5th. It was not necessary to require the state to elect in this case, because the conviction could not have been obtained on this information for the sale on July 14th, inasmuch as the complaint was filed July 14th, and charges the sale to Lon Hicks, whereas that on July 14th occurred on the day of the beginning of the prosecution, with no allegation showing that the sale had occurred previous to the filing of the information, and the sale was to Southall, and not Hicks. It may be necessary in some cases to introduce extraneous sales in order to make out the case, under the exceptions to the general rule which forbid such matters; but this is not brought within these exceptions.

We deem it unnecessary to discuss the refusal of the continuance, as upon another trial the witnesses may be present; at least, under any state of case, it would come in a different form than as presented here.

For the errors indicated, the judgment is reversed and the cause remanded.

On Rehearing.

(June 3, 1903.)

On a former day judgment was reversed. Motion is made for rehearing on the ground that the jurisdiction of this court has not attached to said appeal, because the recognizance is not in compliance with statutory requirements. A completed record in reply to the certiorari shows this contention correct, in that the recognizance does not set forth a binding allegation to abide the judgment of this court "in this case." The rehearing is granted, and the appeal is dismissed for reason above stated.

BRADLEY v. STATE.

(Court of Criminal Appeals of Texas. May 20, 1903.)

INTOXICATING LIQUORS—UNLAWFUL SALE—ACTS OF AGENT—EVIDENCE—CONVICTION OF OWNER—CONVICTION OF PRINCIPAL.

1. In a prosecution of defendant for selling liquor on Sunday as the agent and employé of B., a judgment on plea of guilty of B. to a charge of being engaged as a liquor dealer, and as such making a sale of liquor on the same day on which defendant was charged with an illegal sale, was admissible on the issue as to whether the business in which defendant was engaged in selling liquor belonged to B.

2. In a prosecution for illegally selling liquor, proof that B. and defendant were both in and about a saloon, engaged in running it, and that the reason witness believed it was B.'s saloon was that he had seen him working therein several times, and never saw any one there except

B. and defendant at work, and in a prosecution against B. for illegally selling liquor there he had pleaded guilty, was sufficient to show that B. was a liquor dealer, and that defendant was his agent and employé.

Davidson, P. J., dissenting.

Appeal from Wichita County Court; W. P. Skeen, Judge.

Ed Bradley was convicted of selling liquor on Sunday, and he appeals. Affirmed.

L. H. Mathis, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of selling liquor on Sunday, as the agent and employé of one T. M. Bennett, and his punishment assessed at a fine of \$20, and he prosecutes this appeal.

There is but one bill of exceptions in the record. That is to the action of the court permitting the state to introduce the judgment and plea of guilty of T. M. Bennett to the charge of being engaged as a liquor dealer, and as such making a sale of liquor on the same date alleged against appellant in this information. This proof was offered on the part of the state as tending to prove that Bennett was a liquor dealer at the time of the alleged sale by this defendant of whiskey to Dan Sies. It was objected to on the ground that the same was hearsay, and not binding on this defendant. The information charges that T. M. Bennett was a merchant and grocer and a dealer in goods, wares, etc., being a liquor dealer, and that the said Bradley, appellant, was his agent and employé, and that as such he made the sale of said liquors. An examination of the record discloses that it was a material issue as to whether the business—that is, of a liquor dealer—belonged to T. M. Bennett; and it occurs to us that the proof offered, to wit, the confession of Bennett that it was his business, was admissible in evidence whether this was merely a verbal declaration to that effect or a confession of the fact in the nature of a plea of guilty as in this case. The proof here showed that T. M. Bennett and appellant were both in and about the saloon, and engaged in running it, but the witnesses say that they did not know that Bennett owned or was the proprietor of the saloon; did not know whether Bennett employed defendant, Bradley, in his saloon or not; that the reason witness believed it was Bennett's saloon, he had seen him working in said saloon several times, and never saw any one but him and defendant at work in said saloon. Now, upon the issue as to who was the owner of the saloon, any testimony that had a pertinent bearing upon that issue would be legitimate, and we think the evidence complained of by appellant was properly admitted. *Clements v. State* (Tex. Cr. App.) 34 S. W. 111.

In motion for new trial appellant says that there was no competent and sufficient testimony offered to show that Bennett was

*Rehearing denied June 17, 1903.

a liquor dealer, as alleged in the complaint and information, and no testimony showing that defendant was his agent and employé. We do not agree with either of these contentions. We think the testimony was sufficient to show that Bennett was a liquor dealer, and engaged in that business, and also that appellant was his agent and employé. *W. A. Pigford v. State* (decided at present term) 74 S. W. 323.

There being no errors in the record, the judgment is affirmed.

DAVIDSON, P. J., dissents.

BROWN v. STATE.*

(Court of Criminal Appeals of Texas. May 20, 1903.)

HOMICIDE—INSTRUCTIONS — MANSLAUGHTER — ADEQUATE CAUSE—PASSION — EVIDENCE — CONFESSIONS—INDUCEMENTS — MISCONDUCT OF JURY—DRINKING INTOXICATING LIQUOR.

1. In a prosecution for homicide, the court charged that adultery of the person killed with defendant's wife, providing the killing occurred as soon as the facts of illicit connection were discovered; insulting words or conduct of the person killed toward the wife of defendant, providing the killing took place immediately thereafter; and any other condition or circumstances creating such a degree of anger as to render defendant incapable of cool reflection—constituted adequate cause. The court then charged that if defendant had heard of the adultery of deceased with defendant's wife, and as soon as he discovered the same killed deceased, and at the time of the killing there was aroused in defendant's mind a degree of anger, etc., rendering him incapable of cool reflection, he was guilty of manslaughter; or if defendant saw deceased use insulting conduct towards his wife, and immediately killed him, or as soon thereafter as he met deceased, and at the time his mind was so aroused that he was incapable of cool reflection, he was guilty of manslaughter; and if from any condition or circumstance which was capable of creating in the mind of a person of ordinary temper such anger as to render him incapable of cool reflection, and such condition aroused defendant at the time of the killing, he was guilty of manslaughter. *Held*, that such charges when construed together were not prejudicially erroneous.

2. An instruction, in a prosecution for homicide, authorizing the jury to convict defendant of manslaughter if he was laboring under passion aroused from adequate cause at the time of the killing, was correct.

3. Where it was not shown that any of the jurors became intoxicated by whisky drunk during their deliberations, or that whisky was drunk to excess by them or while they were deliberating on their verdict, the fact that they drank whisky, while reprehensible, was not ground for a new trial.

4. Defendant, on being arrested, was warned by the officer that anything he might say would be used in evidence against him. Defendant then asked the officer whether, if defendant killed deceased because of relations between deceased and defendant's wife, that would help him, to which the officer replied that it might, whereupon defendant made a confession to the officer concerning the killing. *Held*, that such confession was not objectionable on the ground that the officer's statement that deceased's re-

lations with defendant's wife might help him was an inducement to defendant to make a confession.

Appeal from District Court, Harrison County; Richard B. Levy, Judge.

John Brown was convicted of murder in the second degree, and he appeals. Affirmed.

F. H. Prendergast, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of 13 years.

In his motion for new trial appellant complains of the following portion of the court's charge: "Insulting words or conduct of the person killed towards the wife of the party guilty of the homicide, provided the killing take place immediately upon the happening of the insulting conduct." Appellant insists this charge was error, "because there was no question as to insulting words and conduct toward defendant, as the same would be understood by the jury, and because the law permits the husband to kill the adulterer as soon as they meet after the husband is informed of the insulting words." Paragraphs 11 and 12 of the court's charge must be considered together, and they are as follows:

"(11) By the expression 'adequate cause' is meant such as would commonly produce a degree of anger, rage, sudden resentment, or terror in a person of ordinary temper sufficient to render it incapable of cool reflection. The following are deemed adequate causes: (1) Adultery of the person killed with the wife of the person guilty of the homicide, provided the killing occurred as soon as the facts of an illicit connection is discovered; (2) insulting words or conduct of the person killed towards the wife of the party guilty of the homicide, provided the killing takes place immediately upon the happening of the insulting conduct; (3) any condition or circumstance which is capable of creating, and which does create, in the mind of the person guilty of the homicide such a degree of anger, rage, sudden resentment, or terror as to render it incapable of cool reflection, is adequate cause.

"(12) Now, if you believe from the evidence in this case that defendant had heard of the adultery of Robert Washington with his wife, and that as soon as the fact of the illicit connection was discovered he shot and killed the said Robert Washington, in said county and state, about August 1, 1900, and you further find that at the time of the killing there was aroused in the mind of defendant such a degree of anger, rage, sudden resentment, or terror which rendered it incapable of cool reflection, then you will find defendant guilty of manslaughter. Or if you find from the evidence that defendant saw deceased use insulting conduct towards his wife, and that he immediately, upon the

*Rehearing denied June 17, 1903.

¶ 2. See Criminal Law, vol. 15, Cent. Dig. § 2254.

happening of the insulting conduct, shot with a gun and killed deceased at time and place mentioned in the indictment; or if he had been informed of insulting conduct of deceased towards his (defendant's) wife, and that as soon thereafter as defendant met deceased he shot with a gun and killed said deceased at time and place in indictment charged; and if you further find, that at the time of the killing his mind was aroused to such a degree of anger, rage, sudden resentment, or terror as to render it incapable of cool reflection—then you will find defendant guilty of manslaughter. Or if you believe from the evidence that from any condition or circumstance which was capable of creating in the mind of a person of ordinary temper such a degree of anger, rage, sudden resentment, or terror as to render it incapable of cool reflection, and if you further believe that such condition or circumstance, whatever it may have been, did arouse in the mind of defendant such a degree of anger, rage, sudden resentment, or terror as to render it incapable of cool reflection, and that while in such state of mind he shot and killed Robert Washington at time and place in indictment alleged, then you will find him guilty of manslaughter.

"By the term 'meet,' as used in the foregoing charge, signifies that the parties were brought into such proximity as would enable defendant to act in the premises, whether armed or unarmed."

We think, when these paragraphs are considered together, there is no such error apparent as would be calculated to injure the rights of appellant.

Appellant also objects to the twelfth paragraph, quoted above, on the ground that the court authorized the jury to convict appellant of manslaughter if he was laboring under passion aroused from adequate cause at the time of the killing. This we understand to be the law. Appellant, however, insists that defendant would not be guilty at all. This, clearly, is not correct. Various other objections are urged to the twelfth paragraph of the charge, but in our opinion there is no error in the charge. An inspection of the evidence shows that the charge is as favorable to appellant as he could expect.

Appellant insists that a new trial should be granted because the jury drank whisky during their deliberations, insisting that they became drunk. However, the record does not support this contention. It shows reprehensible conduct on the part of the jury in drinking whisky, and for this they were fined by the court. However, it does not appear that any of the jurors were intoxicated, or that the whisky was drunk in excess, or while the jury were deliberating on their verdict. We have animadverted on this matter in various cases before, and must repeat that it is such conduct as should not be tolerated.

By bill of exception it is made to appear: "The state introduced G. W. Munden, who testified that he was sheriff of Harrison county in August, 1900; that he arrested John Brown, and warned him that 'anything he might say to me would be used in evidence against him.' Defendant said, 'Well, Mr. Munden, suppose I killed him about my wife, would that help me?' And Munden replied, 'Well, it might.' Defendant thereupon objected to the witness relating further what defendant said to him, because it appeared that inducements were held out to defendant. The court overruled the objection, and permitted the witness to testify, over defendant's objection, 'Well, I killed him, and I killed him about my wife. I went home that evening and found that my wife had gone over to Frank Washington's, and after I ate supper I got my gun and went over there. I started to kill Robert once while they were on the gallery eating melons, but there were some other people out there, and I was afraid I would kill somebody else; but I waited until he went back in the house and sat down in front of the window. He was sitting on one side of a table and my wife on the other, and I shot him through the window.'" In our opinion this confession was admissible under the following authorities: *Robinson v. State*, 35 Tex. Cr. App. 181, 32 S. W. 900; *Williams v. State* (Tex. Cr. App.) 65 S. W. 1059; *Griminger v. State*, 69 S. W. 533, 5 Tex. Ct. Rep. 631.

No error appearing in this record, the judgment is affirmed.

JOHNSON v. STATE.*

(Court of Criminal Appeals of Texas. May 27, 1903.)

CRIMINAL LAW—STATE'S VERSION OF TESTIMONY—EXCEPTION TO—WAIVER BY SILENCE.

1. Where, on the trial of a criminal case, defendant's attorney, who was present at the time a witness testified, failed to except to the state's version of the testimony of such witness as given by the district attorney in his discussion of the facts, he must be deemed by his silence to have conceded such version to have been substantially correct.

Appeal from District Court, Fannin County; Ben H. Denton, Judge.

H. W. Johnson was convicted of crime, and appeals. Affirmed.

Thurmond & Steger and J. W. Ownby, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of theft from the person, and his punishment assessed at confinement in the penitentiary

*Rehearing denied June 17, 1903.

for a term of four years. There is only one bill of exceptions in the record, and that raises the question as to what a witness may have testified on the trial. It appears from the bill that the district attorney in discussing the facts referred to the testimony of one Finney, reciting his testimony upon a certain point in effect that said witness swore that appellant, after his arrest and after he was turned over to Finney for safe-keeping, got away from him and endeavored to escape, and was captured by some other party. Both his flight and the leaving of some \$85, which the officer had obtained from him, was urged against him. After the trial and conviction appellant procured a statement from this witness that his evidence was different from that insisted on by the state. It seems that this witness' testimony was subsequently procured by the state, and made a part of the state's contest of the motion. It shows that the witness says he testified that when said Johnson was turned over to him when arrested that he (Johnson) got loose from him; that one J. P. Fay ran into witness, and aided defendant in getting loose; that witness did not know who caught him, etc. The affidavit further discloses that Thos. P. Steger, Esq., one of the attorneys for defendant, was also the attorney for Fay in the case against him for aiding in said escape, and that said witness was examined in said case, and Steger knew exactly what his testimony was. Appellant insists there is a great deal of difference between the version given by the district attorney in his speech and the testimony of the witness as appears in his affidavit. We fail to discover any essential difference. The main fact appears both in the witness' testimony and in his affidavit, to wit, the escape or attempted escape of Johnson after he was arrested. How he got away is immaterial. But if there was any dispute as to the witness' testimony on the trial, appellant's counsel, who was present and heard his testimony, should have promptly excepted to the state's version of it during the argument of the district attorney. Evidently they must have conceded, by their silence, that the testimony was substantially as insisted by the district attorney. It does not occur to us that there is anything in this assignment. Without this testimony the state's evidence made a strong case against appellant of theft from the person. The officers saw appellant in the very act of running his hands into the pockets of prosecutor. Immediately afterwards prosecutor discovered the loss of his money, and appellant was caught in the car near by with money answering the description of that lost by prosecutor strangely in his hands. The matter stated in this bill is the only error assigned. We hold that the action of the court was proper.

The judgment is affirmed.

TAYLOR v. STATE.*

(Court of Criminal Appeals of Texas. March 4, 1903.)

CATTLE THEFT—STOLEN PROPERTY—VOLUNTARY RETURN—OWNERSHIP—EVIDENCE OF POSSESSION—ABSENCE OF CONSENT—INSTRUCTIONS—RECENT POSSESSION.

1. In a prosecution for cattle theft, evidence held insufficient to raise the issue of voluntary return of stolen property.

2. In a prosecution for cattle theft, evidence that F. had control, care, and management of the cattle was sufficient to sustain an allegation in the indictment that he was the owner thereof.

3. The fact that such cattle had wandered from F.'s pasture into an adjoining pasture was not material on the issue of control or ownership.

4. Where, in a prosecution for cattle theft, the person in possession, charged to be the owner at the time of the theft, died prior to the trial, evidence that on the night of the alleged theft such person immediately pursued and followed the cattle to a town, and there secured officers and followed on until he found defendant, and thereafter claimed the cattle as his property and took them away, was sufficient to show want of consent to the taking of the cattle.

5. Where, in a prosecution for cattle theft, defendant had been in possession of the cattle as a hired man, and had driven them some 12 or 13 miles before his arrest, the fact that he was not in possession at the time he made a statement to the officers that he had been merely hired to drive the cattle did not render a charge on recent possession of stolen property inapplicable.

Appeal from District Court, Johnson County; W. Poindexter, Judge.

Rather Taylor was convicted of cattle theft, and he appeals. Affirmed.

D. W. Odell, F. E. Johnson, and S. P. Willson, for appellant. Mason Cleveland, Co. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of cattle theft, and his punishment assessed at confinement in the penitentiary for a term of two years.

The evidence discloses that two—perhaps three—parties, on the night of the 29th of August, 1901, took five head of cattle from what is called the "Francis Pasture," several miles southwest of the town of Cleburne. Appellant and two other parties were suspected of the crime. The citizens in the immediate neighborhood made pursuit, passing through Cleburne, where they enlisted a couple of officers, going north of the town some ten miles, to a camp where a small herd of cattle was being held, reaching that point about sunrise. Appellant had been assisting the party in charge of this herd of cattle in gathering and driving them to the point where they were in camp; had left them the night before, and returned to the neighborhood where the five head of cattle were tak-

*Rehearing denied June 17, 1903.

¶ 2. See Larceny, vol. 32, Cent. Dig. §§ 81, 154.

en. Upon reaching the camp, the officers and the crowd took appellant and Vindex Haynes in charge. En route from the cattle camp to Cleburne, some four or five miles north of Cleburne, appellant suddenly stopped his horse, and said to those in charge of him: "There is no use lying about it any farther. Let's go back and get the cattle." He said he was sorry that he had had anything to do with it, that a man had hired them to help him drive the cattle, and that he would go back and show us where the cattle were or where he had left them." This statement was made to the officers who had him in charge. In this crowd, besides the officers, was Officer Pollard's brother, Onan Pollard, Haynes, Ferguson, and Stephens. This officer further testified: "I told Ferguson and the other parties what Taylor had said, and we started to go back and get the cattle with him. We then decided to first come on to Cleburne, as our horses were tired, before we went after the cattle. We then went back—that is, Rather Taylor, Neal Ferguson, and my deputy Sam Ramsey—and Rather Taylor took us to where the cattle were, about six or eight miles north of Cleburne, about two miles east of the Ft. Worth road. When we got near the cattle, he said, 'There are the cattle.' Ferguson and Sam Ramsey drove the cattle back to Cleburne. Defendant did not help, because I had him in the buggy with me." Ferguson, who is here spoken of, was the alleged owner of the cattle; and the evidence shows that subsequent to the transaction, and before the trial, Ferguson died. The testimony is not as clear as it might possibly be as to whether there were two or three parties in charge of the alleged stolen cattle. This fact is mentioned on account of the statement of appellant that the connection of himself and Haynes with the cattle was by reason of the fact that a certain party had hired them.

Appellant contends the evidence raises the issue of voluntary return of stolen property, and cites several cases in support thereof. We have given the testimony in regard to this supposed phase of the record close scrutiny. We do not believe the facts suggested this issue. Appellant, if he took the cattle, had driven them 12 or 13 miles, and had secreted them, and, being taken in charge by the officers, so far as the record is concerned, failed to disclose his connection with them until they had traveled 4, 5, or 6 miles in the direction of the county jail in charge of the officers, and after having passed where the cattle were, leaving them several miles in the rear and to one side of the road. Under the rule laid down in *Elkins' Case*, 35 Tex. Cr. R. 206, 32 S. W. 1046, this evidence does not show a voluntary return. "Where the proof shows that the accused had been detected in the theft, and the property discovered in his possession, it is too late to make a voluntary return. * * * We do not intend to be understood as holding that in the voluntary re-

turn of property the thief may not be actuated by penitence and fear of punishment in order to avail himself of the lighter punishment; but his act of return must be voluntary, and this must be exercised, as stated, before he is detected as a thief and in possession of the property. The proof must show that he was aware of the detection in order to deprive him of the milder punishment under a voluntary return." While the facts here do not show, at the time of his arrest, that he was in possession of the property, it clearly shows his detection, that he had had possession of the property, and had secreted it; and this, in legal contemplation, was still in his possession. He had not abandoned the possession, but had secreted the property, and it was only when he was en route to the county site in charge of the officers that he determined to inform them and owners of the cattle as to their whereabouts. See, also, *Stepp v. State*, 31 Tex. Cr. R. 349, 20 S. W. 753. The *Elkins Case*, to reconcile the conflicts in previous decisions, lays down the rules above enunciated.

It is further contended the verdict of the jury is contrary to the evidence, in that the ownership of the cattle was not established as alleged in the indictment, and the want of consent of the owner was not shown. The ownership was alleged in *N. S. Ferguson*, who was dead at time of trial. The evidence shows that one of the head of cattle taken from Ferguson belonged to the son of N. S. Ferguson, to wit, Arch Ferguson, and the other one was owned by N. S. and Arch Ferguson. Arch Ferguson was not living in Johnson county at the time the cattle were taken, but was living in Dickens county, and had been for several months. N. S. Ferguson had charge of the cattle in Johnson county at the time they were taken. The evidence further shows these two head of cattle alleged to belong to Ferguson had wandered from Ferguson's pasture into an adjoining pasture. Appellant contends, under the facts stated, that N. S. Ferguson was not the owner. There is no question that N. S. Ferguson was in charge of the cattle, and the fact that they escaped into an adjoining pasture did not relieve that possession. He had control, care, and management of the cattle, which made him, under the statute, in so far as the allegations in the indictment for theft is concerned, the owner. *Littleton v. State*, 20 Tex. App. 168. Cattle cannot of themselves stray from the possession of one person into the possession of another, and thus change ownership in themselves. *Alford v. State*, 31 Tex. Cr. R. 209, 20 S. W. 553. On account of the death of Ferguson, the state had to rely upon circumstances to prove his want of consent. These were shown by the fact that on the night of the alleged theft, which occurred about 11 o'clock, Ferguson immediately went in pursuit, followed them up to the town of Cleburne, secured the officers, and followed on until he found defend-

ant and Haynes at the cattle camp of Pate, arrested them and started back to Cleburne, claimed the property, and took the cattle away. This character of evidence, under the circumstances, was permissible, and sufficient to show his want of consent. *Guin v. State* (Tex. Cr. App.) 50 S. W. 350; *Hoskins v. State* (Tex. Cr. App.) 43 S. W. 1003; *Brooks v. State* (Tex. Cr. App.) 31 S. W. 410; *Brown v. State* (Tex. Cr. App.) 28 S. W. 536.

It is also contended the court was in error in charging the law applicable to recent possession of stolen property; the theory being that at the time he gave his explanation, to wit, that he was a hired hand, he was not in possession of the cattle, and therefore a charge with regard to the explanation was not authorized. We do not understand this contention to be the law. Speaking of this in *Eastland v. State*, 59 S. W. 267, 1 Tex. Ct. Rep. 110, the court said: "The statement in regard to the possession is equally admissible, whether made where the party is in actual possession or after parting with possession. This question has been frequently decided by the courts, and we deem it unnecessary to go into an elaboration of it. * * * The explanation in regard to possession of property recently stolen can only apply where the party is either in possession at the time of making the statement or has been in possession. The explanation of such possession cannot occur when the party has not been in possession, nor when made prior to possession. An account of possession of property necessarily carries with it the fact of possession." This authority is directly in point. Appellant had been in possession of the cattle as a hired hand, and had driven them some 12 or 13 miles; and this was his statement of his connection with them, and upon this sought relief from punishment.

It is also contended that the court's charge is wrong in regard to the question of appellant being a hired hand. We do not think so. This phase of the testimony was given in almost every conceivable form that would redound to the benefit of accused. In the sixth paragraph of the charge, the jury were told to acquit if they believed appellant's connection with the cattle transaction was innocent, and in the capacity of a hired hand to drive said cattle; and, if that was true, he would not be a principal in the transaction. In the seventh paragraph they were instructed, if defendant was not present at the time the cattle were taken, but was subsequently hired by the person or persons who did take the cattle to assist them in driving the same in the capacity of a hired hand, they should acquit. In the tenth paragraph of the charge they were fully instructed with reference to the explanation given by himself of his possession of the property. So we do not understand how this charge could have injured him in any way; in fact, it was emphasized by the trial court not only directly instructing them, if he was a hired hand, or if the jury

believed he was a hired hand, or if they had a doubt upon the question, to acquit him, but giving it also in regard to his explanation, thus emphasizing it in every way that could be done. We believe appellant has been accorded a fair trial. The issues of his case have been appropriately submitted by the charge of the court, and the evidence is sufficient to support the conviction.

The judgment is affirmed.

WOODS v. STATE.

(Court of Criminal Appeals of Texas. May 20, 1903.)

INTOXICATING LIQUORS—LOCAL OPTION LAW VIOLATION—PROSECUTION—INFORMATION—SUFFICIENCY—EVIDENCE—ADMISSIBILITY—OMISSIONS IN CHARGE—REPEAL OF LAW—EFFECT.

1. The fact that subsequent to a local option election the boundaries of the precinct were changed, and a part of it cut off and placed in another precinct by the commissioners' court, did not make it necessary, in a subsequent information for violation of the local option law, to set out the boundaries of the precinct as changed; the change having no effect on the local option law in the territory cut off.

2. The clause in an information for violation of the local option law, charging the offense to have been committed in "justice precinct No. 3, as it existed on and prior to February 17, 1900," did not invalidate the information.

3. In a prosecution for misdemeanor, omissions in the charge of the court must be cured by a special written charge requested at the time, or the omission cannot be available on appeal; and Code Cr. Proc. 1895, art. 723, has not changed this rule.

On Motion for Rehearing.

4. In a prosecution for a violation of the local option law a witness testified that he went to the office of defendant and gave him a dollar to send to a certain town for whisky, and that about 20 minutes later he was called to defendant's office, where the whisky was waiting for him. It appeared that the distance from the office to the town was a mile and a half. Held proper to permit the witness to be asked whether, in his opinion, the party who called him had had time to go to the town and get the whisky; it appearing that he had traveled the route himself.

5. The statute expressly provides that prosecutions may be maintained for a violation of the local option law after the repeal of the law in the territory.

Appeal from Hamilton County Court; J. O. Main, Judge.

T. J. Woods was convicted of a violation of the local option law, and appeals. Affirmed.

Eldson & Eldson, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25 and 20 days' confinement in the county jail.

The charging part of the information is as follows: "That heretofore, to wit, on or about the 1st day of February, A. D. 1902, in the said county of Hamilton and state of Texas, and in a subdivision of said county and state, to wit, justice precinct No. 3, as it

existed on and prior to February 17, 1900, one T. J. Woods, late of said county and state, with force and arms, did then and there unlawfully sell to S. M. Couch intoxicating liquor after an election had been held by the qualified voters of said subdivision of said county and state in accordance with law to determine whether or not the sale of intoxicating liquor should be prohibited in said subdivision in said county and state, and such election had resulted in favor of prohibition in said subdivision of said county and state, and the commissioners' court of said county and state had duly made, passed, and entered its order declaring the result of said election, and absolutely prohibiting the sale of intoxicating liquors within said subdivision of said county and state as required by law, and had caused said order to be published in the manner and form and for the length of time required by law," etc.

It appears that the local option election was held for justice precinct No. 3. Subsequent to this election the boundaries of precinct No. 3 were changed, and a part of said precinct was cut off and placed in another precinct by the commissioners' court. Under these circumstances appellant insists that, in order to constitute a valid information, it is necessary to set out the metes and boundaries of justice precinct No. 3 as changed by the commissioners' court. There is no statute or constitutional power granted the commissioners' court to abrogate any part of the local option law. When the local option law has been adopted in a political subdivision of a county, it continues in said territory until the qualified voters thereof shall, by an election held at the proper time and place, abrogate said law by their votes. The mere fact that the commissioners' court cuts off a portion of a justice precinct and places it in another precinct has no effect upon the local option law in that territory. This being true, it follows that it is not necessary for the information to set out the boundaries of a justice precinct. The clause in the indictment, "justice precinct No. 3, as it existed on and prior to February 17, 1900," does not in any way invalidate the information. Nor is it necessary that such clause should be in the information, and the information is sufficient when it simply alleges, "in justice precinct No. 3," without the latter clause.

The seventeenth ground of appellant's motion for new trial is: "The court erred in omitting and failing in its charge to the jury to limit the testimony of John Tippie, a witness for the state, to the intent of defendant, and to the system of doing business by defendant, if any, which testimony of Tippie is set out in full in bill of exceptions," etc. This being a misdemeanor case, omissions in the charge of the court must be cured at the time by a special written charge requested by appellant. His failure to make such request, even though the omission in the charge be erroneous, will not authorize this court to

reverse the case. However, appellant's counsel in argument before this court insists that article 723, Code Cr. Proc. 1895, has changed the rule with reference to misdemeanors. We have carefully examined this question, and in our opinion said article merely extends the time of exception to the charge of the court, but in no way cures the failure of defendant in misdemeanors to tender special charges to the court at the time of the trial. Since the adoption of article 723 this question has been before this court several times, and in each instance we have held that the old line of authorities on the question of charge in misdemeanor cases still applied. *Ramsey v. State*, 65 S. W. 187, 3 Tex. Ct. Rep. 359; *Garner v. State* (Tex. Cr. App.) 70 S. W. 213; *Bush v. State* (Tex. Cr. App.) 70 S. W. 550. For authorities under the old article, see *White's Ann. Code Cr. Proc.* art. 719, § 813, subd. 6. The charge of the court is correct in other respects. We do not deem it necessary to review appellant's various assignments of error, as they present no reversible error.

The judgment is affirmed.

On Motion for Rehearing.

(June 17, 1903.)

The judgment was affirmed at a previous day, and now comes before us on motion for rehearing. Appellant in his motion for rehearing insists that the record shows the lower court erred in permitting the testimony of John Tippie. It appears by the eighteenth bill of exceptions, presenting this matter, that John Tippie testified that in January, 1902, he went to the office of defendant, and gave defendant a dollar to send to Patilloville for a quart of whisky for him; that immediately after he gave defendant the dollar he went out of his office, across the street, a distance of about 80 feet, to a restaurant, and bought a piece of tobacco, and started home, and as he was crossing the street he was motioned by witness Zack Medford, who was standing in the side door of the bottling works, and witness went to him, and Medford told witness his whisky had come, and pointed it out to him, setting on a box in the bottling works, which was defendant's place of business; that the distance from the office of defendant to the saloon at Patilloville was a mile and a half; that it was not exceeding 20 or 30 minutes from the time he gave dollar to defendant until the time he saw Medford motion to him. Thereupon the county attorney asked witness whether or not, in his opinion, Medford had had time, from the time he (witness) left the dollar with defendant until the time Medford motioned to him, to go to and return from the saloon at Patilloville, where the saloon was, in Erath county, and get a quart of whisky; to which appellant's counsel objected because it called for the opinion and conclusion of the witness; that the witness could state facts and let the jury

decide whether or not Medford had time, during the interval mentioned, to go to and return from Patilloville. The court overruled all of the objections, and the witness testified that Medford did not have time to go to Patilloville, in Erath county, a mile and a half, and return with the whisky. The court appends the following explanation to the bill: "Before the witness gave his opinion on the matter, he had stated his familiarity with the route, the nature of the road, etc., from having traveled it himself." We think this testimony was clearly admissible. While to a certain extent it is the opinion of the witness, still, where a witness has traveled a route, he can give his opinion as to how long it would take to travel that distance. The authorities cited by appellant on this proposition are not in point.

Appellant's only other insistence is that this court erred in holding that the court below did not err in refusing to charge the jury to acquit appellant because the evidence showed that the local option law was repealed prior to the filing of the complaint and information. In this there was no error, since the statute expressly says that prosecutions for a violation of the local option law can be maintained after the repeal of the local option law in such territory.

The motion for rehearing is overruled.

SANGER v. JESSE FRENCH PIANO & ORGAN CO.*

(Court of Civil Appeals of Texas. May 30, 1903.)

CONDITIONAL SALES—FAILURE TO RECORD—BONA FIDE PURCHASER.

1. Plaintiff sold a piano to M. on condition that title should not pass till all the payments were made, but did not place the contract of sale on record. M. mortgaged the piano, and thereupon sold it to defendant, who paid her part cash, and credited the balance on a debt due. Afterwards the piano was sold under foreclosure, and defendant purchased it at this sale, paying therefor a sum which, together with the previous cash payment, exceeded the value of the piano. Neither the mortgagee nor defendant had notice of plaintiff's claim of title to the piano. Held that, under these facts, defendant was a bona fide purchaser of the piano, and entitled to protection as such.

Appeal from Dallas County Court; Ed. S. Lauderdale, Judge.

Action by the Jesse French Piano & Organ Company against Alex Sanger. Judgment for plaintiff, and defendant appeals. Reversed.

This suit was instituted in the county court of Dallas county on the 16th day of February, 1897, by the appellee, to recover of the appellant the value of one Starr piano, alleged to have been of the value of \$400. Appellant, by his first amended answer, filed on the 16th day of December, 1902, claimed (1) to be a purchaser of said piano for a

valuable consideration from a Mrs. Meyer, to whom appellee had sold the same, and that he made such purchase without notice of any character of the lien of the appellee; and (2) to have purchased the said piano at a sale of the same by the sheriff of Dallas county under an order of sale issued upon a judgment foreclosing a mortgage lien on said piano, which mortgage lien was a valid subsisting lien, and as against which appellee could not have enforced its lien, for the reason that such mortgage lien was given for a valuable consideration to the mortgagee, who took the same without notice of any character of the lien claimed by the appellee. On December 16, 1902, a jury having been waived, the matters in issue were submitted to the court upon an agreed statement of facts, and the court rendered judgment in favor of the appellee in the sum of \$100. A motion for new trial having been overruled, appellant has perfected his appeal to this court.

Victor N. Hexter, for appellant. U. F. Short, for appellee.

BOOKHOUT, J. (after stating the facts). On December 17, 1894, the Jesse French Piano & Organ Company sold to Fannie E. Meyer, in the state of Arkansas, where she was then residing, one Starr piano, for which she agreed to pay \$350. She paid \$10 in cash, and executed 34 notes, for \$10 each, payable to that company monthly at Pine Bluff, Ark. By contract between the parties, the title to the piano was to remain in the company until the notes were paid. Some time thereafter Fannie E. Meyer removed to Dallas, Tex., taking the piano with her. In March, 1896, she borrowed from defendant Sanger \$25, and again in May she borrowed \$50 from him. In August, 1896, Sanger purchased the piano from her for \$175, paying \$100 cash, and \$75 by canceling the debt he held against her for borrowed money. At the time of his purchase the notes executed to plaintiff for the piano had not been paid, nor had the Jesse French Piano & Organ Company filed its notes and contract in the office of the county clerk of Dallas county. Sanger had no notice, actual or constructive, of plaintiff's claim to the piano at the time he purchased it. We held on the former appeal of this case that the contract, being valid in Arkansas, where made and to be performed, would be enforced in this state, although not recorded here as required by article 3327, Rev. St. 1895, unless the interests of third parties, acquired without notice, would be prejudiced by so doing. 52 S. W. 621. We further held that Sanger was not entitled to protection as a good-faith purchaser, for that he paid part of the purchase money by canceling a pre-existing debt, and that he was only such to the amount of \$100 cash paid at the time of his purchase. The last question decided was not raised in the briefs of the parties on the former appeal.

*Rehearing denied June 13, 1903.

On this appeal the question is sharply presented, and it is contended that Sanger should be held a good-faith purchaser. Upon a more careful and extended examination of the authorities, we are of the opinion that our former holding was incorrect. It may be stated generally, if a valid security, such as a mortgage or judgment lien, is surrendered, or in addition to a precedent debt a new consideration is advanced, or new liabilities are incurred, the purchase will be bona fide. 2 Pomeroy's Eq. §§ 747, 748; McKamey v. Thorp, 61 Tex. 648; Dickerson v. Tillingshast, 4 Paige, 221, 25 Am. Dec. 528; Love v. Taylor, 28 Miss. 574; Padgett v. Lawrence, 10 Paige, 179, 40 Am. Dec. 232. It is held that the consideration paid need not be adequate. Wilson v. Denton, 82 Tex. 531, 18 S. W. 620, 27 Am. St. Rep. 908; Johnson v. Newman, 43 Tex. 612. It must not, however, be grossly inadequate. Nichols-Steuart v. Crosby, 87 Tex. 443, 29 S. W. 380. In this case the piano was worth \$200. Sanger bought it for \$175, paying \$100 in cash and \$75 in a pre-existing debt. Under the facts as shown in the agreed statement, he was an innocent purchaser, and is entitled to protection as such.

In addition to the facts shown on the former appeal, the following facts are now made to appear: On February 3, 1896, Fannie Meyer borrowed \$150 from F. D. Bradley, and executed to him her promissory note therefor, to mature June 1, 1896. As security for said note, she executed to Bradley a chattel mortgage on said piano and on some household goods. This chattel mortgage was duly filed for registration in the office of the county clerk of Dallas county, Tex. Bradley had no actual or constructive notice of the plaintiff's claim to the piano at the time. In January, 1897, Bradley's note not having been paid, he brought suit thereon, and prayed for a foreclosure of his mortgage. Judgment was rendered against Fannie E. Meyer for the debt, and foreclosing a lien on the mortgaged property. The household goods were first sold, and, not bringing sufficient to satisfy the judgment, the piano was also sold, and bought in by defendant Sanger for \$150 cash. The plaintiff, Jesse French Piano & Organ Company, was not a party to the foreclosure suit, but the agreed facts admit, substantially, that the Bradley lien was valid and superior to plaintiff's claim to the piano. Sanger amended his pleadings, and set up the Bradley lien and his purchase under the foreclosure thereof as a defense to the suit, in addition to the other defenses relied on by him. Bradley not having notice of plaintiff's claim to the piano when he took his mortgage, his lien on the piano was superior to the plaintiff's claim. And when Sanger purchased the piano, under the facts shown in the record, at the foreclosure sale, his claim, at least for the amount paid by him, \$150, was superior to plaintiff's rights in the piano. Jones on Mortg. § 582; Kirby

v. Moody, 84 Tex. 201, 19 S. W. 453. In this proceeding for a conversion, Sanger could only be held liable to plaintiff for the value of the piano over and above the liens thereon which were valid and superior to plaintiff's claim. Brooks v. Lewis, 83 Tex. 336, 18 S. W. 614, 29 Am. St. Rep. 650. Sanger has paid out on the piano \$100 cash on his first purchase, and \$150 under the foreclosure purchase, which is \$50 more than its value, and hence he cannot be held liable to plaintiff in this suit for a conversion.

We conclude that there is error in the judgment, for which the same is reversed, and here rendered for appellant. Reversed and rendered.

BLACK et al. v. CLAIBORNE et al.

(Court of Civil Appeals of Texas. June 3, 1903.)

APPEAL—DEFECTIVE BOND—FIXING AMOUNT OF PROBABLE COSTS.

1. Where the bond filed on appeal was found by the Court of Civil Appeals to be defective because not in double the amount of the probable costs, as fixed by the clerk of the trial court, and a new bond was required, the clerk would not thereafter change the record so as to reduce the probable amount of costs, and approve a bond in less than double the amount as first fixed by him.

Appeal from District Court, Bastrop County; Ed. R. Sinks, Judge.

Action between T. C. Black and others and J. D. Claiborne and others. Judgment rendered, and Black and others appeal. Dismissed.

Jones & Jones, for appellants. A. C. Pendergast, for appellees.

FISHER, C. J. On the 6th day of May of this term there was submitted in this case a motion by appellees to dismiss the appeal because the bond was not in double the amount of the costs, as fixed by the clerk of the trial court. We sustained this motion, but gave the appellants until the 27th of May, 1903, to file a new bond; and prior to the last date there was tendered to this court a new bond, which was in the sum of \$600, conditioned that the obligors would "prosecute their appeal with effect, and pay all the costs which have accrued in the court below, and which may accrue in the Court of Civil Appeals and Supreme Court." This bond was approved by the clerk of the district court of Bastrop county on the 16th day of May, 1903; and there is a statement of that date, signed by the clerk, stating that he had fixed the probable amount of the costs in the court below, the Court of Civil Appeals, and the Supreme Court at \$300. This statement is appended to the bond. There is no certificate of the clerk stating that the sureties to the bond are good for the amount and are solvent. The record filed in the case shows that the clerk of the district court on the 27th of January, 1903, fixed the probable amount

of the costs of the suit in the court below, the Court of Civil Appeals, and Supreme Court at \$400. On May 23, 1903, there was filed in this court a second motion by appellees to dismiss the appeal, one of the grounds being to the effect that the bond is not double the amount of the costs as fixed by the clerk, as appears by the transcript. On the 27th of May, 1903, this court inadvertently indorsed on the bond an approval, and ordered it filed as a part of the record. This was upon the supposition that the new bond had corrected the error of the old bond, and that it was in double the probable amount of the costs, as fixed by the clerk, as shown by the transcript. We now withdraw our approval of this bond, and set aside the order approving the same and ordering the same to be filed.

The statute requires the bond to be in double the amount of the probable costs, as fixed by the clerk of the trial court. The clerk of the trial court, during the time in which he had the right to act in the matter, fixed the probable amount of the costs at \$400, as appears from the transcript; and he had no right to change this amount to \$300, and approve a bond for less than double the sum, as shown by the amount stated in the record. When a bond is found by this court to be defective, and a new bond is required, the law does not give the clerk of the trial court the authority to approve the bond, but it must be approved by the Court of Civil Appeals. *Evans v. Ashburn*, 64 S. W. 988, 3 Tex. Ct. Rep. 212. And when this court is called upon to exercise that duty, we must look to and be governed by what the record shows to be the statement of the probable amount of the costs, as fixed by the clerk, when the first bond was approved. When the first bond is found to be defective, and a new bond is required by the Court of Civil Appeals, the clerk of the trial court has no authority whatever to make any change in the record, or to accept or approve such new bond. It is permissible and proper for the clerk to attach to the bond his certificate as to the financial standing of the parties who execute the new bond as sureties.

The order heretofore entered, submitting this case, together with the order approving the bond, are hereby set aside, and the appeal dismissed, for the failure of appellant to comply with our previous order, giving him until the 27th of May, 1903, to file new bond. Appeal dismissed.

ADOUE & LOBIT v. HUTCHES et al.*

(Court of Civil Appeals of Texas. May 29, 1903.)

NOTES—COLLATERAL SECURITY—DEPRECIATION IN VALUE—LIABILITY OF CREDITOR.

1. The maker and sureties of a note secured by a pledge are not entitled to a credit equal to the depreciation in the value of the pledge

between the dates of maturity of the note and institution of suit, in the absence of any demand by them on the payee to sell it, or any stipulation in the contract of pledge that it should be sold at maturity.

Appeal from District Court, Galveston County; Wm. H. Stewart, Judge.

Action by Adoue & Lobit against B. F. Hutches, Jr., and others. From the judgment rendered, plaintiffs appeal. Reversed.

James B. & Chas. J. Stubbs, for appellants. Terry, Ballinger, Smith & Cavin, for appellees.

PLEASANTS, J. This is a suit upon a note for \$650 executed by B. F. Hutches, Jr., on April 1, 1895, and payable to the order of appellants 90 days after date, with interest after maturity at the rate of 10 per cent per annum. The note was indorsed by W. N. Stowe and Julius Runge before its delivery to appellants. When it was indorsed by the said Stowe and Runge there was attached thereto as collateral a certificate of 11 shares of stock in the Texas Bag Company of Galveston. This certificate of stock was delivered to appellants with the note, and they were authorized by a recital in the note to sell said stock in event the note was not paid at maturity, and apply the proceeds of such sale to the payment of the note. No payment has ever been made upon the note. When it became due, the indorsers signed a written waiver of protest, and paid no further attention to the matter; having been informed by the maker shortly after the maturity of the note that he had settled same by turning over to the appellants the stock which they held as collateral. This suit was brought by appellants July 1, 1899, against Hutches, Stowe, and Runge, to recover the amount due upon the note. No demand was made upon said Stowe and Runge for the payment of the note until just before the institution of the suit. The stock held by appellants as collateral was worth at the maturity of the note as much or more than the amount due upon the note. At the date of the institution of this suit, and at the time of the trial in the court below, the value of said stock had greatly depreciated; there being ample evidence to sustain the finding of the jury that the loss by depreciation in the value of said stock between the dates before mentioned amounted to \$605. The court below instructed the jury that, if they found that the stock had depreciated in value after the maturity of the note, the defendants would be entitled to a credit upon said note equal to the amount of such depreciation. Under this instruction, the jury found that the depreciation in the value of the stock amounted to the sum of \$605, and returned a verdict in favor of plaintiffs for the difference between said sum and the amount due upon the note.

Under appropriate assignments, appellants assail that portion of the charge of the court

*Rehearing denied.

containing the instruction above stated, on the ground that under the facts in evidence the defendants were not entitled to a credit for the amount of depreciation in the value of the stock. We think these assignments should be sustained. There is no evidence of any agreement between the payees and the maker of the note to extend the time of its payment, made without the consent of the sureties, and it is not contended that the delay of appellants in bringing their suit in any way affects the liability of the sureties. The only defense urged in this court is that the maker and the sureties, or at least the sureties, are entitled to a credit for the amount of the depreciation in the value of the collateral. It is a well-settled rule that, where mortgaged property or other collateral security is intrusted directly to the creditor, he becomes a bailee, and is liable for damages to the trust property caused by his negligence. *Douglass v. Mundine*, 57 Tex. 347; *Johnston v. Mills*, 25 Tex. 720; *Bank v. Bruhn*, 64 Tex. 571, 53 Am. Rep. 771. But this rule neither expressly nor by reasonable implication requires a creditor to sell the security as soon as the debt matures, in order to relieve himself of liability for any depreciation in the value of the security that may occur after the maturity of the debt, and for which he is in no way responsible, unless, under the stipulations of the mortgage or contract of pledge, he is directed and required to sell the property at the maturity of the debt. When there is no such stipulation, and he is simply authorized to sell, he may sell, or not, at his option, and is not liable for depreciation in the value of the security not due to any negligence on his part. If, when the debt becomes due, the debtor desires the security sold, he should so notify the creditor; and, failing to do this, he cannot hold the creditor liable for depreciation in the value of the security due to causes beyond the control of the creditor. The sureties of the debtor should have the same right to demand the sale of the property as the debtor, and their failure to exercise such right would prevent any liability of the creditor to them for depreciation in the value of the property. The case of *Williams v. Bank* (Tex. Civ. App.) 44 S. W. 620, supports the doctrine here announced. The fact that in that case the property was in the hands of a trustee in no way affects the question. The trustee could only sell at the request of the creditor, or upon the demand of the debtor; and if the failure of the creditor to sell at the maturity of the debt, when the security was placed in his hands, would make him liable for any depreciation that might occur in the value of the property, then his failure to direct and require its sale by the trustee appointed for that purpose, and who could act at his request, would, for a like reason, render him liable. We think there is no distinction between the two cases. The case of

Colquitt v. Stultz, 65 Ga. 305, is directly in point, and fully supports our conclusions. By analogy the same principle is announced in *Sinclair v. Weekes* (Tex. Civ. App.) 41 S. W. 107, and *King v. Ins. Co.*, 58 Tex. 669.

We think appellees are not, under the facts of this case, entitled to any credit for the depreciation in the value of the stock held by appellants as collateral.

The jury having found, upon sufficient evidence, that no settlement of the note had been made, the judgment should have been for appellants for the whole amount due upon said note. It follows that the judgment of the court below should be reversed, and judgment here rendered for appellants for the entire amount due upon said note, and it is so ordered. Reversed and rendered.

MASTERTSON v. BOCKEL.*

(Court of Civil Appeals of Texas. May 25, 1903.)

BOUNDARIES—AGREEMENT TO DETERMINE—MODIFICATION—REFUSAL TO ACCEPT—EFFECT.

1. Where plaintiff and defendant entered into an agreement to fix the boundaries of a survey, and later a modified agreement was drawn up, on defendant being dissatisfied with the boundaries as fixed under the original agreement, a refusal by defendant to enter into the modified agreement, or to accept the boundaries fixed thereunder, left the original in full force, and entitled plaintiff to judgment fixing the boundaries as determined by the survey made thereunder.

2. Defendant could not complain of a judgment in accordance with plaintiff's prayer, fixing the boundaries as determined by the modified agreement, which gave to defendant more land than he was entitled to under the first determination.

Appeal from District Court, Harris County; Wm. H. Wilson, Judge.

Action by Branch T. Mastertson against Fritz Bockel. From a judgment for defendant, plaintiff appeals. Reversed.

Mastertson & Mastertson and W. S. Hunt, for appellant. Jas. A. Breeding, for appellee.

PLEASANTS, J. This is a suit brought by the appellant against the appellee to establish the boundary line between the H. A. Robinson and John M. Swisher surveys, owned by appellant, and the south half of B. H. Freeling survey, owned by appellee. All of said surveys are situated in Harris county. After the institution of the suit the following agreement in writing was made and executed by the appellant and the appellee, Bockel: "State of Texas, County of Harris. This agreement, made and entered into by and between Frederick Bockel and Erasmus Bockel, of the county of Harris, Texas, parties of the first part, and Branch T. Mastertson, of the county of Galveston, Texas,

*Rehearing denied.

party of the second part, witnesseth: First. It is agreed that the said parties of the first part own in fee simple one-half of the B. H. Freeling 1,476-acre survey in Harris county, Texas; said one-half of said land so owned by the parties of the first part being the southeast 738 acres of said survey. Second. It is admitted by the parties hereto that the party of the second part is the owner of all that certain tract of land adjoining the B. H. Freeling survey, and patented to Charles Kessler, assignee of H. A. Robinson, by patent No. 411, and consisted of 640 acres. It is also admitted that said party of the second part owns 1,109 $\frac{1}{2}$ acres of land, patented to him as assignee of John Swisher, by patent No. 206, Vol. 8. Third. That the said Henry A. Robinson and John M. Swisher surveys lie east of and adjoining the said Benton H. Freeling survey, the east line of said Freeling survey being the same as the west boundary of the said Robinson and Swisher surveys. Fourth. That the true position of the said west line of the said Robinson and Swisher surveys and the east boundary line of the said Freeling survey is now uncertain and unfixed, its true and exact position upon the ground being in dispute between the said parties of the first part and the party of the second part. That the parties hereto desire to have said line definitely established and fixed by a survey upon the ground, so that hereafter there can be no dispute and no uncertainty as to where said line actually lies. Now, therefore, for and in consideration of the premises, and in order that said boundary line may be definitely determined, and the further consideration that the party of the second part shall dismiss at his own cost a certain suit now pending in the district court of Harris county, Texas, wherein said boundary line is sought to be determined so far as the same may affect the parties of the first part, the parties hereto agree as follows: (1) That W. A. Polk, county surveyor of Harris county, Texas, or any other surveyor to be agreed upon by said parties, shall, at as early a date as practicable, run out and establish the lines and corners of said Benton H. Freeling survey by beginning the survey on the corners of either the James Hamilton survey, No. 96, the Daniel H. Fitch, the James F. Cruger, or the John Thompson surveys, as staked upon the ground, and running the course and distances called for in the field notes of said Freeling survey so as to include 1,476 acres of land in said survey; the said party of the second part hereby guarantying that the southeast one-half of the said Freeling survey shall contain 738 acres of land, and that said survey shall retain, as nearly as possible, the same general shape as now claimed for it by the said parties of the first part. (2) That the expenses for surveying out said land and establishing and fixing the lines and corners of said survey shall be borne by the said party of the second part, with the exception of the

corner posts, which the said parties of the first part agree to furnish. [Signed] Frederick Bockel, E. Bockel, Parties of the First Part. Branch T. Masterson, Party of the Second Part."

In pursuance of this agreement, the appellant procured a survey of the Freeling grant to be made by W. A. Polk, county surveyor of Harris county; the field notes of said survey made and certified to by said Polk being as follows:

"State of Texas, County of Harris. Know all men by these presents, that I, W. A. Polk, county surveyor of Harris county, Texas, in pursuance of a certain agreement for survey made and entered into by and between the plaintiff, Branch T. Masterson, and the defendants, Frederick Bockel and Erasmus Bockel, parties to a certain suit now pending in the honorable district court in and for Harris county, Texas, being numbered upon said docket 18,684, surveyed the H. B. Freeling survey upon the ground, and find that the boundaries of the said Freeling survey, under the terms of said agreement, are as follows, to wit: Beginning at the northeast corner of the Jacob Walters survey, on the south line of the Pleasant W. Rose survey; thence south 1,000 varas to the southeast corner of the said Walters survey, on the north line of the James Hamilton survey, No. 96; thence east with the north line of said two Hamilton surveys 2,100 varas to the northeast corner of the James Hamilton survey, No. 96; thence south 1,900 varas with the east line of said Hamilton survey to its southeast corner, which is also the northwest corner of the James Cruger survey; thence east 1,900 varas with the north line of the Cruger, Fitch, and John Thompson surveys to the northeast corner of the said Thompson survey; thence south with east line of said Thompson survey 632 varas, the distance called for in the field notes of the said Freeling survey, to a point on the east line of the Thompson for a corner of said Freeling; thence east 402 varas, the distance called for in said Freeling patent, to a point in the prairie where I established the southeast corner of said Freeling survey on the west line of the Henry A. Robinson survey in accordance with its field note calls and the agreement of parties; thence north on the division line between the said Freeling survey and the Henry A. Robinson and John Swisher surveys 2,343 varas to the south line of the Enoch Harris survey, where I established the N. E. corner of said Freeling survey, it also being a corner of the John Swisher survey; thence north, 70 west, 720 varas, to the corner of the said Enoch Harris survey; thence north, 20 east, 930 varas, to the southeast corner of the Louis Gladich survey; thence north, 70 west, 1,727 varas, to the southwest corner of said Gladich survey; thence south 552 varas to the southeast corner of the Pleasant W. Rose survey; thence west 2,350 varas to the beginning, and containing 738

acres south of McIver's pasture place. This survey was made on the 5th to 8th days of May, A. D. 1896, in accordance with the agreement of parties, which said agreement is hereto attached, and made a part of this report of survey. Witness my hand at the city of Houston this 31st day of December, A. D. 1896. [Signed] W. A. Polk, County Surveyor, Harris County, Texas."

The north half of the Freeling survey is owned or claimed by J. W. McIver, and in making the survey of the Freeling, under the agreement above set out, it developed that, if the south line of the north half of said survey was located as claimed by McIver, the defendant, Bockel, would not have 738 acres—the quantity of land claimed by him in said survey—south of said line and west of the east line of said survey as fixed by Polk. For this reason the appellee was not at all satisfied with the survey as made by Polk. To meet the objection of appellee to the Polk survey, appellant proposed the following supplement or modification of the original agreement:

"State of Texas, County of Harris. This agreement, made and entered into by and between Branch T. Masterson and Fritz Bockel and E. Bockel, witnesseth that in settlement of the case of Branch T. Masterson v. Bockel et al. (No. 18,684), pending in the district court of Harris county, the dividing line between the Henry A. Robinson survey, owned by Masterson, and the lower part of the Freeling survey, owned by Bockel, shall be run on the ground so as to give Bockel, south of McIver's pasture fence and west of the Robinson, 738 acres, no more and no less. The surveyor shall fix a post in the ground at a point far enough east of the Thompson survey for the southeast corner of the Freeling to run a line north with the Robinson west line as fixed by the corner post to be put in, so as to give Bockel 738 acres. The surveyors are directed to run the Freeling from the wagon axle at the corner of the Freeling in the east line of the John Thompson survey far enough east to fix the southeast corner post of the Freeling so as to include the 738 acres in Bockel's tract. The field notes, when thus made, shall be made the judgment of the court in the above case."

This proposed agreement was reduced to writing, but was never signed by the parties. The undisputed evidence, however, shows that, shortly after the agreement was proposed, the surveyors named therein, together with the defendant and his attorney, went upon the ground, and began a survey of said line as provided for in said agreement. In making this survey, S. Griffin, who owned a tract of 160 acres of land south of the Freeling survey, claimed that the south line of said survey, as run by Polk and Gillespie, conflicted with the lines of his survey, and forbade said surveyors running said south line as located by them.

When this interruption of the work occurred, appellee informed the surveyors that he would have nothing more to do with making the survey, and would not agree to the line as fixed by them. The surveyors went on with the work, and established the east line of the Freeling survey as directed in said agreement. The line thus established is shown by the following field notes, made and certified to by said surveyor:

"State of Texas, County of Harris. Field Notes of a Survey of 738 Acres Made for E. Bockel and B. T. Masterson. Situated in Harris county, on the waters of Brays Bayou, a tributary of Buffalo Bayou, about six miles south from the county seat of Harris county, and being out of the Benton H. Freeling. Beginning at an iron axle in the E. line of the Thompson sur., same being the S. W. cor. of the B. H. Freeling; th. E. 1,780 ft. to a stake; th. N. 5,867½ ft. to a stake on the south line of McIver land; th. W. along McIver's S. B. line 7,060 ft. to a stake and mound in the E. B. line of the Hamilton survey; th. south along Hamilton E. B. line 4,112 ft. to an iron rod, being the N. W. cor. of the Fitch sur.; th. east along the north lines of the Fitch, Cruger, and Thompson surveys 5,280 to the N. E. cor. of the Thompson sur., a stone for corner; th. south 1,755½ ft. to the place of beginning. Bearings marked —. Surveyed Mch. 30th & Apl. 1st, 1898. B. Poole, J. H. McRady, Chain Carriers. Louis Gillespie, Flagman.

"I, W. A. Polk, county surveyor Harris county, and J. J. Gillespie, surveyor, do hereby certify that the foregoing survey was made actually on the ground, according to law, and that the limits, boundaries and corners, with marks, natural and artificial, are truly described in the foregoing plat and field notes. [Signed] J. J. Gillespie. W. A. Polk, County Surveyor Harris County.

"I, W. A. Polk, county surveyor Harris county, do hereby certify that I have examined the foregoing field notes, and find them correct, and that they are recorded in my office, in Private Sur. Book No. 4, page 162. [Signed] W. A. Polk, County Surveyor Harris County."

The expenses of making both these surveys were paid by the appellant. Appellee refused to recognize the agreements as binding, and appellant, by amended petition filed in the court below, set up the agreements, and asked that the boundary line between his land and that of appellee be fixed and established as the same was located by Polk and Gillespie, as shown by the field notes of the survey made by them in accordance with the agreements above set out. The execution of the first agreement is admitted by appellee in his answer, and it is not assailed on the ground of mistake or fraud, but he claims that no survey of the land was made thereunder, and that it was abandoned by both parties. As to the second agreement,

the answer avers that it was never made by the appellee; that he refused to sign same when it was presented to him by appellant's attorney, but agreed that a survey of his land might be made by Polk and Gillespie, and, if he was satisfied with the line as fixed by said survey, he would accept the same as the boundary line between his land and the lands of appellant. He further avers that he never accepted or acquiesced in the line as fixed by said surveyors under the directions contained in said unsigned agreement. There is not a particle of evidence to sustain appellee's contention that appellant abandoned the first agreement, or surrendered his right to enforce specific performance of same, except in so far as said agreement was modified by the unsigned agreement which appellee contends was never made by him; nor is there any evidence to contradict the testimony of Polk and other witnesses for the appellant, showing that a survey of the land was actually made by Polk under said first agreement, and the line in question fixed as indicated in the field notes of said survey certified to by Polk as before set out. It certainly cannot be held that the offer by appellant to modify the original agreement in the interest and for the benefit of the appellee—such offer not having been accepted by appellee—could defeat or in any way impair appellant's rights under said original agreement.

Upon a former appeal of this case this court held that the agreements in question were, in the absence of allegations and proof of fraud or mistake, valid and binding, and entitled appellant to a judgment fixing the boundary line in accordance with the survey made thereunder. We adhere to our former opinion, and do not deem it necessary to add anything to what is there said in reference to appellant's right to enforce said agreement. 51 S. W. 39.

If appellee did not, as he testifies, make the second agreement—and the jury have so found—then the original agreement remains in full force and effect, and appellant would be entitled to a judgment fixing his boundary line in accordance with said agreement. He only asks, however, to have the line fixed as designated in the field notes of the survey made by Polk and Gillespie; and since the establishment of said line at the place designated in said field notes deprives him of land to which he is entitled, and adds to the quantity to which appellee is entitled under the original agreement, the latter cannot be heard to complain of the boundary thus established.

The judgment of the court below will be reversed, and judgment here rendered in favor of appellant, establishing the boundary line between his land and the land of appellee as the same is fixed and designated in the field notes of the survey made by Polk and Gillespie, before set out. Reversed and rendered.

NICHOLSON-WATSON SHOE & CLOTHING CO. v. URQUHART.*

(Court of Civil Appeals of Texas. May 27, 1903.)

CORPORATE STOCK—SUBSCRIPTION—CONVERSION—FORFEITURE FOR NONPAYMENT OF SUBSCRIPTION—MEASURE OF DAMAGES—APPEAL—FINDINGS—PRESUMPTION AS TO COMPETENT EVIDENCE.

1. Where on appeal it appears that there was ample legitimate testimony to support the court's findings, it will be presumed that it did not consider, and was not influenced by, any irrelevant or incompetent testimony.

2. A direction by a corporation to an agent, holding stock for delivery to a subscriber on payment of the subscription price, to return the stock, and the subsequent action of the board of directors in marking the certificates "Forfeited," constitute a conversion of the subscriber's shares.

3. The measure of damages for the conversion by a company of shares of its stock subscribed for at par value, but not received by the subscriber, is the difference between the par and market values, less the amount due thereon.

4. Rev. St. 1895, art. 668, provides that, if a stockholder shall neglect to pay any installment, the directors may forfeit his stock, on giving him written notice. Held that, in the absence of compliance with the statute, the forfeiture of a subscriber's stock for nonpayment of the amount due thereon is void; payment in advance not having been expressly required by the charter.

Appeal from District Court, Jefferson County; J. D. Martin, Judge.

Action by J. L. Urquhart against the Nicholson-Watson Shoe & Clothing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Hardy & Hardy, Callicutt & Call, and Lanier & Bullitt & Wilson, for appellant. Hazlewood & Gordon and Smith, Crawford & Sonfield, for appellee.

NEILL, J. So far as it is involved in this appeal, this suit was brought by appellee against appellant for the possession of 20 shares of its capital stock, claimed by appellee as a subscriber therefor, or, in the alternative, to recover \$3,000 damages for the conversion of said stock, the par value of which was alleged to be \$100 per share, and the market value at the time of the alleged conversion \$250 per share. The company answered, denying plaintiff's subscription claim to the stock, alleging that his proposition to subscribe therefor was accepted upon the condition precedent that he should pay the full par value of the stock by the time the store of the company opened in Beaumont, and, if he failed to do so, his subscription should be forfeited; that he failed to pay for the stock according to the conditions of his subscription, and made no claim against the company for the shares sued for until about November 20, 1901. The case was tried by the court without a jury, and judgment rendered for the plaintiff for

*Rehearing denied June 17, 1903.

\$2,385 against the company as damages for the conversion of the stock.

These are the conclusions of fact found by the trial judge, upon which the judgment appealed from was rendered: Appellant company was incorporated under the laws of Texas in June, 1901, with its principal office and place of business at Beaumont, Tex., with a capital stock of \$10,000, divided into shares of \$100 each. Plaintiff, Urquhart, was one of the incorporators and promoters of the company, and, before the organization thereof, agreed with the other promoters to subscribe for \$2,000 worth of the capital stock of said company. There was no written subscription for stock by any of the stockholders, but on the 1st day of July, 1901, 10 stock certificates, of the par value of \$200 each, were issued plaintiff, signed by the president and secretary of the company, and sent by its secretary, together with the stock certificates of its other subscribers, to the Beaumont National Bank of Beaumont, Tex., with instructions to deliver them to each subscriber upon payment of the amount due. On or about the 1st day of July, 1901, the plaintiff deposited in the said Beaumont National Bank \$385 to the credit of defendant company, as a part payment of his subscription for said stock, which money was drawn out of the bank and used by defendant in fitting up its storehouse in Beaumont, in which its business was carried on. At a meeting of the company's stockholders at Corsicana, Tex., on the 15th day of June, 1901, plaintiff being present, it was agreed that all stock subscribed for should be paid for by the owners thereof about the time the business of the corporation opened. It opened business on the 20th day of July, 1901. On the 25th day of November, plaintiff applied to the cashier of the Beaumont National Bank for his stock, making no tender of the money due, but offered to pay the balance due on the same, but the cashier refused to deliver the certificates to him; giving as a reason that the bank had been instructed by the secretary of the defendant company not to deliver the same. On the next day the bank returned the certificates of stock that had been issued to plaintiff by one J. S. Hudson, the secretary of defendant company, and on January 1, 1902, at a meeting of the directors of the company, his certificates of stock were indorsed, "Canceled." No notice of this meeting nor of the action of the directors was given to plaintiff. That the balance due on the stock subscribed for by plaintiff is \$1,615, and that its value is \$4,000.

Upon these conclusions of fact, the trial court found the following conclusions of law: (1) That the time of payment was not of the essence of plaintiff's contract of subscription, and that the time of payment did not constitute an antecedent condition by which his right to the stock was affected; (2) that the meeting of the stockholders at Corsicana on the 15th day of June, 1901, was not the ac-

tion of the corporation, and no condition was imposed by said meeting upon plaintiff's right to demand and pay for his stock at any time before said stock had been canceled at the meeting of the board of directors of which plaintiff had notice; (3) that the action of the secretary in directing the Beaumont National Bank to refuse to allow plaintiff to pay the amount due on his stock, and in directing it to return the stock to the company, was the act of the defendant, and a conversion of the stock, which relieved plaintiff from the duty of making an actual tender of the amount due on the stock to the bank that held the same; and (4) that plaintiff is entitled to a judgment for the value of the stock, less the amount still due on his subscription for the same, to wit, \$1,675, leaving a balance of \$2,385, for which sum judgment was entered.

While there are some discrepancies between the trial court's conclusions of fact and the facts shown from the evidence in the record, it is believed that they are immaterial, and in no way affect the merits of the case on this appeal. The conclusions of the trial judge, in so far as they affect the merits of the case, are fully sustained by the record, and need no support from such testimony as the appellant claims was improperly admitted. And it will be presumed, there being ample legitimate testimony to support the court's findings, that it did not consider, and was not influenced by, any irrelevant or incompetent testimony in reaching such conclusions.

The trial court's conclusions that the time of payment of appellee's stock subscription was not of the essence of his contract, and did not constitute a condition precedent affecting his right to the stock, is rather a conclusion of fact deducible from the testimony, than one of law. This conclusion, which is supported by the testimony, seems to us to dispose of appellant's contention that, according to appellee's contract for the subscription of the stock, the payment of its par value on or about July 20, 1891, was a condition precedent to his right to the shares. There is no question about the fact that appellee was a subscriber for the number of shares of stock for the conversion of which he sued. He paid \$385 of the consideration therefor, and its receipt and use by the appellant, as well as the issuance of the certificates of appellee deposited in the bank, to be delivered to him upon payment of his subscription therefor, evidenced the contract of the stock subscription. The action of the company in directing the bank, in which they were deposited, not to receive the proffered payment, but to return the certificates, was the repudiation of its contract with the appellee, and, in connection with the action of its board of directors in marking the certificates "Forfeited," was, in effect, a conversion of appellee's stock, rendering the appellant liable in damages to the appellee, the measure of which was the difference between its

par and market value, less the amount due thereon as found by the trial court.

The validity and binding effect of subscriptions for stock in a corporation, whether they are made after or before the corporation is formed, is not in any way affected by the failure of the subscribers to pay the whole or part of the same, unless payment is expressly required by the charter or enabling act of the articles of association. *Clark & Marshall on Corp.* § 493. Article 668, Rev. St. 1895, provides that if a stockholder shall neglect to pay any installment, as required by the board of trustees, the directors or trustees may declare his stock and all previous payments forfeited to the use of the company, but that no stock shall be forfeited until the directors or trustees have caused a notice in writing to be served on him personally, or by depositing the same in the post office, properly directed to him, at the post office nearest his usual place of residence, stating that he is required to make such payment at the time and place specified in said notice, and that, if he fails to make the same, his stock and all previous payments thereon will be forfeited for the use of the company, which notice may be served as aforesaid at least 30 days previous to the days on which such payment is required to be made. There was no pretense that the appellant complied with, or pretended to comply with, these statutory conditions, before its attempted forfeiture of appellee's stock, and cancellation of the certificates therefor. Therefore its action in attempting to forfeit the stock was absolutely void, and, as before intimated, can only be taken as evidence against appellant of its conversion.

There is no error assigned, requiring a reversal of the judgment, and it is affirmed.

LIQUID CARBONIC ACID MFG. CO. v. LEWIS et al.*

(Court of Civil Appeals of Texas. May 20, 1903.)

LANDLORD AND TENANT—LANDLORD'S LIEN—MORTGAGE BY TENANT—PRIORITY.

1. The lien of a landlord will prevail over a mortgage executed by the tenant upon property subject to the lien where the mortgagee does not forthwith file the mortgage for record, as required by statute.

Appeal from Milam County Court; R. B. Pool, Judge.

Action by the Liquid Carbonic Acid Manufacturing Company against J. F. Lewis and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Clement & Garner, for appellant. Wallace & Morrison, for appellees.

FISHER, C. J. Under the authority of *Security Co. v. Panhandle Nat. Bank* (Tex. Sup.) 57 S. W. 22, the trial judge erred in

reaching the conclusion that it was necessary for the appellant to show that it had a permit to do business in Texas before it could maintain this suit; but, however, upon the main question involved in the case, the judgment must be affirmed. It may be conceded that the superior title to the property in question was in the appellant before the mortgages set out in the findings of fact were executed, but there was a delay upon the part of the appellant in forthwith having its mortgage recorded, so as to give it the standing of a prior lien over the rights of the appellee as a landlord. Upon this subject, we regard the case of *Austin v. Welch* (Tex. Civ. App.) 72 S. W. 881, as decisive of the question. It is there held that the landlord is a creditor within the meaning of the statute, and that his landlord's lien will prevail over a mortgage executed by the tenant upon the property on which the landlord would have a lien, where the mortgagee does not forthwith, as the statute requires, file for record his mortgage. We are of the opinion a proper predicate was laid for the admission of evidence of the contents of the lease executed by Woody to Lewis.

Judgment affirmed.

WALKER v. TEXAS & N. O. R. CO.*

(Court of Civil Appeals of Texas. May 20, 1903.)

APPEAL—BRIEFS—PROPOSITION—STATEMENT—DISMISSAL.

1. Where appellant's brief does not comply with rules 29, 30, and 31 of the Court of Civil Appeals (67 S. W. xv), requiring that each of the propositions shall be followed by a brief statement, in substance, of such proceedings contained in the record as will be necessary to explain and support the proposition with reference to the pages of the record, etc., the appeal will be dismissed.

Appeal from District Court, Harris County; Chas. E. Ashe, Judge.

Action by Robert Walker against the Texas & New Orleans Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Brockman & Kahn, J. V. Meek, and Wm. Sorley, for appellant. Baker, Botts, Baker & Lovett and C. S. Carter, for appellee.

NEILL, J. This suit was brought by appellant against the appellee to recover \$25,000 damages for alleged personal injuries. This appeal is from a judgment in favor of the company. While there are 23 assignments of error copied in appellant's brief, and what is styled a "proposition" under each of them, there is no statement from the record, as is required by the rules of this court, following any one of them. For this reason the appellee objected to the consideration of each and every one of the assignments of error. The objection is well taken.

*Rehearing denied June 17, 1903.

*Rehearing denied June 17, 1903.

Rules 29, 30, and 31 for Courts of Civil Appeals (87 S. W. xv); *Cooper v. Hiner*, 91 Tex. 658, 45 S. W. 554; *Hanrick v. Gurley*, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330; *Guerquin v. McGown* (Tex. Civ. App.) 53 S. W. 585; *Mansfield v. Neese* (Tex. Civ. App.) 54 S. W. 370; *Mayfield v. Robinson*, 22 Tex. Civ. App. 385, 55 S. W. 399. The rules for briefing cases are plain, simple, and easily complied with, and, when a cause is briefed in accordance with them, the labor of a court in disposing of the appeal is materially lessened. Besides, when in the brief of the appellant an assignment is followed by a proposition germane to it, and a statement made from the record, as is required by the rules, supporting it, the appellee, in preparing his brief, is informed as to what part of the record the appellant relies on to sustain the proposition under his assignment, and is enabled therefrom to clearly state his counter proposition, and point out any error or omission in the statement under the proposition in his adversary's brief. When this is done, the Court of Civil Appeals has before it that part of the record relied upon by either party to sustain his contention under the assignment of error, and can readily determine the question involved, without having to grope through the record, and guess as to what part of it is pertinent to the assignment under consideration. While this court has no desire to avoid work, and would much prefer to decide a case submitted to it upon its merits, it is its duty, in the interest of the public, to enforce the rules prescribed by the Supreme Court for attaining the ends of justice, as well as expediting business.

There being no assignment of error presented in appellant's brief in such a manner as requires its consideration, and there being no fundamental error in the judgment of the court below, it is our duty to affirm it, which is accordingly done.

RYON v. GEORGE et ux.

(Court of Civil Appeals of Texas. May 22, 1903.)

DECEDENT'S ESTATE—REJECTED CLAIMS—ACTIONS TO ESTABLISH—TRUST DEED—VALIDITY—JURISDICTION TO DETERMINE—PARTIES—HOMESTEAD.

1. In a suit to establish a rejected claim against a decedent's estate, the district court has jurisdiction to determine the validity of a trust deed given to secure it.

2. In a suit to establish a rejected claim against a decedent's estate, and to determine the validity of a trust deed given to secure it, the trustee is not a necessary party.

On Rehearing.

3. A husband and wife resided on an improved one-acre tract, worth about \$500, in an addition to an incorporated town divided into blocks, lots, and streets. The street in front of their dwelling house led to the principal business street of the town. The town had a population of about 1,500. The husband owned 179

acres outside of the limits of the town, and cultivated it as a farm, using the proceeds to support himself and family. This land was not worth over \$25 per acre. *Held*, as matter of law, that it was not a homestead.

Appeal from District Court, Fort Bend County; Wells Thompson, Judge.

Action by A. P. George and wife against V. M. Ryon, administratrix of J. W. Ryon, deceased, to establish a rejected claim. Judgment establishing the claim and upholding a deed of trust given to secure it, and defendant appeals. Affirmed.

John C. Mitchell and T. E. Mitchell, for appellant. Peareson & Peareson, for appellees.

GARRETT, C. J. This suit grows out of a suit originally brought in the district court of Ft. Bend county by A. P. George and wife against V. M. Ryon, as administratrix of the estate of J. W. Ryon, deceased, to establish a claim against the estate of said J. W. Ryon for the sum of \$1,285.25, which the administratrix on presentation to her for allowance had rejected. The claim was secured by a deed of trust on 179 acres of land in Ft. Bend county, executed by J. W. Ryon to P. E. Peareson, as trustee for J. H. P. Davis, who transferred the claim to the plaintiff. The petition set out the claim, and alleged the fact of the execution of the deed of trust, and asked that the claim be established as a claim against the estate of J. W. Ryon, deceased, but made no prayer as to the lien. The defendant, after answering the petition, filed a plea setting up the defense that the land was the homestead of herself and the said J. W. Ryon, who was her husband at the time of the execution of the deed of trust described in the petition, and prayed that said deed of trust be declared invalid. The plaintiff demurred to the plea praying for the cancellation of the deed of trust, on the ground of the want of jurisdiction in the district court to inquire into the lien. The demurrer was overruled, and on trial by jury a judgment was rendered establishing the claim, but the deed of trust was declared to be invalid, and was set aside and annulled. An appeal to this court finally resulted in affirmance of the judgment of the court below establishing the claim, and in the reversal of so much thereof as canceled the deed of trust because the facts were not sufficient to show that the land was a homestead. *George v. Ryon* (Tex. Civ. App.) 59 S. W. 825; *Id.* (Tex. Sup.) 60 S. W. 427; *Id.* (Tex. Civ. App.) 61 S. W. 138. In remanding the cause, this court directed a new trial upon the homestead issue, with permission to the plaintiffs, if they saw proper, to have their claim upon the land adjudicated.

After the case had been remanded the plaintiffs filed a supplemental petition making a party T. B. Wessendorff, who had been appointed administrator de bonis non of the said estate in the place of the defendant V.

M. Ryon, who had been removed, and asked to have their claim adjudged to be a lien upon the land. The defendant Wessendorff admitted the execution of the deed of trust. The defendant V. M. Ryon demurred to the petition that the court was without jurisdiction to classify the claim, and pleaded her homestead right to the land and the invalidity of the deed of trust, and asked that the same be annulled and her title quieted. Judgment was rendered in favor of the plaintiffs establishing their lien upon the land upon a verdict returned by the jury under the direction of the court. The existence of the claim and the execution of the deed of trust as set out in the petition of the plaintiff were shown. Richmond was shown to be an incorporated town of 1,500 inhabitants, lying on the west bank of the Brazos river. The defendant Virginia M. Ryon was the widow of J. W. Ryon, deceased, and resided with her husband, at the time of his death, within the corporate limits of the town of Richmond, upon lots, in an addition to said town, comprising about one acre of ground. J. W. Ryon was a farmer, and owned the 179 acres of land upon which the deed of trust had been given, and cultivated it as a farm. Neither of them owned any other land. The land was situated across the river from Richmond, outside of the corporate limits.

The district court had jurisdiction to inquire into and establish the plaintiffs' lien upon the land. *George v. Ryon* (Tex. Sup.) 60 S. W. 427; *George v. Ryon* (Tex. Civ. App.) 61 S. W. 138. We should not consider the question of homestead, because it is not properly raised by any assignment of error; but we are of the opinion, however, that the undisputed evidence showed that the 179 acres was no part of the homestead of the defendant Virginia M. Ryon. The verdict is sufficient to support the judgment. It was not necessary to make the trustee a party to the proceeding to establish the claim against the estate. It appears, however, that he was dead. The judgment of the court below will be affirmed.

Affirmed.

On Motion for Rehearing.

(June 19, 1903.)

A motion for conclusions of fact and law was submitted by the appellant in this cause, but, as it was a general request pointing out no questions on which conclusions were desired, and the court having already filed conclusions, the motion was overruled. On motion for rehearing, however, the conclusions with respect to the homestead question are specifically complained of. As the motion for rehearing will be overruled, and our conclusions of fact may not be full enough, we supplement them as follows:

The deed of trust creating the lien which was established by the judgment was executed by J. W. Ryon to R. E. Pearson, as

75 S.W.—4

trustee, September 4, 1885. The evidence does not show that Pearson is dead. At the time of the execution of the deed of trust the appellant and J. W. Ryon were husband and wife, and continued to be until the death of J. W. Ryon, which she testified occurred January 4, 1900. At the time of the execution of the deed of trust J. W. Ryon and his wife resided in the town of Richmond, on a one-acre lot in Deschaumes' addition to said town, occupying it as a home. The said lot and improvements were worth about \$500. Richmond is a town of about 1,500 inhabitants, and is divided into blocks, lots, and streets. It is situated on the West bank of the Brazos river. The old town survey extended to near a bayou or deep gully on the north of which lay Deschaumes' addition, which is joined onto the original town survey, and was laid off in 1875 into blocks, lots, and streets. There is a bridge across the bayou connecting it with the old town. There are five dwelling houses in the addition. The street in front of the Ryon dwelling house leads to the principal business street of Richmond. The town of Richmond was incorporated many years ago, and the addition is included within the corporate limits. The record does not show that the corporation has ever been abandoned. At the time of the execution of the deed of trust J. W. Ryon was a farmer, and cultivated the land upon which the deed of trust was given as a farm, using the proceeds for the support of his family, consisting of himself and the appellant and their children. The tract of land containing 179 acres is situated outside of the town of Richmond on the east side of the Brazos river, which is its west boundary, just opposite Deschaumes' addition, of which the Brazos river is the east boundary. There is a public wagon bridge across the river between the addition and the farm. The land is not worth over \$25 an acre.

The question of homestead is a difficult one, and one about which we have considerable doubt, but the controlling facts are undisputed and present no question for a jury. It is for the court to say upon the facts whether or not the land was a homestead. We are of the opinion that it was not.

Overruled.

GIRVIN v. WOOD.

(Court of Civil Appeals of Texas. May 27, 1903.)

JUSTICE OF THE PEACE—APPEAL BOND—CONDITIONS—PARTIES—CONSTRUCTION OF JUSTICE'S JUDGMENT.

1. A bond given on appeal from a justice, conditioned that appellant shall prosecute his appeal to effect, and shall satisfy the judgment which may be rendered against him, substantially complies with the statute.

2. A justice's transcript showed an entry dismissing the case as to one defendant on motion

¶ 1. See *Justices of the Peace*, vol. 31, Cent. Dig. § 564.

of plaintiff's attorney. The judgment recited that, it appearing that the citation issued to this defendant had been returned not served, plaintiff said he would no longer prosecute his suit against that defendant. It then showed a jury trial, and verdict for plaintiff, and adjudged that plaintiff recover from the other defendants, and that he take nothing by his suit against the first defendant. *Held* that, notwithstanding the recital of a dismissal, the record showed a judgment between the plaintiff and the first defendant, making the latter a necessary obligee in an appeal bond.

3. It was immaterial that the first defendant was not served with citation, as, for aught that was shown by the record, he was an appellee, within the meaning of the statute, judgment on the merits having been rendered between him and plaintiff.

Appeal from Tom Green County Court; Milton Mays, Judge.

Action by C. A. Wood against J. H. Girvin and others. From an order dismissing defendant Girvin's appeal from justice's court, he appeals. Reversed.

Hill & Lee and A. R. Burgess, for appellant.

KEY, J. This suit originated in a justice of the peace court, and was appealed to the county court. C. A. Wood was the plaintiff, and C. E. Cope, Sam Cope, and J. H. Girvin were defendants. As against Girvin and C. A. Cope, the plaintiff recovered in the justice's court; and the defendant Girvin appealed to the county court, making the appeal bond payable to the plaintiff, Wood, and to Girvin's codefendants, C. A. Cope and Sam Cope. In the county court the plaintiff filed a motion to dismiss the appeal because the appeal bond was not conditioned as required by law, and was not payable to the appellee plaintiff. This motion was sustained, and the appeal dismissed. The bond was conditioned "that the above-bounden J. H. Girvin shall prosecute his appeal to effect, and shall pay off and satisfy the judgment which may be rendered against him on such appeal," which was a substantial compliance with the statute.

As to the other point, more difficulty has been encountered. The court below seems to have disposed of the motion upon the theory that Sam Cope had been dismissed from the case, and that, as to him, no judgment was rendered by the justice of the peace. If this construction of the judgment rendered by the justice of the peace was correct, Sam Cope was not a party to the judgment, and should not have been made a payee in the bond. The transcript from the justice's court shows an entry on the docket dismissing the case as to defendant Sam Cope on motion of the plaintiff's attorney. The judgment which follows the entry referred to contains the following language in reference to Sam Cope: "On this day came the plaintiff, by his attorney, and, it appearing to the court that the citation issued to the defendant Sam Cope has been returned not served, the plaintiff says he will no longer

prosecute his suit against the defendant Sam Cope." The judgment then proceeds, showing a trial before a jury, a verdict for the plaintiff, and concludes as follows: "It is therefore ordered, adjudged, and decreed by the court that C. A. Wood do have and recover from the defendants C. E. Cope and J. H. Girvin the sum of one hundred ninety-six & $\frac{80}{100}$ dollars, with interest thereon from this date at the rate of ten per cent. per annum, together with his costs in this behalf expended, and that he have his execution; and it is further ordered and adjudged that the plaintiff, C. A. Wood, take nothing by his suit against the defendant Sam Cope, and that the said Sam Cope go hence without day." The portion of the judgment quoted above discloses the final action of the court. In fact, what preceded it was more in the nature of recitals, and that quoted constitutes the judgment that was rendered. Therefore we feel constrained to hold, notwithstanding the preceding recitals to the effect that Sam Cope had been dismissed from the suit, that in fact the court rendered judgment as between the plaintiff and the defendant Sam Cope; and therefore it was not only proper, but necessary, that the appeal bond should be made payable to him, as well as the other appellees. It is no answer to this to contend that, as the record shows that Sam Cope was not served with citation, the court had no jurisdiction to enter judgment that the plaintiff take nothing as against him. In the first place, for aught that appears in the record, Sam Cope may have appeared before the trial ended, and submitted himself to the jurisdiction of the court. In the second place, although the court may have been without jurisdiction over Sam Cope, yet, as it rendered judgment on the merits of the case as between him and the plaintiff, he was, for the purpose of an appeal, an appellee, within the meaning of the statute, and it was proper for the appeal bond to be made payable to him.

From this it follows that the court erred in sustaining the motion to dismiss the appeal, for which error the judgment is reversed and the cause remanded.

SCHUMACHER et al. v. SCHUMACHER
et al.*

(Court of Civil Appeals of Texas. May 20, 1903.)

LIFE POLICY—CONSTRUCTION—BENEFICIARY.

1. A life policy payable to the wife of assured if living, and, if not living, then to his executors, administrators, and assigns, became, on the death of assured after that of his wife, a part of his estate, to be administered according to the terms of his will.

Appeal from District Court, Grimes County; J. M. Smither, Judge.

Action by Henry D. Schumacher and another against John W. Schumacher, as tem-

*Rehearing denied June 17, 1903.

porary administrator of the estate of Henry Schumacher, deceased, and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

W. W. Meachum, for appellants. Haynes Shannon, for appellees.

JAMES, C. J. H. D. Schumacher, a son of Henry Schumacher, filed this suit against the executors and the other nine children of said Henry Schumacher, to recover a one-tenth interest in the proceeds of two insurance policies on the life of said Henry Schumacher, which had been received by his executors.

W. T. Schumacher, one of the defendants, being in like position as plaintiff with reference to the fund, adopted plaintiff's pleadings, and also claimed a one-tenth interest in the policies.

The statement of facts shows that the policies were payable unto Emma L. Schumacher, wife of Henry Schumacher, of Navasota, Tex., "if living, and, if not living, then to his executors, administrators, or assigns." Emma L. Schumacher died in 1898, and Henry Schumacher died in May, 1901, leaving a will, which was duly probated, in which the said policies are not mentioned, but which contains the following provision: "I will and bequeath to my sons and my daughters Robert, Henry, John W., Ada Wesson, wife of Walter B. Wesson, Minnie J., Ella, Emma, Ruth and Baylor, all of the estate, right, title and interest in possession, reversion, or remainder which I now have, or may have at the time of my death, of, in and to any lands, tenements, hereditaments, or rents, charges upon or issuing out of same, or shall have of, in or to any personal property whatever. It being my will and desire that my said children, Robert, Henry, John W., Ada Wesson, wife of W. B. Wesson, Minnie J., Ella, Emma, Ruth and Baylor shall have all of the property that I now possess or may possess at the time of my death, both real and personal, or mixed, it being my will that they shall share the same equally between them." And that, under said clause in said will, H. D. Schumacher and W. T. Schumacher have no interest in and to the remaining estate of H. Schumacher, deceased.

Demand was duly made of John W. Schumacher, temporary administrator of said estate of Henry Schumacher, deceased, and of the executors of said estate of H. Schumacher, deceased, by the said Henry D. Schumacher, plaintiff, and said W. T. Schumacher, defendant, for their respective shares (one-tenth each) of the said moneys collected by said John W. Schumacher, temporary administrator of said estate, upon said two policies of insurance, as shown in paragraph 2 hereof, which was refused by said defendants.

The proceeds of the policies appear to have been received by the independent executors

of said will. The statement of facts supplements the material facts above by a recital which we copy, as it serves to clearly illustrate the respective contentions on those facts:

"That upon the facts aforesaid the said Henry D. Schumacher and W. T. Schumacher each claim that, under the provisions of said two policies, upon the death of the said Henry Schumacher the proceeds of said two policies belonged to said ten heirs named in paragraph 4 of this agreement, as the children of the said Henry Schumacher, deceased, in which they shared equally (i. e., each was the owner of one-tenth thereof), and that the temporary administrator and executors of said estate were to collect said moneys and pay the same over to the said ten heirs, respectively, they being appointed by said Henry Schumacher in said policies as trustees for the purpose; but the said John W. Schumacher, administrator pro tem., and the executors of the said estate of Henry Schumacher, deceased, claim that by the provisions of said policies, and the will of said Henry Schumacher, deceased, as given in paragraph number 5 hereof, the entire proceeds of the said two policies belonged to his said eight legatees, viz., Robert, Henry Schumacher, John W. Schumacher, Ada Wesson, wife of W. B. Wesson, Minnie Schumacher, Ella Schumacher, Emma Schumacher, Ruth Schumacher, and Baylor Schumacher, which they are to share equally between them (i. e., each one-eighth thereof), and that said Henry D. Schumacher and William T. Schumacher have no interest therein.

"That is to say, that the executors claim that the proceeds of said policies are a part of the assets of the estate of the said Henry Schumacher, deceased.

"The said parties to this suit hereby submit to the court, upon the agreed statement of facts aforesaid, the questions of law for the court to find to whom said proceeds of said policies belong, and to render its judgment thereon, as aforesaid; each and all said parties reserving their right of appeal, if so desired, from whatever judgment the court may render in the case."

The trial judge's conclusion of law was as follows: "That the terms of the said two policies, after the death of the said Emma L. Schumacher, created a title to the said two policies absolute in Henry Schumacher, and that the proceeds of said policies collected after his death by his executors constituted a part of the assets of his estate, to be controlled and devised by the terms of said will the same as any other property belonging to his estate, and that all of said estate, including the proceeds of said policies, passed by the terms of said will to the persons named in said will as devisees, and that the plaintiffs Henry Schumacher and W. T. Schumacher are not entitled to any part of the amount collected out of said policies."

The first assignment of error attacks the

following finding expressed in the judge's conclusions of fact, in effect: That, by the terms of the will, appellants were not to receive any part of said H. Schumacher's estate—as not a correct conclusion from the terms of the will, as shown by the statement of facts. There was no other conclusion to be drawn, or construction to be placed on the will.

The real position which appellants take seems to be that the proceeds of these policies were not any portion of the estate of Henry Schumacher, and not affected by the provisions of his will.

In the second assignment of error, appellants' position is definitely stated to be that the court should have found that, by the terms of the policies, the title to same vested, when taken out, in Emma Schumacher, wife of Henry Schumacher, if living at the time of his death, and, if not living, then in his executors, administrators, or assigns, and, the said Henry Schumacher never having assigned said policies at his death, the legal title to said policies, by the terms thereof, vested in said executors or administrators as a class of trustees to collect same, and pay same over to his ten children, share and share alike, and that said Henry Schumacher did not change the terms of said policies by the provisions of his will, as the same are not mentioned therein.

It seems to us that the question is not whether appellants are entitled to any of the property of the estate of the testator, for the will clearly disinherits them, but the question raised is one of construction of the policies.

The beneficiaries of these policies, after the death of Mrs. Schumacher, were Henry Schumacher, his executors, administrators, or assigns. He never assigned them, and died leaving a will, with executors. Upon his death the executors of the will became the persons entitled to receive the proceeds, as a part of his estate to be administered by them according to its terms. The naming of "executors" in the policy contemplated a disposition of the policies by Schumacher by will. The policies were a part of his estate. *Dulaney v. Walsh* (Tex. Civ. App.) 37 S. W. 615. The instrument under which the executors are acting, and which disposed of his entire property, cut appellants off from any share in the estate, including the proceeds of these policies.

Agreeing with the conclusions of the trial judge, we affirm the judgment. Affirmed.

HARWELL v. SOUTHERN FURNITURE CO.

(Court of Civil Appeals of Texas. May 16, 1903.)

SERVANT—INJURIES—INSTRUCTIONS.

1. Where, in an action by a servant for injuries due to defective machinery, the only de-

fect disclosed was not discovered until after the accident, an instruction that, if the defect was not known to the master, and could not have been known, by ordinary care, in time to have it repaired, the jury should find for defendant, was erroneous.

2. A charge on an issue not raised is reversible error unless it appears from the record to have been harmless.

3. Where, in an action by a servant for injuries due to defective machinery, the evidence was conflicting on all the issues raised, an instruction that it was the duty of the foreman, when informed that the machine was out of order, to make immediate inspection, was erroneous, as assuming that he should have made immediate inspection.

Error from District Court, Bowie County; J. M. Talbot, Judge.

Action by L. C. Harwell against the Southern Furniture Company. Judgment for plaintiff, and defendant brings error. Reversed.

C. S. Todd, for plaintiff in error. Glass, Estes & King, for defendant in error.

RAINEY, C. J. Plaintiff in error brought this suit to recover for personal injuries received by him in operating, as employé of defendant in error, an alleged defective machine—a rip saw. The defects were alleged to have been unknown to plaintiff, and were known, or, by the use of ordinary care, could have been known, to defendant. Defendant pleaded general denial, that the machine was in good condition, assumed risk, and contributory negligence on the part of plaintiff. The evidence was conflicting on all the issues raised. The court charged the jury, in effect, that, if the machine was defective, but that such defect was not known by defendant, and could not have been known by the use of ordinary care and diligence, in time to have repaired or remedied the defect by the use of ordinary care before plaintiff was injured, then to find for defendant. This charge is assigned as error, plaintiff contending that neither the pleadings nor evidence raised the issue as to want of time to repair the machine after discovery of the defect and before the injury. We are of the opinion that this contention should be sustained. The only defect which the evidence tends to show existed, and that could have caused the accident, was not discovered until after the accident. So the question of time to repair could not arise, as that only applies when the employer discovers the defect. Then, in this connection, the issue was whether or not there was a defect, and, if so, did defendant use proper care to discover the defect before the injury? A charge upon an issue not raised is reversible error, unless it appears from the record that it was harmless. Such is not the case here.

The special charge requested, the refusal of which is assigned as error, we think was properly refused. It instructed the jury that it was the duty of the foreman, when informed that the machine was out of order, though the defect was not patent and open to observation, "to make such immediate in-

spection of such machinery, with a view to ascertain and remedy the defect, if any, as a person of ordinary prudence and caution would have done under similar circumstances." This assumes that the foreman should have made an "immediate inspection." Under the evidence it was a question for the jury whether it was negligence in his not making an immediate inspection.

For the error in the court's charge, as indicated, the judgment is reversed, and the cause remanded.

MISSOURI, K. & T. RY. CO. OF TEXAS v. JONES et al.*

(Court of Civil Appeals of Texas. May 23, 1903.)

INJURY TO EMPLOYE—RULES OF MASTER— PLEADING—INTOXICATION OF CO-EMPLOYEE—EVIDENCE OF HABIT.

1. The petition in an action for death of a railroad employé, alleging negligence of the company, in that, after employing deceased, it put him in charge of work with which he was not familiar, and exposed him to danger without providing for his safety and previously warning him of the danger, and the answer, alleging that defendant had promulgated regulations sufficient for the protection of deceased at the time of his injury, setting out the rules relied on as a defense, raise the issue, so as to warrant an instruction as to the duty of railway companies to make and enforce rules for the protection and safety of their employés.

2. Violation of rules of an employer by an employé is not negligence per se.

3. Presence of a brakeman at a crossing to give a signal to the engineer, and to uncouple and couple up a train, he being presumably engrossed with such duties, does not meet the requirement of a rule of the railroad that, when cars are being shoved over a crossing, there shall be a lookout on the leading car, or a flagman at the crossing.

4. Where the conductor and brakeman of the train which ran into the car on which a car repairer was working, killing him, were at the time under the influence of liquor, evidence as to their use of intoxicating liquors on other occasions, both while on and off duty, is admissible in an action against the railroad company for the death.

Appeal from District Court, Hunt County; H. C. Connor, Judge.

Action by Minnie Jones and others against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiffs Minnie Jones and W. W. Jones, Jr. Defendant appeals. Affirmed.

T. S. Miller and Perkins & Craddock, for appellant. Ed. H. Bennett and Crosby & Dinsmore, for appellees.

BOOKHOUT, J. This is an action for injuries resulting in death, instituted February 27, 1902, and in which judgment was rendered in favor of plaintiffs Minnie Jones and W. W. Jones, Jr., on a verdict of a jury, for \$13,000, October 25, 1902, and in favor of ap-

pellant as to plaintiff H. I. Jones, from which judgment defendant has appealed.

Conclusions of Fact.

W. W. Jones was employed by defendant June 24, 1901, as car repairer, at Greenville; his work being confined about the shops and yards at that place. This was his first service for a railway company. On the afternoon of August 16, 1901, E. Whitaker, the foreman of the shops at Greenville, ordered Anderson (another car repairer in defendant's employ at Greenville) and Jones to go to Sulphur Springs the next morning on train No. 6, known as the "Katy Flyer," to repair a disabled car, at the same time handing them a message stating its condition and the number of the car. Whitaker saw them gathering up their tools on the morning they left, and also saw them a few minutes before they got on the train, and did not mention to them anything in reference to the use of a flag, and they carried no flag, for the reason that they had no instructions to carry a flag, or to use one while repairing the car. There was evidence that there were no rules of the company requiring the use of flags in repairing cars on the road, and the only instructions they ever received as to the use of flags was in the yards and on the rip track or repair track at Greenville. Neither Anderson nor Jones had ever been out on the road to repair cars prior to that time. When they reached Sulphur Springs, the first thing they did was to unload their tools, and after getting off the train they walked about 50 yards east, looking for the disabled car, but did not find it to the east; and they then went to the north side of the depot, and found it on the house track, immediately north of and opposite the depot. The agent of defendant at Sulphur Springs saw the repair tools unloaded, and knew that the car repairers were there to repair the crippled car. There was a crossing immediately east of the depot, which was open, and not blocked by any cars; there being one or two cars immediately east of the disabled car, and between it and the crossing, and there were possibly seven or eight box cars east of the crossing. Jones and Anderson saw nothing of any engine or freight train in the yard, heard no engine, and knew nothing of any engine or freight train being in the yard. As soon as they found the car, they went to work on it. Jones was sitting on the rail in front of the wheel on the south side, and Anderson was between the axle and the swing beam at the end of the car, and they had been working about 10 minutes when the accident occurred. They were working right opposite the north window of the ticket office, and probably not over 10 feet away; and the agents of the defendant in the office could have seen them while working on the car, had they looked. The noise they were making could have been heard 50 feet or

*Rehearing denied June 13, 1903.

¶ 2. See Master and Servant, vol. 24, Cent. Dig. §§ 759, 1127.

more. While they were at work the string of cars east of the crossing was pushed back against and coupled to the car or cars next to the disabled car, which moved the disabled car and the cars attached to it to the west 8 or 10 feet, and the wheel on the south side of said disabled car ran over Jones and killed him. At the time of the accident there were two tracks near the depot—the main track and the house track; the main track being on the south side of the depot, and the house track on the north side. It was about 150 yards west of the depot to where the house track connected with the main line, and 650 or 700 feet east of the depot to where the house track connected with the main line. The Boomer track runs off from the house track east of the depot, leading off directly north, to the compress and oil mill; running at right angles to the main track. The Boomer track connects with the house track 664 feet east of the depot. The freight train, the backing of which caused the accident, came into Sulphur Springs at 10:40 a. m. of that day. After doing some switching, a part of this train, including the caboose, was placed on the house track, and the other part, including the engine, was backed in on the Boomer track. This was done to let the east-bound passenger, No. 6, and the west-bound passenger, No. 1, pass the freight. Hamilton was conductor of the freight train, and one Lambeth was rear brakeman. There was no lookout on the leading car as it was backed over the crossing, nor was there a flagman at the crossing.

In deference to the verdict, we find (1) that the agents and employes of defendant company at Sulphur Springs knew, or ought to have known, of the presence of Jones and Anderson, and notified them of the presence of the freight train, and of the time of the arrival and departure of trains, and the danger of repairing the crippled car on the house track, where it was then standing; (2) that the crossing east of the depot over the house track was such a crossing as is contemplated by defendant's rules in reference to lookouts and flagmen; (3) that if a lookout had been on the front car of the train as it backed over the crossing, or a flagman stationed at the crossing, he could or ought to have seen or heard Jones and Anderson at their work; and (4) it was negligence on the part of Foreman Whitaker to send out Jones and Anderson, under the circumstances, to repair the car on the road, without first giving them, or one of them, warning of the danger, and instructing them in reference to the use of signals while performing their work. We find that the failure of appellant to perform its duties in these respects was negligence, and the proximate cause of the injury. We find that W. W. Jones was not guilty of contributory negligence, and that appellees sustained damages in the amount of the verdict and judgment.

Conclusions of Law.

1. Complaint is made of the following clause of the charge of the court: "Railway companies are required to exercise ordinary care to make and enforce such rules and regulations for the protection and safety of their employes as are reasonably necessary for that purpose, but where the company has done this, and an employe disregards the rules under such circumstances as renders him guilty of negligence which causes, or contributes to cause, his injury, he cannot recover; but the violation of the rules of the company by the employes is not negligence per se." It is contended that there is no allegation in the petition raising the issue as to the failure of defendant to make reasonable rules for the protection of its employes engaged in the character of work in which the deceased was engaged, and, further, that the charge makes defendant's duty in respect to making and enforcing rules and regulations more onerous than the law requires, and is upon the weight of evidence. The plaintiffs' contention in the trial court, as shown by the pleadings, was that the company was negligent, in that after employing Jones it put him in charge of work with which he was not familiar, and exposed him to danger without providing for his safety and previously warning him of the danger. The defendant replied that it had promulgated rules and regulations which were sufficient for the protection of Jones at the time of the injury. It set out the rules, and relied upon the same as a defense to plaintiffs' action. These pleadings raised the issue, and the charge of the court complained of is responsive thereto. The paragraph of the charge complained of is among the general principles announced in the first part of the charge, and in a subsequent paragraph the court applies the law to the facts; and, when the charge is considered as a whole, it fairly submits the issues, and is not subject to the criticism that it is upon the weight of the evidence. The instruction that a violation of the rules of the company by an employe is not negligence per se announces a correct principle, and, when considered in connection with the paragraph of the charge in which the court applied the law to the facts, the jury could not have failed to understand the same.

2. It is contended by the appellant that there is error in that paragraph of the charge reading: "Or if you believe from the evidence that a rule of defendant then in force provided that, when cars are being shoved over street or road crossings, a man must be stationed on the leading car, and if you believe that the train, in coming upon said siding, and against the car being repaired by Jones and Anderson, had to pass over a road or street crossing, and if you believe such crossing was such as is contemplated within the meaning of such rule, and if you further believe that defendant had recog-

nized it as such, and if you believe that defendant did not have a man stationed on the leading car at such time," and, in substance, that if they believed defendant was guilty of negligence in this respect, as that term had been previously defined, they could find for plaintiff. There was evidence fairly raising the issue presented in this charge. There was no lookout on the leading car, nor was there a flagman at the crossing. The jury may well have inferred from the evidence that, had there been a lookout on the leading car, or a flagman stationed at the crossing, Jones would have been seen, and the injury avoided. It is true, the evidence shows that Lambeth, the rear brakeman, was at the crossing to uncouple the cars for the crossing. He gave the signal for the train to back up for the purpose of uncoupling the train for the crossing. At the time, he was on the south side of the house track. He had been drinking intoxicating liquor, and was intoxicated. Hamilton, the conductor, testified: "If Lambeth was on the south side of the house track, I could not say what prevented him from hearing and seeing the workmen under the car." The fact that he was there to uncouple the cars did not meet the requirements of the rule to have a flagman at the crossing. Lambeth was there to give the signal to the engineer, and to uncouple and couple up the train, and his attention was presumably engrossed by these duties.

3. There was no error in instructing the jury that "if you believe from the evidence that Jones was inexperienced in doing such work under such circumstances, and did not know the danger incident to the same, and if you believe the defendant failed to warn him of the danger, or if you believe from the evidence that defendant knew of the location of the injured car at Sulphur Springs, and knew of the time when Jones and Anderson would be there repairing the same, and if you believe that the defendant knew of the arrival and departure of trains at Sulphur Springs on said date, and if you believe that defendant knew that cars would be run in upon or back upon the siding where they were at work, and if you believe that defendant failed to notify the said Jones and Anderson of the movement of trains at Sulphur Springs at said time," and in a subsequent paragraph of the charge telling the jury, in substance, that if they so believed, and further found that the defendant in this respect was guilty of negligence, they could find for plaintiff. The pleadings and evidence both raised the issue presented by this charge, and the court properly submitted the same to the jury.

4. There was no error in admitting testimony as to the habits of the conductor, Hamilton, and the brakeman, Lambeth, in reference to the use of intoxicating liquors on other occasions, both while on and off duty. The evidence tended to show that on the occasion of the accident both were under the influence of liquor, and in such case their general hab-

its as to the use of intoxicating liquor was competent evidence. *Railway Co. v. Davis*, 92 Tex. 372, 48 S. W. 570.

5. Error is assigned to the admission in evidence of certain rules of the company introduced by plaintiffs over defendant's objections. The rules were relevant, and, in our opinion, were properly admitted.

The remaining assignments fail to point out any error in the record, and the judgment is affirmed.

McKINNEY v. ELLISON et al.

(Court of Civil Appeals of Texas. May 27, 1903.)

CHATTEL MORTGAGES—CROPS—NOTICE OF EXISTENCE OF MORTGAGE—EFFECT.

1. Notice by plaintiff to one of the defendants, given in the fall of 1899, that he had a mortgage "on M.'s crop," even if referring to the crops of 1900 and 1901, as contended by plaintiff, would be of no force or effect; the mortgage in such case being on something not in existence.

Appeal from Collier County Court; J. H. Faulkner, Judge.

Action by Zona Ellison against John Milam and J. W. McKinney. From a judgment in the county court affirming a justice's judgment in favor of plaintiff and against both defendants, defendant McKinney appeals. Reversed.

Abernathy & Mangum, for appellant.

FLY, J. This suit originated in a justice's court, where Zona Ellison sued John Milam on a promissory note, asking for the foreclosure of a mortgage given to secure the note on cotton grown during the year 1900, and asking for a judgment against appellant, John W. McKinney, for the conversion of 3,200 pounds of the cotton, of the value of \$3.25 a hundred pounds. McKinney pleaded a mortgage lien on the cotton, taken without notice of Ellison's mortgage. The trial in the justice's court resulted in a judgment in favor of Ellison against both defendants, and a like result followed on appeal to the county court.

The vital question in the case was as to which mortgage had the priority. The one taken by Ellison was filed on June 15, 1900, and the one taken by appellant was filed on March 22, 1900. It was claimed in the pleadings that appellant had actual notice of the existence of the mortgage given by Milam to Ellison before he took his mortgage, but there was no evidence that tended to support the allegation; and, on the other hand, it was clearly established that he had no notice that a prior mortgage had been given by Milam. The only evidence offered to show that appellant had any notice of the existence of any mortgage executed by Milam to Ellison was the statement by Ellison: "I told John McKinney in the fall of 1899 that I had a mortgage on John Milam's

crop." To what crop he had reference does not appear; but the inference would be that he referred to the crop of 1899, because no other was in existence. If he referred to the crops of 1900 and 1901, on which he claims he had a mortgage, the notice was of no force or effect, because the mortgage was on something not in existence, and could not take effect until the crop was at least planted. *Cook v. Steel*, 42 Tex. 53; *Silberberg v. Trilling*, 82 Tex. 523, 18 S. W. 591; *Dupree v. McClanahan*, 1 White & W. Civ. Cas. Ct. App. §§ 594, 595. When the mortgage was executed by Milam to Ellison, on November 12, 1899, it will not be contended that the cotton crops of 1900 and 1901 were in existence; and there is nothing to indicate that the cotton crop of 1900 had been planted when the mortgage of appellant was filed, in March, 1900.

In a former opinion rendered herein, some expressions in regard to appellant occupying the position of a creditor, within the contemplation of articles 2549, 3327, Rev. St. 1895, were used, that were not entirely correct, when viewed in the light of *Bowen v. Wagon Works*, 91 Tex. 385, 43 S. W. 872, and that opinion will be withdrawn, and this filed in lieu thereof.

The former order of the court, rendering judgment in this court for appellant, will be set aside, and the judgment of the lower court will be affirmed as to John Milam, and will be reversed, and the cause remanded, as to John W. McKinney.

GULF, C. & S. F. R. CO. et al. v. BARTLETT.

(Court of Civil Appeals of Texas. May 20, 1903.)

ACTIONS—REAL PARTY IN INTEREST.

1. In an action against a railroad company for damages to a horse shipped over defendant's line, and for overcharges of freight, a judgment for plaintiff cannot be sustained where it appears that the horse in question and the overcharges were the property of another at the time suit was brought.

Appeal from Tom Green County Court; Milton Mays, Judge.

Action by W. G. Bartlett against the Gulf, Colorado & Santa Fé Railroad Company and another. From a judgment for plaintiff, defendants appeal. Reversed.

T. S. Miller, J. W. Terry, and A. H. Caldwell, for appellants.

FISHER, C. J. The evidence in the record shows that the horse in question, together with the amount of the overcharges paid, was the property of E. O. Bartlett at the time the appellee brought this suit to recover the value of the horse, together with the overcharges of freight that were paid. If any cause of action existed, it was in favor of E. O. Bartlett, and the evidence does not

show a state of facts that would authorize W. G. Bartlett to maintain this suit. Therefore the judgment is reversed, and here rendered in favor of appellants.

Reversed and rendered.

KERSEY v. FUQUA.*

(Court of Civil Appeals of Texas. May 16, 1903.)

NOTE—BONA FIDE PURCHASER—CONSIDERATION—NOTICE.

1. Defendant purchased from a third person a negotiable note, half of which was plaintiff's property, on representations that such half belonged to plaintiff's husband, against whom defendant held notes. Defendant paid his assignor one half in cash, and promised to pay plaintiff's husband the other half, but never did so; the latter denying ownership. Held that, as to plaintiff's half interest, defendant was not a purchaser for value, so as to resist her recovery from him of her half of the note on payment to him on maturity.

2. Neither was he a purchaser without notice, since he knew that half of the note belonged to some one other than his assignor.

Appeal from Potter County Court; Lon D. Marrs, Judge.

Action by M. O. Kersey against W. H. Fuqua. Judgment for defendant, and plaintiff appeals. Reversed.

L. C. Barrett, for appellant. Browning, Madden & Trulove, for appellee.

SPEER, J. M. O. Kersey, who is the wife of Jeff Kersey, sued W. H. Fuqua to recover the sum of \$112.50, under the following circumstances: On October 25, 1901, one T. J. Stratton and Mrs. Kersey were the joint equal owners of a negotiable promissory note for the sum of \$225, which, according to its face, was payable to the order of said Stratton, and was in his possession. On that day Stratton sold the note to W. H. Fuqua, who had no notice of the interest of Mrs. Kersey, for the sum of \$222.50, one-half of which he was to receive, and did receive, in cash, and the other one-half was to be paid to Jeff Kersey. Fuqua held Jeff Kersey's notes in the sum of about \$80, and an inducement to purchase the Stratton note was the prospect of thus being able to collect this indebtedness. Fuqua immediately notified Kersey that he had bought the note from Stratton, and offered to pay him whatever balance might be owing after deducting the \$80; but Kersey informed him that the note belonged to Mrs. Kersey, and that he would have nothing to do with it, and has at all times refused to make such settlement. Fuqua collected the note on December 5, 1901, the date of its maturity; and, upon his refusal to pay over to her one-half of the proceeds, Mrs. Kersey brought this suit.

The court instructed the jury that if they believed from the evidence that said note was made payable to the order of T. J. Strat-

*Rehearing denied June 6, 1903.

ton, and that said Stratton sold said note to defendant before maturity thereof in consideration of \$222.50, one half paid to said Stratton, and the other half to be paid to Jeff Kersey, and that at the time defendant purchased said note he had no knowledge of Mrs. Kersey's alleged interest in the note, they would find for the defendant. To this charge the appellant assigns error upon the ground that the same was not applicable to the facts in the case, inasmuch as the evidence showed that appellee was not a bona fide purchaser of the note in question, and we think the assignment should be sustained. It is, of course, elementary that a purchaser of a negotiable promissory note, taken before maturity, may get a good title, notwithstanding the seller had none. But to have done so in this instance, Fuqua must have paid a valuable consideration without notice of appellant's rights. The consideration agreed upon was \$222.50, one-half of which was paid at the time, and the remaining one-half was to be paid to Jeff Kersey. This has never been paid, and appellee, to that extent, is liable to the real owner of the fund. In other words, he is in no different position than if he had purchased the note on credit to the extent of one-half its value. This, in effect, is what he did, and he cannot claim to be protected in appropriating appellant's property upon the equitable ground of innocent purchaser, when in fact he has neither paid one cent nor parted with anything of value therefor. See *Benson v. Keller* (Or.) 60 Pac. 918.

It is not contended that the Kersey notes were paid or surrendered up in the transaction, nor that Kersey or any one else placed the note with appellee as collateral thereto. Nor can it be said that the payment to Stratton constituted the valuable consideration required, for the reason that the undisputed evidence shows that was not all the consideration, but that appellee yet owed the sum of \$111.25 when he was apprised of appellant's interest in the note.

But appellee was not an innocent purchaser of Mrs. Kersey's interest in the note. He knew at the time of his purchase that one-half of the proceeds belonged to another than Stratton, and he could not, therefore, have relied upon the legal presumption that the title was in Stratton. His purchase of this one-half was at his peril. The case stands thus: Stratton says to Fuqua: "I have here a negotiable promissory note for \$225, not yet due, to which presumptively I have a perfect title, but in reality I own but one half of it. Jeff Kersey owns the other half, and has authorized me to sell. What will you pay me for it?" Fuqua replies: "Relying upon your statement that Jeff Kersey owns one-half of the note, I will pay you \$111.25, and Kersey a like amount," which is accepted. Mrs. Kersey establishes title to one-half of the note. Fuqua must do one of two things: He must either demand a rescission with Stratton, or recognize Mrs. Ker-

sey's right to her property. If Stratton's representations that Jeff Kersey owns the note are untrue, Fuqua gets no title, even though they are honestly made and confidently believed.

We therefore reverse the judgment of the county court, and render judgment here in favor of appellant for the sum of \$112.50, with interest at the rate of 6 per cent. per annum from December 5, 1901.

TENZLER et al. v. TYRRELL et al.*

(Court of Civil Appeals of Texas. May 13, 1903.)

TRESPASS TO TRY TITLE—ADVERSE POSSESSION—LIMITATION OF ACTIONS—BOND FOR TITLE—CONVEYANCE OF FEE—DECLARATIONS.

1. An appellant will not be heard to complain on appeal of an omission of the trial court to find on an issue of fact on which no request for a finding was made.

2. Where one who had given a bond for title subsequently executed a mortgage on the land, though the grantee in the bond for title had knowledge thereof, it would not start the running of limitations, because the cause of action could not have accrued until the obligor had had been requested and had refused to perform the conditions of the bond for title.

3. Rev. St. 1895, art. 2302, provides that, in actions by or against the heirs of a decedent, neither party shall be allowed to testify as to any transaction with decedent. *Held* that, in trespass to try title by the heirs of one who had given a title bond against those claiming under the bond, declarations made by the obligor to one of plaintiffs were properly excluded.

4. Such declarations were properly excluded, they not being made in denial of a request to execute a deed, or brought home to the grantee in the title bond.

5. Where, in trespass to try title, plaintiffs were the heirs of one who had executed a title bond, and defendants claimed under such bond, it was immaterial whether the bond conveyed the legal title or the equitable title, since, if legal, plaintiffs could not recover, and, if it conveyed the equitable title, they could not recover, because defendants had connected themselves therewith by deeds duly executed by the heirs of the grantee.

6. In trespass to try title by heirs of one who had executed a title bond against those claiming under such bond, it was contended that a certified copy of the bond should not have been admitted, because it bore at the top the word "Duplicate," and at the bottom a memorandum that the grantee would pay the tax on the land described, and for the registration of the original of such duplicate; and it was contended that it appeared from such words that a copy of the original bond was recorded, and that hence the copy of the recorded instrument was a copy of a copy. *Held*, that it was mere speculation to claim that there was no evidence that it was a copy of the original bond.

7. In trespass to try title, a claim that defendants should have been confined to the issue of *res judicata*, because they had specially pleaded it, was untenable; the one whom the court found to be the owner of the land not having made such plea.

8. The consideration for land having been paid under a bond for title, the bond was sufficient to support a plea of three years' limitations, as against the obligor.

*Rehearing denied June 10, 1903.

Appeal from District Court, Jefferson County; J. D. Martin, Judge.

Trespass to try title by Harriet G. Tenzler and others against W. C. Tyrrell and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

J. F. Lanier, H. C. Mayer, and Stewart, Stewart & Lockett, for appellants. Greer, Greer & Nall, for appellees.

FLY, J. This is an action of trespass to try title to two-thirds of the south one-half of the Samuel Stivers league, in Jefferson county, instituted by appellants, Harriet Genevieve Tenzler, Lydia E. Locke Livermore and her husband, Daniel H. Livermore, Harriet A. Locke Harmon and her husband, E. C. Harmon, and Frank C. Locke, Jr., against W. E. Tyrrell and John H. Broocks. The cause was tried by the court without a jury, and judgment was rendered in favor of appellees.

We adopt the following findings of fact of the trial court as the conclusions of fact of this court: "The land in controversy is two-thirds of the south half of the Samuel Stivers league of land, in Jefferson county, Texas. The league was granted to Samuel Stivers by the government of Coahuila & Texas February 21, 1835. Samuel Stivers conveyed to S. S. Tompkins, by deed, the south half of the above league July 28, 1842. On the 9th day of August, 1842, S. S. Tompkins executed in favor of J. R. A. Tompkins, in duplicate, a bond for title, wherein he obligated himself to convey the south half of above league to J. R. A. Tompkins, his heirs and assigns, by a good and bona fide deed. The above instrument was first recorded in Jefferson county October 16, 1878. S. S. Tompkins and J. R. A. Tompkins were brothers. S. S. Tompkins resided in Texas, and J. R. A. Tompkins resided in the state of Tennessee. S. S. Tompkins died August 3, 1876, and left surviving him by marriage three children, viz., Frank Tompkins, a son, and Mrs. Harriet G. Tenzler and Mrs. Stephana Samuella Locke, daughters. That Frank J. Tompkins is dead, and that defendants acquired by a judgment of the district court of Jefferson county whatever interest he owned in the south half of the Stivers league. That Mrs. Stephana Samuella Locke on the 17th day of October, 1869, married Henry A. Locke. That both husband and wife are dead, and left surviving them three children, viz., Lydia E. Locke and Harriet A. Locke, daughters, and Frank C. Locke, Jr., a son. That Lydia E. Locke married Daniel H. Livermore in April, 1891, and that Harriet A. Locke married E. C. Harmon in 1897, and that both of said marriages are subsisting. That plaintiff, Mrs. Harriet G. Tenzler, is a feme sole, and has been since the year 1876. That J. R. A. Tompkins, brother of S. S. Tompkins, died in the state of Tennessee in the year 1879, leaving surviving him by marriage the fol-

lowing children, viz.: J. A. Tompkins, Joel M. Tompkins, Dr. W. R. Tompkins, and James S. Tompkins, sons, and Mrs. Eliza Harrison, a daughter. That J. A. Tompkins died, unmarried, without issue, and intestate, in 1889. That Joel M. Tompkins died, unmarried, without issue, and intestate, in 1882. That Dr. W. R. Tompkins died intestate in 1888, leaving surviving him three children, viz., W. R. Tompkins, Charles D. Tompkins, and James Tompkins. That James S. Tompkins, son of J. R. A. Tompkins, died in 1876, leaving a son, viz., Joel M. Tompkins, and his widow, who afterwards married J. W. Malone. That Mrs. Eliza Harrison, only daughter of J. R. A. Tompkins, died intestate in 1878, leaving as her sole heir a daughter, whose name is Mary V. Goodale, wife of F. L. Goodale. That Mary V. Goodale, joined by her husband, conveyed to W. R. Tompkins an undivided one-third of south half of Stivers league June 28, 1892. That W. R. Tompkins conveyed by deed to John H. Broocks an undivided interest of 984 acres in south half Stivers league December 14, 1892. That on April 11, 1898, John H. Broocks acquired complete title to the interests of the minors Charles L. Tompkins and James Tompkins in south half of said survey. That John H. Broocks conveyed to W. C. Tyrrell 1,336 acres of south half of said league, by metes and bounds, March 29, 1898. That John H. Broocks conveyed to W. C. Tyrrell by deed 1,878 acres of south half said survey March 29, 1899; making, in all, the south half of said league and a portion of north half. That John H. Broocks went into possession of the south half of said survey about January 1, 1894, and began making improvements thereon, and that he and his vendees, under a consecutive chain of title, have held continuous, adverse, uninterrupted, peaceable possession of the premises for more than three years next before the filing of this suit. That Frank C. Locke, Jr., was only 19 years old when suit herein was begun."

The eighth, ninth, and tenth assignments of error complain of the failure of the district judge to find that S. S. Tompkins had repudiated the bond for title executed by him to J. R. A. Tompkins, and had exercised the rights of ownership over the land, and that Mrs. Tenzler had in 1877 repudiated the bond for title. There was no request upon the part of appellants that the trial court should find upon the issues named, and no complaint was made on that score until after an appeal had been perfected to this court. It would be manifestly unjust to the trial court to permit such practice, and appellants will not be heard to complain in this court by an omission to find on issues about which they did not concern themselves on the trial. *Fitzhugh v. Franco-Texas Land Co.*, 81 Tex. 306, 16 S. W. 1078; *Lanier v. Foust*, 81 Tex. 186, 16 S. W. 994; *Cattle Company v. Burns*, 82 Tex. 50, 17 S. W. 1043; *Tackaberry v. Bank*, 85 Tex. 488, 22 S. W. 151, 299.

The mortgage given by S. S. Tompkins to James N. Dupree in 1857, on the land in controversy, was not recorded in Jefferson county, and it was not shown that J. R. A. Tompkins had any notice of the execution of the mortgage. Even if it had been brought to the knowledge of J. R. A. Tompkins, it would not have started limitations to run, because the cause of action could not have accrued until S. S. Tompkins had been requested and had refused to perform the conditions of the bond for title. There was no evidence to that effect in the record. The declarations made by S. S. Tompkins to his daughter Mrs. Tenzler were properly excluded. They were not made in denial of a request to execute a deed, and they were not brought home to J. R. A. Tompkins, and were inadmissible, under article 2302, Rev. St. 1895. *Reddin v. Smith*, 65 Tex. 26; *Parks v. Caudle*, 58 Tex. 216.

One branch of this case was before the Court of Civil Appeals of the First Supreme Judicial District, and, in passing upon the bond for title given by S. S. Tompkins to J. R. A. Tompkins, it was held that it did not pass the legal title, but that it showed on its face that the obligor had sold the land to the obligee, and that the consideration for it had been paid. *Tompkins v. Broocks* (Tex. Civ. App.) 43 S. W. 70. A writ of error was refused by the Supreme Court. In writing that opinion, however, the case of *Baker v. Westcott*, 73 Tex. 129, 11 S. W. 157, seems to have been overlooked, for in that case the Supreme Court held that a similar bond for title passed the legal title to the land. The Supreme Court said: "Whenever the language of the conveyance evidences the intention of the grantor to convey the entire dominion, ownership, and control of the land immediately to the grantee, it should be held as effectual for this purpose as any other conveyance by either of the modes of transferring title recognized by the common law. That a consideration is not necessary to the validity of a deed conveying land has been held in the courts of many of the states. * * * If the instrument in this case was a mere executory contract, the rule of equity would probably require proof of a consideration in order to enforce it, although this is ordinarily presumed from the use of a seal. But we think this instrument, in effect, a deed which conveyed the legal title to Westcott." In that case the obligor relinquished the title whenever the obligee became a citizen of Texas. In the case now under consideration the obligor bound himself to make "a good and bona fide deed to the land whenever called upon so to do." The payment of the consideration was acknowledged. It does not matter, however, whether the title acquired through the bond was a legal or equitable one, as either would support the judgment in this case. If the bond for title conveyed the legal title of the land, appellants' case was fully met, and, whether appellees had connected themselves with it or not, appellants

could not recover. If the bond for title conveyed only an equitable title, appellees connected themselves with it by deeds duly executed by some of the heirs of J. R. A. Tompkins, and appellants could not recover. In either event it would not matter whether the deed from Mary V. Goodale and Frank L. Goodale to W. R. Tompkins was properly admitted in evidence or not.

It is contended that a certified copy of the bond for title executed by S. S. Tompkins to J. R. A. Tompkins should not have been admitted in evidence, because it had at the top the word "Duplicate," and at the bottom, after the certificate of acknowledgment, the following words: "Received of J. R. A. Tompkins two dollars & 50 cents, with which I will pay the tax on the land described in and for the registration of the original of this duplicate instrument." The contention is that it appears from these words that a copy of the original bond for title was recorded, and that therefore the copy of the recorded instrument was the copy of a copy. The recorded instrument purports to be a duplicate, and appears to have been signed and acknowledged by S. S. Tompkins. It is mere speculation to claim that there is any evidence that it was a copy of the original bond for title.

Through the eleventh assignment of error, appellants urge that appellees should not have recovered, because they had specially pleaded *res adjudicata*, and should have been confined to that issue. The assignment cannot be sustained, if for no other reason, because John H. Broocks, Jr., to whom the court found the land belonged, did not plead *res adjudicata*.

The evidence supported the ruling of the trial court that John H. Broocks had acquired title to the land, as to all the appellants except Frank C. Locke, Jr., by three years' limitation. The consideration for the land having been paid, the bond for title would support the plea of three years' limitation, as against the heirs of the obligor in the bond. *Elliott v. Mitchell*, 47 Tex. 445; *Downs v. Porter*, 54 Tex. 59.

The judgment is affirmed.

RYON et al. v. DAVIS.*

(Court of Civil Appeals of Texas. May 21, 1903.)

TAXATION—SALE FOR TAXES—VALIDITY—ATTACK—DIRECT—COLLATERAL—ANSWER—JUDGMENT.

1. In trespass to try title by one whose title depended on a judgment in favor of the state for delinquent taxes, an order of sale issued thereon, and sale thereunder, an answer seeking to have the sale set aside could not be regarded as a direct attack on the sale for the want of proper parties.

2. The answer was not made in time, being filed August 7, 1902, and the suit being instituted June 2d preceding.

*Rehearing denied.

3. The answer could not be sustained as a collateral attack on the sale unless the sale should be held void.

4. An execution sale of several tracts of land in gross for taxes, for which a judgment of foreclosure in gross has been rendered, is not void.

5. A judgment for the sale of land for delinquent taxes should withhold the writ of possession until the expiration of the time for redemption.

Appeal from District Court, Ft. Bend County; Wells Thompson, Judge.

Trespass to try title by J. H. P. Davis against V. M. Ryon and others. From a judgment for plaintiff, defendants appeal. Affirmed.

John C. Mitchell and T. E. Mitchell, for appellants. Peareson & Peareson, for appellee.

GARRETT, C. J. This is an action of trespass to try title, brought in the district court of Ft. Bend county by J. H. P. Davis against V. M. Ryon and others, to recover 179 acres of land, a part of the William Morton $1\frac{1}{2}$ league, situated in said county. The plaintiff's title depended upon a judgment of the district court of Ft. Bend county in favor of the state of Texas against J. W. Ryon and Jennie Ryon for taxes due by them, and an order of sale issued thereon, and sale thereunder. The 179 acres on which the taxes were due was composed of three tracts of land lying contiguous to each other, and forming one body of land; but the judgment ordered the sale of "each" of the described three tracts of land for the satisfaction of said judgment, interest, and costs. The land was assessed for taxes in a body, and the judgment was for the taxes due on it as a whole. The defendants pleaded in reconvention, and sought to have the execution sale set aside for the reason that the three tracts of land were sold by the sheriff in a body, and not separately. The trial was by jury, and a judgment was rendered in favor of the plaintiff upon a verdict returned according to the peremptory instruction of the presiding judge.

The assignments of error are too general to require a revision of the judgment below, but it appears from the evidence that the judgment in favor of the state for taxes was rendered on the 9th day of April, 1898; that the sale was made June 7, 1898; that this suit was brought on June 2, 1902; and that the original answer of the defendants, seeking to set aside the sale, was filed August 7, 1902. Defendants' answer cannot be held as a direct attack upon the sale, for the want of proper parties. Nor was it made in time. It could not be sustained as a collateral attack unless the sale should be held void. It has been held that a sale of several tracts of land in gross for taxes for which a judgment of foreclosure in gross had been rendered is not void. *League v. State* (Tex. Civ. App.) 56 S. W. 262; *Id.* (Tex. Sup.) 57 S. W. 34.

Although the defendants would have two years in which to redeem the land after the sale for taxes, the order of sale would properly issue on the judgment and the sale be made, but the judgment should withhold the writ of possession until the expiration of the two years. *League v. State*, supra. More than two years have elapsed since the sale in this case.

There being no error in the judgment, it is affirmed. Affirmed.

Additional Conclusions.

(June 19, 1903.)

In the above-entitled cause the following additional conclusions are filed: The land in controversy is one body, of 179 acres, that has been known for 15 years as the "Ryon Farm." It is composed of three tracts lying contiguous to each other, and was assessed for taxes as one tract of land, and had been so assessed for a number of years. It was shown to be worth at the date of the sale \$25 an acre. It was sold in gross to I. Kempner for \$104.19, and on payment of the bid a deed was executed to him therefor by the sheriff. Kempner conveyed the land to the appellee for a consideration of \$208.36 cash. It was shown that there was a deed of trust on the land in favor of J. H. P. Davis for \$1,228.25. There was never any offer to redeem from the tax sale. V. M. Ryon testified that her husband died January 10, 1899.

BEVIL et al. v. MOULTON et al.
(Court of Civil Appeals of Texas. May 28, 1903.)

PARTITION—COMMUNITY PROPERTY—OPERATION AND EFFECT.

1. Laws 1848, p. 273, c. 157, makes provision for the partition of community property, and requires the partition to be made in the same manner, as far as applicable, as partition for distribution among heirs. A husband and wife acquired real estate. The wife died, and the husband became administrator of her estate. He applied for partition of the community property. The court entered an order reciting the filing of the petition praying for partition and distribution of the estate among the heirs of the deceased wife, and directing the giving of the required notices. Later the court appointed commissioners "to make partition and distribution" of the estate of the deceased wife by setting apart one half to the husband and the other half to the heirs of the deceased wife, naming them. The commissioners made partition of certain community property, share No. 1 being drawn by the husband and share No. 2 being drawn by the heirs of the deceased wife. The court's decree set apart to the husband share No. 1, and to the heirs of the deceased wife share No. 2. *Held*, that the partition was only a partition between the estate of the deceased wife and her surviving husband, and was not a distribution of the half set apart to the estate of the wife to her heirs, but that half was left subject to further administration.

Appeal from District Court, Hardin County; L. B. Hightower, Judge.

Action by John R. Bevil and others against

Ausbury C. Moulton and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

J. N. Votaw, Cruse & Nall, and Greer & Minor, for appellants. D. W. Doom and D. H. Doom, for appellees.

GARRETT, C. J. This was an action of trespass to try title, brought by the appellants against the appellees for the recovery of land situated in Hardin county. There was a trial to the court without a jury, which resulted in a judgment in favor of the defendants in the suit. The facts were undisputed, and the question for decision is whether or not in a partition of the land in controversy as the community property of John and Frances Bevil it was taken out of the estate of Frances Bevil, deceased, by the partition, and set apart to her heirs, or was only a partition between the estate of Frances Bevil and her surviving husband, thus leaving it subject to further administration. The trial court filed conclusions of fact, which are referred to and adopted by this court, but the material facts may be briefly stated as follows: John Bevil and Frances Bevil were husband and wife in 1839, when the land in controversy was acquired. Frances Bevil died in 1852, and John Bevil was appointed administrator of her estate by the county court of Jasper county in 1853, and returned an inventory and appraisement, and proceeded with the administration thereof. On the 29th day of September, 1856, John Bevil filed his amended application for partition, and contemporaneously therewith filed his bond of the same date, with two sureties, conditional that the said John Bevil should well and truly pay or cause to be paid one-half of all community debts that may be established against said estate in amount not more than \$1,733.42, that being one-half of the amount of the inventory and appraisement, which bond was on the same day approved by the chief justice. It was indorsed, "Bond for Partition." At the April term, 1856, of the court, an order was entered in the estate of Frances Bevil, deceased, reciting that John Bevil, administrator of said estate, had filed his petition praying for partition and distribution of said estate among the heirs at law of the deceased, and directing that the notice required by law be given, citing all persons interested to appear at the next June term. Notice was issued and published citing the heirs and distributees of Frances Bevil, deceased, naming them. At the December term, 1856, an order was entered by the court in said estate, the proceeding being entitled "Partition and Distribution," appointing commissioners "to make partition and distribution of the property belonging to the estate of the said Frances Bevil, deceased, by setting apart to John Bevil, surviving husband of said deceased, one half

part of the same, and the other half to [naming them] heirs at law of Frances Bevil, deceased, and that a writ of partition do issue to them commanding them forthwith to proceed to make such partition and distribution in conformity to this decree, and to return their proceedings upon said writ to the present term of this court." At the January term, 1857, and on the 26th day of January, 1857, the court made a decree of partition reciting and stating as follows: "In the estate of Frances Bevil, deceased. And now come the commissioners, George W. Smyth, M. Neyland, and B. F. Mott, appointed to make partition and distribution of the estate of Frances Bevil, deceased, between John Bevil, surviving husband of deceased, and the heirs at law of the said Frances Bevil, deceased, and render into open court this report of said partition and distribution, which said report was seen, considered, examined, and approved by the court, and ordered to be recorded: 'To the Honorable Gideon J. Goode, Chief Justice of Jasper County: The undersigned commissioners, appointed by your honor at the December term of your honor's court for probate business, 1856, to make a partition between the estate of Frances Bevil, dec'd, in community, and her husband, John Bevil, respectfully show that they have performed that duty so far as practicable under the circumstances by dividing a portion of the property into two shares, as nearly as practicable, which are herewith presented marked "No. 1" and "No. 2." They further show that the said shares have been determined by lot, as the law requires. Share No. 1 was drawn for John Bevil, and that share No. 2 was drawn for the heirs of said deceased. The undersigned would further represent that there is a tract of land situated in Williamson county, part of the headright of John (Jehu) Bevil, which they have been unable to divide for want of more definite information and other impediments. There is also a tract of land situated on Sabine Pass, in Jefferson county, John R. Bevil headright, which they had been unable to divide for the want of more definite information. They would also suggest that outlet No. 34, in Bevilport, is also found on the exhibit of property appertaining to the estate of S. H. Everett, deceased, and as such has heretofore been distributed in the partition of said Everett estate.'" The report is signed and sworn to. Then follows the allotment attached to said report—share No. 1, set apart to John Bevil, including several tracts of land and town lots, among others the lower half of 3,978 acres of land of Thomas Spear's headright, fronting on the river Neches, and divided by line running east and west parallel to the lines of the survey; and share No. 2, set apart to the heirs of the deceased, Frances Bevil, including several tracts of land and town lots, among others the upper half of 3,978 acres

of land of Thomas Spear's headright fronting on the Neches river, and divided by a line running east and west parallel to the lines of the survey. And the decree then concludes as follows: "And it is further ordered, adjudged, and decreed by the court that the partition and distribution of the estate of Frances Bevil as made and reported to this court be, and the same is, declared to be firm and effectual forever, and that share No. 1 be, and the same is hereby, set apart to John Bevil, and that all right, title, and estate thereto fully vest in him, his heirs or assigns; and that share No. 2 be, and the same is hereby, set apart to the heirs of the said Frances Bevil, deceased, and that all the right, title, claim, and estate thereto fully vests in them, the said heirs of the said Frances Bevil, deceased." The upper half of the said 3,978 acres of land of the Thomas Spear's headright on the Neches river included in share No. 2, set apart to the estate of the heirs of Frances Bevil, deceased, is the land in controversy in this suit. At the April term, 1850, the order for the partition of the land in Williamson and Jefferson counties was renewed, and on report of the commissioners that it was incapable of partition it was ordered sold, and was finally sold by the administrator, and the sale confirmed. There was in evidence a certified copy from the minutes of the probate court of Jasper county, December term, 1856, of an account current and final settlement by John Bevil, administrator of the estate of Frances Bevil, as follows: "John Bevil, administrator of the estate of Frances Bevil, deceased, in account current and final settlement with said estate in partition and distribution in community with John Bevil and the heirs at law of the said Frances Bevil, deceased." Then followed a list of the lands belonging to the community estate, and a statement of their appraised value, including "3,978 acres of land, part of the headright of Thomas Spear, on Pine Island Bayou, at \$0.50, \$1,989.00." Also a list of notes due September 2, 1857, amounting in the aggregate to \$510.45. The "account" appeared to be only a statement of the assets belonging to the community estate. An original account or statement to the same effect was in evidence, except that it had the further item of amount transferred from R. W. Bevil's estate, \$141.50. It was sworn to January 3, 1857, and was indorsed: "Approved 3rd day of January, 1857. G. J. Goode, C. J. J. C." It was also indorsed: "Ordered by the court that the above notes and assets remain in the hands of John Bevil, and when collected to be applied to the payment of the debts of the said estate, and the remainder, if any, to be equally divided between said John Bevil and the legal heirs of said Frances Bevil, deceased." John Bevil, as administrator of said estate, filed to the December term, 1858, "an account current for final set-

tlement." It accounted for the notes belonging to the estate, but made no reference to the lands. Notice was ordered by the court to the next regular term. John Bevil died in 1863. At the October term of the court Friend M. Stewart was appointed administrator de bonis non of the estate of Frances Bevil, deceased, and duly qualified as such. The administration of the estate was afterwards transferred in accordance with the change in the court made by the Constitution of 1860 to the district court of Jasper county, and that court on November 23, 1872, on the application of the administrator, made an order for the sale of the land in controversy for the payment of debts and expenses of administration. The land was regularly sold, and the sale thereof was confirmed, and a deed therefor executed to M. C. Moulton by W. H. Bevil, administrator de bonis non, who had been appointed in the place of Stewart, who had died pending the proceedings for the sale. The plaintiffs have the title of M. C. Moulton.

When the application of John Bevil was filed in the county court of Jasper county, the law of 1856 had not been passed which provided for community administration by the survivor, and it was made under the act of 1848, which made provision for the partition of the community property as well as the partition and distribution of the estate among the heirs at law. Section 102 of the act (Laws 1848, p. 273, c. 157) required the execution of a bond by the survivor in order to obtain a partition of the community property as such, and the partition was required to be made in the same manner, as far as applicable, as partition for distribution among the heirs. The application in this case showed that the land was community property of John Bevil and his deceased wife, Frances Bevil, whose estate was being administered by him. It gave the names of her heirs, and asked that they be cited, and for partition between him and them. The features of the proceeding which distinguished it from an ordinary application for partition and distribution of an estate among the heirs of the deceased was that it did not seek to have the share of the deceased divided among her heirs, but set apart to them in bulk, and a bond was filed in compliance with the requirement of the statute for the partition of the community property between the survivor and the estate of the deceased. All of the proceedings in the partition are consistent with the view that it was only a partition between the surviving husband and the estate of his deceased wife. After the application had been filed, and on January 3, 1857, John Bevil filed a final exhibit, entitled "John Bevil, administrator of the estate of Frances Bevil, deceased, in account current and final settlement with said estate in partition and distribution in community with John Bevil and the heirs at law of the said Frances Bevil,

deceased." This exhibit showed sundry lands and notes on hand, including the Thomas Spear survey; and on the same day the court made an order that the above notes and assets remain in the hands of John Bevil, and when collected be applied in payment of the debts of said estate, and the remainder, if any, to be equally divided between John Bevil and the legal heirs of said Frances Bevil, deceased. This order was made pending partition, the decree for which was entered on January 26, 1857, and is consistent with and indicative of the fact that the share of the heirs was to remain subject to administration. After the partition title was done in the administration of the estate, and the two tracts of land that were found incapable of partition were not finally ordered sold until April 26, 1859. The war came on, and John Bevil died in 1863, and in 1866 the administration of the estate was reopened, and the land treated as assets of the estate, and finally sold as the property of the estate. There is nothing in the partition to indicate any purpose to take the property in controversy out of the assets of the estate, and set it apart to the heirs of Frances Bevil, except the expressions used in the orders of the court, "for the purpose of effecting a partition and distribution of said estate among the heirs at law of said deceased," and the use of the expression "partition and distribution" in the application and the report of the commissioners.

It is contended that, if it had been merely a partition between John Bevil and the estate of Frances Bevil, the decree would have vested title to share No. 1 in John Bevil in his own right, and title to share No. 2, the land in controversy, in John Bevil, as administrator of the estate of Francis Bevil, as required in such cases by section 102 of the law of 1848. But as the title to the community share of Frances Bevil at her death descended to and vested in her heirs, subject to administration, the decree simply declared the effect of the law without giving up its jurisdiction over the land as property of the estate; and, although the statute provided that the share of the deceased should be turned over to the executor or administrator, the title was really in the heirs, subject to administration, and the effect of the decree was that the administrator should retain control of the property until the close of the administration or the sale or partition thereof. The construction of the proceedings for the partition contended for by the defendants in the court below was evidently that of the probate court at the time of the partition and in all of its subsequent proceedings ending in the sale of the land to the defendant's predecessor in title.

We are of opinion that the probate court retained jurisdiction of the land in controversy, and that the partition was such a partition as was contemplated by section 102 of the act of 1848 between John Bevil

and his deceased wife, Frances Bevil, as of community property, and was not a distribution of the land to the heirs of Frances Bevil as of her estate.

The judgment of the court below will be affirmed. Affirmed.

DAVIS et al. v. JONES.*

(Court of Civil Appeals of Texas. May 9, 1903.)

EXECUTION — MANNER OF LEVY — VALIDITY — WAIVER OF IRREGULARITY — CLAIMANTS' JUDGMENT, ON BOND — INTEREST OF JUDGMENT DEBTOR SUBJECT TO EXECUTION.

1. Rev. St. 1895, art. 2349, provides: "A levy upon personal property is made by taking possession thereof, when the defendant in execution is entitled to the possession; where the defendant in execution has an interest in personal property, but is not entitled to the possession thereof, a levy is made thereon by giving notice thereof to the person who is entitled to the possession, or one of them when there are several." Article 2352 provides: "A levy upon the interest of a partner in partnership property is made by leaving a notice with one or more of the partners or with a clerk of the partnership." A levy was made by seizing property instead of by giving notice as provided in said articles, though one of the claimants was in possession as joint owner. *Held*, that the levy was not void, however irregularly made.

2. Article 5311, Rev. St. 1895, provides: "A claim made to property, under the provisions of this chapter ["Trial of Right of Property"], shall operate as a release of all damages by the claimant against the officer who levied on said property." *Held*, that by giving a claimants' bond, and proceeding under the statute to test their rights to the property, the claimants waived the manner of the levy.

3. Article 5307, Rev. St. 1895, provides: "In all cases where any claimant of property under the provisions of this title ["Trial of Right of Property"] shall fail to establish his right thereto, judgment shall be rendered against him and his sureties for the value of the property, with legal interest thereon from the date of the bond." *Held* to warrant a judgment on the claimants' bond, where they failed to establish the joint claim made by them.

4. Cattle were levied on under execution as the property of the debtor, and were claimed by two joint claimants, one of whom was the debtor's wife. The evidence showed that the bill of sale ran to the debtor; that he signed notes for the deferred payments, but had paid nothing; that both claimants had paid certain sums on account of the purchase price; that the money paid by the debtor's wife and part of that paid by the other claimant was paid on one of the notes after the levy was made. *Held* not to show that the debtor had no interest in the property subject to execution.

Appeal from District Court, Hardeman County; G. A. Brown, Judge.

Execution in favor of Thomas Jones against H. C. Davis and others. Levy on personal property, and Mary B. Davis and another intervene as claimants. From a judgment on the claimants' bond, they appeal. Affirmed.

Duncan G. Smith and Theodore Mack, for appellants. E. E. Diggs, for appellee.

*Rehearing denied June 13, 1903.

STEPHENS, J. The cattle in controversy were levied on as the property of H. C. Davis under execution in favor of Thomas Jones, and were claimed by Mary B. Davis, wife of H. C. Davis, and Minnie Humphreys, her sister. The court found that Minnie Humphreys owned a half interest in the cattle, and, inasmuch as the execution debt exceeded the value of the cattle, gave judgment on the claimants' bond, which had been executed by Mary B. Davis and Minnie Humphreys as joint claimants, for one-half the value of the cattle. From that judgment the claimants have appealed.

Their brief contains six assignments of error, all grouped, however, as one assignment, and followed by four propositions. We will consider, therefore, only the propositions.

Of these, the first two raise the question whether the court erred in rendering judgment on the claimants' bond after finding that one of the claimants owned a half interest in the property; the contention being that as this claimant was in possession as joint owner, the levy, which was made in the usual way, by seizing the property, instead of by giving notice as provided in articles 2349 and 2352 of the Revised Statutes, was null and void. But we do not so understand the law. The manner of the levy was waived by appellants when they employed this speedy and informal method of testing their rights to the property. Rev. St. 1896, art. 5311. But if not, the levy was certainly not void, however irregularly made. They failed to establish the joint claim as made, which warranted a judgment on their bond. Rev. St. 1896, art. 5307. Whether they were entitled to the reduction made in the judgment from the whole to one-half the value of the property claimed, we need not consider. They were certainly entitled to no more. See *Hamburg v. Wood & Co.*, 66 Tex. 171, 18 S. W. 623. This also disposes of the third proposition.

The fourth and last proposition reads: "The judgment is contrary to the law and the evidence, and utterly without evidence to support it, because the evidence shows that appellant Minnie Humphreys had paid \$2,471½ on the property, that the appellant Mary B. Davis had paid \$240.62½ on the property out of separate funds, and that H. C. Davis never paid anything on it, and therefore had no interest; and appellee, Thomas Jones, could not acquire any right in the property by virtue of the levy of his execution, if in fact there had been a legal levy." It does not follow from the facts stated in this proposition that the court erred in holding that the property was subject to execution as the property of H. C. Davis. The bill of sale under which appellants deraigned title was made by J. A. Scarbrough to H. C. Davis, and the notes for the deferred payments were signed by H. C. Davis. A part of the money paid by

Minnie Humphreys to Scarbrough and all the money paid by Mary B. Davis was paid on one of these notes after the levy on the cattle had been made. If, then, Mary B. Davis acquired any interest in the cattle as against appellee, her right could not have arisen from such payment. Nor do the facts stated in the proposition show that H. C. Davis had no interest in the cattle subject to execution. The issue of fraud in the transfer of the property from H. C. Davis to appellants was raised by the pleadings, and also by the circumstances in evidence, but we are not required by this proposition to review the evidence on that issue. It is sufficient to hold that every fact stated in the proposition might be true, and yet the judgment be correct. It is therefore affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS v. SCHILLING.*

(Court of Civil Appeals of Texas. May 9, 1903.)

SERVANT—INJURIES—NEGLIGENCE—EVIDENCE—
RES GESTÆ—SELF-SERVING DECLARATIONS—HEARSAY—INSTRUCTIONS.

1. In an action against a railroad for injuries to a switchman, the court instructed that, if plaintiff was injured by a risk assumed, the verdict should be for defendant; that plaintiff assumed the risks ordinarily incident to his employment, and, if his injuries were caused by risks incident thereto, or if the result of an accident, the verdict should be for defendant; and a further instruction placed the burden of proof on plaintiff. *Held* that, in view of such instructions, an instruction that it was the duty of the railway company to use ordinary care in the operation of its trains and cars so that its employees should be reasonably safe in the discharge of their duties was not erroneous on the theory that it told the jury that by the exercise of ordinary care employees would be safe, while in fact the duties of a switchman were dangerous per se, and could not be made reasonably safe.

2. The court charged at defendant's request that if the jury found for plaintiff, in arriving at the amount of the verdict, if they believed that a surgical operation would benefit plaintiff, and that ordinary care would require him to have it performed, they should only consider plaintiff's injuries as they would have been had such operation been performed at such time as a person of ordinary prudence would have had it performed. At plaintiff's request the court charged that plaintiff would not be required to have an operation performed that a person of ordinary care would not have had performed, and that if a person of such care, in the condition that plaintiff was in, would not have had the operation, they would consider plaintiff's injuries as they were without the operation. *Held* that, the court having given defendant's charge, it was proper to give that for plaintiff.

3. An instruction is properly refused where the evidence is not sufficient to raise the issue embraced in it.

4. A switch foreman instructed a switchman that a certain number of cars would be cut from a train and sent onto a certain track. As the cars were running onto the siding, he boarded them, and the engineer suddenly applied the brakes, and the sudden checking of the

*Rehearing overruled June 6, 1903.

car threw plaintiff forward, and as he went to step over onto the other car the two cars parted, and he fell between them. *Held* that, the switchman being ignorant of the fact that the foreman had made a cut in the cars being switched, and not presuming that the stopping of the engine would affect him, the making of such cut was the proximate cause of the injury.

5. It was not error to admit plaintiff's testimony that under the direction of the foreman and from custom all the cars should have gone in coupled together, though the petition merely sought a recovery under the special instructions, the instructions being in accord with the custom.

6. Testimony of a witness that he was 12 feet from plaintiff when the accident happened, and that it could not have been over a minute when he got to him; that plaintiff told witness that the foreman "changed his mind or cut; I forgot which it was"—was admissible as *res gestæ*.

7. The testimony was not self-serving.

8. The testimony was not hearsay.

Appeal from District Court, Grayson County; Rice Maxey, Judge.

Action by B. E. Schilling against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

T. S. Miller and Head & Dillard, for appellant. C. H. Smith and Wolfe, Hare & Semple, for appellee.

BOOKHOUT, J. Appellee, as plaintiff, instituted this suit on December 16, 1901, against the appellant, as defendant, to recover \$50,000 damages for personal injuries alleged to have been sustained on account of the negligence of its foreman, George Boggs, in giving to plaintiff, as switchman, improper orders in reference to the handling of the cars about which he was engaged in the Denison yards on the night of April 16, 1901. A trial before a jury on October 17, 1902, resulted in a verdict and judgment in favor of appellee for \$13,000, to reverse which this appeal is prosecuted.

Conclusions of Fact.

On the 16th day of April, 1901, the appellee, while in the employ of appellant as switch brakeman in its yards at Denison, Tex., received a permanent injury, whereby he sustained damages. George Boggs was switch foreman, and it was his duty, when freight trains arrived, to see that the cars were placed on the proper track in the yards. A train came in from the south, known as the "Mineola Local," consisting of a caboose, five flat cars, and several box cars. This train was taken possession of by the switch crew to be broken up and the cars distributed on the proper tracks. The train was brought down by Boggs and two switchmen to where the plaintiff was standing. Boggs called out instructions to plaintiff as to how the cars were to be placed. He said, "The caboose goes to Y and flats to the east," meaning that the caboose was to be placed on the Y track, and the flat cars were to be placed on the

east track; the east track being an extension of the lead track. As foreman, it was the duty of Boggs to make the cut of the cars he desired to go on the different tracks. The caboose was cut off by Boggs and kicked in on the Y track, the brakeman, Landaker, riding the caboose in for the purpose of setting the switch. After the plaintiff had closed the Y switch, and seen that the proper signals were displayed, he stepped over to the west of the lead track. As the flat cars came by, he waited until the southwest corner of the second flat car from the south end of the train reached him, when he boarded the same for the purpose of riding the flat cars to the east track, and, at the proper time, setting the brakes. He testified that: "As the second car reached me, I placed my lamp on my right hand, threw my right hand in the iron pocket and my left foot on the box below the car covering the journal of the wheel and my left hand on the car and drew myself up on the flat car, and I was just in the act of straightening up on the car when the engineer applied the air on the engine. When he did this the slack ran out of the train, which caused the cars to jerk, and it threw me forward toward the south, and as I went to step over onto the other car the two cars parted, and I fell between them. The cars at this time were going eight or nine miles an hour. * * * The five flat cars should have been cut off together, not separately, one by one; but the entire five ought to have gone in coupled together. The flat cars were not cut off in this way, but the most southern car was cut off by itself from the rest." We find the facts as above testified to, and that the foreman, Boggs, was guilty of negligence in giving the order he did, and in cutting off the first flat car from the other four, and in not having all five of the flat cars coupled together when they were kicked in on the east track; and we further find that such negligence was the proximate cause of the injury to appellee. In deference to the verdict, we find that appellee was not guilty of contributory negligence, and that he has sustained damages in the amount found by the jury.

Conclusions of Law.

1. It is contended that the trial court erred in instructing the jury as follows: "It is the duty of the railway company to use ordinary care in the operation of its trains and cars, so that its employes shall be reasonably safe in the discharge of their duties;" the contention being that this charge assumes and tells the jury that by the exercise of ordinary care in the operation of its trains and cars the employes will be reasonably safe in the discharge of their duties, when in fact the operation of railway trains and cars, especially with the duties of switchman, is dangerous per se, and cannot be made reasonably safe for switchmen. It is further insisted that said charge is misleading. The charge should

be construed as a whole, and when this is done we do not think the jury could have placed upon it the construction contended for by appellant. At the instance of the appellant the court instructed the jury that: "If you believe from the evidence that under defendant's method of conducting the switching it was the duty of switchmen to watch out for the cuts, and determine the number of cars in them, then you are instructed that the plaintiff assumed the risk in doing switching in this way, and it was the duty of himself to look out for the cuts, and determine the number of cars in them; and, if he was injured by a risk thus assumed, you will return a verdict for defendant." They were further instructed that the plaintiff, "in entering upon the employment of a switchman with the defendant company, assumed the risks and dangers ordinarily incident to such employment, but did not assume any risks arising from the negligence of defendant, if any you find there was." And also: "If you believe from the evidence that plaintiff's injuries, if any, were caused by one or more of the risks or dangers which were ordinarily incident to his employment as a switchman, or if from the evidence you believe that plaintiff's injuries, if any, were the results of an accident—that is, that they were not caused by any negligence of said George Boggs or of plaintiff—then, in either of these events, you will find for the defendant." The court further placed the burden of proof upon plaintiff. We do not think the jury could have inferred from the whole charge that it was possible to operate the train or cars or conduct the work of switching and making up trains without the risks and dangers ordinarily incident to such employment.

2. Complaint is also made of the following charge, given at the request of plaintiff: "You are instructed that plaintiff would not be required to have an operation performed that a person in the exercise of ordinary care would not have performed. So, if you believe from the evidence that a person of ordinary care, for his own physical welfare, in the condition in which you find and believe from the evidence plaintiff was and is, would not have an operation performed, and if you find for the plaintiff, then you will consider plaintiff's injuries in the condition that you find and believe from the evidence that they were and are without such operation." It is insisted that the evidence was not sufficient to authorize the submission to the jury of the issue as to whether or not a person in plaintiff's condition, in the exercise of ordinary care, would fail to have an operation performed in order to obtain relief and lessen his injuries. The court had previously, at the request of appellant, instructed the jury as follows: "If you find in favor of plaintiff, then, in arriving at the amount of the verdict, you are instructed that if you believe from the evidence a surgical operation would benefit plaintiff's leg, and that the exercise

of ordinary care on plaintiff's part would require him to have such operation performed, then it would be plaintiff's duty to have this done, and you will only consider plaintiff's injuries as they would be had this been done at such a time as a person of ordinary prudence would have had it performed." The court having, at the request of appellant, given the last charge quoted, it was proper for it to instruct the jury as was done in the charge requested by appellee. There was as much evidence to warrant the instruction given at the request of appellee as there was for the giving of the prior instruction on the same issue at the request of appellant.

3. It is insisted that the court erred in refusing the following special charge requested by defendant: "If you believe from the evidence that plaintiff was himself guilty of negligence, either in the manner he got upon the car or in standing too near the end of the car after he got thereon under the circumstances that he did, and that such negligence on his part proximately contributed toward causing his injuries, you will find in favor of defendant, even though you may believe that the defendant was also guilty of negligence which proximately contributed toward causing plaintiff's injuries." The evidence was not sufficient to raise the issue embraced in this charge, and hence there was no error in refusing the same.

4. The defendant requested the following special charge, which the court refused, and its refusal is made the ground of the fifth assignment of error: "If you believe from the evidence that in the discharge of his duties plaintiff was near the end of the flat car, and that by the checking or stopping of said car he was caused to lunge or step forward in the direction it had been going, and was thereby caused to fall in front of the car, you will find in favor of defendant, even though you may believe that, had the car still in front of him not been negligently uncoupled, he would have saved himself by stepping on it, as in such case the negligent uncoupling of such car would not be the proximate cause of plaintiff's injuries." The refusal of this charge was not error. The negligence claimed by appellee was that the foreman, after informing him that the flat cars would be cut at the last of such cars on the north, without notice, cut off the last car on the south, thereby placing plaintiff, without warning, at a dangerous place, made so by the manner in which the work had to be done, which included the sudden stopping of the engine and cars not cut. If the cars had been cut at the point Boggs informed appellee the cut would be made, then the sudden stopping of the engine would not have affected plaintiff in his position on the car at the time he was injured. Being ignorant of the fact that the foreman had changed the cut, and not presuming that the sudden stopping of the engine would affect him in his position, he was, without warning, placed

in a dangerous position, which proximately caused the injury.

5. There was no error in refusing the special charge requested by defendant, the refusal of which is made the ground of the sixth assignment of error, said charge being to the effect that, although the jury may believe that Boggs called, "Caboose to the Y and flats to the east track!" yet if they further believed from the evidence that after this, and before the caboose was placed on the Y, Boggs gave another call, which changed the call to Schilling, such as Schilling could and should have heard, and under this call, under the custom of doing the work, the switchman was himself to look out for cuts, and determine how many cars they contained, then the plaintiff assumed the risk of this method of doing the business, and the jury would find for defendant. The evidence did not warrant the giving of such charge. The evidence did not tend to show a custom that the switchmen were to look out for cuts, and determine how many cars they contained. The evidence shows that, if any change was made in the order by Boggs, the appellee had no notice of it.

6. We are of the opinion that there was no error in admitting in evidence over the objection of defendant the testimony of plaintiff that: "Under the direction of Foreman Boggs at the time the switching was being done, and from the custom while we were switching a train, the five flat cars went to the east track. Under those instructions and the custom in the yards with reference to switching a train, the flat cars should have been uncoupled from the rest of the train four cars above where the uncoupling was actually made. The five flat cars should have been cut off together, not separately one by one, but the entire five should have gone in coupled together." While the petition sought a recovery on the special instructions given by Foreman Boggs, the general and special instructions were the same, and, both being in accord with the usual custom of switching in the yards, no damage could have accrued to appellant by admitting said evidence. It would seem that evidence of the usual and customary manner of doing the work was admissible for the purpose of determining whether, under the circumstances, the foreman was guilty of negligence and for refuting any imputation of contributory negligence on the part of appellee.

7. There was no error in admitting over the objection of defendant the testimony of George Landaker that he was 12 feet from the plaintiff at the time he was hurt, and he went immediately to him, and that it could not have been over a minute after plaintiff was hurt before witness got to him, and that the first thing plaintiff said after witness got to him was to take his mother's address, and then said, "Boggs changed his mind, or cut; I forgot which it was," to which the counsel for defendant objected for the following

reason: because the same was self-serving and hearsay. The said evidence is not self-serving or hearsay. The exclamation was admissible as *res gestæ*. *Railway Co. v. Robertson*, 82 Tex. 657, 17 S. W. 1041, 27 Am. St. Rep. 929; *Railway Co. v. Anderson*, 82 Tex. 516, 17 S. W. 1039, 27 Am. St. Rep. 902; *Railway Co. v. Davis* (Tex. Civ. App.) 65 S. W. 217; *Railway Co. v. Bond* (Tex. Civ. App.) 20 S. W. 930.

8. Assignments numbered from 11 to 18, inclusive, complain in one form or another of the finding of the jury. These assignments, as well as the nineteenth, to the effect that the verdict is excessive, are disposed of adversely to appellant by the conclusions of fact as found by this court.

Finding no error in the record, the judgment is affirmed.

BURKHEAD v. BUSH.*

(Court of Civil Appeals of Texas. May 9, 1903.)

SCHOOL LANDS—RIGHTS UNDER HOMESTEAD SURVEYS—PATENTS.

1. In the case of lands equitably owned by the public free school fund, one whose homestead survey thereof, under which he claims, not having been made till October, 1898, and the benefits of Act April 18, 1899 (Laws 1899, p. 123, c. 81), and Act Feb. 23, 1900 (Laws 1900, p. 23, c. 11), being limited to those whose homestead surveys were made prior to such time, it cannot avail him that he became an actual settler and made application for such survey before that time.

2. A patent purporting to have been issued by virtue of a purchase and payment under a certain act establishes in the patentee at least a *prima facie* right to the land.

Appeal from District Court, Scurry County; Arthur Yonge, Special Judge.

Action by A. P. Bush, Jr., against B. T. Burkhead. Judgment for plaintiff. Defendant appeals. Affirmed.

Jenkins & McCartney and C. R. Kinchen, for appellant. Ed. J. Hamner, for appellee.

CONNER, C. J. Appellant prosecutes this appeal from an adverse judgment for the N. E. $\frac{1}{4}$ of section 127, block 97, situated in Scurry county. It is admitted that section 127 is situated within what has long been known as the "Texas & Pacific Reservation," and is one of the sections recovered by the state of Texas from Bacon and Graves, and which was expressly declared to be public free school land in the act of the Legislature approved April 18, 1899. See Gen. Laws 26th Leg. p. 123, c. 81.

Appellant claimed as the assignee of one H. Menn. H. Menn was the head of a family, without homestead, and as such became an actual settler on the land in controversy, and, on January 1, 1898, made application in due form for its survey as a homestead do-

*Rehearing denied June 6, 1903.

nation, in accord with the provisions of Rev. St. 1879, arts. 3939, 3940, and of an act for the relief of actual occupants of public lands, approved April 24, 1879 (Laws 1879, p. 160, c. 145). The survey was made in accord with the application on October 26, 1898, and the field notes duly recorded in the office of the county surveyor on the 29th day of the same month, and filed in the General Land Office on September 11, 1899. There was also filed in the General Land Office at the same time proof by H. Menn and two other credible persons that H. Menn had in good faith occupied and improved said land as a homestead for a period of three consecutive years. On August 30, 1899, H. Menn applied to purchase the land at the price of \$1 per acre; the application, as recited therein, being under the provisions of an "act to provide for the sale of all lands heretofore and hereafter surveyed and set apart for the benefit of the public free schools and the several asylums, and the lease of such lands, and of the public lands of the state, and the patenting of any part of the said lands for church, cemetery, or schoolhouse sites, and to prevent the free use, occupancy, unlawful inclosure, or unlawful appropriation of such lands, and to prescribe and provide adequate penalties therefor, as provided for in title 87, c. 12a, of the Revised Civil Statutes of 1895, and the amendments thereto by the act of May 19, 1897 (Laws 1897, p. 184, c. 129), and as provided for in chapter 81, p. 123, of the act passed at the Twenty-Sixth Legislature." This application, together with H. Menn's obligation for \$156, bearing interest at the rate of 3 per cent. per annum, payable, together with one-fortieth of the principal, on or before the 1st of November of each year, was transmitted to and filed in the General Land Office at the same time as were the field notes and proof of occupancy above mentioned, to wit, on September 11, 1899. H. Menn at the same time forwarded to the State Treasurer the sum of \$4, as first payment of one-fortieth of the principal under his said application to purchase. It is admitted that section 127 had been classified and appraised at \$1.50 per acre at the time H. Menn applied to purchase the quarter section in controversy, and that no change in appraisement has since been made. It is also admitted that H. Menn's application to purchase had been rejected by the Commissioner of the General Land Office, and said \$4 returned to him, on April 19, 1900. Upon H. Menn's transfer to appellant, which bore date March 29, 1900, and which was duly recorded in Scurry county August 27, 1900, appellant, who is the head of a family, and without other home, went into possession, and became an actual settler upon the land in controversy, claiming it as his home. Appellee, who was plaintiff in the suit, adduced in evidence a patent from the state of Texas, dated September 12, 1901, granting to him said section 127, and reciting that he had purchased and

fully paid for said land in accordance with an act approved February 23, 1900.

Appellant very forcefully insists that on January 1, 1898, and until the act of April 18, 1899, took effect, the land in controversy was unappropriated public domain, and subject to location and appropriation under the homestead donation acts, and that hence H. Menn, by his actual settlement on, survey, etc., acquired a homestead right, entitling appellant, as his assignee, to a recovery. But we have been unable to distinguish this case from that of *Hogue v. Baker*, 45 S. W. 1004, wherein our Supreme Court held that lands situated and similarly circumstanced as that in controversy were not subject to homestead entry and acquisition. For here it was proven, as was admitted in the *Hogue* Case, that the records of the General Land Office established the facts recited in the preamble of the act of February 23, 1900, and contained in chapter 11, p. 29, of the called session of the Twenty-Sixth Legislature. Accepting, then, the case referred to as conclusive against the homestead donation right asserted, we have land recovered by the state, equitably owned by the public free school fund, and which was of the general character or class of lands expressly set apart and appropriated to such fund by the act approved April 18, 1899 (Laws 1899, p. 123, c. 81), before referred to. It was provided in the act, however, that it should not apply to lands that had in good faith and for value been purchased from the original locator prior to the institution of the suit in which the state had recovered such lands, and where such purchaser had not been made a party to the suit. This act, in section 3b, also provided that pre-emption locations on any of the lands mentioned therein which were settled upon and surveyed as required by law prior to May 20, 1898, and which had been continuously so occupied as a home, should not be disposed of under the act, or sold or leased by the Commissioner of the General Land Office under any law, but should remain for future legislative action; and (quoting from the section cited) "provided, those who have attempted in good faith to acquire any such lands under the homestead donation act shall have a preference right of six months, regardless of the provisions of this section, to purchase such lands at one dollar per acre." The next legislative act applying was that approved February 23, 1900, also hereinbefore mentioned. This act, so far as applicable, if at all, to appellant's title, in section 7 thereof, gave a preference right to purchase at not less than \$1 per acre "to all applicants for 160 acres or less, who were actual settlers upon said lands on January 1, 1900, who had settled upon and had homestead donations surveyed prior to May 23, 1898." Among other things, it was also provided in section 11 that in cases where lands had been recovered by the state which had been purchased by one not a party to the suit, who had paid

full value, without actual knowledge of any defect in the title, such purchaser should have the right to buy the lands so purchased by him at not less than \$1 per acre. Otherwise than by the recitals in the appellee's patent, it was not shown that he falls within the scope of any of the privileges accorded in either of the legislative acts of 1899 or 1900. But the patent at least purported on its face to have been issued by virtue of a purchase and payment in accordance with the latter act, and at least established in him a prima facie right to recover; and the burden was certainly upon appellant to show not only that he, together with the vendor, Menn, was within the benefits and privileges accorded by the legislative acts referred to, but also that his right was superior to that of appellee. This we do not think he has done.

The homestead survey under which appellant claims was made in October, 1898, and the field notes were not filed in the land office until September 11, 1899. The benefits of both the act of 1899 and of 1900 were limited to those whose surveys had been made prior to this time, and the application to purchase upon which appellant relies was very clearly insufficient under any other provision of the school land law; the land in question having been appraised by the commissioner at \$1.50 per acre.

It not appearing that appellant has superior right, nor that the Commissioner of the General Land Office, in awarding the land by patent to appellee, exceeded his powers, it is ordered that the judgment be affirmed.

POLING v. SAN ANTONIO & A. P. RY. CO.*

(Court of Civil Appeals of Texas. May 20, 1903.)

MASTER AND SERVANT—HOSPITAL FUND FOR RAILROAD SERVANTS—IMPROPER TREATMENT—LIABILITY OF COMPANY—INCOMPETENCE OF PHYSICIAN—EVIDENCE—MEASURE OF CARE—HARMLESS ERROR.

1. In an action against a railroad for damages alleged to have been caused by the employment of an incompetent surgeon in the company's hospital to treat plaintiff, an employé, in which the surgeon had testified that he had no diploma, the exclusion of evidence that the surgeon was not a graduate of a medical college, because he did not possess a diploma, was harmless.

2. It appearing that the surgeon had a certificate authorizing him to practice, evidence that he had not been properly examined by the board of medical examiners was incompetent.

3. Evidence that a physician, testifying as a witness, who had never examined the surgeon, did not consider him well versed in the science of medicine, was immaterial.

4. A newspaper account of the proceedings of the board of medical examiners was inadmissible.

5. Where a railroad retains a certain sum monthly from the wages of its employés for the purpose of furnishing medical attention to such employés when necessary, but derives no profits

from such fund, it is only required to use ordinary care in the selection of a competent physician.

6. If the railroad used due care to employ a competent physician, it is not liable for injuries to an employé caused by such physician's improper treatment.

Appeal from District Court, Nueces County; Stanley Welch, Judge.

Action by W. A. Poling against the San Antonio & Aransas Pass Railway Company. Judgment for defendant. Plaintiff appeals. Affirmed.

J. C. Scott, for appellant. Stayton & Berry, for appellee.

NEILL, J. This suit was brought by appellant against appellee to recover \$20,000 damages for the loss of sight in his left eye, alleged to have been occasioned by the negligence of the defendant company. The substance of the allegations of plaintiff's cause of action is that on or about April 17, 1897, while he was in the employ of the defendant as its station agent at Kerrville, he was against his will required by the company to sign an agreement, the purport of which was to authorize the defendant to deduct from his wages 50 cents per month, to be appropriated by the company as a hospital fee to be used in the care and treatment of its servants for personal injuries or sickness incurred by them while in its service; that at or about the time stated defendant had in its service as physician at Kerrville one E. Palmer, whose duty it then was to furnish medical attention to plaintiff as an employé of the company, and its other employés when such attention was needed; that Palmer was not a competent physician, or legally qualified as such to practice medicine; that this was known to the defendant when it employed him as a physician, and retained him in its service with such knowledge of his incompetency; that on or about the date aforesaid some foreign substance got in plaintiff's eye, and he applied to Palmer, as the company's physician, to remove the substance, and treat his eye for the injuries inflicted by it; and that Palmer, on account of his incompetency, so negligently treated his eye as to cause plaintiff the loss of its sight therefrom. It was also alleged that the defendant exercised no care in the selection of Palmer as its physician, and negligently and carelessly retained him in its service as such after knowledge had been brought home to it of his incompetency. The defendant, after answering by a general denial, pleaded that plaintiff was not treated for his injured eye by Palmer, as the physician of the company, but that plaintiff employed him to minister such treatment as his private physician; that when plaintiff applied to Palmer for treatment, he, having lived in Kerrville for

*Rehearing denied June 17, 1903.

¶ 6. See Master and Servant, vol. 34, Cent. Dig. § 142.

a long time, where Palmer was engaged in the general practice of medicine, knew, if Palmer was incompetent, of his incompetency to practice his profession; that the defendant exercised ordinary care in employing Palmer as physician in its service, and to ascertain his efficiency during the time of his employment to practice medicine; and that, if plaintiff was injured by the negligence of Palmer, the company was not liable for the consequences of such negligence. The case was tried before a jury, and the trial resulted in a verdict and judgment for the defendant, from which the plaintiff has appealed.

The evidence developed upon the trial shows the following facts: That, as alleged by the plaintiff, the defendant exacted from him and its other employes 50 cents each per month, to be taken from their wages, as a hospital fee to be used in the treatment of the company's servants for sickness and personal injuries received while in its employment. This fee, however, was not exacted or appropriated by the company for its profit, but simply for the benefit of its employes, from whom it was collected. The fund realized from its collection was not sufficient to defray the expenses for hospital and physician's services for which it was designed, and the deficit was made up and paid by the company itself. At the time plaintiff alleges the injury to his eye, Dr. Palmer was in the employment of the defendant at Kerrville as its physician for the treatment of its employes in sickness and for personal injuries. Before employing him the company, through its medical director, made diligent inquiry of responsible and intelligent citizens in and around Kerrville, where Palmer had been engaged in the practice of medicine for nearly 20 years, as to his competency. The information received by the company in response to such inquiries was that Palmer was a competent physician and skilled surgeon, and fully capacitated to discharge the duties for which he was employed by the company. His general reputation in and around Kerrville as a competent physician and surgeon was good, and such reputation continued until this case was tried. Palmer, according to his own testimony, never had a diploma to practice medicine. On the 15th of August, 1892, the board of medical examiners of the Thirty-Eighth Judicial District of the state of Texas issued Palmer a certificate that he was duly qualified to practice as a physician and surgeon in accordance with the laws of the state of Texas, which certificate was signed by the president and secretary of the board, and on the 7th day of November, 1892, was handed by Palmer to A. E. McFarland, who, the testimony shows, was at that time the clerk of the district and county courts of Kerr county, for record, and was on that day filed by him for record, but by mistake, instead of being recorded in the office of the

district clerk, was recorded in that of the county clerk, and was never recorded in the office of the district clerk until August 27, 1900. On or about April 17, 1897, the plaintiff got some foreign substance in his eye, and applied to Dr. Palmer to remove it. Upon examination the doctor found nothing in his eye, but discovered its lid was granulated, and treated it for the granulation. His treatment, according to the testimony of the physicians, was such as is ordinarily given by competent physicians in such cases. However, Dr. Palmer, finding in the progress of his treatment that the disease of the lid was more aggravated than he thought upon his first examination, sent plaintiff to San Antonio to a skilled oculist for examination and treatment. The diagnosis of the oculist in San Antonio was the same as Dr. Palmer's, and he pronounced the treatment that had been given by Palmer as the proper remedy to be administered for the disease, and sent the patient back to Kerrville, telling him that Dr. Palmer could treat him as well as he could. It finally developed, upon further examination and treatment, that plaintiff's eyeball was injured in some way to the extent that the sight in his left eye was practically lost. As to whether Dr. Palmer treated plaintiff in his capacity as a physician and surgeon for the defendant, or as plaintiff's private physician, the testimony is conflicting, and upon this issue we conclude as a fact that the treatment given was not as the physician of the company, but as plaintiff's private physician. We also conclude that the defendant used ordinary care in the selection of Dr. Palmer as its physician and surgeon; that he was a competent physician and surgeon, and fully qualified to discharge the duties of his employment; and that the loss of sight in plaintiff's eye was not caused either by the negligence of defendant or of Dr. Palmer.

Conclusions of Law.

1. The plaintiff was not prejudiced by the refusal of the court to permit the witness Everett's testimony that "E. Palmer was not a graduate of a medical college, because he did not possess a diploma," to be introduced in evidence, for the reason that Dr. Palmer himself testified that he had no diploma. The testimony of Palmer settled the fact that he had no diploma, and the additional reason given by the witness in the answer for his conclusion that Dr. Palmer had no diploma is immaterial.

2. As to whether Dr. Palmer stood an examination before the board of medical examiners that issued him the certificate referred to, authorizing him to practice medicine, is immaterial to any issue in this case. The certificate was issued to him, and as to whether the board acted irregularly in its issuance cannot be made a subject of inquiry in this case. Therefore the trial court did

not err in excluding the evidence offered by the plaintiff to prove that Dr. Palmer never stood an examination for license to practice medicine in Texas.

3. This answer of the witness Everett: "I practiced medicine in the same town Dr. Palmer did nearly eight years, and did not consider him well versed in the elementary branches of medicine; but, having never examined said Palmer, it is impossible for me to say just to what extent is his knowledge of medicine, and his ability, qualification, and fitness for the practice of medicine in its various branches—i. e., anatomy, physiology, pathological anatomy, pathology, surgery, practice of medicine, etc."—is immaterial upon the issue as to whether the defendant exercised ordinary care in employing Palmer as its physician; for, according to the answer itself, the witness shows that it was impossible for him to state the extent of Palmer's knowledge of medicine. That he did not consider Palmer well versed in the elementary branches of the profession is shown by the answer to be simply the opinion of the witness, without knowledge of facts for its basis.

4. We cannot perceive upon what principle it can be contended that the publication in the Kerrville News, a newspaper published and circulated in Kerr county, Tex., of date February 1, 1894, of the proceedings of the medical board of examiners of the Thirty-Eighth Judicial District, could be admitted in evidence in this case. Such publication was purely hearsay, and there was no evidence introduced or offered tending even to show that the defendant company had any knowledge of it, either at the time or after it employed Dr. Palmer as its physician.

5. As we have before intimated, the certificate issued by the authorized board of medical examiners and deposited for record on the 7th day of November, 1892, with the county and district clerk of Kerr county, was sufficient in law to authorize him to practice medicine in that county, and pretermitted any issue as to his being a licensed physician under the laws of this state; and the court did not err in instructing the jury to that effect. Besides, from the nature and character of this suit, and the evidence developed, it may be questioned as to whether or not Palmer was a licensed physician under the laws of Texas could be made an issue in this case.

6. The court did not err in either of these paragraphs of its charge:

"In this case the plaintiff has failed to show that the defendant has retained for its own benefit and profit the hospital fund of 50 cents per month from each of its employes, but all the evidence shows that the defendant company derives no profit from the retention of said hospital fund from its employes, nor has it designed same for profit, and that therefore in this case the only measure of duty owing to the said plaintiff by the said defendant, arising from its agreement to

furnish him with medical attention when needed, was the use of ordinary care to select, employ, and retain a competent physician as its local physician at the town of Kerrville for the treatment of plaintiff and the other employes of defendant in case of sickness or injury.

"If, on the contrary, you believe that the defendant, the San Antonio & Aransas Pass Railway Company, selected, employed, and retained Dr. E. E. Palmer as its railway physician at Kerrville, and that in selecting, employing, and retaining him it used ordinary care—that is, the care that an ordinarily prudent person would have used—to select a competent physician, you will find a verdict for the defendant, and whether the said Dr. Palmer treated the eye of plaintiff properly or not."

Railway v. Scott, 18 Tex. Civ. App. 321, 44 S. W. 589; S. P. Co. v. Mauldin, 19 Tex. Civ. App. 166, 46 S. W. 650; Railway v. Early (Ind.) 40 N. E. 257, 28 L. R. A. 546; Elghmy v. Railway (Iowa) 61 N. W. 1056, 27 L. R. A. 296; Railway v. Sullivan (Ind.) 40 N. E. 138, 27 L. R. A. 840, 50 Am. St. Rep. 313; Railway v. Artist, 60 Fed. 365, 9 C. C. A. 14, 23 L. R. A. 581.

7. The undisputed evidence shows that the defendant did not undertake to furnish and provide plaintiff with medical attention for profit. Therefore the court did not err in refusing to give, at plaintiff's request, special charge No. 1 as complained of in his eighth assignment.

8. What we have said in regard to the preceding assignments of error demonstrates that the court did not err in failing to give the other special charges requested by the plaintiff.

9. Our conclusions of fact dispose of the assignment which complains of the insufficiency of the evidence to support the verdict.

There is no error assigned requiring a reversal of the judgment, and it is affirmed.

JOHNSON v. BIBB.*

(Court of Civil Appeals of Texas. May 16, 1903.)

PUBLIC LANDS—COMMISSIONER OF LAND OFFICE—SETTING ASIDE UNAUTHORIZED FORFEITURE—SUBSTITUTE VENDEE.

1. An unauthorized, inadvertent attempt of the Commissioner of the General Land Office, under Rev. St. 1895, art. 4218, to forfeit land, and payments thereon, for an abandonment, may be set aside by him, it appearing there was no abandonment.

2. Even if a sale of public school lands in 1898 be void, because to a minor, it is validated by Gen. Laws 1899, p. 259, c. 150, providing that where any person prior to January 1, 1899, has made application to purchase such lands, and taken certain steps, which were taken by the minor, the award of the land to him shall be validated.

3. A sale to a substituted purchaser of public lands, with recognition by the Commissioner

*Rehearing denied June 13, 1903, and writ of error denied by Supreme Court.

of the Land Office and the State Treasurer of conveyances to him by the original purchaser and prior substituted purchasers as having the effect of an equitable assignment of the benefits of the original purchaser's payment of one-fortieth of the purchase price, renders immaterial any invalidity in the original or prior substitute sales, and makes unnecessary any payment by him of the original one-fortieth of the purchase money; Rev. St. 1895, art. 4218k, providing that, when its terms have been complied with, the substitute vendee shall become the purchaser direct from the state, and such article not requiring him to make the first payment as in case of an original purchaser.

Appeal from District Court, Jones County; N. R. Lindsey, Judge.

Suit by Robert T. Bibb against John R. Johnson. Judgment for plaintiff. Defendant appeals. Reversed.

Jno. B. Thomas and C. H. Steele, for appellant. Thomas L. Blanton and Theodore Mack, for appellee.

CONNER, C. J. On August 6, 1900, appellee instituted this suit in the ordinary form of trespass to try title to recover from appellant school sections 94 and 100, situated in Jones county, and, upon a trial before the court without a jury, obtained judgment in his favor.

At appellant's request, the court filed conclusions of fact, which we think are fully sustained by the evidence, and which are hence adopted entire. From the findings it appears that said sections had been duly sold, the sale forfeited, and the land reclassified as dry grazing land, and appraised at \$1 per acre, prior to May 19, 1898, and that on that day B. B. Brockett, a minor over 18 years of age, in due form applied to purchase section 94 as an actual settler thereon, and section 100 as additional to his home section. He executed the proper obligations, and the proper amount as first payment was transmitted to and received by the State Treasurer, and the lands were awarded to him. On December 27, 1898, Brockett in due form conveyed both sections to one C. Pool, who forthwith became an actual settler on section 94, and who on March 6, 1899, in due manner and form as required by Rev. St. 1895, art. 4218k, became the substitute purchaser from the state. On September 19, 1899, Pool reconveyed to Brockett, and he on the 28th day of the same month likewise became a substitute purchaser from the state. On April 9, 1900, Brockett conveyed both sections to the appellant, John R. Johnson; the latter on the day of sale making actual settlement on section 94 as his home section. On August 9th thereafter, Johnson made, in due form, an original application to purchase section 94 as a home, and section 100 as additional, but this was rejected by the Commissioner of the General Land Office on the ground of the previous sale to Brockett. Appellant thereupon filed in the General Land Office his conveyance from Brockett, which had been duly recorded in Jones county, and at

the same time applied to purchase said lands as a substitute purchaser under Brockett. His obligations and applications bore date of April 9, 1900, and were in due form, but the applications were verified on January 25, 1901. These applications were granted, and appellant on January 28, 1901, was in due form and manner entered upon the record of the Commissioner of the General Land Office and upon the account in the State Treasurer's office as the substitute purchaser from the state. It also appears "that the commissioner of the General Land Office wrote, in red ink, the following across the face of each of the two applications and obligations of B. B. Brockett that are dated September 9, 1899, to wit: 'Land forfeited for abandonment 1/22/1901. Charles Rogan, Commissioner.' 'Land reinstated 2/7/1901. Charles Rogan, Com'r.' And that the Land Commissioner made the following indorsement on the account kept in his office with the said purchasers, under the said B. B. Brockett purchase of said land, to wit: 'Cancelled 1/22/1901.' 'Reinstated 2/7/1901.' And that the State Treasurer made the following indorsement on the account kept in his office with said purchasers under the said B. B. Brockett purchase, to wit: 'Cancelled Abandonment 1/22/1901. 'Reinstated' 2/7/1901.'" Upon the entry of forfeiture January 22, 1901, the county clerk of Jones county was by letter notified thereof, and that the land was on the market as dry grazing land at \$2.50 per acre, which letter was received by said clerk and filed in his office January 25, 1901. By letter of February 7, 1901, the clerk was notified by the commissioner that the sale to Brockett had been reinstated, and the land taken off the market. This letter was received by the clerk February 9, 1901, the clerk changing his records in accordance with instructions upon the respective dates received as stated. It also appears that neither Pool nor appellant transmitted to or tendered the State Treasurer one-fortieth of the purchase money at the time of the respective substitute sales to them, but the one-fortieth of the purchase price paid by B. B. Brockett at the time of the original award to him, and the annual installment of interest under appellant's claim of title, have all been paid to and accepted by the State Treasurer, and said accounts are, and at all times since May, 1898, have been, in good standing in the Land Office and in the office of the Treasurer, save as shown by the indorsements hereinbefore quoted. Appellant made due proof of three years' occupancy by him and his vendors of section 94, which was received and filed in the General Land Office May 22, 1901, and due certificate thereof issued September 24, 1902. Appellee's title had its inception on the 17th day of May, 1901, at which time he became an actual settler on section 100, and in due form applied to purchase it as his home, and section 94 as additional, at the appraised price of \$2.50 per acre. At the time

he made his applications and obligations, which in all things were regular in form and for the proper amounts, appellee caused them to be filed with the county clerk of Jones county, and paid such clerk one-fortieth of the purchase price as applied for; and the applications and obligations were received and filed in the General Land Office on the 22d day of May, 1901, but were rejected by the Commissioner for the reason that said land had been sold, and appellee's tender of purchase price and one year's interest had been refused by the State Treasurer. The court found that Brockett was an actual settler in good faith on section 94 on May 17, 1898, and that no abandonment thereof ever took place, but concluded, nevertheless, that the Commissioner's said indorsement of forfeiture operated as such, and that his attempted reinstatement was unauthorized, and hence that the land was on the market at the date of appellee's application, and that appellee was therefore entitled to recover.

Appellee, by cross-assignment, insists that the evidence fails to support the court's findings to the effect that the accounts in the Land and Treasurer's offices of Brockett, Pool, and appellant, Johnson, remained in good standing, and that the land in controversy has never been abandoned by either of the parties named. Upon a careful review of the evidence, however, we conclude that the evidence, while conflicting, is sufficient to support and establish the facts as found by the trial court, and as hereinbefore stated. Upon the facts stated we conclude, as appellant assigns, that the court erred in his conclusion of law and in rendering judgment for appellee.

The law operating at the time empowered the Commissioner of the General Land Office to forfeit the land, and all payments made to the state thereon, only for nonpayment of interest, and when the purchaser had failed to reside upon and improve in good faith the land purchased. Rev. St. 1895, art. 4218k. The power is dependent upon the fact. Where the fact of abandonment does not exist, the power of forfeit on this ground cannot exist. The court, upon sufficient evidence, as we think, found that no abandonment of the land in controversy had occurred on January 22, 1901, when the Commissioner attempted to forfeit it, and the attempt, therefore, had no force or effect whatever. He hence could certainly cancel and set aside as he did on February 7, 1901, the unauthorized, inadvertent attempt to forfeit. See *Moore v. Rogan* (Tex. Sup.) 73 S. W. 1.

It is insisted, however, that the original sale to B. B. Brockett, May 19, 1898, was a nullity, because of his minority. If, under the law of that sale, we were disposed to concede this, which we do not find necessary to do (see *Watson v. White* [Tex. Civ. App.] 64 S. W. 826, et *O'Keefe v. McPherson* [Tex. Civ. App.] 61 S. W. 534), it does not follow that the land was upon the market at the

date of appellee's applications to purchase. Some time prior to this date the Legislature passed an act which, under the facts of Brockett's settlement, payments and occupancy, we think, validated the original Brockett sale. See Gen. Laws 1899, p. 259, c. 150; *Jones v. Dowlen* (Tex. Civ. App.) 63 S. W. 938; *Strickel v. Turberville*, 67 S. W. 1058, 4 Tex. Ct. Rep. 779. This view is not, as we think, necessarily in conflict with the case of *Spence v. Dawson*, 70 S. W. 73, 5 Tex. Ct. 825; and, if not, and if the original sale to Brockett was either valid when made, or made so by the act cited, it certainly follows that his transfer to C. Pool, and Pool's substitution as a purchaser on March 6, 1899, which in that event was in all respects regular and in compliance with Rev. St. 1895, art. 4218k, on that subject, were valid, and effectually took the land off the market. If the substitute purchase of Pool was valid, as we think it was, the fact that he thereafter reconveyed the land to Brockett, and thereupon abandoned the land, can avail appellee nothing, in the absence of a forfeiture of the substitute sale therefor. *O'Keefe v. McPherson* (Tex. Civ. App.) 61 S. W. 534. If it be said that Pool's sale to Brockett, and the substitute sale by the state to Brockett on September 28, 1899, were both void by reason of Brockett's then minority, such void acts would not have the effect, ipso facto, of abrogating the previous sales, and replacing the land upon the market. The substitute purchase by appellant, Johnson, on January 28, 1901, followed prior to the acquisition of any right in appellee. This sale, of itself, if valid, would render all preceding sales and transactions immaterial, in so far as appellee's rights are concerned, and we feel unable to assign any good reason why the substitute sales to both Pool and appellant, Johnson, were not valid. The statute cited (4218k) provides that, when its terms have been complied with, the substitute vendee "shall become the purchaser direct from the state, and be subject to all the obligations and penalties prescribed by the chapter, and the original purchaser shall be absolved in whole or in part, as the case may be, from further liability thereon." It is in such case, to all intents and purposes, a new sale, upon substantially the same terms and conditions as if the sale was an original one, save that actual settlement seems not to be required where three years' occupancy has already been had, and proof of that fact made, and save that the substitute applicant is not by said article required to make the first payment as in case of an original purchaser. Both Pool and Johnson, as to actual settlement, forms, and substance of applications, obligations, etc., complied strictly with the law. Neither, however, paid the State Treasurer one-fortieth of the purchase money. But the Commissioner and State Treasurer, however, recognized the several conveyances to them as at least having the effect of an

equitable assignment of the benefit of Brockett's payment of the one-fortieth of the purchase price that would otherwise have been required, and consequently credited Pool and appellant, respectively, therewith; and we think such action consonant with justice, and contemplated by the statute, and that it should be upheld. In the case of *Spence v. Dawson*, supra, so urgently relied upon by appellee, the Supreme Court was considering the application held invalid in that case as an application to become an original purchaser of additional lands, when it declared the application invalid for the failure to make the first payment. As an application to become a substitute purchaser, it was held invalid on another ground, to wit, on the ground of nonsettlement.

In view of the foregoing views, we pretermitt, as unnecessary, a determination of the effect of the facts, which seem of weight, that appellee's settlement on section 100 was but five days prior to the expiration of three years' continuous occupancy of section 94 by appellant and his vendors, and that due proof of such continued occupancy was received and filed in the General Land Office on the same day as was appellee's applications to purchase, and that it was not shown that such applications were in fact filed prior to the filing of such proof. We conclude that the land in controversy was not upon the market for sale at the time of appellee's settlement and applications to purchase, and that the judgment should have been for appellant.

The judgment is reversed, and here rendered for appellant.

MARKOWITZ v. GREENWALL THEATRICAL CIRCUIT CO.*

(Court of Civil Appeals of Texas. May 28, 1903.)

CORPORATIONS—LEASE OF OPERA HOUSE—CONTRACT WITH MANAGER—ULTRA VIRES—BREACH—MEASURE OF DAMAGES—NOTES—ACCOMMODATION INDORSER—WITHDRAWAL OF INDORSEMENT—RETURN OF NOTE—EFFECT—LANDLORD AND TENANT—SUBLET—TING—DEMURRER.

1. Under Rev. St. 1895, art. 3250, forbidding the subletting of premises without the landlord's consent, a subletting without the landlord's consent gives him the right to forfeit the lease.

2. The lessee of an opera house contracted with another, whereby the latter was to receive a certain sum for managing the house, and a certain portion of the profits at the end of the season. *Held* not a subletting of the premises.

3. In an action against a corporation on a contract, the question whether the contract was ultra vires, because it amounted to a contract of ordinary partnership between the corporation and an individual, could be raised by general demurrer.

4. A contract between a corporation which was the lessee of an opera house and an individual provided that the individual should become the manager of the house, and receive therefor a certain sum weekly, and a percentage of the profits at the end of the season. The individual was required to pay one-half of the yearly ren-

tal of the house during the contract, and a bonus of a certain sum to the corporation; but it was provided that the corporation might remove the individual if it deemed his services unsatisfactory, in which case he should receive only his interest in the profits, and it was provided that all money should be deposited in the name of the corporation. *Held*, that the contract did not give the individual any such power of control or share in the transaction of the business of the corporation as to make it ultra vires.

5. An accommodation indorser may withdraw his indorsement at any time before the note has passed into the hands of innocent third parties.

6. Where one purchased an interest in the business of the lessee of an opera house, and gave a note therefor, with an accommodation indorser, and the lessee sold his lease, whereby the contract was impossible of performance, and the indorser requested that the note be returned, which was done, such return of the note did not preclude the purchaser of the interest in the business from suing for breach of contract, on the theory that the contract was unenforceable for want of consideration.

7. The lessee of an opera house contracted with plaintiff, whereby plaintiff was to become the manager of the house for a certain salary, and to have a half interest in the profits at the end of the season, and plaintiff was to pay one-half of the annual rent, and a certain sum as the purchase price of his interest in the business; but it was provided that plaintiff might be removed as manager by the lessee, and only receive his interest in the profits. Subsequently the lessee verbally repudiated the rights of plaintiff, and subsequently sold the lease to the landlord, and returned to the accommodation indorser a note which the lessee had received from plaintiff as the purchase price of his interest in the business. *Held*, that neither the verbal repudiation, nor the return of the note, constituted a breach of the contract, but the breach consisted of the sale of the lease, whereby performance was rendered impossible.

On Motion for Rehearing.

8. The lessee having repudiated the contract, plaintiff's failure to tender the annual rent and amount of the note did not forfeit his rights under the contract.

9. The measure of damages in an action for the breach of the contract was one-half the sale price of the lease, less the amount of the note and one-half of sums expended by the lessee upon the opera house.

10. The lessee testified that, but for the differences between himself and the landlord, he would have charged a certain sum per year for the bookings of theatrical companies for the remainder of the lease, but he did not testify that he received less than the value of his promised services. *Held* not to present the issue of the right of the lessee to have the sum mentioned by him deducted from the sum received by him for the lease.

Appeal from District Court, Galveston County; Wm. H. Stewart, Judge.

Action by E. Markowitz against the Greenwall Theatrical Circuit Company. From a judgment for plaintiff, granting insufficient relief, he appeals. Reversed.

James B. & Chas. J. Stubbs, for appellant. Kleberg & Neethe, for appellee.

GILL, J. This is an action brought by appellant, E. Markowitz, against the Greenwall Theatrical Circuit Company, a corporation,

*For statement of additional facts, see 75 S. W. 317.

† b. See Bills and Notes, vol. 7, Cent. Dig. § 602.

to recover damages for an alleged breach of contract. A trial by jury resulted in a verdict and judgment for plaintiff for \$1,000. He has appealed, and complains that the amount awarded him is inadequate. Appellee contends that appellant was not shown to be entitled to anything. It does not, however, seek a reversal of the judgment, but assigns that as a reason why the appellant's contention should not be allowed.

The following is a copy of the contract alleged to have been breached:

"Articles of Agreement.

"Made and entered into this sixteenth day of July, 1901, by and between the Greenwall Theatrical Circuit Company, a private corporation organized under the laws of the state of Texas, with their principal offices at Galveston, Texas, parties of the first part, and E. Markowitz, of Galveston, Texas, party of the second part:

"Witneseth: That for and in consideration of a bonus of three thousand dollars in hand paid by said party of the second part to the parties of the first part, receipt of which is hereby acknowledged, the said first parties agree to give said second party the position of business manager of the Kyle Opera House in Beaumont, Texas, during the term of said party of the first part's lease, which is for five years, beginning October 1, 1901, and to pay to said second party for such services the sum of twenty dollars per week during the theatrical season, commencing on or about October 1st, and ending on or about April 1st, also to pay him fifty per cent. of the net profits, payable at the end of each theatrical season, on or about May 1st of each year. Said party of the second part hereby agrees to act in the capacity of business manager of said opera house and to give it his personal attention in the best possible manner.

"It is also agreed that if the party of the first part feel the interests of all concerned are not thoroughly taken care of, they have at any time the right to remove said second party from the position as business manager, and replace him by another of their own selection, in which event said party of second part shall receive only his fifty per cent. interest of the net profits.

"It is further mutually agreed that any losses that may accrue in running said opera house shall be borne equally by the parties of the first and second parts.

"Said second party also agrees to pay one thousand dollars on the first day of October each year during the continuance of this contract, same being one-half the yearly rent of said opera house. Failure of said second party to meet this payment when due, or to pay his portion of any weekly losses that may accrue makes this contract null and void.

"It is also understood and agreed that all moneys shall be deposited in the name of the Greenwall Theatrical Circuit Company at the

end of each week, after first paying all expenses accruing for said week. The money so deposited to remain in bank until the close of the theatrical season, when it shall be divided between the parties of the first and second parts as above stated.

"Box office and house statements must be sent as follows after each performance—one to the Grand Opera House, New Orleans, La., one to the American Theatrical Exchange, and one retained at said opera house in Beaumont, Texas.

"In witness whereof, we hereunto affix our signatures this day and year first above written. Greenwall T. C. Co., H. Greenwall, Prest. E. Markowitz.

"Witness: Dave A. Weiss."

It was executed as indicated by its date, and on July 17, 1901, the appellee accepted from appellant his 90-day promissory note for \$3,000, indorsed by I. H. Kempner, in lieu of the \$3,000 in cash agreed by appellant to be paid. Theretofore, on March 31, 1901, W. W. Kyle, of Beaumont, Texas, had entered into a written agreement with appellee whereby he undertook to erect at Beaumont, Tex., a building to be used as a theater and opera house, and leased the same to appellee for a period of five years, at an annual rental of \$2,000, to be used by appellee for theatrical purposes. This is the lease mentioned in the contract above set out. When Kyle, the owner of the building, learned that appellant was to be the manager, he objected on account of his supposed unpopularity at Beaumont, and was insistent that the arrangement be abrogated. Thereupon appellee changed the plan in that respect, but also undertook to annul and repudiate its entire contract with appellant. The latter insisted upon the binding effect of the contract, and advised appellee that, if his rights were not respected, he would bring suit. Notwithstanding this, the appellee about October 1st returned the \$3,000 note to Kempner, and about October 13th took charge of the opera house, and proceeded with its operation, without reference to the interests of appellant. The note was returned without the knowledge or consent of appellant, and was requested by Kempner only when he learned through one of the officers of appellee that the contract had been breached or annulled. In a subsequent letter to appellant, Kempner advised him that the contract was good, and urged him to insist upon his rights. Appellee took possession of the opera house on October 13, 1901, in an unfinished condition; and operated it until the 16th day of November, 1901, when, on account of differences with Kyle, and for other reasons, the lease was surrendered to Kyle for \$15,000 cash, and the \$2,000 which had been paid by appellee on October 1st for the first year's rent was returned to it. This sale to Kyle also included all the contracts which up to that time had been made by appellee with various dramatic and opera companies to show in the house during that season, and

bound Kyle to pay appellee \$200 per year to secure show companies for him during the remainder of the lease. Evidence was adduced by each party upon the issue of probable profits, as affecting appellant's measure of damages, and it was upon this conflicting evidence that the jury awarded him the sum of \$1,000; the court having instructed the jury that they could not consider the price at which the lease was sold to Kyle in estimating the appellant's damages. The verdict of the jury determined the issue of liability, and, as the verdict upon that issue was not assailed before the trial court as unsupported by the facts, we regard it as finally determined against the appellee, unless some of the independent law propositions urged by appellee are found to be sound and applicable.

The appellant contended in the lower court, and contends here, that the sale of the lease furnished a certain measure of appellant's damage, and that, because the very act by which the breach was irrevocably accomplished furnished such a certain measure, the court should have instructed the jury that, in case they found for appellant on the issue of liability, they should return a verdict for appellant for \$7,500, less the amount of the \$3,000 Kempner note, with interest to the date of the breach.

The appellee contends that the judgment should not be disturbed, because no liability was in fact shown, and, in support of this position, urges: (1) That the contract with appellant was void because it amounted to a subleasing of the premises without the landlord's consent. (2) Because the contract was one of partnership, and, it appearing from the allegations in plaintiff's petition that appellee is a corporation, it was had on general demurrer, since a corporation has no power to enter into partnership with either another corporation or an individual. (3) Because Kempner, being an accommodation indorser, had the right to recall his indorsement, and, having recalled it before appellee had changed its position by reason thereof, the contract was unenforceable, for want of consideration.

We will first dispose of the independent propositions presented by appellee, and first of the question of subletting. While the lease in question did not contain a stipulation against subletting, the omission is supplied by statute, which forbids subletting without the landlord's consent (Rev. St. 1895, art. 3250); and, if the covenant has been violated, the right to forfeit the lease therefor accrued to the landlord by force of the statute. We are of opinion the contract sued on did not amount to a subletting. The term imports a surrender of possession of the leased premises by the lessee to the sublessee. The statute was passed for the benefit of the lessor, and its purpose was to empower the lessor to say who should occupy his premises. To this end the statute ap-

plies as well to an assignment of the lease as to a subletting. *Railway v. Settegast*, 79 Tex. 256, 15 S. W. 228; *Moser v. Tucker*, 87 Tex. 94, 26 S. W. 1044. The contract in question cannot be construed as invading any such right, for, though it covenants to place the appellant in charge as manager of the business, that part of the contract is rather one of employment, than an incident of his right to share in the profits; the right being reserved in the appellee to select a different manager if for any reason the interests of the enterprise would thereby be best subserved. It is also manifest from the terms of the instrument that the appellee retained full control of the entire enterprise, and sold to appellant for \$3,000 only a half interest in the profits, and imposed the burden of half the losses, but conferred no privilege of management or control. If the arrangement constituted a partnership between appellant and appellee, it was one in which the latter retained full control of all the capital, including the lease; and the articles of copartnership gave the appellant no right inconsistent with the right of the lessor to insist that the original lessee should alone control, and be responsible for the leased premises. It seems to us that the appellant has done no more than buy an interest in the enterprise; that the purchase carried no direct interest in the lease, and, as none of the rights of the landlord were invaded, he had no power to nullify it. Of course, if the transaction had amounted either to a sublease or an assignment, we would be constrained to hold, under the authority of *Moser v. Tucker*, 87 Tex. 94, 26 S. W. 1044, that the lessee could not be held to a contract which his lessor might at any moment annul, and of whose power to do so the appellant had notice. The lease of the premises to appellee did not carry with it the obligation to conduct therein a theatrical enterprise, but only conferred the privilege to do so. We are unable to perceive the force or reasonableness of the contention that one, for instance, who procures a lease on a building for the purpose of conducting therein a mercantile business, may not take with him into the business a partner, and yet retain the absolute ownership of the lease. We are unable to see why he could not become so obligated to his partner as to lose the right to terminate the lease during the existence of the partnership, and yet violate no right of the lessor. The case before us is a parallel of the illustration used.

At a former day of this term the judgment of the trial court in this cause was reversed, and rendered in favor of appellant for a greater sum, as hereinafter shown. The opinion, however, was withdrawn, our judgment suspended, and reargument invited on the question of ultra vires. This course was pursued in view of the case of *Sabine Tram Co. v. Bancroft* (Civ. App.) 40 S. W. 837, which had not been cited and was not before us when the case was first considered. Our

first conclusion upon the question was that, as the defense of ultra vires had not been made in the court below, it could not be heard here. It seems to have been generally held that the defense must be pleaded and proved. *Railway Co. v. McCarthy*, 96 U. S. 258, 24 L. Ed. 693; 7 A. & E. Ency. of Law, pp. 731, 755; 5 A. & E. Ency. Pleading & Practice, pp. 95, 96. But it is also true that an act upon which a suit is based may be so manifestly beyond the scope of the power of any corporation, or of the corporation sued, as its nature may be disclosed by descriptive allegations in the petition, that the question is reached by general demurrer. We declined to consider the point here because we believed the petition did not show such a transaction as was necessarily beyond the scope of corporate authority, even if it were conceded that an ordinary, unexecuted contract of partnership was alleged, and damages asked for its breach. We are convinced by the reasoning in the case last cited above that the principle which controlled us is not sound, and unless this case can be fairly distinguished from *Bancroft's Case*, supra, our judgment ought not to stand. In the case cited, the firm of Thos. Bancroft & Sons was alleged to be a partnership composed of four individuals, engaged in the business of operating a sawmill owned by the firm, and in selling the product of the mill. The tram company was averred to be a private corporation organized under the general incorporation laws of Texas, and authorized by its charter to "erect, operate, and maintain sawmills and log booms in Orange, Newton, Jasper, and adjoining counties in Texas, and to manufacture and sell lumber." These two concerns entered into written articles of copartnership under the firm name of T. Bancroft Sons & Co. They specifically agreed to become partners in the manufacture and sale of lumber to be sawed from logs furnished and delivered at a named point by the tram company, to be sawed at the mill owned by Thos. Bancroft & Sons. The tram company was to put \$20,000 into the business as working capital, and was to receive pay for the logs furnished by it at a named price. The profits and losses were to be shared equally. There are many other details not materially affecting the character of the partnership, but the following is worthy of particular notice: "The Sabine Tram Company shall suggest and appoint a general business manager who shall sell all lumber manufactured by this copartnership to the best interests thereof and who shall have general control of the finances of the same, and who shall apply the proceeds of the sales as follows." Then follow provisions as to payment of expenses, insurance, cost of logs, etc., and the profits were to be divided two-thirds to Bancroft & Sons and one-third to the corporation. It was further provided that all the funds of the concern should be placed in the hands of a treasurer elected by the partner-

ship. The life of this agreement was to be three years. The corporation sued for damages because of the refusal of Bancroft & Sons to carry out the contract. The damages claimed were loss of profits. The question of ultra vires was presented under the general demurrer. Whether it might thus be raised was not discussed, but the court held that the agreement alleged constituted an ordinary partnership; that the general rule that a corporation could not enter into such a contract was applicable to Texas corporations, their powers being fixed by the general incorporation laws, which the court judicially knew. The conclusion reached has apparently received the approval of the Supreme Court of this state, as writ of error was refused. But whether refused upon this point or another, the rule stated is manifestly sound, and to that extent we were in error in our first conclusion, for in this case, also, the corporation is averred to be organized under Texas laws. The question could be raised by general demurrer, because the pleader could not allege such a state of facts as would justify a Texas corporation in engaging in an ordinary partnership, and a charter provision authorizing such an engagement is beyond the range of possibilities in this state, under present laws. The question, then, which remains to be determined, is whether the contract sued on constituted an ordinary partnership, conferring such privileges upon each member of the firm as to render it obnoxious either to any rule of public policy, or unfair and hurtful to the stockholders as such.

It is said in *Morawetz on Corporations*, § 421: "It seems clear that corporations are not impliedly authorized to enter into partnership with other companies or with individuals. The existence of such a partnership would interfere not only with the management of the corporation by its regularly appointed officers, but would impair the authority of the shareholders themselves, and involve the company in new responsibilities, through agents over whom it would have no control." To the same effect is A. & E. Ency. of Law, vol. 7, p. 794, where many authorities are cited. In truth, we have not found the rule anywhere stated to be otherwise. All authorities concur both as to the rule, and the reason of the rule. In stating the rule the term "partnership" is used in its general sense, and is qualified in most authorities by the word "ordinary." Clearly, that character of partnership is meant where the element of mutual agency is present, whatever else may be lacking, for it is against that element that the rule is mainly directed. The question involved in such cases as this is the character of the agreement. If the parties did not agree to assume such relations as would constitute a partnership, they did not in fact become partners, in the ordinary sense of the term. The intention, as gathered from the language of the instrument,

must control. The question has not arisen between an outsider and one of the parties, but between the parties themselves. In cases involving the rights of third parties, the rule is ordinarily different, and parties who had no thought of forming a partnership may so acquit themselves as to be bound to third parties under the rules governing that relation. A. & E. Ency. Law, p. 797. On the other hand, a contract of absolute partnership may exist, in which the word "partnership" or "partner" does not occur. The purpose of the parties to assume the relation may be clearly expressed by the use of other terms, and all the consequences of a partnership follow, even as between themselves, including the mutual right of management and control. In each case, as between the parties, the legally ascertained intention would govern in determining the nature of the relation. 22 A. & E. Ency. Law, pp. 110, 111. To illustrate the significance of the word "ordinary," occurring in the statement of the rule forbidding partnerships between corporations among themselves or with individuals, let us keep in mind the reason of the rule, and suppose the case of a silent or secret partner, who puts in a part of the capital stock, but is accorded no right of control or power to act for the partnership, or to bind it in any way. It is plain that such a partnership on the part of a corporation is not forbidden by the rule (the corporation being the active partner), because in none of its elements does the contract come within the reason of the rule. In such a case the corporation neither confuses nor hides its identity in the partnership, nor surrenders the right to control its own affairs through its authorized officials and agents. The individual partner in such a case merely buys an interest in the possible profits by paying an agreed sum, and assuming the responsibility for half the losses. He is in no proper sense a partner. Such contracts between corporations and individuals have been generally upheld. A. & E. Ency. Law, p. 796; *Mestier & Co. v. Chevallier Paving Co. (La.)* 32 South 520; *Bates v. Coronado Beach Co.*, 109 Cal. 160, 41 Pac. 855.

But appellee contends that the test of a partnership is the sharing in the profits and the losses. This is generally true, though not conclusive, and such an arrangement will usually be held to constitute a partnership of some sort, and to invoke the rules of law governing the partnership relation; but surely counsel will not contend that where the inquiry is in the nature of the partnership, or the question as to the right of control should arise between the partners, the investigation should halt at the discovery of the agreement to share profits and losses, and should go no further? It is not the partnership against which the law protests, but loss of control of its own affairs by the corporation. It seems to us it cannot be doubted that, if the members of a partnership appeal

to the courts to determine the question of management and control, the courts should go at once to the articles of copartnership, and, if their provisions are found to be unambiguous, should refuse to look elsewhere. In construing those articles in which the parties had undertaken to prescribe their rights and limitations, the ordinary rules of construction would be invoked, and thereby the meaning of the instrument (that is to say, the intention of the parties) would be ascertained and declared. A. & E. Ency. Law, pp. 25, 113. The question of authority in the one partner or the other would be thus determined.

No law forbids an individual to surrender to another the control of his interest in a joint venture. So it seems to us that in this case the question of right of control—the power of Markowitz to share in the transaction of the business of the concern—is presented to the court, and will serve to test the validity of the contract in question. Recurring to its provisions, we find that the corporation is already the owner of the lease. The enterprise is already planned and on foot, and the corporation is organized for the purpose of conducting it. A business manager is needed, and appellant is selected for the purpose at an agreed salary, but at the same time buys an interest in the profits, in consideration of an agreed sum, and an obligation to pay half the rent and bear half the losses. The corporation, having appointed him manager, retains absolute control over him as such; provides that all money shall be deposited in its own name, and further stipulates that it will pay to appellant half the profits, if any, at the end of the theatrical season. If any losses should occur, and appellant should fail to pay his proportion thereof each week, the corporation may annul the agreement. If he fails to pay his part of the rent upon a named day, the agreement is terminated. In neither of these events does he get back any proportion of his \$3,000 bonus paid to the corporation. There is no such provision. That much of the consideration has passed absolutely to the company, and these other things he must do, also, in order to retain his right to half the profits. Neither his \$3,000 note nor his obligation to share rent and losses, has given him any interest in any property, nor purchased for him any partnership holdings. What he purchased and all that was conveyed to him was an interest in the possible profits. He was promised no voice in the conduct of the business, and it is easily gathered from the four corners of the instrument that it was not contemplated that he should have any, except at the will of the corporation. His \$3,000 did not become a part of the firm's assets, and, if his services were rendered by permission of the corporation, he was directly compensated therefor. There was no specific agreement to become partners, and no partnership name was adopted.

The firm name could not have been signed, for none existed. The only element of partnership present is the sharing of profits and losses, and, as has been shown, that alone will not render the contract on the part of the corporation unlawful.

Appellee contends that the provision as to the appointment of a manager was present in *Bancroft's Case*, supra, and that therefore the two cases cannot be distinguished. That and the sharing of profits and losses are the only features which the two cases have in common, as clearly appears upon analysis. *Bancroft's Case* has the additional features of a capital stock, a distinct firm name, an explicit agreement to become partners, the joint selection of a treasurer, and the management of the mill by the Bancrofts. Indeed, the only restriction on the authority of the individuals was the appointment of a manager by the corporation, upon whom was imposed the duty to sell the product of the mill, pay expenses, and divide the profits. The power of the Bancrofts to incur expenses in the running of the mill was unlimited. In construing the contract in question, the presumption should be indulged that the parties intended to do a lawful thing, and make a contract which would bind them. The enterprise undertaking was within the corporate power and purpose. This is not denied, and we find no feature in the case which would justify the court in reading into the contract a provision which, if present at all, is so only by implication, and which is contrary to the spirit, if not the letter, of the language used. We conclude the cases are easily distinguishable, and that the contract in question was within the power of the corporation. Notice of the many cases cited and ably presented by learned counsel would be interesting, but as they all concur on the main proposition, and differ only as to the application of the rule to individual cases, we have concluded it would serve no useful end.

The third independent proposition we also regard as untenable. It is true that an accommodation indorser may withdraw his indorsement at any time before the note has passed into the hands of third parties for value. The authorities cited by appellee—*A. & E. Ency. Law* (2d Ed.) vol. 1, p. 340; *Tenn. Bank v. Johnson*, 1 Swan, 233; *Bank v. Howe*, 40 Minn. 390, 42 N. W. 200, 12 Am. St. Rep. 744—go no further. In the case at bar, plaintiff had, with the \$3,000 note, purchased a half interest in the profits of the enterprise. It was accepted in lieu of cash, and the interests of the parties became fixed. If appellee had seen fit to hold appellant to the contract against his wishes, it is certain Kempner could not have then revoked his indorsement. It seems to follow logically that appellee cannot defeat the rights of plaintiff, and justify its breach, by voluntarily consenting to the cancellation of the note. The rule, to be fair, should work both ways. The parties had

exchanged binding promises. Valuable rights had passed. Kempner did not undertake to revoke his indorsement because of the contract, or on account of a change of his mind with reference thereto, nor for anything that Markowitz had done or failed to do, but because of its breach on the part of appellee.

We are thus brought to the question of the measure of damages. We have already stated the position of appellant. In opposition to this, appellee propounds two further propositions: First, that the petition in this respect is bad on general demurrer, because the damages prayed for are too speculative and remote to be recoverable; second, because the sale of the lease, and the sum it brought, bear no such relation to the breach of the contract as to furnish the plaintiff a measure of damage for its breach.

The petition sets up the facts, and asks for damages. So, after all, the question must turn upon the inquiry whether from the facts the court can ascertain the damage suffered by appellant, without going into the field of pure speculation. "Damages which are the natural and probable result of a breach of contract, and which may be reasonably anticipated therefrom, but which are so speculative and so dependent upon numerous and changing contingencies that their amount is not susceptible of proof with any reasonable degree of certainty, may not be recovered." *Central Trust Co. v. Clark*, 92 Fed. 298, 34 C. C. A. 354; *Fraser v. Mining Co.*, 9 Tex. Civ. App. 211, 28 S. W. 714. The rule stated is one of general application, and is well established, but another equally well established, and to which all others yield, is that whenever, in a given case, damages are shown to have been suffered by the actionable fault of another, and by reason of the facts the court finds that the damages actually suffered can be safely ascertained, the court will make the inquiry and award the damages; and this whether they include loss of profits, or any other element, however difficult or uncertain of proof they may ordinarily be. This is but another way of saying that every damage suit must be determined upon its own facts, and such a reasonable and safe measure of damages applied as the facts may furnish. This rule is most frequently applied in actions sounding in tort, but is equally applicable to breaches of contract, where the damages prayed for are unquestionably within the contemplation of the parties, and the question is one of certainty of proof. Compensation is the basic principle, but, owing to the ever recurring differences in the facts of cases, it is difficult, if not impossible, to lay down a general rule as to the measure of damages. *Brigham v. Carlisle* (Ala.) 56 Am. Rep. 28; 8 A. & E. Ency. Law, p. 628. No rule of universal application has been formulated. The requirement of certainty of proof of the loss claimed, and the exclusion

ordinarily of future profits as an element of recovery, is but the old rule in a new form—that the plaintiff must make out his case with reasonable certainty. Some cases are such in their circumstances as to afford an obvious rule by which a just and adequate compensation can be readily measured, and when this is the case the rule should be unhesitatingly applied. *Gilbert v. Kennedy*, 22 Mich. 117; *Warren v. Cole*, 15 Mich. 274; *Allison v. Chandler*, 11 Mich. 548. This course is infinitely safer and better than to substitute therefor some abstract generality, which may prove inapplicable in some important particular. Such is the case before us. In this case the actual breach was accomplished by the sale of the lease. Appellee had not bound itself to accord to appellant any management or control, so a denial of that privilege was not a breach, but was in accord with the terms of the instrument. The mere verbal repudiation of his rights on the part of the appellee was not a breach, for it might nevertheless have proceeded with the enterprise, and settled justly with appellant on the days named for a division of the profits. The return of the note to Kempner was not a breach, for that was a matter in which the appellant had no concern. The appellee might have donated the note to a charity, or disposed of it in any other way, and appellant would not have been heard to complain. The note was not partnership assets, but the individual property of appellee. The breach, then, consisted in the sale of the lease, for thereby the continuance of the business was rendered impossible. The case has this peculiar feature: The life of the lease and the term of the partnership were identical. The partnership business actively begun at the inception of the lease. The building was leased for no other purpose than an opera house. The right to so use the house was valuable only to the extent to which the house could be profitably used for theatrical purposes. One purchasing the lease must necessarily be controlled by probable future profits in estimating its value. The sum of \$15,000 paid by Kyle to appellee for the lease was what the appellee actually realized from the venture, and less than what Kyle, perhaps, hoped to realize from the operation of the house, for it is manifest from his purchase of the bookings of theatrical and opera companies that he intended to continue the business. The bookings up to that time, having been made pursuant to partnership purposes, were a part of the partnership acquisitions and capital. Thus stated, it is plain that if at the end of one month's operation the partnership had been terminated by mutual consent, the sale value of the lease would have been an accurate basis of settlement. For a like reason, the court will seize hold of that fact in the case as it stands, as furnishing a measure of the minimum profits,

at least, for, surely, having thus wrongfully breached the contract of partnership, the appellee will not be heard to say the profits would have been less than the business actually brought at the sale. Such a rule would permit a partner who owned a lease, without which the partnership could not proceed, to sell his lease at a handsome profit, pocket the profits, and mock his wronged partner with the doctrine that his damages consisted of lost profits, which the law would not allow, because incapable of certain ascertainment. The court will rather accept the joint judgment of the purchaser and the seller at the accomplished sale that the present value of the future profits is \$15,000, and award appellant such an interest as the contract authorizes.

It is unnecessary to notice any of the other points presented by appellee. In our opinion, they are without merit. Our former conclusion was that the court erred in not instructing the jury, in case they found for plaintiff, to award him \$7,500, less the face of the Kempner note, with interest to the date of the breach. The judgment of the trial court was reversed, and judgment here rendered for appellant in accordance with that view. We have, after mature reconsideration, decided to adhere to our first conclusion.

Reversed and rendered.

On motion for rehearing.

(June 19, 1903.)

Appellee earnestly presents the proposition that, as we found on the original hearing that the contract in question was not breached by the verbal repudiation on the part of appellee prior to October 1st, it follows inevitably from the facts that appellant had forfeited his rights by nonpayment of his note and the half of the annual rent. It is evident we have been misunderstood. We did no more in that connection than apply the familiar doctrine that, when a party who has contracted with another to do certain things repudiates the contract in advance of the date fixed for performance, the other may accept the repudiation as a breach, and sue at once, or he may await the event and accept performance, if the first party repents and tenders it. We thought, also (and are still of the same opinion), that appellee, having stated in advance that he would not perform, cannot now be heard to complain that appellant did not tender the amount of the note and his share of the year's rent. The law did not require of appellant a futile act, and he, having been advised that appellee would accept nothing and accord nothing, might, until otherwise advised by appellees of their repentance, assume that the state of mind continued to endure, and that any tender would be refused. We think we were right

then in saying the act by which the breach was irrevocably accomplished was the sale of the lease.

Our attention is called to a portion of the record which renders it necessary to reform our judgment as to amount. We held originally that appellant was entitled to a judgment equal to half of the sum for which the lease was sold, less such sums as he was shown to owe. In doing so, we assumed that the sum received for the lease was net profit, the year's rent having been returned. The record, however, shows that Greenwall testified he had expended money upon the opera house, and he estimated that, taking everything into consideration, including the receipts up to the date of the surrender of the lease, he had lost about \$800. This evidence is not contradicted. We are therefore of the opinion the sum last named should be deducted from the price of the lease before the estimate of the amount due appellant is made. This will result in the reduction of our former judgment in the sum of \$400.

Greenwall also stated that, but for the differences between him and Kyle, he would have charged Kyle \$500 a year for bookings of show companies for the remainder of the lease, and appellee insists that this, also, should be deducted. From Greenwall's entire testimony, it is manifest that he had Kyle in his power as to the item mentioned, and dictated that part of the contract, as well as the consideration he was to receive. He does not say he received less than the value of his promised services, but, after stating the details, says generally he would have charged more. We do not think his statement presents the issue of a right to have \$500 a year for four years deducted from the sum received for the lease.

It is not necessary to discuss the other points presented by the motion. They are fully covered in the main opinion. The judgment having been reformed in the respect mentioned, the motion is overruled. Overruled.

THORNBURGH v. SCHOOL DIST. No. 3.
(Supreme Court of Missouri, Division No. 1.
May 27, 1903.)

SCHOOL DISTRICTS—BONDS—VALIDITY—RECITALS—ESTOPPEL—BONA FIDE PURCHASER.

1. Recitals in school district bonds issued in violation of statutory provisions cannot give rise to an estoppel in favor of bona fide purchasers before maturity.

2. Under Const. art. 10, § 12, providing that no school district shall be allowed to become indebted to an amount exceeding the revenue for the year, without the assent of two-thirds of the voters voting at an election held for the purpose, and limiting the indebtedness which may be incurred to a sum not exceeding 5 per cent. of the value of the taxable property therein, one

using the school district on bonds issued by it has the burden of proving that the bond issue was authorized by two-thirds of the voters, and that it did not exceed the debt limit.

3. Rev. St. 1879, § 7032, as amended by the act of 1881, directs that a school district election for the purpose of authorizing the school board to borrow money shall be held at an annual or special meeting for the purpose after 15 days' notice, and provides that the voting shall be by ballot, and that the authority to make the loan shall be conferred by two-thirds of the votes cast. The records of a school board showed that at a board meeting a special meeting of the voters was called; that 21 days later a voters' meeting was held, at which propositions to sell the old schoolhouse and site and erect a new building were submitted and carried; that subsequently the school board met, and "ordered that notices be posted, calling meeting of the voters for the purpose of changing site, selling old house, making appropriation of \$3,789, or one per cent. on assessed valuation, leaving proceeds arising from sale of present house for seating new house," and that afterwards the voters "assembled, pursuant to call, after due notice of 20 days, * * * and considered propriety of the loan as per notice"; and that the loan was carried by a vote of 17 to 2. Held not to show authority in the board to issue bonds.

4. Const. art. 10, § 12, prohibiting any county, city, town, school district, or other political corporation from incurring any indebtedness exceeding 5 per cent. of the "value of the taxable property" therein, as ascertained by the assessment for state and county purposes, forbids a school district from incurring an indebtedness exceeding 5 per cent. of the value of the taxable property therein subject to taxation for school purposes.

5. Where a school district issues bonds in excess of the debt limit, the court cannot reduce them to an amount within the debt limit, and give judgment thereon for the reduced amount, the bonds being wholly invalid.

6. The fact that a school district used the money obtained from the sale of invalid bonds issued by it in the construction of a school building did not render the bonds enforceable at law.

Brace, P. J., and Marshall, J., dissenting in part.

Appeal from Circuit Court, Chariton County; John P. Butler, Judge.

Action by William H. Thornburgh against School District No. 3. From a judgment for defendant, plaintiff appeals. Affirmed.

T. K. Skinker, for appellant. A. W. Mullins, for respondent.

VALLIANT, J. This is a suit upon nine bonds and coupons issued by the defendant, a school district in Chariton county. The bonds bear date December 1, 1883, and are a part of an issue of 14 bonds, aggregating \$3,500, which was made to raise money to build a schoolhouse in the district. The answer admits that the bonds were issued by the persons at the time holding the position of directors for the school district, but avers that they acted without authority and in violation of law, for the reasons that no election was held as required by law, no notice of such election was given, no order was made by the board of directors, or entered on the record of the board, authorizing the issue of the bonds, or providing for the borrowing of money to build a school-

¶ 1. See *Municipal Corporations*, vol. 36, Cent. Dig. §§ 1972-1976.

house; that the aggregate amount of the bonds issued exceeded 5 per centum of the value of taxable property in the district, as shown by the assessment next before the last assessment for state and county purposes—and for those reasons the bonds were invalid. The reply traversed the affirmative statements in the answer, and averred that the bonds were sold by the district for \$3,500; that the district received the money, and with it built a schoolhouse, which has been used as such since 1883, and is still so used by the district.

Upon the trial the plaintiff introduced in evidence the nine bonds and the coupons sued on. The following is a copy of one of the bonds. All the rest are like it: "Know all men by these presents, that in pursuance of section No. 2, of an act approved March 21, 1881, amendatory of section No. 7032 of article 1, chapter 150, of the Revised Statutes of Missouri, 1879, and by virtue of an election held at the schoolhouse on August 28th, 1883, in District No. 3, township 56, range 21, Chariton county, Missouri, whether a loan of \$3,500 should be made for the erection of a schoolhouse in said district, which proposition was submitted to the legal voters thereof on said day, after twenty days' notice of said election had been given, as provided by law; and whereas, at said election, seventeen ballots were cast and canvassed in favor of the loan, and two ballots were cast and canvassed against the loan: Now, therefore, in compliance with an order made and entered on record by the board of school directors of said district on the 30th day of August, 1883, the said District No. 3, township 56, range 21, of Chariton county, Missouri, acknowledges itself indebted, and for value received, promises, fifteen years after date, to pay the bearer two hundred and fifty dollars, with interest thereon at eight per cent, payable annually at the Chariton County Exchange Bank in Brunswick, Missouri, upon the presentation of the proper coupons hereto attached, at said bank. This bond is payable at any time after the expiration of two years, at the option of said district, and after maturity bears ten per cent. interest. In testimony whereof, the said school district has executed this bond at a session of the board of directors thereof, by the said board signing their names hereto as directors of said district; and by the signing of the name of said district by said board and clerk. [Signed] District 3, Township 56, Range 21. By F. R. Stanley, S. P. Dillon, H. Suits, Directors. Attest: Hiram Suits, Clerk. December 10th, 1883." The plaintiff's evidence tended further to prove that he purchased the bonds and coupons before their maturity, paying for the same a premium over their face value; that in doing so he relied on the recitals on the face of the bonds, the certificate of registration by the State Auditor indorsed thereon, and the assurance by

the person from whom he bought them that all the matured interest to date had been paid; that he made no examination of records to ascertain if the recitals contained in the bonds and in the certificate of registration were true. A witness for plaintiff testified: That he was one of the clerks of the election at which it is claimed the bonds were authorized by the vote of the people. That the election was held in the district on August 28, 1883. He saw several written notices posted in different places in the district, and the election was held pursuant to the notices. After that, at the request of the directors, witness procured the printing of the bonds, and witnessed their execution by the directors. Another witness for plaintiff testified: That his firm built the schoolhouse in 1883-84. They were employed by the directors to do so, and were paid out of money deposited in bank for that purpose. That there were about 150 voters in the school district.

Plaintiff's record evidence was as follows: Proceedings of the meeting of the school board August 2, 1883, showing that plans for a schoolhouse were submitted and adopted: "Ordered that notices be posted, calling meeting of voters for the purpose of changing site, selling old house, making appropriation of \$3,789, or one per cent. on assessed valuation, leaving proceeds arising from sale of present house for seating new house." Proceedings of special meeting August 23, 1883: "The qualified voters of district No. 3, township 56, range 21, assembled pursuant to call, after due notice of twenty days. Organized by appointing W. A. Bennett and J. P. Moore as judges, and John Gould as clerk. Submitted and considered propriety of the loan, as per notice. Proceeded to ballot, with the following results: For the loan, 17; against, 2." Proceedings of meeting November 7, 1883, related to the purchase of a lot, "all to be paid for out of the proceeds arising from the appropriation for erecting house and purchasing site." Certain entries in the record book, showing the issuance February 5, 1885, of a warrant for \$282.35 to pay interest on bonds; a payment of \$98, as balance of bond No. 1; a payment of \$526.96 January 23, 1887, on bond and interest; and a memorandum indicating a loan from the Exchange Bank at Brunswick on bonds amounting to \$3,500.

Defendant introduced in evidence the proceedings of the meeting of the school board July 7, 1883, at which it was "ordered that special notice of meeting be posted according to law, calling the voters together for the purpose of erecting new schoolhouse, selling old site, purchasing new site." Then of the meeting of July 28th: "Voters of District No. 3, township 56, range 21, met pursuant to call; notice having been posted according to law. Submitted a proposition to sell old schoolhouse and site. Carried. Sub-

mitted proposition to erect new schoolhouse. Carried." A paper purporting to be a notice of an election to be held on August 29, 1883, on the proposition to negotiate a loan of \$3,500 to build a schoolhouse, in the handwriting of the clerk of the school board, and found fastened in the book in which the proceedings of the board were recorded, was read in evidence over the objection of the plaintiff. Defendant's testimony tended to show that the value of the taxable property in the district, as shown by the assessment for 1881, was \$56,200, which included railroad property to the value of \$25,589. The assessment for 1882 showed taxable property to the value of \$74,880, of which \$27,292 was the value of railroad property, and \$9,180 merchants' stocks. The assessment for 1883 was \$86,243, of which \$32,424 was railroad property, and \$13,243 merchants' stocks.

The plaintiff asked instructions on the theory that if he purchased the bonds before maturity, without knowledge or information of any irregularity or illegality in their issue, he had a right to assume that they were issued in compliance with law, and was not bound to examine the records of the school board to ascertain if the law had been complied with; that defendant could not defeat the suit by showing that the election was held on a different day from that specified in the notice of election, or by showing that there was no order of the board or record directing the issuance of the bonds; also that if plaintiff was the purchaser before maturity, without notice, as above mentioned, and if the men who signed the bonds were directors of the school district, and the bonds were issued for the purpose of building a schoolhouse, the finding should be for the plaintiff for the full amount of the bonds and coupons, unless the issue was in excess of 5 per cent. of the taxable value of the property in the district, as shown by the assessment for 1882, including railroad property and merchants' stocks, in which event the recovery should be scaled down by appropriating the excess among the 14 bonds issued, and plaintiff was entitled to recover on his 9 bonds and coupons after the amount thereof should be so scaled down. The court refused those instructions. Defendant asked instructions to the effect that if the election was held on the 28th, while the notice called for an election on the 29th, of August, no authority was conferred thereby on the board to issue the bonds; that if \$3,500, the amount of the whole issue, was in excess of 5 per cent. of the value of the taxable property in the district, as shown by the assessment next before the last assessment for state and county purposes previous to the incurring of the indebtedness, then the bonds were invalid, and plaintiff could not recover; and that, in making the estimate, neither railroad property nor merchants' stocks was to be included. The court

gave those instructions, and gave also a peremptory instruction to the effect that the plaintiff, under the evidence, was not entitled to recover. To the ruling of the court in refusing and giving instructions, plaintiff duly excepted. There were a finding and judgment for the defendant, from which plaintiff has prosecuted this appeal.

1. Appellant's chief reliance is upon his proposition that since he is a purchaser for value, without notice, before maturity, the defendant is estopped by the recitals in the bonds to deny that the requirements of the law were complied with in their issuance. Appellant is not without authorities in other jurisdictions to support his proposition, but that is not the law of this state. In Missouri all corporations of this kind are limited in their powers, having only such as are conferred by law, and any one dealing with such a corporation is charged with knowledge of its limited authority. In case the existence of facts necessary to the validity of an act of such corporation is required by law to be made a matter of public record, one cannot claim to have been misled to his disadvantage by trusting to false recitals, if he has neglected to examine the public records, which would have shown him the truth. What is here said is in reference to essential facts, not mere irregularities in procedure. In *Carpenter v. Lathrop*, 51 Mo. 483, this subject was discussed at length, and the previous decisions of this court on the point were reviewed, by Vorles, J., who delivered the opinion of the court, and thus stated the conclusions: "I think, in all cases where the bond or other instrument purports to have been issued by delegated power, it devolves on the plaintiff to show that the power has been conferred, before he can recover. * * * The plaintiff seems to have relied upon the recitals made in the bonds, and upon the record of the order for the printing of the bonds made by the trustees of the town. I have already stated that I do not think that these recitals are sufficient evidence to bind the defendant, or to show that the power existed in the trustees to execute the bonds." In *Catron v. Lafayette Co.*, 106 Mo. 659, loc. cit. 667, 17 S. W. 578, the court, per Brace, J., referring to the holder of such a bond, said: "He must, at his peril, ascertain that the county court has power to issue the security for such purpose, and then he has the right to trust to the decision of the proper authorities when the bonds were issued as to the regularity of the proceedings." That is as far as this court has ever authorized one to trust the recitals in bonds of this character. In *Heard v. School District*, 45 Mo. App. 660, our Kansas City Court of Appeals, per Smith, P. J., after reviewing the decisions of this court, said: "It is thus seen that the rule which now obtains in this state is that the recitals in a bond of the class to which that sued on belongs are neither prima facie nor com-

clusive evidence of the required authority to issue the same. These recitals in the bond, of themselves, prove nothing. The bond, it seems, would be just as valid without them. They do not dispense with the necessity of proving what they recite, when an action is brought on the bond." That is a correct conclusion from the adjudications in this state. What the law requires to be done, in order to confer authority on the board of directors for the school district to issue bonds, must, in order to make out the plaintiff's case, be shown to have been done, by evidence other than recitals on the face of the bonds; and, if the law requires a record of the facts to be kept, the record is the best evidence of the facts, and primarily none other is admissible. The Supreme Court of the United States draws a distinction, which we do not draw, between requirements prescribed by statute and those prescribed by the Constitution. In *Hedges v. Dixon County*, 150 U. S. 182, 14 Sup. Ct. 71, 37 L. Ed. 1044, the court, per Mr. Justice Jackson, at page 187, 150 U. S., and page 73, 14 Sup. Ct., 37 L. Ed. 1044, said: "Again, the Constitution of the state having prescribed the amount which the county might donate to a railroad company, that provision operated as an absolute limitation upon the power of the county to exceed that amount; and it is well settled that no recitals in the bonds, or indorsed thereon, could estop the county from setting up their invalidity, based upon a want of constitutional authority to issue the same. Recitals in bonds issued under legislative authority may estop the municipality from disputing their authority as against a bona fide holder for value, but, when the municipal bonds are issued in violation of a constitutional provision, no such estoppel can arise by reason of any recitals contained in the bonds." Therefore, even under the decisions of the Supreme Court of the United States to which we are referred by appellant, the recitals in these bonds are not evidence, because the limitation on the power of the board of directors to issue them is placed by the Constitution of the state. In our judgment, a false recital in a bond can no more destroy the force of a positive requirement of a public statute, than it can of a requirement of the Constitution. The court did not err in refusing the instructions asked by plaintiff, based on his theory as to the effect of the recitals in the bond.

2. Section 12, art. 10, of our Constitution, ordains: "No county, city, town, township, school district or other political corporation or subdivision of the state, shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness

be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes, previous to the incurring of such indebtedness." Under this clause of the Constitution, the board of directors had no authority to incur indebtedness to any amount exceeding the revenue for the year, without the assent of two-thirds of the voters in the district, and even with such assent the board was forbidden to incur indebtedness to exceed in amount 5 per cent. of the value of the taxable property in the district. The burden was therefore on the plaintiff to show that this bond issue was authorized by two-thirds of the voters, and that it did not exceed 5 per cent. of the value of the taxable property in the district. The Constitution did not declare how the will of the voters in the district was to be expressed. That matter was therefore left to the General Assembly to direct by statute. Section 7032, Rev. St. 1879, amended by the act of 1881, which was the law when these bonds were issued, conferred on the school board, within the constitutional limit, authority to borrow money to build schoolhouses, and directed how the will of the voters in the district on that subject should be expressed. The statute directed that an election should be held, at an annual or special meeting for that purpose, after 15 days' notice had been given by written or printed notices posted in the district; that the voting should be by ballot; and that the authority to make the loan should be conferred if two-thirds of the voters so expressed. The authority to borrow the money and issue the bonds was devolved on the board of directors, but, before they could exercise the authority, they would have to order an election to ascertain the will of the voters. The board of directors was the organization through which the whole machinery of the law was to operate. The board was required by law to keep a record of its proceedings. Section 7042, Rev. St. 1879. That was a public record, and to it we must primarily look, to ascertain what action the board of school directors took in this matter. Referring first to the parts of the record introduced in evidence by the defendant, because they are prior in date to those introduced by plaintiff, we see that at the board meeting of July 7th a special meeting of the voters of the district was called, and that in accordance therewith a meeting was held on July 28th, at which a proposition to sell the old schoolhouse and site, and build a new schoolhouse, was submitted and carried. But these bonds do not purport to have been issued pursuant to authority derived from that meeting, or at that election, if there was an election then. Those were the proceedings, doubtless, to which one of plaintiff's witnesses (Mr. Kinley) referred to

when he said that he advised his client not to invest in the bonds, because the vote was not taken in the manner prescribed by the statute. The bonds in suit purport to have been issued under proceedings instituted subsequent to those above referred to, and evidenced by the parts of the record introduced in evidence by the plaintiff as of dates August 2d and August 28th. Now let us see if there is anything in the proceedings of the board under those dates to constitute a foundation for the action of the directors in issuing the bonds. The only thing in the record of August 2d bearing on the subject is: "Ordered that notices be posted, calling meeting of voters for the purpose of changing site, selling old house, making appropriation of \$3,789, or one per cent. on assessed valuation, leaving proceeds arising from sale of present house for seating new house." That is all there is in this record to support the claim that this board ordered a meeting of the voters to be held on August 28th to consider the proposition to authorize the board to borrow \$3,500 to build a school-house, and issue bonds to secure the payment thereof. The order of the board does not name a date on which the meeting of the voters is to be held, and it makes no reference to borrowing money. It refers to making an appropriation, but for what purpose is not stated. The statute imposes on the clerk the manual labor of signing and posting the notices, but it does not clothe him with authority to order a meeting of the voters, or to designate the day on which an election shall be held. The board alone had authority to do that, but in this instance omitted to do it. The record of August 28th says that the qualified voters "assembled pursuant to call after due notice of twenty days. Organized by appointing W. A. Bennett and J. P. Moore as judges, and John Gould as clerk. Submitted and considered propriety of the loan as per notice. Proceeded to ballot, with the following results: For the loan, 17; against, 2." Plaintiff draws the conclusion from that record that a notice was posted, calling a meeting on that day, and specifying that the meeting was for the purpose of considering the subject of a loan. But if such notice was given, it was not in pursuance of any order of the board of directors. Besides, whilst the record of August 28th says that the "propriety of the loan as per notice" was considered, it does not say what loan the notice designated. Therefore we cannot, from the record, learn what loan was considered. Those are the only record entries of the board's proceedings bearing on the subject prior to the issuance of the bonds, and they fall short of showing any authority in the directors to make the issue.

3. The Constitution, as we have seen, expressly forbids the board of directors to incur indebtedness in excess of 5 per cent. of the value of the taxable property in the dis-

trict, "to be ascertained by the assessment next before the last assessment for state and county purposes, previous to the incurring of such indebtedness." The learned counsel in this case are not agreed as to which assessment we must refer for the purpose of determining whether this indebtedness exceeded the limit prescribed by the Constitution. Counsel for appellant are of the opinion that it is the assessment of 1882, while counsel for respondent think it is that of 1881. If we should concede to appellant that the assessment of 1882 is the standard, it would still leave the bond issue in excess of the prescribed limit. According to the assessment of 1882, the value of the taxable property in the school district was \$74,839; but included in that estimate is the sum of \$27,292, as the value of railroad property, and \$9,180, as the value of merchants' stocks. If we deduct either of those items, it will leave the assessment less than \$70,000, and therefore \$3,500 would be in excess of the 5 per cent. limit. It has been decided by this court that, at the date these bonds were issued, railroad property was not taxable for the purpose of raising money with which to pay for a schoolhouse (State ex rel. v. Wabash Ry., 83 Mo. 395), and counsel for appellant concede that to be the law. But the learned counsel argue that, whilst railroad property was not taxable for this purpose, it was nevertheless to be taken into account in estimating the extent to which the board might go in incurring indebtedness for this purpose, because, by the terms of the Constitution, the assessment named as the basis of the calculation is "the assessment next before the last assessment for state and county purposes." The clause of the Constitution under discussion is not aimed at school districts alone, but its language is: "No county, city, town, township, school district or other political corporation or subdivision of the state shall be allowed to become indebted," etc. No distinction is made between any of these political corporations named, in respect of the subject. The same ratio between the value of the taxable property and the tax to be levied is prescribed for all alike, in one group. If we should give to the words "assessment for state and county purposes," in this clause, the meaning that appellant's counsel think they should have, then we should have a school district empowered to become indebted to a greater degree than 5 per cent. of the property liable to be taxed for its payment, while a county, city, town, or township had no such power. The plain purpose of the Constitution is to forbid the incurring of a public debt beyond a certain per centum of the value of the property taxable for its payment. That purpose must not be lost sight of in interpreting any doubtful words in the clause. The language is not that the corporation shall not incur indebtedness exceeding 5 per centum of the value of property within its territorial limits

subject to taxation for state and county purposes, but it is that it shall not incur such indebtedness "exceeding five per centum on the value of the taxable property therein." Then it specifies the source from which information as to that value is to be obtained; that is, the official assessment for state and county purposes. If the clause under discussion had simply forbidden the school district to incur indebtedness "exceeding five per centum on the value of the taxable property therein," without further demonstration, it would have left open the question of how that value was to be ascertained, and in that event the board of directors could have ordered an assessment for that purpose. But the lawmakers were unwilling to leave it in that condition, and therefore they pointed out the standard by which the valuation was to be ascertained, to wit, the official assessment for state and county taxation. The words "for state and county purposes," in that clause, are merely descriptive of the official document to which reference is made. At the date of the issuance of the bonds in question, the case of *State ex rel. v. Wabash Ry.*, above cited, had not been decided; and the school directors doubtless assumed that railroad property in the district was taxable for the purpose of paying the bonds, and they acted on that assumption; but it was a mistake, and that mistake was fatal to the bonds. It has also been decided that the value of merchants' stocks was not to be taken into account in estimating the taxable value of property in the county. *State ex rel. v. K. C. & C. Ry.*, 116 Mo. 15, 22 S. W. 611. Yet merchants' stocks were included in the estimate on which the directors relied when they issued those bonds. Deducting, as we must, from \$74,889 (the assessment of 1882), the railroad property, \$27,292, and the merchants' stocks, \$9,180, only the sum of \$38,417 remains as the basis on which the board of directors, if they had been so authorized by the assent of the voters, could have predicated a bond issue, 5 per cent. on which basis would have been \$1,920.85. For this reason, even if the assent of the voters had been obtained, the issue of bonds to the amount of \$3,500 was in violation of the clause of the Constitution above quoted, and the bonds were invalid.

4. It is contended, however, that, in case the amount of the bonds is found to be in excess of the constitutional limit, the court should scale them down to the amount that was lawful, and give plaintiff judgment for his proportion of the reduced amount. That course would be equivalent to the making of a new contract for the parties—not only a contract which the parties themselves did not make, but one which we have no means of knowing they would have made. The voters of the district, who were to be first consulted, might be very willing to build a new schoolhouse of a style to cost \$3,500, but unwilling to build one of a style to cost only

\$1,900. We can gather from the meager record of the school board in evidence that the proposition involved the selling of an old schoolhouse and the building of a new one. How can we assume in such case that the voters would not have preferred to keep the old schoolhouse, in preference to building such a new one as \$1,900 would pay for? But we need not conjecture on such a subject. The school directors essayed to make a contract that they were expressly forbidden by the Constitution to make, and it is therefore wholly invalid. The argument is made that the school district got the money for these bonds, and used it in the construction of a schoolhouse, which it has ever since used, and still possesses and enjoys. If this were a suit in equity to subject the property to the payment of the money furnished to purchase it, that argument would be in place; but this is an action at law, and the plaintiff must stand or fall on the question of the validity of the contract.

There are some other questions discussed in the briefs, but they become unimportant, in view of the conclusion we have reached on the points above considered.

The trial court, on the main questions, took the correct view of the case, and the judgment is affirmed.

BRACE, P. J., and MARSHALL, J., concur in paragraphs 1, 2, and 4, and in the result, but dissent from paragraph 3. ROBINSON, J., absent.

CAMPBELL et ux. v. ST. LOUIS & SUBURBAN RY. CO.

(Supreme Court of Missouri, Division No. 1.
May 27, 1903.)

STREET RAILROAD—CROSSING ACCIDENT—
NEGLECT—DRIVER—CONTRIBUTORY NEGLIGENCE—DUTY TO STOP—ORDINANCES—
PROOF—EVIDENCE—COMPETENCY—INSTRUCTIONS.

1. In determining whether a 16 year old boy, killed by a street car while driving over a crossing, was guilty of contributory negligence, his conduct is to be measured by the standard of an ordinarily prudent boy of his age, and not by that of a man of mature years.

2. Whether a 16 year old boy, killed by a construction car while attempting to drive across a street car track at a street crossing, was guilty of contributory negligence, held, under the evidence, to be a question for the jury.

3. Where both parties to an action against a street railway for negligent death tried the case on the theory that defendant was not liable for a violation of the ordinances governing the running of street cars, unless it was shown that it had agreed to be bound by such ordinances, an ordinance showing such an agreement on the part of defendant was relevant.

4. By accepting St. Louis Ordinance No. 19,393, granting to defendant a franchise for a branch on condition that it complies with all the general ordinances and charter provisions in relation to street railroads then in force or thereafter to be enacted, and "applicable to its entire line of railroad, or any part thereof," defendant agreed to be bound by all the ordinances relating to street railroads, not only as to the branch, but as to its entire line, if such agreement was necessary.

5. Under the express provisions of Rev. St. 1899, § 3100, a volume of ordinances purporting to be published by authority of a city is admissible as evidence of an ordinance contained therein.

6. St. Louis Ordinance No. 15,954, granting to defendant a franchise to construct a line over certain streets and alleys, and authorizing it to run cars on that part at a rate of 20 miles an hour, is not in violation of City Charter, art. 3, § 28, providing that no special or general ordinance in conflict or inconsistent with a prior ordinance shall be valid until such prior ordinance, or its conflicting point, is repealed by express terms, as it does not attempt to repeal the general ordinance limiting the speed of street cars to 8 miles an hour, but only makes an exception to its operation, having it in full force as a general rule.

7. On a mere showing that a person had for 20 years the common experience of a city man traveling on street cars, he was not competent to give an opinion as to the speed of a car, based on the noise heard at a distance of more than 120 feet.

8. Where there was no evidence available to plaintiff in an action for negligent death to support the hypothesis that defendant's motorman failed to stop on the first appearance of danger to the deceased, it was error to instruct that, under an ordinance, defendant's motorman was bound to stop on the first appearance of danger, and was negligent if he failed to do so.

9. Where the evidence was conflicting as to whether defendant's street car had a headlight at the time of the accident, the court properly refused to instruct the jury to find in its favor if plaintiff's intestate was driving toward its track in a wagon which had no light, and defendant's motorman could not, by the exercise of ordinary care, have discovered the horse and wagon in time to avoid the collision after they came within range of the car.

10. Where, in an action against a street railway for the death of a driver at a crossing, there was no contention that defendant was liable notwithstanding the negligence of the deceased, the court properly refused to instruct that defendant was entitled to a verdict if the car was running at such a rate of speed that when the danger to the deceased could have been discovered the motorman could not stop the car in time to avert the accident, even though it was running at the highest rate of speed mentioned by any witness.

11. Whether a 16 year old boy, killed at a street car crossing, should have stopped to look and listen for a car before driving onto the track at a crossing on a dark and foggy night, held to be a question for the jury; the evidence being conflicting as to whether the car had a headlight.

12. A requested instruction in an action against a street railway for the negligent death of a driver at a crossing, that the deceased was negligent if he drove onto the track without looking and listening for a car, and could have seen or heard the car, had he done so, was not covered by an instruction that he was negligent if he failed to use ordinary care in driving across the track or looking out for approaching cars, and was improperly refused.

Appeal from Circuit Court, St. Louis County; John W. Booth, Judge.

Action by Thomas J. Campbell and wife against the St. Louis & Suburban Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed.

McKelghan & Watts and Robt. A. Holland, Jr., for appellant. Clinton Rowell, Jos. H. Zumbalen, and S. P. Spencer, for respondents.

VALLIANT, J. This is a suit for damages, under section 2864, Rev. St. 1899, for the death of plaintiffs' minor son, which they allege was caused by the negligence of the servants of the defendant in running a car on its railway. Defendant operates a street railway in St. Louis. The accident occurred at the point where defendant's tracks cross Whittier street. At that point defendant's tracks run east and west, and Whittier street north and south. Plaintiffs' son, who was 16 years old, was driving a grocery delivery wagon, going south on Whittier street, shortly after 6 o'clock in the evening, November 3, 1899, when, as he was crossing defendant's south track, the wagon was struck by a car with such violence that he was thrown out and instantly killed. The petition states that at that time there was an ordinance of the city which required the servants of defendant in charge of the car to keep a vigilant watch for vehicles and pedestrians either on the track or moving towards it, and, on the first appearance of danger to such vehicles or pedestrians, to stop the car in the shortest time and space possible, and that such cars after sunset should be provided with signal lights, and no car be run at a greater speed than eight miles an hour. It then states that the servants of defendant so negligently managed the car on this occasion as to cause it to strike the wagon, and throw the plaintiffs' son therefrom and kill him. Then the petition specifies four acts, as of negligence, which it alleges defendant committed, to wit, that there was no headlight; that the car was running 20 miles an hour; that the men in charge did not keep a vigilant watch, and failed to stop the car in the shortest time and space possible on the first appearance of danger to the vehicle; and that they failed to ring a bell on approaching the crossing. The answer was a general denial, and a plea that the plaintiffs' son was negligent, in that he drove on defendant's track without looking or listening for an approaching car, and thereby contributed to the accident. Reply, general denial.

The testimony for plaintiffs tended to prove as follows: Defendant's tracks are laid in an alley that runs east and west between West Bell street, on the north, and Morgan street, on the south. It is an unusually wide alley, being about 60 feet in width; the defendant owning a right of way 20 feet wide through the center. There are two tracks; the north track being used for the west-bound cars, and the south track for the cars east bound. Whittier street runs north and south, intersecting the above-named streets, alley, and railroad tracks at right angles. This is in a residence district in the western portion of the city. The next street west of Whittier, and parallel to it, is Pendleton; the next, Newstead; and the next, Taylor avenue. The railroad tracks are on a straight line and level from Whittier street to Taylor avenue and beyond. There is a roadway in

the alley on the north side of the tracks, 20 feet wide, and one on the south side 23 feet wide. In the angle made by the west line of Whittier street and the north line of the alley is a two-story brick stable. There were telegraph poles along the line of the railroad, one of which was just west of Whittier street. There was an arc light at the intersection of Whittier and West Bell streets, but no light at the crossing of the tracks. The night was dark and foggy. Whittier street was paved with vitrified brick, which pavement extended down to the railroad tracks. A wagon passing over the pavement made considerable noise. The vehicle in which plaintiffs' son was driving was an ordinary grocery delivery wagon, covered at top and sides, except that on each side, by the driver's seat, it was open for a space of 18 inches, so that the driver could see to the right and the left as well as to the front. On this occasion he came from the north, driving south on Whittier street, and, without stopping or slackening his pace, crossed the north track; and just as he got on the south track the wagon was struck by an east-bound car, and he was thrown out and instantly killed. It was not a regular passenger car, but a construction or repair car. It carried no headlight, but there were lights inside, and an incandescent bulb in the hood at the front of the car, with a reflection throwing the light upward, designed to enable the operator to see the wire overhead. The plaintiffs' witnesses variously estimated the speed of the car at 12, 15, and 20 miles an hour. It did not slacken its speed until it struck the wagon, and it stopped about 120 feet east of Whittier street. Four of plaintiffs' witnesses heard the car when it was halfway between Pendleton and Whittier streets, and recognized by the sound that it was a car approaching rapidly. Only one of these was in a position to see in that direction, and she testified that she saw the car midway between Pendleton and Whittier streets. This witness was standing in the alley on the north side of the tracks at the back gate of the second house east of Whittier street, so that she was about 250 feet from the car when she first saw and heard it. Another one of these four witnesses was in the rear room of the same house, with the windows closed; and she heard, but did not see, it. Another was standing on the front porch of house No. 4206 West Bell street, which is the second house west of Whittier. It was about 130 feet from where he stood to the north line of the alley, the house intervening. He was permitted to testify, over the defendant's objection, that, judging from the noise of the car, it was running 12 to 15 miles an hour. One of plaintiffs' witnesses, who at the time of the accident was in the employ of the defendant, and on this car, testified that it was his duty to put the headlight on the car, and that he did so. The headlight was burning when the car left De Hodiamont, but, wheth-

er it was burning when they reached Whittier street, he did not know. This witness and another for plaintiffs testified that the car, running 12 to 20 miles an hour, could be stopped in 35 to 50 feet.

Over the objection of defendant, the plaintiffs read in evidence a duly certified copy of an ordinance of the city (No. 19,393, approved June 10, 1898) authorizing the defendant to build and operate a branch of its road through a portion of Union avenue to Forrest Park, the conditions of which had been duly accepted in writing by the defendant, and one clause of which was as follows: "The St. Louis & Suburban Railway Company, in accepting this ordinance, agrees to comply with the provisions of all general ordinances and charter provisions affecting street railroads that may be in force or which may hereafter be enacted and applicable to its entire line of railroad or any part thereof." Then, over the objection of defendant, plaintiffs read in evidence, from the volume of Revised Ordinances of 1892, sections 1275 of Ordinance 17,188, which provides that no car shall be drawn at a greater speed than eight miles an hour; that the motorman of each car shall keep a vigilant watch for all vehicles, either on the track or moving towards it, and on the first appearance of danger to such vehicle the car shall be stopped in the shortest time and space possible; and that all cars, after sunset, shall be provided with signal lights.

At the close of the plaintiffs' evidence, the defendant asked an instruction in the nature of a demurrer to the evidence, which the court refused. To the introduction of evidence over defendant's objections, and to the refusal of the instruction asked, exceptions were duly saved.

The evidence for defendant tended to show: That the car was running 10 or 12 miles an hour. That the headlight was burning, and continued to burn until the lamp was broken in the collision. That the gong was sounded at a point 60 feet before reaching the street. That the motorman, as he approached Whittier street, had taken the slack out of the brake, which tends to slacken the speed and place the car under control. On approaching within .6 or 8 feet of the street, and seeing nothing on the crossing, he let off the brake, and then, for the first time, saw the horse on the west-bound track. He immediately set the brake and reversed the power, but the reverse action did not take effect, and the collision resulted. The car went 60 or 70 feet east of Whittier street before it stopped. The headlight did not illumine the whole street, but only to the west-bound track. When the motorman let go the brake, there was nothing in sight. When the horse came in view, it was not more than 15 feet from the car, and was going quite fast. The space within which a car could be stopped, going as this was, was 60 to 90 feet.

Defendant offered in evidence Ordinance

No. 15,954, entitled "An ordinance authorizing the St. Louis & Suburban Railway Company to acquire, construct and maintain a double track passenger railroad on, along and across certain streets, alleys and city blocks in the city of St. Louis," etc., approved February 6, 1891. This is the ordinance under which the defendant had acquired and was operating this part of its railway when the accident occurred, and it authorized the defendant to run its cars on that part of its road at a rate of 20 miles an hour. Plaintiffs objected to the evidence on the ground that it was invalid in so far as it essayed to authorize defendant to run its cars at the rate of 20 miles an hour, in the face of the general ordinance in evidence limiting the speed of cars to 8 miles an hour, and in violation of section 28, art. 8, of the city charter (Rev. St. 1889, p. 2100), which provides that "no special or general ordinance, which is in conflict or inconsistent with general ordinances of prior date, shall be valid or effectual until such prior ordinance, or the conflicting part thereof, is repealed by express terms." The court sustained the objections, and defendant excepted.

The case was submitted to the jury on instructions which, together with other instructions asked and refused, will be hereinafter considered, exceptions thereto having been duly saved. The result of the trial was a judgment for plaintiffs for \$5,000, from which defendant appeals.

1. The first question is, did the court err in refusing the instruction in the nature of a demurrer to the evidence? The argument in support of that instruction is that the plaintiffs' evidence shows that the deceased was himself guilty of negligence which contributed to the accident. From the facts and circumstances shown by the plaintiffs' evidence, the conclusion might reasonably be drawn that the deceased was guilty of such negligence, but, unless that is the only conclusion that can reasonably be drawn from those facts and circumstances, the demurrer to the evidence was properly overruled. If the evidence was such that there could reasonably be no two opinions about it, then its effect should have been declared by the court as a matter of law; otherwise it was a question of fact for the jury. *Gratiot v. Ry.*, 116 Mo. 450, 21 S. W. 1094, 16 L. R. A. 189; *Weller v. Ry.*, 120 Mo. 635, 23 S. W. 1061, 25 S. W. 532. That the boy could have seen the car coming, if he had looked, may be inferred from the testimony of Annie Pierson, the witness for plaintiffs who stood at the back gate of the house 4188 West Bell street. She was the only one of plaintiffs' witnesses who was in a position to see it, and she testified that she saw it when it was midway between Pendleton and Whittier streets, and heard it, also, and that it had no headlight. She was east of Whittier street, and farther from the car than the boy was after he came into the alley, clear of the stable; and, if there were

any telegraph poles to obstruct his view, they would have obstructed her view, also. Then there was the testimony of three other witnesses for plaintiffs, who, although they were not in positions to see, yet testified that they heard the car coming, and recognized what it was. There is room to suspect that Annie Pierson might have been mistaken as to having seen the car, if, as she said, it had no headlight, and if, as all the witnesses said, it was a dark, foggy night. And yet it is not improbable that she did see it, because she had been standing there 10 minutes, her eyes had become accustomed to the darkness, and she may have recognized the car by other lights than the headlight. Whether she saw the car, or not, was a question for the jury. The plaintiffs were not bound entirely by her testimony on that point. It was incumbent on the boy to have used his eyes and ears before driving on the track, and, if all that these witnesses said was true, he would have seen or heard the car if he had stopped and looked and listened. Whilst it is the duty of one under such circumstances to look and listen, and sometimes it is his duty to stop in order the better to see and hear, yet it is not always incumbent on him to stop for that purpose; and whether he should do so, or not, in a given case, depends on the circumstances, and, if it is doubtful, the jury are to judge of it. In this instance the boy did not stop, and whether he looked or listened, we can only judge by inference. It may be that he both looked and listened, but that he was deceived by the fact, if it was the fact, that there was no headlight, and that his listening was rendered ineffectual by the noise of his own wagon rattling over the vitrified brick pavement. It has often been said that a man approaching a railroad with the purpose of crossing it is chargeable with the duty to himself of looking and listening for a train. There is nothing technical about that rule. It is the dictate of common sense, and one's conduct in relation to it must be judged with common sense. What the law requires is the exercise of that degree of care which such persons of ordinary prudence under like circumstances usually exercise. To determine in a given case whether or not such care has been exercised, the triers of fact must consider who the person is; his age, condition, experience; the time, place, and all the surrounding conditions. The most of what is said in our books on the subject of the duty of one about to cross a railroad track to look and listen is said in cases of crossings of steam railroads in the country, but the principle applies also to crossings of street railroads in cities. Yet conduct that might well be regarded as negligence in the one case need not necessarily be so regarded in another. The noise of an approaching train on a steam railroad in the country is more easily heard and distinguished for what it is than is the noise of a street car, which is often undistinguishable in the roar of the city, so

that a jury in the one case might well say that the person did not use his sense of hearing, because, if he had listened, he could not have failed to have heard and recognized the noise of an approaching train, while in the other they might reasonably conclude that the fact that he did not seem to hear and recognize the noise of an approaching street car did not conclusively show that he was negligent in the matter of listening. The triers of the fact must decide that question under the peculiar circumstances of the particular case in hand.

A fact to be borne in mind in this case is that this was not a passenger car, whose familiar appearance would be at once recognized by one used to seeing street cars, and for the like of which one would, at a crossing, naturally be on the lookout; but it was a construction car, whose outlines at night were not so easily seen, or, if seen, recognized for what it was. Therefore, in passing on the question of whether the plaintiffs' son was negligent in failing to see this car, we must remember that it was not such an object in appearance as one looking out for a car would expect to see, and that it is possible that, through the darkness, he might have seen this object without recognizing what it was.

There is another important fact to be taken into consideration in passing on the question of contributory negligence in such case; that is, the age and condition of the person whose conduct is under inquiry. Here was a boy 16 years old—old enough to be held accountable for his acts, but not to be judged as we would judge a man of mature years. The question is not what would an ordinarily prudent man of mature years have done under like circumstances, but what would an ordinarily prudent boy of 16 years have done under like conditions? Care and prudence increase with that experience which years of maturity bring, but do not come by intuition to a boy in whose veins the blood of youth is leaping, and to whom danger is a pleasant incentive. Reasonable men, considering the case, might construe the conduct of a mature man to be inconsistent with the care that should be expected of him, and therefore adjudge him guilty of negligence, and yet construe the same conduct in a boy of 16 years as nothing more than was to be expected of one of his age. We do not mean to say that a boy 16 years old is to be excused when he fails to exercise that degree of care to be expected of an ordinarily prudent boy of that age, but we mean that he is to be measured by the standard of an ordinarily prudent boy, not by that of an ordinarily prudent man of mature years. Beach on Contributory Neg. (3d Ed.) § 216; 7 Am. & Eng. Ency. L. (2d Ed.) 405; Plumley v. Birge, 124 Mass. 57, 26 Am. Rep. 645. In this case the boy had a right to expect that there would be a headlight on any car on that road, and

if he looked in both directions as he approached the tracks, and saw no headlight, and if he then concluded, for that reason, that there was no car coming, and drove on the track, the court had no right to say, as a matter of law, that he was guilty of contributory negligence. We do not mean to say that he was not guilty of contributory negligence, or that the jury would not have been justified in finding him guilty; but we mean that men might reasonably differ about it, and therefore it was for the jury to say whether, under all the circumstances, he was or was not guilty.

The court did not err in overruling the demurrer to the evidence.

2. The court did not err in overruling the objection to the admission in evidence of Ordinance No. 19,398. Both parties tried the case on the theory that it was necessary for the plaintiffs to show that the defendant had agreed to be bound by the ordinances of the city governing the running of street cars, before it could be held liable for a violation of the same. Therefore, whether that is a correct theory or not, neither party is in a position to question it in this case. That ordinance was relevant evidence, if it was necessary for the plaintiffs to make such proof. The objection made by defendant was that it related only to that branch of defendant's road which was named in the ordinance. Whilst the license conferred by the ordinance related only to the branch therein named, yet that license was made the consideration for which the defendant agreed to be bound by all the general ordinances and charter provisions in relation to street railroads then in force or thereafter to be enacted, "applicable to its entire line of railroad, or any part thereof." Therefore, if it was necessary for defendant to agree to obey the law before it would become binding on it, there was such agreement, based on a valuable consideration, and made applicable not only to the branch authorized in the ordinance, but to defendant's entire line. The objection to the reading in evidence of section 1275, art. 6, of Ordinance 17,138, from the volume of Revised Ordinances, was also properly overruled. That volume purported to be published by authority of the city, and was admissible in evidence, under section 3100, Rev. St. 1899.

3. But it was error to have sustained the plaintiffs' objection to Ordinance 15,954, offered in evidence by defendant. That ordinance authorized the defendant to run its cars on the part of its road where this accident occurred at 20 miles an hour. The objection was that the ordinance was invalid, under section 28, art. 3, of the city charter, hereinabove quoted, because in conflict with the general ordinance above mentioned, which limited the speed of street cars to eight miles an hour; the general ordinance not being expressly repealed. That point has been decided by this court, in

Ruschenberg v. Ry., 161 Mo. 70, 61 S. W. 626, contrary to the plaintiffs' contention. It was in that case decided that a similar ordinance, relating to a portion of the road of another street railway company in the city, was not, in effect, an attempt to repeal the general ordinance by implication, but only the making of an exception to its operation, leaving the ordinance in full force as a general rule. That is a correct construction of the ordinance and of the charter provision.

4. One of the plaintiffs' witnesses, standing on the front porch of his residence, at No. 4206 West Bell street, in which position he was about 125 feet from the alley, with the house intervening, was permitted to give his opinion as to the speed of the car, judging alone from the noise it made. He said it was running between 12 and 15 miles an hour. It was not claimed that he had ever made any particular study of the subject, or that he had even been in the business of operating street cars, but he had for 20 years or more the common experience of a city man traveling on street cars. Long training and study make men so proficient in particular subjects that they sometimes really know more than the casual observer seems possible, and therefore we ought to hesitate to pronounce as impossible the possession of such knowledge when it is claimed with a fair show of reason. But when very unusual technical knowledge is claimed, the party offering the evidence ought to be able to show the court that such attainment is practicable by experience and study, and that it is so recognized in the particular trade or science. There is no sound more familiar to the ears of a city man than that made by a street car in motion, and one may by the sound form some idea as to whether the car is moving fast or slowly, but to the man of common experience the idea is very indefinite. When such evidence is offered, the court, in the first instance, must pass on the question of the qualification of the witness to give an opinion; and, unless the court is satisfied that the witness is really enabled to give something more than a vague guess, it ought to rule the evidence out, as not worthy to influence a verdict. The objection to this evidence ought to have been sustained.

5. For the plaintiffs the court instructed the jury that, as required by the city ordinance, the defendant's motorman "was bound to keep a vigilant watch for persons on foot, and for vehicles either upon its track or moving towards it, and, upon the first appearance of danger to such person or vehicle, said motorman was bound to stop the car within the shortest time and space possible," and that, if he failed to do so, he was guilty of negligence, and, if such negligence caused the accident, the defendant was liable, provided the deceased was himself exercising ordinary care. Appellant contends that this instruction was erroneous, for two reasons:

First, that defendant had not agreed to be bound by the ordinance; second, that there was no evidence that the motorman did not keep a vigilant watch, or that he did not stop the car in the shortest time and space possible, upon the first appearance of danger. What has already been said in paragraph 2 of this opinion disposes of the first of these objections. The second objection, however, is more serious. The plaintiffs are in the position of saying that the driver of the wagon could not see the car because the night was dark and foggy, and there was no headlight. The motorman was in no better position to see the wagon than the driver was to see the car. The same darkness which hid the one hid the other. If the telegraph poles obstructed the view of the driver, they were there to obstruct the view of the motorman also. Annie Pierson said she saw the car, but did not see the wagon until it was struck. She was in a better position than the motorman was to see the wagon. One of the plaintiffs' witnesses (Schira) said that the motorman could see a wagon on Whittier street when he was 150 feet west. But that witness did not come on the scene until after the accident had occurred, and what he said was only his opinion on a subject which, from aught that appears, he knew no more about than any one of the jurors trying the case. Plaintiffs insist that it was a dark, foggy night, and there was no headlight on the car. If those are the facts, then the only evidence that the motorman failed to keep a vigilant watch was the failure to have a headlight to enable him the better to see, for a man cannot be said to keep a vigilant watch if he lets his lamp go out. But if it was dark, and there was no headlight, and he could not see the wagon, what appearance of danger was there for him to guard against by stopping the car in the shortest time and space possible? The ordinance does not require the motorman to stop the car on the first appearance of a vehicle approaching the track, but on the first appearance of danger. There must therefore be an appearance of danger before the mandate of the ordinance to stop the car is applicable. We are not now discussing the question of negligence in running a car in the dark without a headlight across a public street, but we are limiting our attention at present to the requirements of this ordinance. If the plaintiffs be limited to their own testimony, and to their own theory of a dark night and no headlight, there was no foundation in the evidence for the instruction now under discussion. The only hypothesis upon which that instruction can rest is that there was a headlight, as the defendant's witness testified there was. The motorman testified that the headlight was burning, and that it threw the stream of light down the track on which he was moving, and enabled him to see the wagon on the north track, but that the light extended no farther than that track. He also said that as

soon as he saw the wagon he threw on the brake and reversed the motor, but that it failed to take effect. If that testimony is true, then he was not guilty of violating the ordinance, for he did all that he could do in the emergency. But the jury were the judges of the weight to be given his testimony. If they credited part of his testimony and discredited part, they were acting within their province. And so it was with the plaintiffs' evidence, the jury were free to believe and to disbelieve as their judgment dictated. There was evidence for the plaintiffs that this car, when going at the speed it was, could have been stopped, with the appliances at hand, in a space of 35 to 50 feet. The defendant's evidence was that it required 60 to 90 feet. Plaintiffs' evidence was that the car ran 125 or 130 feet east of Whittier street before it stopped. The evidence of defendant was that it went only 60 or 70 feet east of the street. If there was a headlight, and if the car could have been stopped in 35 to 50 feet, and it was not stopped until it went 125 or 130 feet beyond the east line of the street, those facts furnished the foundation for an argument that the motorman did not stop in the shortest time and space possible after he saw the danger. To build a case on that theory, however, the plaintiffs must abandon their position in regard to there being no headlight, and fall back on the defendant's evidence which tends to show that there was a headlight. But the plaintiffs cannot abandon their first position for the reason that they barely escaped being forced to a nonsuit on the theory that there was no headlight. If there was a headlight, the boy could not have failed to have seen it if he looked; and if he saw it, but did not heed it, or if he did not see it because he failed to look, he was guilty of negligence. There was no evidence available to the plaintiffs to support the hypothesis that the motorman failed to stop the car in the shortest time and space possible on the first appearance of danger. It was error, therefore, to have given that instruction.

6. The second instruction given for plaintiffs was based on the general ordinance which forbids the running of street cars at a greater speed than eight miles an hour. It instructed the jury that, if the car was being run at a greater speed than eight miles an hour, the act was negligence. The giving of that instruction was error, for the same reason given in paragraph 3 of this opinion, holding that the court erred in sustaining the objection to the ordinance allowing defendant to run its cars on that part of its road 20 miles an hour. From this it follows, also, that it was error to have refused defendant's instruction 9, which was the contrary to plaintiffs' second instruction.

7. The third instruction for plaintiffs is that the burden of proving negligence on the part of the deceased was on the defendant, and submits that question to the jury in unobjectionable form. The objection appellant

urges against it is that the evidence for plaintiffs, as well as that for defendant, shows so unquestionably that the deceased was guilty of negligence, that the court should have so peremptorily ruled, and have taken the case from the jury. We have discussed that question in the first paragraph of this opinion. For the reason there shown, it was not error to have given plaintiffs' third instruction.

8. The court refused the following instruction asked by the defendant: "(6) The court instructs the jury that if they believe from the evidence that Howard C. Campbell was driving south on Whittier street in a wagon which had no light, and that said wagon and the horse drawing the same could not have been discovered by said motorman, in the exercise of ordinary care, in time to avoid a collision after said wagon or horse came within range of the car—that is to say, near enough to the track to be in danger of being hit by the car—then your verdict should be for the defendant." That instruction would exonerate the defendant, notwithstanding the boy may have been misled into danger by the neglect of the defendant to have a headlight on its car, and notwithstanding the fact that the failure of the motorman to discover the danger may have been caused by the absence of a headlight. The instruction was properly refused. The eighth instruction asked by the defendant has the same defect, and was properly refused.

9. The court refused the following: "(7) The court instructs the jury that if you believe from the evidence that when the dangerous position of Howard C. Campbell, or of his wagon or team, could have been discovered by the motorman by the exercise of ordinary care on his part, the car which struck said wagon was running at such a rate of speed that the said motorman in charge of said car could not stop the said car in time to avert a collision with said Campbell, or his said wagon or team, by the exercise of ordinary care on the part of said motorman, and the use of the appliances at his command, then it is your duty to find a verdict for the defendant, even though you may believe from the evidence that the car which struck the wagon was running at the time of the collision, or immediately before that time, at the highest rate of speed mentioned by any witness." If there had been any question in this case as to the liability of the defendant notwithstanding the negligence of the deceased, that would have been a proper instruction, but under the evidence no such question arose. The instruction was therefore properly refused.

10. The court refused the following: "(10) The court instructs the jury that even though they believe from the evidence that the pavement on Whittier street at and about the place where the collision occurred between the defendant's car and the wagon and horse driven by the deceased was paved with vitrified brick, and that by reason of

that character of pavement the horse and wagon driven by the deceased made such a noise when passing over the same that the deceased was unable to hear an approaching car while his horse and wagon were in motion, yet the jury are further instructed that it was then the duty, under such circumstances, of the deceased, before entering upon defendant's track, to stop his horse and wagon so as to be able both to listen and to look for an approaching car, and to hear the noise of the same, if the jury believe from the evidence that the car in question made a noise that would enable him to hear it if the deceased had stopped and listened for the same; and if the jury further believed from the evidence that by so stopping his horse and wagon he could have heard the approaching car before going upon the defendant's track, and in time to avoid a collision, but that he failed to do so, but, upon the contrary, went upon the track without stopping his horse and wagon for the purpose of listening for an approaching car, then in that case the jury are instructed that such conduct on the part of the deceased was negligent, and the verdict of the jury should be for the defendant." The question whether or not ordinary care required a person about to cross a railroad track to stop, the better to see and hear, is like the question whether or not the plaintiff in a given case was guilty of contributory negligence. It is sometimes a question of law, and sometimes a question of fact. Sometimes there can be no two reasonable opinions about it. Then it is the duty of the court to decide it as a matter of law. But sometimes it is doubtful. Then it should be left to the jury. There is no doubt but that prudence required one in the condition of this boy to stop, and, if he had stopped, the probabilities are that he would have at least heard the car. But the question is, what degree of prudence required him to stop? The standard that he is to be judged by is that degree of prudence that is reasonably to be expected of a 16 year old boy, and in this case the question of whether there was or was not a headlight to warn him was to be considered in determining whether he did or did not exercise that degree of prudence when he failed to stop. Whether, therefore, the degree of prudence with which he was chargeable demanded that the boy in this case should have stopped to look and listen, was a question of sufficient doubt to be left to the jury; and the court therefore did not err in refusing the instruction which declared it to be his duty, as a matter of law, to do so, and negligence if he did not.

11. The court refused the following: "(11) The court instructs the jury that if they believe from the evidence that Howard C. Campbell drove upon the track of defendant's line on Whittier street without looking and listening for an approaching car on

said track, and that, if said Howard C. Campbell had looked and listened for an approaching car before entering upon said track, he could have seen or heard the east-bound car approaching on the defendant's track, then Howard C. Campbell failed to exercise ordinary care in so driving upon said track, and his said failure to look and listen was negligence on his part, and your verdict should be for the defendant." It certainly was the duty of the driver of the wagon to look and listen, and there was sufficient in the evidence to raise a question if he did either. The instruction was probably refused on the idea that the same hypothesis was presented in instruction No. 5 given for the defendant, which directed a verdict for the defendant if the jury should find that the accident resulted from the negligence of the deceased "in failing to use ordinary care in driving across defendant's tracks, or in failing to use reasonable care to look out for the cars approaching on defendant's tracks." But the defendant was entitled to the more explicit instruction on this point. The court erred in refusing that instruction. Instruction 12 refused is but a duplicate of instruction 11.

For the errors above mentioned, the judgment is reversed, and the cause remanded to be retried in accordance with the law as herein declared.

BRACE, P. J., concurs. MARSHALL, J., concurs in result. ROBINSON, J., absent.

BABCOCK v. HAHN.

(Supreme Court of Missouri, Division No. 1.
May 27, 1903.)

RECORDER OF DEEDS—WHERE TO KEEP OFFICE—"SEAT OF JUSTICE."

1. Rev. St. 1899, § 9055, providing that the recorder shall keep his office and records at the "seat of justice" in each county, merely requires him to keep them at the "county seat," and not at the courthouse itself.

2. Rev. St. 1899, § 9055, provides that the recorder shall keep his office and records at the "seat of justice" in each county. Act Dec. 14, 1822 (1 Ter. Laws 1804-24, p. 989, c. 421), appointed commissioners to select a site for the courthouse within the town of St. Louis. This was done, and the courthouse built, and court held there both before and after the city became an independent subdivision of the state. Const. 1875, art. 9, § 2, provides that "all additions to a town which is a county seat" shall be regarded as a part of the county seat. *Held*, that section 9055 did not forbid the recorder from removing his records to an addition to the city of St. Louis included within its limits since 1822.

Appeal from St. Louis Circuit Court; Jacob Klein, Judge.

Injunction by Luther Babcock against William H. Hahn. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

G. B. Webster, for appellant. Chas. W. Bates and A. Nicholson, for respondent.

VALLIANT, J. Plaintiff is a resident and taxpayer of the city of St. Louis, and defendant is the recorder of deeds of that city. The petition states that the defendant is about to remove his office, its books and records, from the courthouse to the city hall, and the prayer of the petition is that he be enjoined from doing so. The court sustained a demurrer to the petition, and, final judgment thereon for defendant having been duly entered, the plaintiff brings the cause to this court by appeal.

The plaintiff bottoms his case on section 9055, Rev. St. 1899, which is: "The recorder shall keep his office at the seat of justice in each county, and shall provide same with suitable books in which he shall record all instruments of writing authorized or required to be recorded." The contention is that the term "seat of justice" in that section means the courthouse, and that, therefore, it is unlawful to remove the office to the city hall, which the petition says is seven squares distant from the courthouse in the same city, and is located on a spot that was not in the town of St. Louis in 1822, when the present courthouse was located.

Passing over, without deciding, the question as to the right of the plaintiff as an individual resident and taxpayer to maintain such a suit, we come at once to the main proposition, which plaintiff lays down as the foundation of his case; that is, that the term "seat of justice" means the courthouse only. The petition goes back to the act of the General Assembly entitled "An act concerning a courthouse and jail in the county of St. Louis," approved December 14, 1822, 1 Ter. Laws 1804-24, p. 989, c. 421. That act appoints certain commissioners "to select a proper site within the town of St. Louis whereon to erect a courthouse for said county," and authorizes them to accept deeds conveying the land selected to the county for that purpose. Then the petition states that the commissioners selected the lot or square on which the courthouse is now located, that a courthouse was built on it in 1824, and that a courthouse had ever since been maintained on that square, and the courts of record of the county were held there until 1876, when the city became separated from the county, and became an independent subdivision of the state, since which date the civil courts of record have continued to be held in that courthouse; and from those facts the pleader draws the legal conclusions that that courthouse alone is the seat of justice in the city of St. Louis. The demurrer admits the material facts stated in the petition, but does not admit the legal conclusion drawn from them. Whether, under the facts stated, the present courthouse in the city constitutes alone the seat of justice, is a question of law properly raised by the demurrer. The terms "seat of justice" and "county seat" are synonymous, and are used indifferently to express the same thing in all

our statutes relating to the subject. The learned counsel for respondent have demonstrated this in their brief by reference to various statutes from the beginning of the state to the present time. 1 Ter. Laws Mo. 1804-24, p. 657, c. 287, § 7; Id. c. 303, p. 752; Id. c. 340, p. 796; Id. c. 347, p. 806; Laws Mo. 1825, c. 3; Rev. St. 1899, §§ 6671, 6675, 6694, 6712, 6713, 6719, 6725, 6726. Those terms are so treated by the best authorities, as the following quotations show: Bouvier: "Seat of justice. The county seat; the place where the courthouse and county offices are located, the place where the chancery, circuit, and county courts are held and where the county records are kept." Black's L. Dic.: "A county seat or county town is the chief town of a county, where the county buildings and courts are located and the county business transacted." Webster: "County seat, a county town, the chief town of a county where the county business is transacted, a shire town." Century Dic.: "County seat. The seat of government of a county; the town in which the county and other courts are held, and where the county officers perform their functions." The authorities relied on by the learned counsel for the plaintiff also treat those terms as synonymous. In *Ellis v. State*, 92 Tenn. 85, 20 S. W. 500, the court said: "The 'seat of justice,' within the meaning of the Constitution, is what is commonly called 'the county seat.' It is the place where the courthouse and the jail and the county officers are located." The word "place" is there used as meaning "town." The court does not say, as the plaintiff in this case says, that the seat of justice is the courthouse, but it says it is the place where the courthouse and other county buildings are located. In *State ex rel. v. Smith*, 46 Mo. 60, also relied on by appellant, the question was whether the county court had authority to remove the courthouse from its original site to a new addition to the town of Lebanon. The court referred to the act of February 24, 1849 (Laws 1849, p. 28), organizing the county of Laclede, and said that by provision of the act "commissioners were appointed to locate a seat of justice; that the commissioners, in the discharge of their duties, selected as the seat of justice for said county the tracts or parcels of ground on which the original town of Lebanon was afterwards built. The commissioners received as a donation for said county seat fifty acres of land," etc. And further in the same opinion the court said that the county authorities "caused the tracts of land so selected as the seat of justice to be laid off in town lots and blocks, and that in the sale block number two in the tract so laid off was reserved for the purpose of erecting thereon the public buildings of the county." The court in that opinion not only uses the terms "seat of justice" and "county seat" as synonymous, but says that the commissioners se-

lected 50 acres as the seat of justice, and that the same were laid off into town lots, and the town was built on those lots. Section 8104, Rev. St. 1899: "There shall be kept and maintained in good and sufficient condition and repair, a common jail in each county within this state, to be located at the permanent seat of justice for such county." That statute as imperatively requires the jail to be located at the seat of justice as does the statute on which the appellant relies require the recorder to keep his office at the seat of justice. Yet it is unusual for the jail to be under the same roof or on the same lot or square as is the courthouse of a county. The term "seat of justice" for a county is like the term "seat of government" for the state. The Constitution requires certain officers to reside at the seat of government; to keep their records and perform their duties there. That does not mean that they are all required to reside under the same roof, or keep their offices in the capitol building.

The petition avers that at the time the courthouse was erected in the town of St. Louis in 1824 the land on which is the city hall, to which the recorder is about to remove, was not embraced in the town limits, and for that reason the removal is unlawful. In *State ex rel. v. Smith*, above referred to, it was held that the county court had no authority to remove the courthouse to a lot or square that was not a part of the original town of Lebanon, for the reason that the 50 acres had been donated to the county with the understanding that the courthouse should be located there. The county had sold lots, and induced people to invest there, etc. That case arose and was decided in 1870. But in 1875 a new Constitution was adopted, and in it was the following: "All additions to a town which is a county seat shall be included, considered and regarded as a part of the county seat." Article 9, § 2. This was a new provision in our law. In that clause not only is the county seat called a town, but all additions are by express terms made a part of the county seat. There could have been no object in adopting that clause if it was not to impress upon the additions to the town the same character as regards county business as the original town possessed. If it did not accomplish that purpose it did not accomplish anything.

The city of St. Louis being for all necessary purposes a county in itself, the seat of justice of such quasi county is the city itself, and as the city hall, to which the defendant was about to remove his office when this suit was filed, is within the city limits, it is at the seat of justice, within the meaning of section 9055, Rev. St. 1899.

The judgment sustaining the demurrer was correct, and it is affirmed. All concur, except ROBINSON, J., absent.

LORTS et al. v. WASH et al.

(Supreme Court of Missouri, Division No. 2.
June 9, 1903.)

WILL CONTEST—MENTAL CAPACITY—INSTRUCTION—ATTESTING WITNESSES—NECESSITY OF PRODUCING—QUALIFICATION OF EXPERT WITNESS—MOTION TO STRIKE OUT PLEADING—APPEAL—PRESENTATION OF QUESTION.

1. Where alleged error in overruling a motion to strike out an answer is not called to the attention of the lower court in the motion for a new trial, it cannot be reviewed on appeal, the motion to strike being no part of the record proper.

2. A doctor's testimony that he has treated a great many old people, and is acquainted with the effects of pneumonia upon them, does not qualify him to testify to the probable mental capacity to make a will of an old person suffering from that disease.

3. In a will contest case a declaration of law that, to constitute a sound mind, the testator must not only be able to understand that he has given his property to one object of his regard, but must also comprehend the extent of his property and the nature of the claims of other natural objects of his bounty, and to recollect who they are, and to form an intelligent purpose of excluding them from any share in his estate, is properly refused, as requiring too severe a test of capacity.

4. The declaration is also properly refused where the court has declared the law to be that if testatrix was on her deathbed, racked with pain and disease, and feeble in mind and body, and not having sufficient understanding and intelligence to transact her business affairs, and comprehend the transaction in question, the nature and extent of her property, and to whom she was giving it, she had not testamentary capacity.

5. It is not necessary in a will contest case that the will should be proved by the testimony of all of the subscribing witnesses.

Appeal from Circuit Court, Phelps County; L. B. Woodside, Judge.

Action by Stephen Lorts, as guardian of William Lorts, and others, against Eldorado Wash and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

Thos. M. & Cyrus H. Jones, for appellants.
J. A. Watson, F. H. Farris, and J. B. Harrison, for respondents.

Statement.

FOX, J. This is a suit brought by appellants on the 12th day of May, 1900, to contest and set aside the will of Caroline Wash, who died on the 23d day of February, 1900, and the will was executed on the 22d day of February, 1900. The pleadings in the case, after averring the interests of the heirs and the execution of the will, make the following allegations, viz:

Allegation in Petition.

"The plaintiffs further state that said Caroline Wash was over 70 years of age when she died; that at and for some time prior to the date of her death she was weakened, both in body and mind, by old age; that she, some time prior to her decease, was under the direct influence and control of Eldorado

Wash and Pierre Watson; that several days prior to her decease she was attacked by a deadly malady, and then and there became sick unto death, and so remained up to the 23d day of February, A. D. 1900, when she died; that on the 22d day of February, A. D. 1900, she being then and there enfeebled by her old age and the ravages of the deadly disease aforesaid, and racked by excruciating pains, and while in the throes of death, the said defendants, Eldorado Wash and Pierre Watson, procured the preparation of a paper writing, and procured and induced the said Caroline Wash to sign the same."

By the terms of the will Eldorado Wash and Pierre Watson were made the beneficiaries of said will. Said will was duly witnessed and probated, which was duly averred in the petition. The petition further avers that said instrument aforesaid "was not and is not the will of Caroline Wash, for that the said Caroline Wash, for a long time prior to her death, was debilitated both in body and mind, as aforesaid, and plaintiffs state and aver the fact that she was under the influence and control of said defendants, for the purpose of influencing and poisoning the mind of said Caroline Wash against plaintiffs, made false, fraudulent, and fabricated reports and charges of and concerning plaintiffs to her, for the fraudulent purpose of inducing her to disinherit plaintiffs, and obtain for themselves a bequest of all her property; that for a long time prior to her death the said defendants unduly and artfully influenced her, the said Caroline Wash, so that she was completely under their influence and control up to the date of her death as aforesaid. That on the day of her death, as aforesaid, the said defendants, by their undue influence, artful designs, and fraudulent practices, induced and procured the said Caroline Wash to sign the aforesaid instrument of writing, purporting and pretending to be her last will and testament. That at the time she, the said Caroline Wash, signed said paper of writing as aforesaid, she was in a dying condition, all as hereinbefore said, and her mind was so enfeebled and unsound as to render her totally incapable of understanding the matter in hand, and that she did not comprehend the purport of the instrument signed by her."

The answer of defendants is in words and figures as follows:

"Now comes the defendants, and for answer to plaintiffs' petition admit:

"First. That the parties plaintiffs are the persons they represent themselves to be, and that their heirship in the estate of Caroline Wash, deceased, is as charged in the petition.

"Second. That the will of said Caroline Wash has been probated, as charged, and that the same now stands as the true will of Caroline Wash.

"And defendants, further answering, aver

that the will in contest is the true will of said Caroline Wash, and deny each and every allegation in plaintiffs' petition contained not herein specifically admitted.

"Wherefore, defendants having fully answered, ask to be discharged with their costs."

The will of Caroline Wash, sought to be annulled by this proceeding, was as follows:

"State of Missouri, County of Phelps. In the Name of God, Amen: I, Caroline Wash, being of sound and disposing mind, and knowing the uncertainties of life and the certainties of death, do hereby make, publish and declare this to be my last will and testament, hereby revoking all former wills and testaments made by me.

"First: I give and bequeath to my beloved daughter, Eldorado Wash, and to Pierre Watson all my personal property of whatsoever kind I may possess at the time of my decease; Except such part thereof as I give to the other persons hereinafter mentioned in this will; they, the said Eldorado Wash and Pierre Watson to share alike in said property.

"Second: I give and bequeath to William Lorts, Sallie Fuhring, Hannah Lorts, Genette Lorts, Lulu Lorts, Frederick Lorts, Herman Lorts, and Alexander Lorts, who are heirs at law of my daughter, Mary Lorts, deceased, the sum of one dollar each, to be paid within one year after my decease.

"Third: I give and bequeath to John Morris, Samuel Morris, Stephen Morris, James Alexander Morris, who are heirs at law of my daughter, Anna Mariah Morris, deceased, the sum of one dollar each, to be paid within one year after my decease.

"Fourth: I give and bequeath to my son, James Alexander Wash, or to his heirs at law, the sum of one dollar to be paid within one year after my decease, provided the same is called for by him or those who legally represent him, and if the same be not called for as aforesaid, within one year after my decease, then the same is to revert to Eldorado Wash.

"Fifth: I give and devise to my daughter, Eldorado Wash, and Pierre Watson all my right, title and interest in and to the following described real estate lying, being and situated in Phelps County, Missouri, to-wit: The South-west quarter of Section number five, in Township number thirty-nine, in range number six, west; the South half of the South-east quarter of Section number five, Township No. thirty-nine, Range number six, west; The North-west of the South-east quarter, west half of Lot number one, of the North-east quarter, west half of lot number three of the North-east quarter, Lot number three of the Northwest quarter, and the East fractional west half of lot number four of the Northwest quarter, all in Section number five, in Township thirty-nine, Range number six, West; and the North half of Section number eight, in Township thirty-

nine, Range number six, West; It being my intention to give and to devise to them all my interest in the above described lands, as is shown by my declaration, as the widow of T. A. Wash, deceased; they, the aforesaid Eldorado Wash and Pierre Watson, to share alike in the above described premises.

"Sixth: I hereby appoint my executors, Eldorado Wash, and Pierre Watson, to act in settling up my estate without bond, and I hereby charge them to, as soon as practical after my decease, to pay all indebtedness that may exist against me at the time of my decease.

"Witness my hand and seal this 22nd day of February, Nineteen Hundred.

"Caroline Wash. [Seal.]

"In Testimony Whereof, we the undersigned witnesses hereby certify that the above named Caroline Wash signed the within document in our presence this 22nd day of February, A. D. 1900.

"Witnesses:

"J. A. Watson.

"C. C. Watson.

"S. T. Mitchell.

"J. J. Carter."

A jury being waived, this cause was submitted to the court upon the testimony introduced.

It is unnecessary to burden this opinion with a detailed statement of all the testimony offered in the cause; it is sufficient, to dispose of the legal question involved, to simply say that there was testimony by both plaintiffs and defendants tending to prove the issues presented by the pleading.

The following declarations of law, as disclosed by the record, were given at the request of the plaintiffs:

"(1) The court declares the law to be that if it appears from the evidence that, at the time the will in question was made, Caroline Wash was on her deathbed, racked with pain and disease, and feeble in mind and body from such sickness, and had not sufficient understanding and intelligence to transact her ordinary business affairs, and to comprehend the transaction then in question, the nature and extent of her property, and to whom she was giving the same, then she had not sufficient capacity to make a will, and the issues will be found for the plaintiffs.

"(2) The court declares the law to be that the burden of proof is upon the defendants in this case to prove the proper execution and attestation of the will in question, and that the testatrix was of sound mind at the time of the execution of said will; and, unless the defendants or proponents of said will have shown such facts by a preponderance of the testimony, the issues will be found for the plaintiffs."

Instructions Nos. 3 and 4 requested by plaintiffs were refused, which we will notice in the course of the opinion.

The court found the issues for the defend-

ants, and rendered judgment accordingly, sustaining the will. From this judgment plaintiffs have prosecuted their appeal, and this cause is now before us for review.

Opinion.

The attack upon this will is based upon two grounds: First. It is alleged that the beneficiaries in said will, by the exercise of an undue influence over the mind of the testatrix, procured the declaration and publication of the will involved in this suit. Second. That Caroline Wash was, by reason of her physical and mental condition, incapable of making a will.

The first contention urged by the plaintiffs is that the court erred in overruling the motion filed to strike out the answer of defendants. This motion was filed, and the reasons assigned in it for striking out the answer of defendants was because they had refused to obey the command of subpoena to appear before a notary public and give their depositions in this cause. It will be observed that the error complained of in this motion was not called to the attention of the court in the motion for new trial. This motion to strike out was no part of the record proper, and, in order to subject the action of the court in overruling it to review, its attention had to be directed to it in the motion for new trial. The action of the trial court upon this motion has not been properly preserved by this record, and is therefore not before us for review.

Our attention is next directed to the error complained of in the exclusion of testimony. During the progress of the trial, Dr. Johnson, of Rolla, Mo., was introduced as a witness. He had never visited Mrs. Wash during her illness. He testified as follows: "Q. Now I will ask you if in your experience you have treated old people, that is, over the age of 60 or 70. A. A great many. Q. Are you acquainted, or from your experience do you know the effect of this disease upon old people? A. Yes, sir. Q. Now I will ask you, doctor, if a woman 73 years old, sick with la grippe and pneumonia from Sunday till Saturday morning, delirious on Tuesday and Wednesday, with a temperature on Sunday of 103, on Tuesday of 105, delirious on Wednesday and Thursday, her temperature 101, pulse 120, and in a sinking condition and in considerable pain, Friday morning delirious, pulse less than 100, temperature 105, and dead the following Saturday morning, would be of sound and sufficient memory on Thursday evening to realize and comprehend the extent of the business of making a disposition of her property? (The defendants objected to this question for the reason that the witness had not qualified himself sufficiently to be authorized to answer that question, and for the further reason that it is not based upon the facts as heretofore developed in the trial, and for the further reason that it is not within the

pale of human testimony to determine the condition of man's mind, which objection was by the court sustained; to which action of the court in sustaining the said objection of the defendants, the plaintiffs, by counsel, in open court, objected and excepted at the time.)" The court was clearly correct in excluding the answer to this question. In the first place, the answers to the preliminary questions do not show that the doctor had any opinion as to her mental condition. He may have, from his experience in treating pneumonia, formed a very correct opinion generally as to the effects of that disease upon the system; but he does not pretend to say that he could give an opinion as to her mental condition at the time she executed this will. This question was clearly incompetent.

Complaint is also made that the court excluded competent evidence offered by plaintiff, tending to impeach witness J. A. Watson, the attorney who wrote the last will of Mrs. Wash. This testimony, offered for the purpose of impeachment, consisted of a circular, issued by Watson while he was a candidate for some office. It is as follows:

"To the voters of Phelps County.

"Rolla, Mo., April 13th, 1900.

"As some of my opponents are circulating a report to the effect that I, as attorney, drew up a will for the late Carry Wash, deceased, in which I fraudulently had her give my brother a portion of her estate, and as they are also circulating various fraudulent reports about the same, I desire to take this method to say to the voters of this county that said reports are absolutely false and without any foundation whatever, and are being circulated by my opponents for the express purpose of misleading the people of this county, and thereby to injure my chances for nomination to the office of prosecuting attorney.

"The facts in the case are shown by the following affidavit, which is signed by Eldorado Wash, a daughter of the deceased, and by S. T. Mitchell and J. J. Carter, who were present when said will was drafted by me, and who were also witnesses to the same.

"State of Missouri, County of Phelps--ss:

"On the 15th of April, 1900, before me, W. D. Jones, a notary public, within and for the county of Phelps and state of Missouri, comes Eldorado Wash, S. T. Mitchell and J. J. Carter, and state the facts to be that they were present at the residence of the late Carry Wash, deceased, on the 22nd day of February, 1900, when she made her last will and testament; that she told J. A. Watson, as her attorney, in our presence how she desired to dispose of her property, and that he wrote her will exactly as directed, and that she signed the same in our presence, and that the said J. A. Watson did nothing whatever but write said will as her attorney

as she directed, and reports of whatever nature to the contrary are to our knowledge and belief absolutely false.

"[Signed]

Eldorado Wash.

"S. T. Mitchell.

"J. J. Carter."

"Subscribed and sworn to before me, this 13th day of April, 1900.

"[Seal.] W. D. Jones, Notary Public.

"My commission expires April 16th, 1900."

"Permit me to say in conclusion, that I never in my life spoke a word to Mrs. Wash or she to me about what disposition she was to make of her property except what was said between us in the presence of the above named parties, as above stated.

"I also desire to further state that I have tried to make this race fairly and squarely on my merits as a lawyer and a man, and I have not expected, nor do I expect to get into office by slandering and abusing my opponents, as they are trying to do me, and no matter to me what the result of this primary election is, I shall stand as I have ever stood to the grand old Democratic party, true to its flag, true to its principles, and true to its nominees. Respectfully,

"J. A. Watson."

We have carefully read the testimony of Watson, both direct and cross examination, and we find no error in the exclusion of this circular. It was purely a circular, applicable to a political campaign, and did not, in fact, impeach the witness upon the material parts of his testimony. This leads us to the contention of the plaintiffs that the court erred in refusing instructions Nos. 3 and 4, as requested by the plaintiffs. That we may fully appreciate the application of the instructions, as to the facts as developed by the testimony, we here quote them as follows:

"(3) The court declares the law to be that, in determining whether undue influence was used to procure the execution of the paper writing offered as the last will of Caroline Wash, it will take into consideration her mental and physical condition at the time of executing it, the will itself, and the provisions therein, and if from all the facts and circumstances in evidence it appears that Pierre Watson and Eldorado Wash, the beneficiaries of said will, were constantly with Caroline Wash for some time before and during her last sickness, and were active in procuring said will to be written, and that they or either of them mentioned the names of the disinherited grandchildren of the said Caroline Wash, and that they were present, and either of them assisted in dictating or mentioned the names of the disinherited grandchildren to the said Caroline Wash, or to the said scrivener, then and in that case said will was not the will of said Caroline Wash, and the issues will be found for the plaintiffs.

"(4) The court declares the law to be that,

In order to constitute a sound and disposing mind, the testator must not only be able to understand that he or she has by his or her will given the whole of his or her property to one object of his or her regard, but must also have capacity to comprehend the extent of his or her property, and the nature of the claims of others whom by his or her will he or she is excluding from all participation in that property, and that he or she must at the time be capable of recollecting who those relations are, and of understanding at the time their respective claims upon his or her regards and bounty, and must be of sufficient mind and judgment to deliberately form an intelligent purpose of excluding them from any share in his or her property; and in this case, unless it appears from the evidence that the testatrix was of sufficient strength of mind and memory to comprehend the extent and description of her property interest, as well as to remember and give to the scrivener writing her will the names of each of her grandchildren entitled to participate in her property, the issues will be found for the plaintiffs."

We will simply say, as to instruction No. 3, that the testimony in this case did not warrant any such instruction. After a careful examination of all the testimony, there is an entire absence of any substantial testimony tending to show any undue influence exercised over the mind of Mrs. Wash in procuring the will involved in this suit. In the case of *Jackson v. Hardin*, 83 Mo. 175, Phillips, C., in a very able and forcible opinion, announced very clearly the true rule as applicable to this subject. He says: "The influence denounced by law must be such as amounts to overpersuasion, coercion, or force, destroying the free agency and will power of the testator. It must not be merely the influence of affection or attachment, nor the desire of gratifying the wishes of one beloved, respected, and trusted by the testator—citing *Rankin v. Rankin*, 61 Mo. 295; *Higgins v. Carleton*, 28 Md. 118 [92 Am. Dec. 666]; 1 Redf. on Wills, pp. 522, 523. While the extreme age, helplessness, and consequent susceptibility of the testator are important facts in the ascertainment of the undue influence, yet it is not to be inferred from either age, sickness, or debility of body, if sufficient intelligence remains. *Higgins v. Carleton*, supra." He also very appropriately adds, in discussing this question: "As neither courts nor juries can make wills for men, they ought to be careful in unmaking them." There was no error in refusing instruction No. 3.

As to instruction No. 4, it will suffice to say that it is not in all respects in harmony with the approved precedents; it requires a test of capacity which would render most people incapable of disposing of their property. While the instruction in the main is correct, yet it undertakes to add to the approved precedents, which renders it objec-

tionable. Aside from this, instruction No. 1, given at the request of plaintiffs, embodied sufficiently the features as urged by this refused instruction. This was a trial by the court, and instruction No. 1 indicates very clearly the theory upon which the case was tried, and pointedly shows that the court applied the tests of capacity sanctioned by the well-settled law on that subject.

It is further insisted by plaintiffs that defendants should have introduced all the subscribing witnesses. This contention is most appropriately answered by this court, in the case of *Craig v. Craig*, 156 Mo., loc. cit. 361, 56 S. W. 1097, where it is announced that "our statute requires that a will be in writing, signed by the testator or by some one by his direction in his presence, and be attested by two or more witnesses subscribing it in the presence of the testator [section 8870, Rev. St. 1889; § 4604, Rev. St. 1890]. But the law does not make the proof of the will dependent alone on the testimony of the subscribing witnesses or render their testimony absolutely essential." To the same effect is *Mays v. Mays*, 114 Mo. 536, 21 S. W. 921: "The law does not place the validity of these important muniments of title at the mercy of those who may be called upon to verify their execution." While the general rule is announced in *Craig v. Craig*, supra, that all the subscribing witnesses should be introduced, it does not follow that a failure to introduce them would constitute error. That rule is announced as a suggestion of the appropriate method of procedure in cases of this character. On the other hand, the rule is well-settled that all that is required of those claiming under the will is to make out a "prima facie" case. Judge Black, in *Norton v. Paxton*, 110 Mo., loc. cit. 462, 19 S. W. 807, in speaking of the method of procedure, announced this very plain and simple rule. He says: "It is sufficient for those who claim under the will to make out a prima facie case in the first instance. There is a presumption that every adult person is composed of sound mind, but the presumption is one of fact only. It may be that the production of a will, reasonable on its face, with proof of due execution and attestation, and that the testator was of full age, will make out a prima facie case on the part of the proponents, thus giving full force to the presumption, though the usual course is to offer some evidence of mental capacity. The parties claiming under the will having made out a prima facie case, the contestants must bring forward their evidence. But it does not follow from all this that the burden of proof shifts. It remains with those claiming under the will." It was not absolutely essential to introduce all the witnesses attesting the execution of this will.

It is earnestly insisted by plaintiffs that the finding of the trial court was not sustained by the proof. We are unable to concur with the views of the learned counsel as

to this claim. Upon a careful consideration of all the testimony, we are of the opinion that the judgment in this cause was amply supported by the testimony. As was elsewhere said, "Courts cannot make wills," and the unmaking of them ought to be based upon reasonably satisfactory evidence. Marshal, J., in the case of *Sehr v. Lindemann*, 153 Mo., loc. cit. 288, 54 S. W. 537, very clearly states the rule and the application of it. The testimony in that case was in some respects similar to the evidence in this case. He says: "Under the statute of wills the owner of property is permitted to dispose of it as he chooses after his death. If he makes no disposition of it by will, the statute of descents disposes of it for him. When a will is contested, it devolves upon the proponents to prove the execution of the will, that the testator was of requisite age, and that he was sane. This makes out a prima facie case, and it then devolves upon the contestants to establish incompetency or undue influence. By competency is meant intelligence sufficient to understand the act he is performing, the property he possesses, the disposition he is making of it, and the persons or objects he makes the beneficiaries of his bounty. Imperfect memory caused by sickness or old age, forgetfulness of the names of persons he has known, idle questions, or requiring a repetition of information, will not be sufficient to establish incompetency, if he has sufficient intelligence remaining to fulfill the above definition. Mere opinions of witnesses that the testator was 'childish,' or acted 'funny,' or was 'worse than a child,' or that there were 'inequalities in the will,' unaccompanied by any testimony showing any particular act or fact evidencing incompetency, do not make out a case of incompetency when the testimony shows that the testator 'knew what he was doing and to whom he was giving his property.' By undue influence is meant such influence as amounts to force, coercion, or overpersuasion which destroys the free agency and will power of the testator. It is not merely the influence of affection or desire to gratify the wishes of one who is near and dear to the testator. And 'affirmative proof of such undue influence is required to be made either by direct facts shown, or by facts and circumstances from which undue influence results, as a reasonable and fair inference and not a mere conjecture.'"

The testimony in this case falls to show any undue influence, as contemplated by law, in procuring the making of this will. The testimony upon the issue as presented, of incapacity to execute the instrument, on the part of the plaintiffs, is very slight, and of a very unsatisfactory nature. The doctor who testified and expressed an opinion does not pretend to be an expert upon nervous diseases or diseases of the brain, and even his testimony upon cross-examination, and upon answers to questions pro-

pounded by the court, indicate that Mrs. Wash was capable of executing the will and disposing of her property. The testimony on the part of the defendants not only made out a prima facie case, but, by a clear preponderance of testimony, established the capacity of Caroline Wash to execute the will before us. The court had the witnesses before it in this cause, and doubtless observed their conduct and demeanor. Sitting as a jury, its province was to determine their credibility and the weight to be attached to their testimony. Its findings will not be disturbed.

The judgment will be affirmed. All concur.

STRAUB v. CITY OF ST. LOUIS.

(Supreme Court of Missouri, Division No. 2.

June 9, 1903.)

MUNICIPAL CORPORATIONS—SIDEWALKS—OBSTRUCTIONS—NOTICE—CHILDREN PLAYING ON WALK—INJURIES—LIABILITY.

1. Where it is shown that the city officials had permitted an obstruction on a sidewalk to remain for 10 days prior to an accident, it must be presumed that they had notice thereof.

2. While plaintiff's seven year old son was on the sidewalk on a public street, he attempted to climb onto an old store counter which had been unlawfully placed on the walk near the curb, causing it to fall and injure him. *Held*, that the mere fact that he was playing on the sidewalk when injured did not exonerate the city from liability.

Appeal from St. Louis Circuit Court; D. D. Fisher, Judge.

Action by Caroline Straub against the city of St. Louis and another. Judgment for plaintiff, and defendant city appeals. Affirmed.

B. Schnurmacher and Alex. Nicholson, for appellant. Kleue & Welsh, for respondent.

GANTT, P. J. This court has jurisdiction of this case solely because the city of St. Louis, the defendant, is one of the political subdivisions of the state. The plaintiff, the mother of Edwin Straub, a minor not seven years old, brought her action against one Middleton and the city jointly for damages resulting to her, as the mother, by the loss of the services of the child, and for the value of his nursing and expenses of medical treatment, from the negligence of the said Middleton in placing an old counter on the edge of the sidewalk on St. Louis avenue, and against the city for permitting it to remain there for a period of 10 days, in a dangerous position, and likely to injure children traveling or playing on the street. Plaintiff recovered judgment for \$400, and the city appeals.

The facts of the case are practically undisputed. On or about the 20th of June, 1898, one Middleton, who was a shoemaker

¶ 2. See *Municipal Corporations*, vol. 24, Cent. Dig. § 1663.

on St. Louis avenue, in St. Louis, put an old counter out on the sidewalk in front of his premises. At first he placed it along the side of the house, on the inside of the sidewalk, leaning it against the house. About two days later he placed it on the outside of the sidewalk, near the curb, with the front part of the counter facing the sidewalk, and the open part toward the street. The pavement was brick. There were no supports to the counter, save that one end of the counter was closed and the front was solid, while the other end and the back were open. Edwin Straub, the son of plaintiff, was between six and seven years old. The counter remained on the sidewalk in the position noted for about ten days. It had the words "For Sale" written in chalk on it. On June 30th Edwin was playing on the sidewalk with another boy, and jumped or climbed on one edge of the counter from the outer or street side, and it fell on him and broke his leg. The little boy's mother lived on the same avenue, and nearly opposite Middleton's shop.

That the counter was unlawfully on the sidewalk, in the circumstances detailed, there can be no sort of doubt. The sidewalks are highways, and are not designed or intended for the display of merchandise. Middleton had no right to obstruct the sidewalk with the old counter, and, when the city officials permitted it to remain there ten days, it must be presumed they had notice of its being there. Having no support on one whole side and one end, it needed very little to upset it. Such an obstruction on a public sidewalk, where old and young alike are free to travel, is one which the city was bound to see was likely to cause injury to some pedestrian—especially thoughtless and inexperienced children.

The main contention of the city for reversing the judgment of the circuit court is that the little son of plaintiff, when he was injured by the falling of the old counter on him, was not traveling, but playing, on the sidewalk; and we are cited to numerous cases limiting the liability of municipal corporations for accidents occurring on their streets to those who were using them for purposes of travel. But those cases do not reach the point now under consideration. Thus in *Bassett v. St. Joseph*, 53 Mo. 290, 14 Am. Rep. 446, it was held that "It is well settled in this state that it is incumbent on a city having full control of its streets, and the improvement thereof, to keep them in a reasonably safe and good traveling condition." In that case the city left or permitted an excavation on the border of one of its streets to remain unguarded, and a lady passing along the sidewalk by said excavation was near to a mule standing by said excavation, and was kicked at by the mule, and, in her effort to escape from the mule, fell into the excavation. There the city contended that the excavation would not have caused the in-

jury but for the action of the mule, and here that the counter would not have injured the boy if he had not jumped on it or touched it; but the court said it is true, if it had not been for the kicking of the mule, the injury might not have happened, but it is equally true that, if there had been no excavation, the kicking of the mule would have been harmless—necessarily each contributed to the injury—and the city was held liable. In *Brennan v. St. Louis*, 92 Mo. 482, 2 S. W. 481, this court approved the *Bassett* Case, and reasserted the doctrine that, if the city's neglect combines with some other accidental cause, it is liable. In *Haley v. City of Kansas*, 87 Mo. 103, 56 Am. Rep. 443, the child was killed by the falling of a wall upon a house standing near the unguarded wall. The child was in the house when she was killed, and not on the street, and the insistence was that the negligence of the city in not abating the nuisance of the old wall which stood on private property near the street entitled plaintiff to recover; but the court ruled that the child was not using the street for any purpose, and there could be no duty owing to her because of the defendant's duty in respect to its streets. Clearly that case is not in point. Neither is the *Arnold* Case, 152 Mo. 173, 53 S. W. 900, 48 L. R. A. 291, 75 Am. St. Rep. 447, where the children were skating on a private lot with a pond on it. The case of *Donoho v. The Vulcan Ironworks*, 75 Mo. 401, does involve the question before us. In that case the circuit court gave the following instruction: "If the jury believe from the evidence that plaintiff, Donoho, at the time he received the injuries complained of, was, in company with other boys, using Clay street for the purpose of playing or amusing themselves thereon, and not for the purpose of passing or traveling on said street, then, notwithstanding he was injured, he cannot recover against the city of St. Louis." The Court of Appeals reversed the judgment for the giving of this instruction, and this court approved its judgment. The opinion of the Court of Appeals is found in 7 Mo. App. 447. In that case a boy of 11 years of age was injured by the falling of a bank of earth upon him. The ironworks company and the city were jointly sued for undermining and leaving the bank without proper safeguards, and the plaintiff's evidence tended to prove that, on Sunday next after the Saturday on which the Vulcan Company's employes had been excavating, the plaintiff, being on an errand for his mother, stopped to watch some boys who were playing at the foot of the bank, when the bank fell, and killed one boy and injured plaintiff. The defendant's contention was that the other boys were digging in the bank, and plaintiff joined them; that he was not using the street for travel, but only as a playground and for his own amusement. Hence it prayed the instruction above recited. The Court of Appeals discussed the cases of *Stinson v. Gardiner*, 42

Me. 248, 66 Am. Dec. 281, and *Blodgett v. Boston*, 8 Allen, 237, in which it was ruled that, if children use a highway for their sports, the city is not responsible for their injuries, though they result from defects in the highway. In that case a boy 11 years old was playing "old man on the castle" on a plank sidewalk in Boston, and, when another boy came to catch him, he, in starting, put his foot between the planks, where it got caught, and, in trying to extricate it, twisted it, and it resulted in serious injury. While holding he could not recover, *Bigelow, C. J.*, said: "We by no means intend to say that a child who receives an injury caused by a defect or want of repair in a road or street, while passing over or through it, would be barred of all remedy against a town merely because at the time of the occurrence of the accident he was also engaged in some childish sport or amusement." Judge Lewis, in the *Donoho Case*, calls especial attention to the fact that those New England cases rested in statutory provisions, whereas in Missouri the liability rests upon general principles applicable to the municipal dereliction of a legal duty. The view that adults and children alike can use our highways and streets solely for traveling has not been generally accepted with us. Men, women, and children may walk or drive on our thoroughfares for pleasure or innocent amusement; and it would be a harsh rule to hold that the rich man, driving over the streets for pleasure alone, if injured by a defect or obstruction in the street, may recover, and that the boy or child, who, in our large cities, particularly, has no other place to indulge his natural proclivities for play, and while indulging in innocent amusement is crippled by a defective sidewalk or obstruction, is not allowed a like recovery. In *City of Chicago v. Michael Keefe, Adm'r*, 114 Ill. 222, 2 N. E. 267, 55 Am. Rep. 860, a child 10½ years old was injured while rolling a hoop along a sidewalk, in consequence of its unsafe condition; and it was held to be a question of fact whether he was guilty of negligence, or not, and the law neither inferred negligence nor its absence merely from the fact of the child rolling the hoop. Mr. Justice Scholfield said: "Appellant asked the court to instruct the jury as follows: 'The jury are instructed that the sidewalks of the city are not made for the purpose of a playground for children, nor as a mere place for the recreation of children, and that the condition of the sidewalk is only to be considered with reference to its use for the ordinary travel along the same,' and 'that, if you believe from the evidence that he would not have fallen or have been injured if he had gone along the sidewalk in the ordinary mode, then you must find for the city, as the sidewalks are not made for the purpose of a playground for children.'" That able and learned justice then discusses the same New England cases referred to by Judge Lewis in the *Donoho*

case, and points out that they rest entirely upon statutory liability in those states, and says: "On the contrary, we hold, on principles of common law, that an action for damages resulting from negligence will lie against a municipal corporation if the duty to make repairs is fully declared, and adequate means are put within the power of the corporation to perform the duty." "We assume, as self-evident, that with us streets are open to the use of the entire public as highways, without regard to what may be the lawful motives and objects of those traversing them; that those using them for recreation, for pleasure, or through mere curiosity, so they do not impinge upon the rights of others to use them, are equally within the protection of the law while using them, and hence equally entitled to have them in a reasonably safe condition with those who are passing along them as travelers or in the pursuit of their daily avocations. In crowded cities, their use for pleasure, and sometimes even for the promotion of health, may be regarded as a public necessity. On like principle, why may they not be used by children in play and amusement, so long as the rights of others being on or passing along the street shall not be prejudiced thereby? We can perceive no reason." The instruction was held erroneous. In equally strong and no uncertain language the Court of Appeals of New York, in *McGuire v. Spence*, 91 N. Y. 303, 43 Am. Rep. 668, said: "In this state we have held that the duty exists not merely as to travelers, but as to all persons lawfully in the streets, and have imposed upon a city a liability for negligence where the person injured was in no sense a traveler, but engaged in excavating the street, under lawful permission, for the benefit of a private corporation. *Rehberg v. The Mayor*, 91 N. Y. 137, 43 Am. Rep. 657. This plaintiff was lawfully in the street. She had a right to be there, not to be exposed to the possible dangers of an uncovered opening in the sidewalk. Nor does it matter that she was at play with other children." In *McGarry v. Loomis*, 63 N. Y. 108, 20 Am. Rep. 510, we stated it as a proposition too plain for comment that "it is not unlawful, wrong, or negligent for children on the sidewalk to play." In that case the girl was 14 years old, and was engaged in jumping the rope, and while so engaged fell into an open area. In *District of Columbia v. Boswell*, 6 App. Cas. D. C. 420, the court said: "To say that children may not engage in innocent play upon the sidewalks adjacent to their homes, save at their own risk under all circumstances, would be to enforce a cruel and unreasonable rule against the many children in every large city who have no other place to seek fresh air and recreation in each other's company. Plaintiff had a perfect right to play on the sidewalk with her little companion, and there could be no negligence in so doing, and this was one of the uses of the sidewalk which

defendant is bound to have anticipated." *Kunz v. City of Troy*, 104 N. Y. 344, 10 N. E. 442, 58 Am. Rep. 508; *Gibson v. Huntington*, 38 W. Va. 177, 18 S. E. 447, 22 L. R. A. 561, 45 Am. St. Rep. 853. These cases, in our opinion, announce the correct rule. The plaintiff's child was lawfully in the street. He had a right to be there and play with his companion. The city had negligently permitted a dangerous obstruction to remain on its sidewalk for 10 days. The question of contributory negligence was fairly and properly submitted to the jury, and there is nothing unreasonable in the verdict.

The judgment is affirmed. All concur.

EMMONS v. QUADE et al.

(Supreme Court of Missouri, Division No. 2.
June 9, 1903.)

ASSAULT—CIVIL ACTION—CHILDREN—TRESPASSERS—NEGLIGENCE—TRIAL—ISSUES—INSTRUCTIONS—APPEAL.

1. Where the grounds for a motion for a new trial were that the court erred in giving several specified instructions, and the court granted a new trial, and specified in its record that it erred in giving one certain instruction, on appeal from the order the appellee was not precluded from insisting on error in the other instructions.

2. Plaintiff sued for trespass to his person, alleging that while he, with other boys, was playing in one of defendant's cars, defendant's employé assaulted him, and in attempting to escape he fell and was injured. Defendant admitted attempting to imprison the boys in the car in order to turn them over to the officers. The court instructed that defendant had a right to drive plaintiff out of the car, and that if it was not guilty of any violence, but plaintiff, fearing he might be locked in the car, fell because of the fright, defendant was not responsible. *Held*, that this was erroneous, the action not being founded on negligence.

3. Defendant's act was an unlawful assault, and it was liable for the natural consequences.

4. The instruction was inapplicable to the issue, because defendant's evidence showed that defendant's effort was to imprison the boys in the car, and not to drive them away.

5. Instructions to find for defendant if plaintiff was injured by contributory negligence in getting out of the car were erroneous, contributory negligence being no defense to a willful assault.

6. Plaintiff alleged that while he, with other boys, was playing in one of defendant's cars, he was assaulted by one of defendant's employés, who acted wrongfully, negligently, wantonly, and unlawfully in driving them away. The case was tried on the theory of willful and unlawful trespass to plaintiff's person, and plaintiff's instructions were so limited. *Held*, that the plaintiff's use of the word "negligently" in his petition did not tender the issue of negligence, and warrant instructions for defendant thereon.

7. In an action by a boy of 12 for an assault committed on him while playing in one of defendant's cars, it was improper to instruct that defendant was authorized to "drive" the boy away, without requiring defendant to notify plaintiff or order him out of the car, and without limiting the force defendant might lawfully use.

Appeal from Circuit Court, Jackson County; Roland Hughes, Special Judge.

Action by Guy Eimmons, by his next friend,

against T. N. Quade and the Kansas City Milling Company. There was a verdict for defendants, and from an order granting plaintiff a new trial, defendants appeal. **Affirmed.**

Harkless, O'Grady & Crysler, for appellants. Shannon C. Douglass and P. D. Clear, for respondent.

GANTT, P. J. This is an appeal from an order of the circuit court of Jackson county, granting plaintiff a new trial. The action is for damages for personal injuries. The plaintiff is a boy about 12 years old—rather small for his years. Just prior to the trespass to his person, of which he complains, he had gone with some other boys into an empty box car standing in the yards of the Kansas City Milling Company to gather up the wheat left therein when unloaded. While other boys had been in the habit of going into these empty cars and glean- ing the loose wheat and corn left therein, this was plaintiff's first visit. The company, it seems, was annoyed by the boys, and ordered Quade to keep them out. On August 3, 1898, Quade discovered some boys, including plaintiff, in one of the cars. The car was standing east and west, and both doors—that on the north and the one on the south—were open. Quade ordered Kemper, another employé, to close the south door quickly, and at the same time he attempted to shut the north door. The plaintiff's testimony tends to show that he had a club in his hand at the time, and, just as he undertook to close the north door, exclaimed to the boys, with an oath, "Get out, or I will hurt you." Plaintiff was greatly frightened at the threat and action of Quade, and the prospect of being imprisoned in the car, and endeavored to escape out of the north door, which, for some reason, Quade did not succeed in closing entirely. The evidence for plaintiff tended to show Quade not only shoved the door violently against his side and left arm, but struck him with the club on the left arm, and by reason of the shove and the blow he fell to the ground, and sustained a fracture of the bone of his left arm and of the cap of his elbow, resulting in a permanent injury. He sued for \$4,000 for compensatory and \$1,000 exemplary damages. For the defendants, the evidence shows that Quade was acting under the orders of the milling company; that he was endeavoring to catch the boys in the car and turn them over to the police; that he did not strike plaintiff with a club at all, or even strike at him; that, in escaping from the car, plaintiff got caught on the foot of another boy, or some obstruction, which threw him sideways and caused him to fall on his left shoulder, and it was in this way he received his injury. Quade denied swearing at the boys and threatening them. The defendants' evidence also tended to show the injuries

were not so serious as claimed by plaintiff, and that defendants were using reasonable means to keep the boys from trespassing on the property of defendants. The jury returned a verdict for defendants, and thereupon, in due time, plaintiff filed his motion for new trial, which the court sustained. This appeal is based upon the alleged error in sustaining this motion. The grounds of the motion for new trial were, briefly, that the court erred in giving for defendants instructions Nos. 3, 4, 5, 6, and 7; that instruction 5 for defendants was contradictory of instructions Nos. 1 and 3 given for plaintiff. The court granted a new trial, and specified in its record that it erred in giving instruction No. 5 for defendants.

1. Preliminary to an examination of the question whether the court erred in granting a new trial on the ground that its instruction No. 5 for defendants was erroneous, counsel have earnestly pressed us to hold that, inasmuch as the circuit court only granted the new trial for the one error, plaintiff is precluded on this appeal from insisting the court erred in giving any other instruction, or in any other respect. Counsel for defendants insist that this is the rule announced in *Candee v. Ry. Co.*, 130 Mo. 142, 31 S. W. 1029. This is a misapprehension of that case. We said in that case: "If the trial court assumes to set aside a verdict for any reason not contained in the motion, it is still its duty to specify that reason upon the record; but, whatever the grounds for its order, it was clearly the intention of the statute to give the right of appeal from its decision thereon, and if, in the opinion of the appellate court, its reasons are insufficient, the verdict must stand, and the cost of another trial avoided, in the absence of affirmative showing by the party in whose favor the new trial was granted that it was properly set aside on other grounds." In that case, as in *Bradley v. Reppell*, 133 Mo. 545, 32 S. W. 645, 34 S. W. 841, 54 Am. St. Rep. 685, no other exceptions to evidence or instructions had been taken, and so the one instruction on which the court granted the new trial was the only point before us for review. In this case the plaintiff, as the record discloses, duly excepted to defendant's instructions 3, 4, 5, 6, and 7, and insisted that defendant's instruction 5 was in conflict with plaintiff's instructions 1 and 2. So that the facts are entirely different from those disclosed in the *Candee* and *Reppell* cases. Here, as was said in that case, the plaintiff insists on making the "affirmative showing" that the new trial was properly granted on other grounds than the erroneous instruction No. 5. This, we hold, may be done, and such is the settled practice in this court. In *Hewitt v. Steele*, 118 Mo. 463, 24 S. W. 440, this court said: "It is thus made apparent that the opinion of the court in sustaining the motion for new trial did not become a part of the record of the court, and in this respect did not comply

with the mandate of the law. But even if it did, if the court's action in granting the new trial can be sustained upon any ground shown by the record and proceedings in the cause, the judgment must be sustained." This is the universal holding when the court neglects to specify on its record the ground on which it sustains the motion. *Kreis v. Ry. Co.*, 131 Mo. 533, 33 S. W. 64, 1150; *Bank v. Wood*, 124 Mo. 72, 27 S. W. 554. The party obtaining the new trial has no occasion to appeal, but, if he causes the record to set out his grounds for new trial in full, he is not precluded from showing by the record brought to the appellate court by his adversary that he was entitled to the new trial, notwithstanding the trial court only specified one, and that one, perhaps, not a sufficient, reason for granting the new trial. *Bradley v. Reppell*, 133 Mo. 560, 32 S. W. 645, 34 S. W. 841, 54 Am. St. Rep. 685; *Haven v. Ry. Co.*, 155 Mo. 216, 55 S. W. 1035; *Thompson v. Ry. Co.*, 140 Mo. 125, 41 S. W. 454. It follows, then, that, if the court erred in giving the other instructions specified in his motion for a new trial by the plaintiff, the order granting the new trial was properly granted, although the court thought error had been committed only in giving defendants' instruction 5.

Without incurring this opinion with all of the pleadings and instructions, it will suffice to say that the plaintiff tried the case on the theory that *Quade*, acting by the direction of his codefendant, the milling company, was guilty of a wanton and willful trespass and assault upon the plaintiff, by beating him with a stick, and, by frightening him by curses and threats of assault, caused him to fall from the car and break his arm, and the instructions embodied the principle that, although the plaintiff was a trespasser by playing in the car, the defendants had no right to use more force than was necessary to eject him, and did assault him and beat him with a stick, or by attempting to close the doors of the car, and, by curses and threats of violence, so frightened him as to cause him to fall from the car and break his arm, then plaintiff was entitled to recover. They are in the usual and proper form in such cases, except the instructions were entirely too long—a vice that the circuit courts ought to discourage and discountenance.

For the defendant, the court instructed the jury in the fifth instruction, that the plaintiff was a trespasser, and the defendants had a right to drive him out of the car, and that if defendant the milling company, through its employes, was using ordinary means to threaten the boys, or scare them, and they were not guilty of any negligence in the means used, and did not use any violence to plaintiff, but that plaintiff was frightened and scared, and feared that he might be locked up in the car, and in his effort to escape from the car he fell because

of his fright, defendant was not responsible. The plaintiff's case was not founded on negligence—it was an action for trespass against his person; and, although he was a trespasser in the car, this did not justify defendant and its employes in assaulting him with a club, nor did it justify them in imprisoning him in the car, as Quade testified he was endeavoring to do, in order to turn him over to the police. Although trespassers, these boys were guilty of no criminal offense, and there is no evidence that they were. There was not even a suspicion that they were guilty of any criminal offense which would justify the defendant or its servants in imprisoning them; and when Quade admits that he was endeavoring to imprison the plaintiff and his companions, in order to turn them over to the officials of the law, and, in his effort to do this, so frightened plaintiff that, in his effort to escape, he fell and broke his arm, he was guilty of an unlawful trespass against the plaintiff. His act was a wrongful and unlawful assault, and he and his principal were liable for the necessary and natural consequences of the unlawful effort to arrest him. The police officers would not have been authorized to arrest plaintiff, without a warrant, for a misdemeanor not committed in their presence, and it is not insisted there was the slightest suspicion that he had committed a felony. *State v. Holcomb*, 86 Mo. 380, 381. In our opinion, the instruction was clearly erroneous in excusing the defendants for any injury which the plaintiff sustained in his effort to escape from a wrongful and unlawful arrest or imprisonment which was about to be imposed upon him.

Before the defendants were justified in using force to remove plaintiff from the car, it was their duty to have first ordered him to leave, and given him a reasonable opportunity to do so; and even then they could only use such force as was necessary for that purpose, and as plaintiff was a small boy, of only 12 years, and Quade a grown man, his removal could easily have been effected without the use of club, and without imprisoning him in the car. Moreover, the evidence of defendant Quade shows that his purpose was not to remove the boy from the car, but to imprison him in it; hence all the preamble of this instruction in regard to the efforts of the defendant and its employes to keep the boys away from the cars and prevent their being hurt is inapplicable to the issue tendered by plaintiff, which was a wanton assault and battery, and an unlawful attempt to arrest plaintiff, and the answers were general denials.

This instruction 5, as also the third, fourth, and sixth, given for defendants, all in effect permitted the jury to find for defendants if plaintiff was injured by his own

contributory negligence in getting out of the car. Contributory negligence is no defense to an unlawful and intentional assault, and all these instructions are erroneous to that extent. *Gray v. McDonald*, 104 Mo. 313, 16 S. W. 398; *Beach on Cont. Negligence*, § 22; *Morgan v. Cox*, 22 Mo. 377, 66 Am. Dec. 623; 1 *Shearman & Redfield on Negligence* (5th Ed.) § 64.

Defendants insist that plaintiff tendered the issue of negligence in his petition, and it is true that in the second count the word "negligently" is used, but it is so coupled with the words "wantonly, wrongfully, and unlawfully drove by force and threats," etc., that it is evident that the pleader was seeking to recover for a willful trespass, and not a negligent act, and hence it was mere surplusage. Nor was the case tried on such a theory. It was tried as a willful and unlawful trespass to plaintiff's person, and plaintiff's instructions are so limited.

The defendants' instructions are contradictory of plaintiff's, and were erroneous. Besides, it was improper to charge that defendants were authorized to "drive" the boy—a child only 12 years old—without requiring defendants to notify or order him out of the car, and without limiting the amount of force that defendants might lawfully use. Instructions 3 and 6 for defendants assert, in substance, that if the plaintiff was frightened by Quade's effort to imprison him and by his threats, and, in his efforts to avoid being shut up in the car and to avoid the threatened injury, jumped and fell, or stumbled and fell, defendants are not liable. Besides containing the error of tendering plaintiff's contributory negligence as a defense, its effect was to mislead the jury into regarding it as entirely legal and proper for defendants to frighten the plaintiff by threats, and by attempting to imprison him in the car, and that, if he was hurt by reason of such conduct, defendants were not liable, if the jury should find that, as a matter of fact, Quade did not strike him with the stick, though plaintiff and his companions all testified that he did. Considering the age of the plaintiff, and his want of experience, and the uncontradicted facts that he had never been about the cars before that day, and the sudden closing of the south door of the car, and the appearance of Quade with a club, the facts tend strongly to prove at least an unlawful assault, for which defendants are liable, even if Quade did not strike him with the stick, which several disinterested witnesses testify he had in his hand when the boy fell out of the car. We think the instructions for defendants were erroneous, and were well calculated to induce the jury to bring in a verdict contrary to the law.

The judgment of the circuit court in granting a new trial is affirmed. All concur.

COPELAND v. WABASH R. CO.*

(Supreme Court of Missouri, Division No. 2.
March 31, 1903.)

RAILROAD COMPANIES—DUTY TO TRAINMEN—SAFE BRIDGES—EVIDENCE—INSTRUCTIONS—ATTORNEYS ATTEMPTING TO PREJUDICE JURY—JURORS READING NEWSPAPER ARTICLE.

1. A railroad company owes the duty to its trainmen to construct and maintain reasonably safe bridges; and, having constructed a pile bridge where it was not reasonably safe, because of the high, swift water in case of rain, the floating logs, and the insufficiency of the earth under it to support piles, whereby it gave way under a train, injuring the conductor, it is liable for the injury.

2. Evidence, in an action for injury to a conductor by the giving away of a pile bridge under his train, held sufficient to support a finding that the earth under the bridge was insufficient to support the piles.

3. An instruction, in an action for injury to a railroad conductor by a bridge giving way, does not authorize a verdict for him on a finding that it was a pile bridge; it being that the jury should find for him if the accident was caused by reason of the defective condition of the bridge, and it was a pile bridge, and on account of the character of the stream and the country drained by it said bridge was not reasonably safe at that place.

4. An instruction, in an action for injury to a railroad conductor by the giving way of a bridge under his train, that defendant was not bound to furnish a bridge of a particular kind or style, but only a reasonably safe one for carrying trains, does not conflict with one that if, on account of the stream and topography of the country drained by it, a pile bridge was not reasonably safe, defendant had not performed its duty, and, if the injury resulted therefrom, it was liable.

5. Defendant's requested instruction, directing the jury, in passing on the extent of plaintiff's injuries and his physical condition, to consider that prior to the accident he had rheumatism, is properly amended to say that they may consider he had rheumatism prior to the accident, if they believe his subsequent ailments resulted in whole or in part therefrom.

6. That an attorney of plaintiff gave interviews to reporters does not tend to prove, so as to be ground for new trial, that he procured his statements as to a former trial to be published and caused them to be distributed, that they might be read by the jurors to prejudice them against defendant.

7. That jurors, pending the trial, see a paper which simply states how the jurors stood on a former trial as to awarding damages, and that plaintiff was suing for injuries received in a wreck where eight men were killed, and that a coffin was bought for him, but he recovered, is not ground for new trial.

Appeal from Circuit Court, Audrain County; E. M. Hughes, Judge.

Action by G. C. Copeland against the Wabash Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Geo. S. Grover and Geo. Robertson, for appellant. P. H. Cullen, E. S. Gantt, and W. M. Williams, for respondent.

BURGESS, J. This is an action for \$35,000 damages alleged to have been sustained

by plaintiff, a passenger conductor on defendant's railroad, by reason of the negligence of defendant company to provide and maintain a bridge which was reasonably safe. The specific allegations of the petition upon which the case was tried are as follows: (1) That said bridge was a pile bridge, and, on account of the character of the stream and the country drained by it, such a bridge at that place was not reasonably safe; (2) that the piling that supported said bridge had become rotten, unsound, or defective, and therefore not reasonably safe; (3) that there was not sufficient earth around some of said pilings, and for that reason the bridge was not reasonably safe. The answer was a general denial. The trial resulted in a verdict and judgment in favor of plaintiff for \$15,000. Defendant appeals.

The accident occurred by reason of the train upon which plaintiff was discharging his duties being ditched at Rose Branch, in Clay county, on June 26, 1897. Plaintiff left Union Depot at Kansas City at 5:30 that evening, in charge of his train; his objective point being St. Louis, Mo. The train had to cross Rose Branch, a small stream, about 1 mile west of Missouri City, and 20 miles east of Kansas City. As it was crossing Rose Branch, the bridge over that stream gave way, wrecking and ditching it, by reason of which plaintiff was greatly and permanently injured. Rose Branch is a stream about $3\frac{1}{2}$ miles long, skirted upon either side by broken land and abrupt bluffs, heavily timbered. It drains about 1,300 acres of land. For many years persons in the locality have been cutting timber in the valley of this stream and on the hills on either side of it. The tops of the trees were scattered along the branch and in the valley on either side of it. Logs, full-grown trees, and other timber were cut and lying loose in and across the branch and in its valley. This state of affairs had existed for years, and was known to the defendant long prior to the time Mr. Copeland was injured. The precipitous bluffs on either side of the stream caused the water to rush into it with great rapidity. An ordinary rainfall would cause it to overflow, and when it overflowed it carried great quantities of timber and driftwood, and lodged it against the piling supporting the railroad bridge. On the evening of the accident, June 26, 1897, plaintiff left Kansas City at 6:20 p. m., as conductor in charge of a regular east-bound passenger train on defendant's railroad, bound for St. Louis. The train was composed of an engine, tender, and 7 cars, viz., a mail car, 3 passenger coaches, a chair car, baggage car, and a sleeping car. It was raining some, but not very hard, when the train left Kansas City. The regular west-bound passenger train on defendant's road arrived in Kansas City that evening just before the train in charge of plaintiff left there. This train passed over Rose Creek bridge at 5:43 p. m., and was on time

*Rehearing denied June 9, 1903.

¶ 1. See Master and Servant, vol. 24, Cent. Dig. § 222.

at Missouri City, one mile east of there, at 5:38 p. m. This train safely crossed over Rose Creek bridge at the usual rate of speed, and at that time the water was not running in the branch underneath that structure. It was raining "just a very little bit" when this train crossed over Rose Creek bridge. This train had seven passenger cars, and was heavier than the train in charge of plaintiff. An extra freight train, east-bound from Kansas City to Missouri City, composed of an engine, tender, 10 or 12 loaded cars, and 3 empty cars, or 15 cars in all, passed over Rose Creek bridge in perfect safety at 6:20 that evening. It was not raining, and there was very little water in Rose Branch, when this train crossed it. Defendant's section foreman, with three men and a hand car, passed over Rose Creek bridge that evening at 5:45 p. m., going east to Missouri City. There was no water in Rose Branch then "to amount to anything." It was just beginning to rain. The foreman "noticed nothing unusual as to the condition of the bridge over Rose creek." There is, as the record shows, very little water in the branch at ordinary times. The driftwood in time of heavy rains floated down Rose Branch and lodged against the piling supporting the railroad bridge, but was removed as soon as practicable by defendant's section men. These men saw no driftwood in Rose Branch on the evening of the accident when they passed over the bridge.

The bridge in question was constructed in 1890. On the east and west banks of the stream stone abutments were constructed, upon which the bridge rested. The bridge was what is known as a "pile bridge," with about 60 feet of water way between the abutments. The stringers, upon which rested the rails of the track, were white pine, 7 by 16, and 32 feet long; that is, they were 16 feet at the top, 7 inches wide, and 32 feet long. The joints in the stringers were broken; that is, every other one was crossed, starting with 16 feet, then the next one would come 32 feet and fastened over with caps, and the next one the same way. Underneath the bridge, supporting it, were three rows of piling, 16 feet apart, and 16 feet from the edge of each abutment. Each row or bent contained 6 piles, or 18 in all. These piles were of Missouri white oak, perfectly new in 1890, purchased along the line of defendant's railway, and were inspected at Moberly by an experienced bridge builder before being used, and were all sound. As unloaded at the bridge, these piles were each 35 feet long, but were cut off to 30 feet each, so as to fit in the space under the rails. They varied from 16 to 18 inches in diameter, and were driven from 15 to 17 feet in the earth to the solid rock, where they could not be driven any further. In driving these piles a steam hammer weighing 2,500 pounds was used. After the piles were driven, cross-braces were put on each row or bent of 6

piles. After the accident it was discovered that the west side of the pilings in the bridge was entirely gone, and the piling in the middle bent was broken square off, and the piling in the east bent broken and splintered.

Defendant's tracks cross Rose Branch at right angles, at which point its bottom is solid rock or soapstone, and level, or nearly so, but its covering was of made earth, not evenly spread over it. The bed of dirt upon it was standing on its surface. It was higher and much more solid on the east side, and gradually inclined down toward the west abutment. The main channel of the stream ran next to the west abutment, and against the west row of piling. The wagon road passing under the bridge was not a public road, or one much traveled, but was a place where some neighbors passed through, going to and from their work. This road, or passageway, was between the east abutment and the east row of piling, and practically on the bank of the stream. From this wagon road the dirt gradually declined down toward the west row of piling, and the west abutment, until the earth around the west row of piling was perhaps not half so deep as the dirt beneath the wagon road; nor was it near so compact or solid, because it was sandy, and the water usually standing on it percolated through it. The west bent or row of pilings washed out entirely. It was the washing out of the west bent that caused the catastrophe. The middle bent, which was set in deeper and more solid earth, did not wash out, but broke square off. The earth in which the east row of piling was set was still deeper and more solid than the earth around the middle bent. The east bent did not wash out, and, while the piles broke, they did not break off square, like the ones in the middle bent, but in breaking splintered like fairly sound timber.

Plaintiff offered much testimony tending to show that by reason of the accumulation of drift against the bridge, and the water working its way out under it, the earth under the bridge had been washed away. As to whether the bridge was a proper or safe structure at this point, and the pilings sound or decayed and rotten, the evidence was in conflict. Defendant's evidence showed, however, that from the time of the completion of the bridge in July, 1890, it was inspected frequently, sometimes as often as two or three times a week, up to 22 days prior to the accident, and was found to be all right. About 100 feet west of defendant's bridge was a bridge erected by Clay county over Rose Creek Branch, 66 feet long, 16 feet wide, and rested on piles 8 feet long. It was about 6 or 7 feet above the water, when there was any in the branch. This bridge had been there for 15 years prior to 1897 without washing out.

The bridge was on a curve, and the engine rounded it at a speed of about 50 miles an hour. The track and bridge were both in

line, and the bridge apparently all right. No driftwood was seen against the bridge. The water in the branch was about 4 feet below the cross-ties, which rested on the top of the bridge. The engine crossed the bridge, but the entire tender did not. The forward trucks of the tender crossed the bridge, but the rear trucks were derailed, and went down the embankment on the east side of the track. The mail car and the baggage car went down into the creek. The smoking car and one chair car followed the baggage car, but the rear chair car did not fall entirely into the stream. The sleeping car tipped partly into the creek, with the rear trucks on the west bank. Plaintiff was sitting in the smoking car at the time, went down with it, was badly crushed and bruised, and taken out more dead than alive.

The county bridge was swept off of its supports by the high water, and was afterwards found to be comparatively intact in the river bottom below defendant's bridge. While the evidence upon behalf of defendant tends to show that the accident was the direct result of a sudden, unprecedented, and extraordinary flood, there was evidence on behalf of plaintiff tending to show that the rain was not an unprecedented one, and that the branch had been as high up on one, and perhaps two, occasions before.

At the time the plaintiff was injured he was a fine specimen of physical and mental manhood. He was a very active man for one of his size, strong and athletic. The injury made of him a total physical wreck, so that he has since then been unable to perform any labor, or to move, rest, or sleep. He is now an invalid for life. He was unconscious, and thought to be in a dying condition, for several days after the accident. He was in the hospital for seven weeks, and it was six months before he was able to go to his home in St. Louis. His spine was injured, and there was a good deal of soreness over it at the time of the trial. His abdomen and stomach were mashed, bruised, and injured, being swollen and black for months. His shoulders were wrenched, and the bones and ligaments broken and torn. His eyes were permanently injured. His heart was misplaced, the apex being turned upward and toward the left nearly $2\frac{1}{2}$ inches. His sixth and seventh ribs were broken. His liver had been injured, and at the time of the trial was not in its normal condition. His nervous system lacked tone and vitality. All these conditions were present at the time of the trial, and the medical testimony established that they affected his general health, were permanent and incurable, painful, and incapacitated him from any labor at the present or any future time. He has never been able to lie down in bed since his injuries. He can only lie in bed by being propped up with pillows. He cannot lie on his left side.

A demurrer was interposed at the close of

plaintiff's case, and overruled, and again at the close of all the evidence, and again overruled.

Over the objection and exception of defendant, the court, at the request of plaintiff, instructed the jury as follows:

"(1) The court instructs the jury that if they believe, from the evidence, that plaintiff was in defendant's employ as conductor of the east-bound passenger train on the 26th of June, 1897, and that said train was wrecked by the falling of defendant's bridge across Rose Branch, and plaintiff was thereby injured, and the said wreck was caused by reason of the defective condition of said bridge in any of the particulars hereinafter mentioned, and that said bridge was a pile bridge, and on account of the character of the stream and the country drained it (said bridge) was not reasonably safe at that place, or that the piling that supported said bridge had become rotten, unsound, or defective, or that there was not sufficient earth around some of said piling, and that from any or all of said causes said bridge, on said 26th of June, 1897, was not reasonably safe for the passage of defendant's said train over the same, and that defendant knew of the defective and unsafe condition of said bridge, or by the exercise of reasonable care and diligence could have ascertained the same before the arrival of the train, upon which plaintiff was conductor, at said bridge, then the verdict must be for the plaintiff.

"(2) The jury are instructed that the risks assumed by the plaintiff in accepting employment from defendant as conductor of its passenger train were only such as were incident to said employment, and did not include any risks arising from negligence upon defendant's part (if there was such negligence) in failing to use reasonable care and diligence to see that its tracks and bridges were in a reasonably safe condition.

"(3) The jury are instructed that, while the defendant was not bound to provide against the effects of a storm which it could not reasonably anticipate, yet if they believe, from the evidence, that the bridge over Rose Branch was not reasonably safe on account of its being a pile bridge, or because some of the piling had become rotten and decayed, or because there was not sufficient earth or dirt around said piling, and that the fall of the bridge was caused by its defective condition in any of the particulars aforesaid, and not by reason of the extraordinary force of the storm, then the fact that the bridge fell during said storm will not prevent a recovery in this case.

"(4) The jury are instructed that the opinions of the parties who testified as experts are merely advisory, and not binding upon the jury, and the jury should accord to them such weight as they believe, from all the facts and circumstances in evidence, the same are entitled to receive.

"(5) 'Ordinary care,' as used in these in-

structions, means such care as a reasonably prudent person would have exercised under the same circumstances.

"(6) If the jury find for the plaintiff, in estimating his damages they will take into consideration, not only his age, the physical injury inflicted, and the bodily pain and mental anguish endured, together with the loss of time occasioned, but also any and all such damages which it appears from the evidence will reasonably result to him from said injuries in the future."

The following instructions were given at the request of the defendant:

"(1) The court instructs the jury that if the said bridge in question was composed of such material as was used by men of ordinary care engaged in building pile bridges, and if said material was given a reasonable inspection at the time it was put in the bridge, and found to be suitable for the use to which it was put, and if the maintenance of the bridge thereafter was given such care and inspection as would be given by men of ordinary care and prudence, and if by such inspection nothing was found to indicate that the bridge was not reasonably safe for the purposes for which it was used, then the defendant is not liable, and you will return a verdict for the defendant; and you are further instructed that what is meant by 'ordinary care,' as used in these instructions, means such care as an ordinarily prudent person would exercise under the circumstances given in evidence in the case.

"(3) The court instructs the jury that, before the plaintiff can recover in this action, he must prove to the reasonable satisfaction of the jury, by the greater weight of the evidence in the cause, that his injuries are due to the negligent conduct of the defendant, its agents, or servants, and that, had it not been for such negligence in constructing or maintaining the bridge in question, he would not have been injured; and, if he has failed to so prove, your verdict will be for the defendant. And you are further instructed that the defendant was not bound to furnish its employes any particular kind or style of bridge over Rose Branch, or other streams its railroad crosses; that defendant has discharged its full duty to plaintiff when it has constructed and maintained a bridge over Rose Branch such as is in ordinary use by itself and other railroads, and reasonably safe to carry trains over it under ordinary conditions and circumstances; that defendant was not bound to anticipate unprecedented, extraordinary, or unusual rainfalls, or to build such a bridge as would resist or stand against such; and if the jury believe that the bridge over Rose Branch, as constructed and maintained, was reasonably safe for the purpose for which it was built in times of usual and ordinary rainfall, then plaintiff cannot recover.

"(4) The court instructs the jury that if you believe the bridge in question, as built

and maintained, was reasonably safe for the passage of defendant's trains over it under ordinary conditions, and that it was destroyed or weakened so that it was made unsafe by an unusual rainfall, and that the wreck was thereby caused, then the accident is due to causes over which the defendant had no control and for which it is not blamable, and you will return a verdict for the defendant.

"(5) The court instructs the jury that the defendant is not bound to furnish any particular kind or style of bridge over Rose Branch to the plaintiff, and it is in no sense an insurer of his safety; that all the law requires of the defendant toward its employes is that it shall furnish a bridge over its streams that is reasonably safe for carrying trains over them under ordinary conditions.

"(6) The court instructs the jury that if you believe, from the evidence, that in the construction and maintenance of the said bridge the officers, agents, and servants of the defendant, in and about such work, exercised ordinary care—that is, such as is usually exercised by men of ordinary prudence under the same or similar circumstances—then defendant is not guilty of the negligence charged; and what is meant by the word 'negligence' is the want of that degree of care that an ordinarily prudent person would have exercised under the same or similar circumstances.

"(7) The court instructs the jury that one of the defenses in this case is that the wreck was caused by the act of God—that is, an extraordinary or unusual rainfall—and you are instructed that the law is that the defendant is not liable for damages or injuries resulting from an inevitable accident or the act of God; and you are instructed that if you believe, from the evidence in the case, that the wreck in which plaintiff was injured was caused by an extraordinary or unusual rainfall, and that it would not have occurred from an ordinary rainfall, then the verdict should be for the defendant.

"(8) The court instructs the jury that, although you may believe from the evidence that the defendant was negligent in either or both the construction and maintenance of the said bridge over Rose Branch, yet if the wreck is not due to such negligence, and would not have occurred in an ordinary rainfall, and is due to such extraordinary or unusual rainfall alone, then the defendant is not liable, and you will return a verdict for the defendant.

"(9) Although the jury may believe that a bridge with a single span reaching clear across Rose Branch was better than a bridge with piling in the bed of the branch, and although some parts of the piling had decayed, and although some of the dirt was washed away from around the piling, and that the piling was driven in soft earth, and driftwood was allowed to accumulate against the bridge,

yet if the bridge, under these conditions, was reasonably safe for the purposes for which it was designed, and would have been reasonably safe under ordinary conditions and in the time of ordinary rainfall, and under such conditions said train would have passed safely over said bridge, but said wreck was the result of an extraordinary or unusual rainfall, then the defendant is not liable, and you will return a verdict for the defendant.

"(10) If the jury find, from the evidence in this case, that the fall of defendant's bridge and the wreck of its train thereby at Rose Branch on the 26th day of June, 1897, was occasioned by a sudden and unusual or extraordinary rainstorm then and there prevailing, which caused an unusual amount of water to accumulate in said branch, and thereby wash away a bridge previously constructed by the county of Clay over an adjacent highway, resulting in its being forced by said water against the supports under defendant's bridge, thereby causing said supports under defendant's bridge to give way and cause the wreck, resulting in the injuries to plaintiff here sued for, then you are instructed that the plaintiff is not entitled to recover in this action, and your verdict must be for the defendant.

"(11) The court instructs the jury that you cannot resort to guess, conjecture, random judgment, or supposition to determine the cause of the wreck; but, before plaintiff is entitled to recover, he must prove by the evidence in the case that his injuries were caused by the negligence of defendant, its servants, agents, or officers, and negligence is a matter that must be proven, and cannot be presumed, nor can it be inferred from the happening of the accident; and if the evidence in this case fails to show that the wreck in which plaintiff was injured was caused by the negligence of defendant, or if the evidence satisfies you that the wreck was caused by unusual or extraordinary rainfall, or if from the evidence you are unable to determine the cause of the wreck, or if from the evidence the probabilities are equally strong that the wreck was occasioned either by defendant's negligence or by an extraordinary or unusual rainfall, then it is your duty to return a verdict for the defendant.

"(12) The court instructs the jury that you are sole judges of the weight of the evidence and of the credibility of the witnesses, and, if you believe any witness has intentionally sworn falsely to any material fact, you are at liberty to disregard the whole of the testimony of such witnesses; and in arriving at your verdict you will take into consideration, not only all the evidence in the case, but all the facts and circumstances given in evidence, and, in determining what weight and credibility shall be given to any witness testifying in the case, you will consider his conduct while upon the witness stand, the reasonableness or unreasonableness of his testimony, and, in cases where he is testifying as an ex-

pert, you will consider his opportunities for forming his opinions, his qualifications for giving opinions upon the subject of his testimony, his attitude toward the parties to the action, and all the other facts and circumstances given in evidence in the trial of the case.

"(13) The court instructs the jury that the plaintiff is not entitled to recover, for loss of time, his wages as a railroad conductor on a railroad train, and you can only consider the evidence of such wages in considering the value of time lost.

"(16) The court instructs the jury that, if you believe that any witness in this case has sworn to a state of facts therein in the face of and in opposition to obvious physical facts or contradictory to the common knowledge or experience of men, then it is your duty to wholly disregard any such testimony.

"(17) In this case the defendant has set up the act of God as a defense against any recovery by the plaintiff. By the expression 'act of God' the law means any phenomenon or action in the physical world around us (not occasioned by the intervention or interference of man) which is extraordinary or unprecedented, or outside of common experience, which is irresistible in its character, and which cannot be before seen or prevented, such as extraordinary or unprecedented storm of any kind, or an unprecedented overflow of water, or an earthquake, or a sudden death or the like. If, therefore, the jury find from the evidence that before the train in question approached Rose Branch an extraordinary or unprecedented rainstorm or waterspout passed down and across the valley of Rose Branch (which defendant's servants in charge of the train did not and could not foresee), causing an extraordinary and sudden rise in the waters of said branch, which swept away the county bridge in evidence, and hurled it against the piling of defendant's bridge, where the county bridge became the cause of extraordinary scouring action in the waters of said branch, they being arrested in their flow by the impediment of the county bridge, by means of which the west bent of defendant's bridge was washed out, and the supports of its bridge weakened, whereby the train was wrecked and plaintiff injured, then the jury must find the issues for defendant."

The court gave the following instructions of its own motion:

"(13) The court instructs the jury that, in considering the extent of the plaintiff's injuries and his physical condition, you may consider the fact that plaintiff, prior to the accident, had had rheumatism. If you believe his subsequent ailments, in whole or in part, resulted therefrom, you are instructed that plaintiff was bound to use all means within his power to effect a cure of himself from the injuries received in the accident, and if he has not done so, and has neglected to properly treat himself, then he cannot recover for any condition due to such neglect; and, in

considering the element of damages based on account of loss of time, you will consider the nature of his employment as a railroad conductor, and cannot allow for loss of time sued for since the commencement of the action, to wit, December 15, 1898, but may consider the fact, if proven, of impairment of earning capacity.

"(14) The court instructs the jury that, although you may believe that the plaintiff has a displaced heart, and that his liver is not in its natural position, yet, before you can consider these facts as an element of damages, it must be proven to your reasonable satisfaction that these conditions were caused by the wreck, either directly or indirectly, and that the wreck is due to the negligence of the defendant, as explained in the other instructions."

To the giving of all of said instructions, and each of them, defendant duly excepted.

The defendant then prayed the court to give the following instructions:

"(13) The court instructs the jury that, in considering the extent of the plaintiff's injuries and his physical condition, you will consider the fact that plaintiff, prior to the accident, had had rheumatism and other ailments. You are instructed that plaintiff was bound to use all means within his power to effect a cure of himself from the injuries received in the accident, and if he has not done so, and has neglected to properly treat himself, then he cannot recover for any condition due to such neglect; and, in considering the element of damages based on account of loss of time, you will consider the nature of his employment as a railroad conductor, and cannot allow for loss of time sued for since the commencement of the action, to wit, December 15, 1898, but may consider the fact, if proven, of impairment of earning capacity.

"(14) The court instructs the jury that although you may believe that the plaintiff has a displaced heart, and that his liver is not in its natural position, yet, before you can consider these facts as an element of damages, it must be proven to your reasonable satisfaction that those conditions were caused by the wreck, and that the wreck is due to the negligence of the defendant, as explained in the other instructions.

"(18) The court instructs the jury that there is no evidence in this case that the bridge in question was not a suitable bridge to have been placed over Rose Branch, and that a pile bridge is not a suitable structure for that point, and that there is no evidence that said bridge was made of unsound or unsuitable material for a bridge, but the evidence shows that it was built of proper material for a bridge; and if you find, from the evidence, that said bridge was reasonably maintained and reasonably inspected after it was built, and nothing therein was found to indicate that it was unsafe for the

purpose for which it was used, then your verdict should be for the defendant.

"(19) And you are further instructed that: although you may find that sap rot had taken place on the piles, or some of them, and that they were reduced on account thereof in size, yet if you further find that the piling in that condition was reasonably safe for the purposes of a bridge, and was reasonably supported, so as to make the bridge a reasonably safe structure as a bridge, then the verdict should be for the defendant.

"(20) The court instructs the jury that under the pleadings and all the evidence in this case the plaintiff is not entitled to recover."

To the refusal of such instructions the defendant then and there duly excepted.

It was not the duty of defendant to furnish plaintiff any particular kind of bridge, so that the one furnished was reasonably safe for the purpose for which it was used; nor does the petition otherwise allege. It does, however, allege that the bridge over Rose Branch was a "pile bridge, when it should have been a span bridge," but then proceeds to set forth its infirmities, and the dangerous condition it was in at the time of and before the accident. The mere allegation that the bridge was a "pile bridge," without more, does not state a cause of action; but after this allegation follows averments which, if true, show why it was not the proper kind of bridge for that place, and not reasonably safe. That it was defendant's duty to its employes in its train service to construct and maintain a reasonably safe bridge over Rose Branch, and if it failed to do so, and in consequence of such failure plaintiff, while in the discharge of his duty, was injured, that defendant is liable to him in damages for such injury, there can be no question. *Cobb v. Railway*, 149 Mo. 609, 50 S. W. 894.

Defendant asserts that there was no proof whatever in support of the allegation that the earth under this bridge was insufficient to support the piles; but we are unable to give our assent to this contention. The evidence upon this feature of the case was as follows:

E. P. Donovan, public administrator of Clay county, on direct examination, testifying on behalf of defendant, said: "I am familiar with the bed of Rose Creek. It is made of soapstone rock and limestone. In olden times I have seen Rose Branch cut out there when there wasn't any water left in it, and I have seen soapstone there." Again, on cross-examination, the same witness said: "I do not know whether there is any quicksand in the bed of Rose Branch or not. I saw sand there, but whether it was quicksand or not I will not say. I have seen dirt left by the stream that would mire until it dried up; that sediment and sort of gumbo above the sand would wash out. I have seen

it when there would come down a freshet and wash it out. It was washed down deep enough so you could see the hard soapstone. I have seen soapstone there in the bottom of the branch after one of these freshets. I don't remember when it was or how many times."

H. B. Wood testified as follows: "I think it has been described as good as I can describe it. The river sediment forms in there and washes from the hills. It washes down the dirt, and it settles there, and the river backs up there over it. Sometimes it is a kind of sandy soil, and sometimes it is black and blueish mud, and very sticky, like soft soap. It will slip out when you catch it in your hand. Sometimes the river would back in there, and there would be more mud than others. It would wash out after another rain. Could not say how deep it is to solid rock. Have been bathing down there when I could stand on solid rock or bottom, but whether it was rock or soapstone I cannot say. It was perfectly solid, and I could stand on it."

A. C. Kidd testified as follows: "The soil into which these piles were driven was soft dirt, or made dirt. The river backs up under there every year. The river leaves a sediment there. The Missouri river some years settles as gumbo, and some years it settles as quicksand. I have seen it both. Some years it is soft, and some years it is pretty solid."

Mr. Crabtree testified: "I never examined the earth into which this piling was driven, only when the horses got mired in it just below the bridge; 30 or 40 feet below the bridge, probably. I think the character of the dirt under the bridge was something similar to that. I think the Missouri river sediment makes sand sometimes, and it is dark blue, like with mud, like the same kind they took out when they put in this bridge; something about like that same kind of stuff. Under the bridge at the west bent it is not very solid. It is a kind of spongy soil. Could not walk very close to the edge of the water without getting into the mud six or eight inches deep."

Samuel Roby testified that "the earth into which these pilings were driven was soft mud; a kind of quicksand sediment or wash from the hills; soil washed from the uplands and backed up by the river. When the river is high, it backs in; and mud, it is very soft. When the river is high, and big rains come, it makes it very soft and milky. I should judge the sediment to be about eight feet, from what I know about it, from sounding it with a rod of iron. * * * I took a three-quarter rod of iron I had there to see how deep the mud was under the bridge, and it was nine feet under the railroad bridge, and seven feet and something at the county bridge, until we struck something we supposed to be soapstone or rock."

Frank McCoy, a witness, said: "I suppose it was made land. It was soil from the bluffs and the Missouri river. When the river backs in there, and stands awhile, it leaves a sand probably a foot, or a foot and a half; and if the creek gets high, and runs, it runs in mud on top of it from the bluffs. That is about the way it is formed. When it crossed the branch, there is a soapstone bottom. I have seen it. * * * I never dug down through this stream to find where solid rock was. Have seen the day when there was no dirt in the river at all; when the river ran along and washed it off clear, and I could see the soapstone."

Dr. Henshaw stated: "I think the soil in which the piles were sunk is soil that was washed in from the hills. It has washed in there, and some of the soil is sediment from the river that backed in there, and when it is muddy it leaves a sediment from the river water. I think the last time I noticed it there was a hole of water under the bridge; that is, before the wreck."

Wm. McCoy testified that "the soil beneath the bridge is soft and quicksand. It is made of earth. On the east side it is hard sometimes, but on the west side I never saw it hard at all. On the west side it would mire anything that went in there—any kind of stock. I have seen stock in there, horses and cattle, and I have helped to get them out. There has been water under that bridge pretty nigh all the time."

Seth White testified as follows: "All that land in the bottom is made by the Missouri river. In driving pumps you find a sort of sand or gumbo. That land is made by the deposits from the river. It is made soil, and we call it 'made land' that is left there by the river. At times, when there is plenty of water and wet, it is very spongy and muddy, and this gumbo comes down with the water under this bridge. I do not know just the character of it, but it is made dirt."

D. D. Holt, a witness for plaintiff, testified that he was present when they built the bridge to supply the one that gave way. He testified as follows: "I saw them when they laid the first stone. From the bottom of the creek, down, I suppose it was about six feet from the bank up to where the abutment stood, and perhaps it was a good deal more. From the bottom of the creek down to solid rock it was not very far; six feet, perhaps, from the bed of the creek. With the exception of a little mud on that five or six feet, the balance was quicksand and gravel. I saw it when they were drawing it out and shoveling it out. I seen it again some days after the wreck, and I seen it sunk at the same place. I was down there after the wreck in 1897. They were sinking and digging out the old stone, and putting in a new stone abutment there. I didn't see any difference in soil I saw in 1897 and that which I saw 31 years ago. I saw them digging in 1897. They digged six feet from

the bottom of the creek before they struck solid rock. They struck quicksand directly they started. When they stopped they struck rock. From the bottom of the creek down to where they stopped was nothing but quicksand. I saw it when they drew it out by the tubs full."

It is clear from these excerpts from the evidence that there was some evidence tending to show that the earth under the bridge was insufficient to support the piles. Its weight was, of course, for the consideration of the jury. The bridge was constructed out of first-class material; but there was evidence tending to show that at the time of the accident some of the piling was decayed, and not of sufficient strength to withstand the pressure of the water and driftwood which came in contact with it. And while the fact that the bridge went down under the train did not of itself make out a *prima facie* case in plaintiff's favor (*Bowen v. Railway Co.*, 95 Mo. 274, 8 S. W. 230), and it was incumbent on him to show how and why the accident occurred, the falling of the bridge was one of the incidents which occasioned the injury, so that the case does not stand alone on the fact that the bridge fell and that the plaintiff was injured; but if, in connection therewith, the evidence showed that the bridge was a pile bridge, and on account of the character of the stream and the country drained by it such a bridge at that locality was not reasonably safe, or that the piling that supported it had become rotten, unsound, and defective, and therefore not reasonably safe, or that there was not sufficient earth around some of said pilings, and for that reason the bridge was not reasonably safe, or for any or all of these reasons it fell and injured plaintiff, and that defendant knew of the unsafe condition of said bridge, or by the exercise of reasonable care and diligence could have ascertained the same before the arrival of the train upon which plaintiff was conductor at said bridge, he made out a *prima facie* case entitling him to go to the jury, and it then devolved upon defendant to overcome this *prima facie* case, and to show by the weight of the evidence to the satisfaction of the jury that the accident was attributable to some other cause; and this defendant undertook to do by showing that a sudden, unforeseen, unprecedented, and extraordinary storm, flood, and waterspout, purely local in its character, occurred in the immediate vicinity of Rose Branch, only a few brief minutes prior to the arrival of that train at that point, which swept the county bridge against this structure and wrecked it, and hence the accident was the result of *vis major*, or an act of God, for which the defendant is not liable. But the evidence upon this point was not all one way, and, while it tended to show that the rise in Rose Branch was occasioned by an unprecedented rainfall, there was evidence to the contrary, to such an extent that the court would not have

been justified in taking the case from the jury upon that ground. Besides, defendant's assertion that the high water in the branch washed the county bridge from its location, and swept it against the railroad bridge, and wrecked it, is merely conjectural, as there was no evidence to that effect.

It is said, for defendant, that by the first and third instruction given at the plaintiff's request the jury were expressly authorized to find a verdict in plaintiff's favor if the bridge was a pile bridge. This we think a misinterpretation of these instructions, and that by no fair construction can they be construed as telling the jury that they were authorized to find a verdict in plaintiff's favor simply because the bridge in question was a pile bridge. They simply told the jury that defendant was bound to maintain a reasonably safe bridge, and submitted to them, for their determination from the evidence, whether such a bridge over Rose Branch, in view of the area of country drained by it and the character of the stream, was reasonably safe. It would have been difficult to have presented this feature of the case to the jury in more apt words than were employed in that respect, to wit: "And that said bridge was a pile bridge, and on account of the character of the stream and the country drained by it said bridge was not reasonably safe at that place." Now, if the instruction had presented the case to the jury upon the ground alone that the bridge was a pile bridge, without more, defendant's contention would clearly be correct; but it went further, and in connection with the fact that the bridge was a pile bridge submitted to the jury to say whether, on account of the character of the stream and the country drained by it, such a bridge was reasonably safe at that location.

So with respect to the third instruction. It left to the jury for their determination the question whether a pile bridge was reasonably safe over Rose Branch at the place of the accident, under all the facts and circumstances in evidence. The entire instruction should be considered together, and not certain parts or words taken from it; and when this is done it is not in any way open to the objection urged against it.

Nor is there any conflict between plaintiff's instructions and the third and fifth given in behalf of defendant. They are framed, when taken together, to cover certain features of the case—plaintiff's, that defendant was bound to furnish him a reasonably safe bridge over Rose Branch, though of no particular kind or style; while by defendant's the jury were told that defendant was not an insurer of plaintiff's safety, and was only required to furnish a bridge that was reasonably safe for carrying trains under ordinary conditions. The conflict between these instructions and plaintiff's, to the effect that if, on account of the character of the stream and the topography of the coun-

try drained by it, a pile bridge was not reasonably safe, then defendant had not performed its duty to plaintiff, and if the injury resulted from such negligence he was entitled to recover, is not apparent; nor do we think there is any. They merely presented diverse views of the respective parties with respect to the duty of the defendant to the plaintiff, and are not at all inconsistent or inharmonious. Upon the part of defendant the jury were told that no particular kind or style of bridge was necessary, but that defendant's duty was performed when a reasonably safe bridge was constructed. For the plaintiff the jury were told that it was the duty of defendant to provide and maintain a reasonably safe bridge, and if, on account of the stream and the country drained by it, a pile bridge was not reasonably safe at that place, etc., the defendant was negligent. Clearly there is no inconsistency or conflict in these instructions.

Another contention is that the thirteenth and fourteenth instructions asked by defendant, modified by the court, should have been given as asked. There is no merit in this contention. The first-named instruction, as asked, directed the jury, in passing upon the extent of plaintiff's injuries and his physical condition, to consider the fact that prior to the accident he had rheumatism and other ailments, when, as amended, it told the jury that they might consider the fact that plaintiff had rheumatism prior to the accident, if they believed his subsequent ailments, in whole or in part, resulted therefrom. Clearly, unless plaintiff's rheumatic troubles have some connection with the injuries, there was no reason why they should be considered by the jury in making their verdict.

The fourteenth instruction was amended so as to authorize the jury to take into consideration any physical injuries to plaintiff resulting directly or indirectly from the accident. That the instruction, as amended, correctly presented the law on this phase of the case to the jury, is beyond any question.

No error was committed in refusing the eighteenth and nineteenth instructions asked by defendant, as those that were given covered fully every phase of the case.

Defendant asserts that illegitimate and improper means were resorted to by one of plaintiff's counsel to prejudice the jury against the defendant, outside of the court room, in that a false and misleading account of the first trial, there having been one before this, was furnished to the Mexico newspapers by him, and thereafter published during the progress of the trial here under review; that such newspapers, containing the articles above described, were read by the jury, or by certain members of it, during the trial. While this point is made in the motion for new trial, on the hearing of that motion there was no evidence adduced show-

ing that the jury ever read these statements in the Ledger and Intelligencer, the papers in which they were published, and therefore they were not hurtful to defendant. Nor does the mere fact that P. H. Cullen, one of plaintiff's attorneys, gave out these interviews to the reporters of the papers named, prove or tend to prove that he procured such statements to be published, and thereafter caused them to be distributed in Mexico, to the end that they might be read by the jurors, for the purpose of prejudicing the jury against the defendant.

The trial began on Monday, February 19th, and continued until the afternoon of the 23d, when the jury were sent to their room to consider of their verdict. After their supper that evening they were sent back to their room, where they remained until about 10 o'clock that evening, when they reported to the court that they were unable to agree, and were discharged until morning. One of the jurors, by the name of Crum, in the meantime procured a copy of the Mexico Message, cut from it the article which had been published a few days before concerning the Copeland Case, read it over, and showed it that night to another member of the jury with whom he was rooming. This is also one of the errors assigned in this case. The article is as follows:

"The Copeland Case.

"Again on Trial in the Audrain Circuit Court.

"G. C. Copeland is suing the Wabash Railroad for \$35,000 for injuries received in the wreck at Missouri City, June, 1897, where eight men were killed. A coffin was bought for Copeland, but he recovered. The trial last term of court resulted in a hung jury. One of the jurors was for nothing, and hung to the last, while one of the others was for \$20,000, two for \$15,000, and eight for \$10,000. There is much interest in the case. Every point of ground will be contested. The trial may last a week."

There is nothing said or intimated in this article with respect to the right of plaintiff to recover. It does not undertake to espouse his cause, or to attribute his injury to the fault or negligence of defendant, but simply gives an impartial statement of how the jury stood upon the former trial and a few facts connected with the accident; and does the fact that, pending the trial, some of the jurors read the article, furnish a sufficient reason for the interference by this court, and for a reversal of the judgment upon that ground? We think not. The matters stated in the article, even if they had been published in either of the papers and read by the jurors before they were selected to try the case, would not have disqualified them; and certainly the reading of the article thereafter, and while serving as jurors, would not of itself be sufficient cause for setting aside the verdict by the trial court,

or for a reversal of the judgment by this court upon that ground.

The same question was before the Supreme Court of Michigan in the case of *Sherwood v. Chicago W. M. Ry. Co.*, 88 Mich. 108, 50 N. W. 101, in which it is said: "After the trial had been in progress a day, some newspapers published and circulated in Grand Rapids, where the trial was in progress, an item in regard to the former trial, in which was stated the amount of the verdict. It was shown that some of these articles reached some of the jury. Defendant thereupon requested the court to permit an inquiry to be made to the jury, and ascertain whether they had read these articles, and, if they had, to arrest the progress of the trial of the case and grant a new trial. The application was overruled. Defendant's counsel insist that this was prejudicial, and especially in view of the fact that a verdict in the present case was larger than in the former. This rule, if established, would render incompetent every juror who knew the amount of the former verdict. Intelligent men, who are the most competent jurors, are usually readers of newspapers. Newspapers have the right to publish verdicts and judgments rendered in the courts. The result would be to render incompetent as jurors in many cases nearly all the intelligent residents of the county. It, of course, makes no difference when the jurors learn the amount of the former verdict. It is, indeed, desirable that such things, as far as possible, should be kept from the knowledge of the jury; but, however unwise it may be to publish them at the time of the trial, no violation of law is committed in so doing; nor will the reading of them by jurors render them incompetent."

In *Harriman v. Wilkins*, 20 Me. 98, it was decided that where a jury found among the papers, without any fraud on the part of the successful party, the verdict rendered upon a former trial, this constituted no ground for vacating their verdict.

In 2 *Thompson on Trials*, § 257, it is said: "The mere fact that the verdict in a former trial gets accidentally into the hands of the jury, with the papers, held no ground for a new trial," etc.

Fuller v. Fletcher (C. C.) 44 Fed. 34, was an ejectment suit. It had been tried five times. Verdicts for the defendants at the first and the plaintiff at the second trials were set aside by the United States Circuit Court. A verdict returned for plaintiff at the third trial was set aside by the United States Supreme Court on writ of error. 120 U. S. 534, 7 Sup. Ct. 667, 30 L. Ed. 759. The fourth trial resulted in a hung jury. On the fifth, the defendants obtained a verdict, and plaintiff moved to have the same set aside, because the jury had read the opinion of the Supreme Court in 120 U. S. 534, 7 Sup. Ct. 667, 30 L. Ed. 759, which opinion, as read by them, was published by defendants in pam-

phlet form and by them generally distributed. The copy of the opinion which the jury read will be found in 120 U. S. 584, 7 Sup. Ct. 667, 30 L. Ed. 759, and said opinion contains a full statement of the evidence at the former trial, including a map of the disputed land in reduced size; also a statement of the finding of the jury for plaintiff, and the opinion of the Supreme Court; of about 12 pages, stating the evidence and discussing the weight of the evidence, and the conclusion of the court that a verdict for the plaintiff was not authorized. The verdict for defendants on the fifth trial was challenged by plaintiff for the reason that the jurors had read the opinion of the Supreme Court above referred to. In overruling the motion for a new trial on these grounds the court said: "The depositions, taken by a commissioner appointed by the court with the consent of the parties, prove this state of facts: One of the defendants before the last trial caused to be printed 100 pamphlet copies of the opinion of the Supreme Court as reported in *Fletcher v. Fuller*, 120 U. S. 581-585, 7 Sup. Ct. 667, 30 L. Ed. 759, and distributed them among friends and relatives interested in the case, and among other persons in the neighborhood, including some who had been jurors or witnesses at former trials. Pending this trial the foreman and another of the jury each read one of these copies, brought to his notice under the following circumstances: A copy was left, by whom it did not appear, at the place of business of the foreman in Providence. Goodling, the town clerk of Lincoln, and who held other lands under the same title as the defendants, testified that two days before the last trial he called at the residence, in Lincoln, of another juror drawn and attending at the term, and afterwards sworn as a juror in this case, and gave him a copy, for the purpose of enabling him to understand the case better, and with no intent to influence his judgment. Goodling's conduct, though meddlesome and foolish, does not appear to have been dictated by a corrupt intent to interfere with the administration of justice, and there is not the slightest evidence that either of the defendants had a hand in it. On the contrary, it is clearly proved by the uncontradicted testimony of the defendants that none of them had anything to do with transmitting or delivering such copies to either of those jurors, or to any other juror who sat at this trial; and it is also proved by the testimony of both of those jurors that no such copy was taken into the jury room or laid before the jury. In order to set aside a verdict because a paper was unlawfully communicated to the jury, it must at least appear, either that the party in whose favor the verdict was afterwards returned took some part in the communication, or that the paper was such as could be supposed to have influenced the minds of the jury. The copies in question having been communicated to the two jurors

out of court and without any participation of the defendants, the case stands just as if those jurors had happened, on the way to or from the court, during the trial, to read the opinion in a newspaper or in the official reports of the Supreme Court; and there is no such presumption that they could have been unduly influenced by their separate reading of that opinion as will justify the setting aside of the verdict subsequently returned by the jury after being fully instructed by the court upon the law applicable to the case. *U. S. v. Reid*, 12 How. 361, 366, 13 L. Ed. 1023."

The case of *Kerr v. Lunsford*, 31 W. Va. 659, S. S. E. 493, 2 L. R. A. 668, is also in point. In that case the court said: "The motion for a new trial was also based upon an affidavit that the *Wheeling Intelligencer*, a daily newspaper published in the city of Wheeling, had the following paragraph published therein during the trial: 'The Lunsford Will Case still drags its slow length along. It will probably occupy the entire remainder of the week. The general public opinion is that the jury will sustain the will or disagree. Among the witnesses examined yesterday were Rev. Dr. Cunningham, Attorney General Caldwell, Hon. Daniel Lamb, and John O. Pendleton.' And affiant further says that said daily newspaper has a large circulation in and through said city, and is very generally read by the people of said city, as he believes. Here is no evidence that any member of the jury read said paragraph; and, if they had, that would not be sufficient to set aside the verdict. If the fact was as therein stated as to the 'public opinion' on the case, the members of the jury, who are not required to be, and were not, kept together, could have heard the matter talked of without themselves being culpable. If verdicts could be set aside on such grounds, suits would be interminable. The court did not err in refusing to set aside the verdict on this ground."

To the same effect is *U. S. v. Reid*, 12 How. 361, 13 L. Ed. 1023.

It is said in 12 Ency. Pl. & Pr. p. 622: "And even when the jurors received newspapers containing accounts of or comments upon the case, a new trial will not be granted if there was nothing calculated to mislead or improperly affect their minds, or to prejudice their verdict." As we are unable to see how or in what way defendant could have been prejudiced, or the jury influenced, by reading of this article, we are not inclined to think the judgment should be reversed upon that ground.

While the excessiveness of the verdict is assigned for ground for a new trial in the motion filed for that purpose, it is not urged in the briefs filed by counsel for defendants upon the attention of this court. But, in any event, no one can read the evidence in this case with respect to plaintiff's physical condition, before the accident and since, the

extent of his injuries and their permanency, the suffering that he has undergone and will have to endure during his life, and his incapacity to work or labor, and entertain for a moment the idea that the sum awarded him was at all excessive.

Our conclusion is that there was ample evidence to take the case to the jury upon all the issues, and, as its weight was for their consideration, and not ours, we should not interfere upon that ground. Finding no reversible error in the record, we affirm the judgment. All of this division concur.

STATE v. FAULKNER.*

(Supreme Court of Missouri, Division No. 2.
May 19, 1903.)

PERJURY—TESTIMONY BEFORE GRAND JURY—DENIAL OF KNOWLEDGE—INDICTMENT—SUFFICIENCY—REPUGNANCY—EVIDENCE—CORROBORATIVE—CIRCUMSTANTIAL EVIDENCE—MATERIALITY—CRIME UNDER INVESTIGATION—ILLEGAL COMBINATION—HEARSAY—CONFIDENTIAL COMMUNICATIONS—AID IN COMMITTING CRIME—VARIANCE—FORMS OF KNOWLEDGE—SELF-CRIMINATING EVIDENCE—WAIVER OF PRIVILEGE—QUESTIONS FOR COURT—MATERIALITY OF FALSE TESTIMONY—INSTRUCTIONS—CRIMINAL PROCEDURE—SPECIAL VENIRE—METHOD OF DRAWING—SERVICE OF LISTS.

1. It is perjury for a witness subpoenaed before the grand jury investigating a charge of bribery to testify that he "did not know of, nor had he ever heard of," the existence of money alleged to have been deposited for the purposes of the bribe, when he in fact had knowledge of such money and the purposes for which it was to be used.

2. A witness who falsely denies before the grand jury any knowledge of a fact material to the investigation, cannot defend a charge of perjury on the ground that the evidence sought from him would have been merely cumulative.

3. An indictment for perjury committed before the grand jury is not repugnant in alleging that it had been "developed" before the grand jury, which was investigating a charge of bribery, that money had been deposited, and that it "became material" to the issue to ascertain defendant's knowledge of said money and the purposes for which it was to be used; it being the right and duty of the grand jury to obtain all the material evidence that they could to substantiate the charge.

4. The statute providing for the issuance of special venires as of course on motion made three days before the day set for trial, being expressly declared to be applicable to cities having over 300,000 inhabitants, is therefore not special, and makes no invidious distinction in the case of St. Louis.

5. Rev. St. 1899, §§ 3791, 6566, relative to special juries, are not in conflict. The former secures to all litigants the right to a special jury, and the latter merely provides the machinery for drawing such juries in cities of over 100,000 inhabitants.

6. A special jury is not a jury drawn by chance from a wheel, but is one selected by the proper officer in the exercise of judgment and discretion.

7. Rev. St. 1899, §§ 3791, 6566, securing to all litigants the right to a special jury, and providing a peculiar method for selecting such jury in cities of over 100,000 inhabitants, are not unconstitutional.

8. Under Rev. St. 1899, § 2619, requiring the service of a list of jurors on defendant 24 hours

*Rehearing denied June 9, 1903.

before trial in cases in which the offense is punishable with death or life imprisonment, 12 hours before trial where there is a minimum and no maximum limit, and in other cases "before the jury is sworn, if defendant requires it," defendant in a prosecution for perjury, punishment for which is imprisonment for not less than two nor more than seven years, is only entitled to the list before trial, and if he requires it.

9. There is no conflict between Rev. St. 1899, § 2619, which provides the time within which a list of jurors shall be delivered to defendant in a criminal prosecution, and section 6566, providing for the machinery for drawing a special jury in cities of over 100,000 inhabitants, and requiring a delivery of the list to each party.

10. Statutes providing for summoning jurors are merely directory.

11. It is not necessary in a criminal prosecution that defendant's counsel be served with the list of special jurors by the sheriff, but service by the clerk is sufficient.

12. In a prosecution for perjury a special venire for 50 jurors was issued, and on the return day thereof defendant insisted on the full number being summoned, whereupon 50 more were selected, the venire being returnable four days later. On the latter day 12 jurors were examined on their voir dire, and found competent, but the next day defendant objected that they had been drawn from the second list, and moved to complete the list from the first list. *Held*, that defendant had no absolute right to require the court to return to the first list, and the court, in its discretion, had power to deny the motion.

13. The fact that there was no objection to any juror on the panel as finally chosen shows that no prejudice resulted to defendant.

14. In a prosecution for perjury committed before the grand jury in denying knowledge relative to the existence of an alleged bribe which the jury were investigating, the fact of the bribery was pertinent and material, but its pertinency depended on defendant's knowledge thereof.

15. A prosecution for perjury cannot be based on the testimony of the accusing witness unless corroborated.

16. A conviction of felony must be established beyond a reasonable doubt, and, while it may be established by circumstantial evidence, the circumstances must be consistent with guilt and inconsistent with innocence.

17. The fact of the existence of a combination in a legislative body to control legislation is not of itself sufficient to establish that such combination was for illegal and corrupt purposes, and thereby render a member thereof responsible for, or show his knowledge of, a corrupt bargain on the part of another member to accept a bribe for the purpose of influencing legislation.

18. In a prosecution for perjury in falsely denying before the grand jury knowledge of a bribe under investigation by them, witness had testified to a communication with defendant, in which the latter had detailed his knowledge of such bribe, whereupon witness had said that he had heard the story before. On cross-examination he said that he had not told defendant from whom he had heard it, whereupon, on redirect examination, he testified from whom and how he heard it, which was in defendant's absence. *Held*, that the testimony was hearsay, had not been induced by defendant on cross-examination, and was hence improperly admitted.

19. Communications made by a client to his attorney before the commission of a crime, and for the purpose of being guided and helped in its commission, are not privileged.

20. Rev. St. 1899, § 4659, rendering an attorney incompetent to testify concerning any communication made to him by his client in

that relation, or his advice thereon, without the consent of the client, is merely declaratory of the common law, and does not affect the exceptions to the rule excluding such communications.

21. The rule rendering communications between attorney and client privileged does not exclude all communications between them, but only such as pass in professional confidence.

22. A communication made by a client to his attorney in attempting to procure his services in securing a bribe which had been promised but withheld is not privileged.

23. Where, in a prosecution for perjury, the indictment charged defendant with having falsely testified that he did not "know" of the existence of a certain bribery fund, it was error for the court to charge that defendant should be found guilty if he falsely swore that he had not "heard" of such fund.

24. In a prosecution for perjury, error in charging that defendant would be guilty if he falsely testified that he had not "heard" of the existence of a certain bribery fund, where the perjury assigned in the indictment was a denial of "knowledge," was not cured by cautioning them that what defendant had read in the papers would not be knowledge.

25. In a prosecution for perjury, assigned on defendant's false denial of knowledge of a bribery fund deposited to influence legislation, a requested charge defining and limiting defendant's sources of knowledge to personal knowledge derived from his own sources apart from gossip, rumor, and hearsay should have been given, subject to modification charging defendant with knowledge if he belonged to a criminal conspiracy or combine in the house of delegates, founded for the purpose of corruptly influencing legislation, of which the alleged bribe solicitor was a member, and in which capacity he solicited the bribe—that being the theory on which the state was proceeding.

26. In a prosecution for perjury committed before the grand jury, the fact that the testimony assigned as false was given after the grand jury had instructed indictments to be drawn in the matter relative to which defendant was testifying did not affect the materiality of such testimony or defendant's responsibility therefor.

27. A witness, when called upon to testify to self-criminating evidence, may, if his privilege be wrongfully refused, decline, and, if imprisoned for contempt, obtain redress by habeas corpus, or yield, save his exceptions, and obtain a reversal of the judgment.

28. The right of a witness to refuse to give self-criminating evidence is a personal privilege, which he may waive, and will be held to have waived if he voluntarily answers without objection.

29. Perjury may be assigned on the giving of false testimony, which, if true, would have been self-criminating.

30. In a prosecution for perjury committed before the grand jury which was investigating a charge of bribery in corruptly influencing legislation, a charge to acquit defendant unless the alleged offerer of the bribe was employed by the directors of the company for whose benefit the legislation was to be enacted was properly refused, the evidence overwhelmingly establishing that he was the criminal agent of the company, working under the direct orders of its president.

31. Such evidence did not constitute a substantial variance from the indictment, which alleged that the offerer of the bribe was employed by the company.

32. In a prosecution for perjury the materiality of the evidence assigned as false is a question for the court, which cannot be submitted to the jury.

33. It is not error to refuse requested instructions when fully covered by the charge as given.

34. In a prosecution for perjury committed before the grand jury, which was investigating a charge of bribery in corruptly influencing legislation, it was error to admit evidence establishing an agreement between the offerer of the bribe and a member of the city council to bribe certain other members of the council, such evidence being irrelevant, and tending merely to impress the jury with the general corruption existing in the city government.

Appeal from St. Louis Circuit Court; Walter B. Douglas, Judge.

Harry A. Faulkner was convicted of perjury, and appeals. Reversed.

Thomas B. Harvey, Chas. P. Johnson, and Thos. J. Rowe, for appellant. Edward C. Crow, Atty. Gen., Sam B. Jeffries, Asst. Atty. Gen., and Jos. W. Folk, for the State.

GANTT, P. J. At the December term, 1901, of the circuit court of the city of St. Louis for the disposition of criminal causes, to wit, Division No. 8 of said court, the grand jury summoned from the body of said city in open court preferred the following indictment against Harry A. Faulkner:

"State of Missouri, City of St. Louis—ss. Circuit Court, City of St. Louis, December Term, 1901. The grand jurors of the state of Missouri within and for the body of the city of St. Louis, now here in court, duly impaneled, sworn, and charged, upon their oath present: That at the said city of St. Louis, on the 31st day of January in the year one thousand nine hundred and two, and during the December term, one thousand nine hundred and one, of said court, the grand jury of the state of Missouri within and for the body of the city of St. Louis were then and there duly and legally convened, having been then and there duly and legally impaneled, sworn upon their oath, and charged according to law in Division No. 8 of said court, and that a certain complaint was then and there made and presented before said grand jury against one Charles Kratz and one John K. Murrell and other persons for the offense of bribery committed by the said John K. Murrell, Charles Kratz, and others in said city of St. Louis; and that in the investigation and hearing of said complaint before said grand jury so impaneled and sworn as aforesaid it developed that in October and November in the year one thousand and nine hundred there was pending in the municipal assembly of the city of St. Louis, consisting of a city council and a house of delegates, an ordinance known as 'Council Bill No. 44,' and commonly known as the 'Suburban Railway Bill,' same being a measure giving and granting to the St. Louis & Suburban Railway Company, a railroad corporation, certain rights, privileges, and franchises. That one John K. Murrell was at said time a member of said house of delegates, and that one Charles Kratz was at said time a member of said city council, and that one Philip Stock

was employed by said St. Louis & Suburban Railway Company, a corporation as aforesaid, to secure the passage of said ordinance by said municipal assembly; and that on or about November 30, 1900, the said John K. Murrell, member of the house of delegates, as aforesaid, went to said Philip Stock, and stated that, unless a large sum of money, to wit, seventy-five thousand dollars, should be put up for the use and benefit of said house of delegates, the said ordinance would not be passed by the said house of delegates, but that, if said Philip Stock, agent of the said St. Louis & Suburban Railway Company, would place with said John K. Murrell the said sum of seventy-five thousand dollars, that said ordinance would pass said house of delegates; and after some conferences the said Philip Stock and the said John K. Murrell went to the Lincoln Trust Company, a corporation, with offices at number 700 Chestnut street, in what is known as the Lincoln Trust Building, and there said Philip Stock, in the presence of said John K. Murrell, deposited in lock box numbered one hundred and thirty-two of the safe deposit vaults of the said Lincoln Trust Company the sum of seventy-five thousand dollars, there being two keys to said box, said Philip Stock holding one key and the said John K. Murrell holding the other key, and that the said sum of money was deposited with the express understanding between said Philip Stock and said John K. Murrell that, upon said ordinance being passed by the house of delegates, the city council, and signed by the mayor, the said sum of money would be turned over to the said John K. Murrell for his own use and benefit, and for the use and benefit of the other members of the house of delegates he claimed to represent. That in said investigation one Harry A. Faulkner was duly summoned as a witness, and did then and there personally appear as a witness before said grand jury in regard to said complaint. That the said Harry A. Faulkner was then and there duly sworn by the foreman of the said grand jury, and took upon himself his corporal oath, the said foreman, to wit, one William H. Lee, being then and there duly and legally authorized and empowered and having competent authority to administer the said oath to the said Harry A. Faulkner, and that then and there it became important and was material to the issue and to the investigation of said complaint by the said grand jury whether the said Harry A. Faulkner had any knowledge or information of the existence of said sum of seventy-five thousand dollars, and of the purpose for which it was to be applied. And then and there he, the said Harry A. Faulkner, on his corporal oath, and before the said grand jury, did feloniously, falsely, corruptly, knowingly, willfully, and maliciously depose and swear in substance and to the effect following: That he did not know nor had he ever heard of the existence of the said seventy-five thousand

dollars deposited in the Lincoln Trust Company as aforesaid for the purpose of influencing, or bribing, or corrupting any member of the house of delegates for his vote or influence in the passage of said ordinance; whereas in truth and in fact he, the said Harry A. Faulkner, then and there well knew of the existence of the said sum of seventy-five thousand dollars, and that said sum of seventy-five thousand dollars was deposited in a box in this safe deposit vault of said Lincoln Trust Company as a bribe to be paid to the said John K. Murrell and other members of the house of delegates, whom he claimed to represent, to influence their votes for and in favor of the passage and enactment of the said ordinance in the said house of delegates; and so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Harry A. Faulkner, at the city of St. Louis aforesaid, on the thirty-first day of January aforesaid, in the year aforesaid, in the manner and form aforesaid, feloniously, falsely, knowingly, wilfully, and corruptly committed willful and corrupt perjury; contrary to the form of the statute, and against the peace and dignity of the state."

The defendant was arrested, and was duly arraigned, and pleaded not guilty, and was tried at the June term, 1902, and convicted, and his punishment assessed at two years in the State Penitentiary. After unsuccessful motions for a new trial and in arrest of judgment, he was duly sentenced, and from that judgment and sentence he has appealed to this court.

The facts necessary to a correct understanding of the rulings of the circuit court and the exceptions of defendant's counsel are, in substance, the following: The state offered evidence proving and tending to prove that the municipal assembly of the city of St. Louis is composed of the house of delegates and the city council, constituting what is known as the municipal assembly. The defendant, Harry A. Faulkner, in 1900 and 1901 was a member of the house of delegates branch of the municipal assembly. In September, October, and November, 1900, there was in the said house of delegates an organization or association commonly called a "combine" for the purpose of controlling legislation, and also, it was asserted by the state, for obtaining money for their votes. This combine consisted of 19 members, and included John K. Murrell and defendant, Harry A. Faulkner. In October, 1900, there was introduced in the municipal assembly an ordinance known as "Council Bill No. 44," giving and granting to the St. Louis & Suburban Railway Company certain privileges and franchises. The ordinance was introduced October 9th. It remained in the council until February 8, 1901, when it passed that body, and was referred to the house of delegates. Numerous meetings of the council took place from the date of the introduction of the bill before its final passage. While

the bill was so pending before the municipal assembly, one John K. Murrell, a member of the house of delegates, and a member of the before-mentioned combine of 19 members, of which the defendant was likewise a member, went to Philip Stock, who was "the legislative agent" of the St. Louis & Suburban Railway Company, and asked if he (Stock) represented the St. Louis & Suburban Railway Company. Stock told him that he did. Murrell thereupon said, in effect, "I represent the house of delegates, and we want seventy-five thousand dollars from your company, and if you do not give it the bill will not pass, and if you do give it the bill will pass." Murrell further proposed that half of the amount be paid when the bill should pass the house of delegates, and the other half when it became a law. Stock told him that he would not submit the proposition to his people, because he knew they would not accept it, but that, if Murrell would make the proposition that the \$75,000 should be paid after the bill had been passed and signed by the mayor, then he would submit it. This took place on October 17, 1900. Murrell next came to see Stock on October 22d of that year, and stated that he could not recede from his first proposition, because he was not sure that, if a veto took place, the council would pass the bill over the veto. Stock said that that was all he could do in the matter, and Murrell thereupon handed Stock his card, with the telephone numbers on it, and stated that if he wanted to see him to telephone him. On November 19, 1900, Murrell again came to see Stock, and stated that the proposition that \$75,000 should be put up to be turned over after the bill had been passed and signed by the mayor would be accepted. Stock told him that he would make the money arrangements, and would telephone Murrell when he was ready. On November 23d Stock telephoned Murrell that the matter was all right, and to meet him the next day at the German Savings Institution at 10 o'clock. Murrell, in accordance with the appointment, met Stock the next morning at the German Savings Institution, where Mr. Richard Hoopes, cashier of that bank, handed Stock a package of money wrapped up. The arrangements for this money had been made at the German Savings Institution by Charles H. Turner, president of the Suburban Railway Company, who had secured the services of Philip Stock in looking after the passage of the ordinance for the Suburban Railway Company. Stock had reported to Turner, the president of the railway company, the result of his conferences with Murrell, representing the house of delegates, as a result of which Turner arranged with Mr. Hoopes to turn over the \$75,000 to Stock for the purposes indicated. After obtaining the \$75,000, Murrell and Stock went to the Lincoln Trust Company, and to the safety deposit department of the trust company, and rented lock box 132. They both signed their names to identifica-

tion cards, and Murrell opened the package and counted the money, and found it to be \$75,000, which he put in the box, and locked up. There were two keys to the box. One was delivered to Murrell and the other to Stock, the agreement being that both must be present when the box should be opened, and that when the bill passed both houses and was signed by the mayor it would be delivered to Murrell for the house of delegates. As a further precaution, a password was selected, without which no one could have access to the box, and the word "carriage" was settled on as such password, because Mr. Murrell was in the carriage business.

Prior to this, in October, 1900, Charles Kratz, a member of the city council, had approached Philip Stock, and demanded the sum of \$60,000 for the passage of the Suburban bill through the council. It was finally arranged that the sum of \$60,000 should be put up under the agreement that it should be paid to Charles Kratz for himself and other members of the council when the Suburban bill became a law. Charles H. Turner, the president of the Suburban Railway, made arrangements at the German Savings Institution for the \$60,000. Philip Stock obtained the money, and, together with John G. Brinkmeyer, who was representing Charles Kratz in the transaction, went to the Mississippi Valley Safety Deposit Department, and rented a lock box, into which was placed the \$60,000, there being two keys to this box likewise, one being held by Stock and the other by Brinkmeyer, representing Kratz. Here also the agreement was that the box should not be opened unless both were present, and when the Suburban bill should become a law it should be opened, and the \$60,000 turned over to Brinkmeyer for Kratz.

After the ordinance passed the council, as before stated, and was sent to the house of delegates, and referred to committee, and before it was reported by the committee of the house, an injunction was issued by the circuit court of the city of St. Louis enjoining the house of delegates from taking action on the bill. This was in February, 1901. While the injunction proceedings were pending and in force, the house of delegates expired by limitation in April, 1901, a new house of delegates being elected. It appeared in evidence, however, that the combine of the old house of delegates continued its existence for the purpose of securing the \$75,000, or a part of it, as the members insisted they did all they could do, and it was not their fault that the bill was not passed. Efforts were made to compromise with Stock for part of the money. About the 18th of January, 1902, Murrell saw Stock, and told him there would be a meeting of the boys of the old house of delegates, and they wanted to compromise the matter for half, and that he (Murrell) would have to report to the meeting on Monday following. Stock told him he would not do anything in the matter at all further than

to pay any expenses that Murrell had been to. Murrell then said, "The grand jury will take hold of it."

Paul Reiss, for the state, testified that in November or December, 1901, prior to the defendant testifying before the grand jury that he knew nothing of the corruption fund of \$75,000, and had never heard of it, defendant, in talking to said Reiss, a fellow member of the house of delegates from the Twenty-Eighth Ward, but who was not a member of the combine, said he understood that a brewer by the name of Stock held a key to the box in the Lincoln Trust Company, and that the boys interested in the proposition were a desperate lot, and, unless the matter was fixed up, they would make trouble. Again, on December 21, 1902, and about one week prior to the defendant testifying before the grand jury denying all knowledge or information regarding the corruption fund, the defendant, Faulkner, went to Paul Reiss on the floor of the house of delegates, and asked him whether he had seen the Star-Sayings of that day. Reiss told him he had not. The defendant, Faulkner, then handed Reiss a paper, and called his attention to an article referring to a meeting at the house of Edward Butler of the members of the combine. Reiss asked who had made the matter public. Defendant, Faulkner, answered: "Those boys are desperate. They have held a meeting, and got one of their number to give this to the press for the purpose of scaring Stock, to have him settle up, and they will go before the grand jury in order to get that money." On January 30, 1902, the grand jury of the city of St. Louis had under investigation these charges of bribery against John K. Murrell and Charles Kratz. A great many witnesses were summoned, and, among others summoned before the grand jury was the defendant, Harry A. Faulkner. The defendant, after being duly sworn, was asked if he knew anything of the \$75,000 in the lock box in the Lincoln Trust Company, or if he had ever heard anything about it, or had any information concerning it. He swore that he did not know anything about it, had never heard of the \$75,000 being there, and had no information concerning it, and that he had never heard of this \$75,000 referred to directly or indirectly by any member of the house of delegates, except as he had read in the newspapers. On January 31st the defendant, Faulkner, was recalled before the grand jury, and asked especially regarding the conversation with Mr. Reiss. He first said that he did not remember it, and persisted in giving that answer, but finally denied that he had any conversation with Reiss on the subject. On the defendant's denial of knowledge or information concerning the corruption fund he was indicted for perjury. Philip Stock, when summoned before the grand jury, confessed his part in the bribery scheme, and delivered

the key to the box in the Lincoln Trust Company, and a committee from the grand jury, together with the circuit attorney, visited the Lincoln Trust Company, and lock box 132 was opened in the presence of the committee from the grand jury, the circuit attorney, and officials of the trust company, and found to contain \$75,000. The evidence also showed that the box had not been opened from the time John K. Murrell and Philip Stock had placed the package there until it was opened in the presence of the grand jurors, as aforesaid. The \$75,000 was produced in court, and identified by Stock as the same \$75,000 deposited for the purpose of bribing the Suburban bill through the municipal assembly.

At the time that the defendant, Faulkner, was before the grand jury and gave the alleged false testimony for which he was indicted, the grand jury had voted to indict John K. Murrell and Charles Kratz in connection with the bribery matter, but the indictments had not been drawn up nor signed and were not in fact found or returned into court until February 1, 1902. The grand jury, as shown by the evidence, after the voting of indictments against Murrell and Kratz, continued the investigation for the purpose of securing additional evidence as to them, and for the further purpose of getting proof, if possible, as to the other parties implicated in the transaction. It appeared from the facts and circumstances in the evidence that Murrell in negotiating with Stock, and having the seventy-five thousand dollars put up in the Lincoln Trust Company under the corrupt agreement as to the passage of the bill, asserted he was representing the combine in the house of delegates and that the seventy-five thousand dollars was to go to the members of the combine upon the Suburban bill being passed and signed by the mayor.

The defendant, Harry A. Faulkner, was generally reputed to be a member of the combine, and generally voted with it on questions before the house of delegates.

It further appeared in evidence, as showing the illegal purpose of the combine and the knowledge of its purpose as to the corruption fund as well as the intent as to the bribery, that Julius Lehman, another member of the combine, in May, 1901, went to Paul Reiss, the same witness with whom the defendant had the conversation detailed above, and endeavored to secure the services of Reiss in seeing Stock and bringing about a settlement between Stock and "the boys" of the old house interested in the fund. Lehman, in this conversation, likewise displayed an acquaintance with the facts which he could only have acquired in the meetings of the combine and in hearing the report of John K. Murrell as to what he had done. This evidence also tended to show that the money was for "the boys," and was a cir-

cumstance indicating that the members of the combine knew of the deposit.

Various errors are assigned and we will proceed to their examination in the order of the appellant's brief.

1. The indictment is assailed on the ground, first, that the averment therein that defendant testified under oath before the grand jury that "he did not know of, nor had he ever heard of, the existence of the said \$75,000 deposited in the Lincoln Trust Company, as aforesaid, for the purpose of influencing or bribing or corrupting any member of the house of delegates for his vote or influence in the passage of said ordinance," was immaterial, and we infer the argument to be that, therefore, perjury could not have been committed, even if defendant did falsely so swear, since it is necessary, to constitute the crime of perjury, that the false testimony should have reference to some material issue or inquiry in order to be itself material matter. At common law, in an indictment for perjury, it was necessary to aver and show with great particularity wherein the alleged false testimony was material. Section 2039, Rev. St. 1899, was intended to somewhat simplify the drawing of indictments for this offense. It provides that: "In any indictment for perjury it shall be sufficient to set forth the substance of the offense charged and by what court or before whom the oath was taken, averring such court or person to have competent authority to administer the same and that the matter or testimony alleged to be false was material to a certain matter or issue named without setting forth the particular facts showing its materiality, together with the proper averments to falsify the matter wherein the perjury is assigned, without setting forth any part of the record, proceeding or process or any commission or authority of the court or person before whom the perjury was committed or the form of the oath or affirmation or the manner of administering the same." Looking to this indictment, it will readily be noted that it avers that the December term, 1901, of the circuit court of the city of St. Louis was in session, and the grand jury of the state within and for the body of said city were then and there duly and legally convened, and had been duly impaneled, charged, and sworn, according to law, in Division No. 8 of said court, and that there was then and there pending before said grand jury a complaint against one Charles Kratz and one John K. Murrell and other persons for the offense of bribery committed by said Murrell, Kratz, and others in said city of St. Louis, and in the investigation and hearing of said complaint before said grand jury it appeared that said John K. Murrell was a member of the house of delegates, and said Kratz was a member of the city council, and that Philip Stock was employed by the Suburban Railway Company to

procure the passage of an ordinance known as "Council Bill No. 44," and that on or about November 30, 1900, the said Murrell had gone to said Stock and told him that, unless \$75,000 should be put up for the use of the house of delegates, the said ordinance would not be passed, but, if said Stock would place said sum with said Murrell, said ordinance would pass, and that accordingly said sum was deposited by Stock in lock box 182 of the safe deposit vaults of the Lincoln Trust Company to await the passage of said ordinance, and that said sum was deposited with the express understanding between said Stock and said Murrell that upon said ordinance being passed by the house of delegates and the city council, and signed by the mayor, said sum of money would be turned over to said Murrell for his own use and benefit, and for the use and benefit of the other members of the house of delegates whom he claimed to represent; in short, that the grand jury was investigating whether said Murrell and said Kratz were guilty of bribery in agreeing to pass said Ordinance No. 44 for the said sum of \$75,000, so agreed to be paid by Stock when passed. Thus the cause is named; the court in which the grand jury was impaneled, charged, and sworn; the authority of its foreman, W. H. Lee, to administer oaths to the witnesses brought before it; that defendant, Faulkner, had been duly summoned as a witness before said body; and it is then averred "that then and there it became important and was material to the issue and to the investigation of said complaint by the said grand jury whether said Faulkner had any knowledge or information of the existence of said sum of seventy-five thousand dollars, and of the purpose for which it was to be applied."

It is urged that defendant's knowledge of the fact was wholly immaterial; that the only material thing was, did the fact of bribery exist? The distinction thus sought to be made ignores the character of the tribunal before whom the oath was taken and the purpose of its institution in our system of criminal jurisprudence. Until the adoption of the amendment to section 12 of article 2 of our Constitution at the general election in 1900, by which it is provided that "no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information, which shall be concurrent remedies," no person could be prosecuted criminally in this state for a felony otherwise than by an indictment preferred by a grand jury, summoned from the body of the county in which the supposed offense was charged to have been committed. It was a safeguard thrown around every citizen, a right that had been handed down to us from our English ancestors. It was a maxim of the English law, as Blackstone says, that "no man can be convicted of any capital offense (or any felony) unless by the unanimous voice of twenty-four of his equals and

neighbors; that is, by twelve, at least, of the grand jury in the first place, assenting to the accusation, and afterwards by the whole petit jury, of twelve more, finding him guilty." The grand jury are sworn "to diligently inquire and true presentment make of all offenses against the laws of the state committed or triable in the county of which they have or can obtain legal evidence." Section 2489, Rev. St. 1899. It is their duty to satisfy themselves that sufficient evidence exists for requiring the accused to answer to an indictment before a petit jury. If they think that the accusation is unfounded, they ignore the bill by indorsing thereon, "Not a true bill," and, on the other hand, if they consider the evidence sufficient, their foreman indorses the indictment with the words, "A true bill," and signs his name thereto. Our laws also require that the names of all material witnesses must be indorsed upon the indictment.

At an early period in the history of this state it was objected that a grand jury had no right to propound to a witness before them the general question, "Do you know of the violation of the criminal laws of this state in the past twelve months?" but that a bill of indictment must first be drawn up charging some particular person with a crime, and the question to the witness limited to the inquiry as to his knowledge of such person committing that crime. But this court, through Judge McGink, repudiated that claim. In his opinion in *Ward v. The State*, 2 Mo. 120, 22 Am. Dec. 449, referring to the obligation of the grand jury to diligently inquire, he asks: "And how should they inquire? Not by going into the secret recesses of gamblers and gambling devices to ask and seek information, but to send for persons who might, in their opinion, be most likely to give evidence relating to these matters. It is a solemn and important duty that every citizen owes to his country to give evidence in courts of justice against offenders against the peace and good order of the community." It was then the duty and right of the grand jury who were investigating the charge of bribery against Murrell to send for defendant, and inquire of him if he had any knowledge or information of the existence of said sum of \$75,000, which it was reported that Murrell had agreed should be paid to him to secure the passage of said bill No. 44. Any knowledge or information possessed by him concerning "the existence of such fund and the purposes for which it was to be used" was material to the inquiry the grand jury was then making. It was the natural and orderly way in which the grand jury would ascertain the material facts upon which to base an indictment or to refuse to find one. It was their sworn duty to obtain the legal evidence, to ascertain the witnesses by whom the charge could be substantiated, and to indorse their names on the indictment, not

alone for the benefit of the prosecuting attorney, but for the protection of the person charged in the indictment in the preparation of his defense. This inquiry, and the defendant's answer, taken in connection with the allegations of the indictment, disclose the materiality of the question and answer to the inquiry then being made.

It is not to be expected that any one witness before a grand jury, any more than in the trial of a case in court, will be able to depose to the whole case. As said by Sherwood, J., in *State v. Day*, 160 Mo., loc. cit. 249, 12 S. W. 365: "Nor is it necessary in such cases that the false statement tends directly to prove the issue in order to sustain an indictment for perjury. If it be circumstantially material, or tends to support and give credit to the witness in respect to the main fact, it is perjury. *State v. Wakefield*, 73 Mo. 549, and cases cited." 2 Wharton's *Crim. Law*, §§ 1277, 1282, 1801, 1803, 1316, 1322, 1323, and cases cited; Wharton's *Crim. Evid.* (9th Ed.) § 131; 22 *Amer. & Eng. Ency.* p. 667, and cases cited. That a witness subpoenaed before a grand jury and interrogated as to his knowledge of a crime alleged to have been committed in the county in which the grand jury is lawfully impaneled may commit perjury by falsely swearing that he did not know of the commission of such crime, or any material fact constituting a link in the chain of evidence necessary to establish such offense, is now too well settled to admit of a doubt. In *State v. Wakefield*, 73 Mo. 549, Judge Henry, speaking for the whole court, said: "The fact, if true, that Wakefield had received money from Pate to be paid to a police commissioner, would constitute a link in the chain of circumstances tending to establish the guilt of such commissioner of the charge the jury was investigating, and, if his testimony in every other respect was true, and only false in this, he was as guilty as if his testimony was false in every particular." Judge Lewis, whose opinion in the same case (9 Mo. App. 326) was by this court approved, in discussing the same point, said: "Each fact, although insufficient of itself alone to prove even that a crime has been committed, is yet, because of its relation to other facts in proof, material to the issue on investigation. Were it otherwise, there might be false swearing as to every link in the necessary chain of evidence, and yet no perjury at all. The law offers no such immunity to those who would falsely defeat the ends of justice." In that case the false testimony was given before a grand jury investigating whether certain members of the police board had accepted bribes for giving information when raids would or were expected to be made by the police upon gambling establishments in St. Louis. As already said, it had long before that been held that perjury could be committed by a witness before a grand jury swearing he did not know of any person bet-

ting upon any game of cards in the county in which the grand jury was impaneled. *State v. Terry*, 30 Mo. 368.

This is also the law in other jurisdictions. In *State v. Offutt*, 4 Blackf. 355, the indictment was for perjury committed before the grand jury. A motion to quash was entered on the ground that the law does not warrant a prosecution for perjury committed in falsely swearing before a grand jury, and the court held "there was not the slightest foundation for the proposition"; "that the provisions of the statute extend to false evidence before a grand jury admits of not the least doubt." To the same effect is *State v. Schill*, 27 Iowa, 263; *State v. Turley*, 153 Ind. 345, 55 N. E. 30; *Mackin v. People*, 115 Ill. 312, 3 N. E. 222. But it is unnecessary to pursue this question further, as our own statute law (section 2506, Rev. St. 1899) provides that "members of the grand jury may be required by any court to testify whether the testimony of a witness examined before such jury is consistent with or different from the evidence given by such witness before such court; and they may also be required to disclose the testimony given before them by any person upon a complaint against such person for perjury or upon his trial for such offense." As pointed out by Judge Brace in *State v. Thomas*, 99 Mo., loc. cit. 250, 12 S. W. 643, the evil sought to be remedied by this section was the immunity which witnesses enjoyed from prosecutions for perjury committed before grand juries under the old rule, which was crystallized in section 2508 (section 1793, Rev. St. 1879), which prohibited any grand juror disclosing evidence given before the grand jury, and this last-mentioned section had been construed to prohibit such testimony even under the process of the courts. *Tindle v. Nichols*, 20 Mo. 326; *Beam v. Link*, 27 Mo. 261. As to the scope of the inquiry which the grand jury may take in examining a witness in its effort to ferret out crime, it was well said in *State v. Schill*, 27 Iowa, 263: "The grand jury is by the law endowed with the power and charged with the duty of inquiring into all indictable offenses committed or which may be tried within the county. Their duty is to inquire. They cannot tell in advance of inquiry whether in fact an offense has been committed, or who committed it. They can only act upon testimony given under oath by witnesses produced, sworn, and examined before them or upon legal documentary proof. That perjury may be committed by willfully giving false testimony of a material character before a grand jury is evident, and is recognized by the statutes." Necessarily, the grand jury has a greater latitude in examining a witness in such inquiry than a party would be allowed in a given case in open court. As said by the court in the *Wakefield Case*, they are at liberty to inquire for evidence, to establish a charge link by link, and are entitled to

true answers. As said in *State v. Turley*, 153 Ind. 345, 55 N. E. 30, their duty is to "diligently inquire—to obtain legal evidence—to discover and detect crime, and for these purposes have the right to interrogate witnesses concerning all matters which may tend to accomplish that result. It is evident that the grand jury in making the investigation required by law may require witnesses to testify concerning matters not admissible on the trial of the cause. It is true that an indictment should be returned upon legal evidence, but the grand jury may require witnesses to answer questions tending to show where and from whom they may obtain such evidence." In the light of all these rulings it cannot be doubted that, if defendant in fact did falsely testify before the grand jury, as charged in the indictment, that he did not know of, nor had he ever heard of, the existence of the \$75,000 deposited in the Lincoln Trust Company to bribe certain members of the house of delegates, when in truth and in fact he did know of the said money and the purpose for which it was to be used, he was guilty of perjury.

But it is insisted by the learned counsel that defendant's knowledge of an incriminating fact was wholly immaterial in the investigation of Murrell's guilt, and that there is a broad distinction between the fact of knowledge of and the fact itself of which one has knowledge; the answer to which is very plain. The grand jury were charged with the ascertainment of the evidence which would establish the guilt of Murrell. It was material to know what facts, if any, tending to prove the incriminating facts, were within the knowledge of the witness before them. So far as the witness was concerned, his knowledge of the incriminating facts was all the grand jury were trying to learn from him, and, if he had knowledge of them, it was his sworn duty to impart it, and thus lead the grand jury to a knowledge of the ultimate fact of which they were in quest—the fact itself which would show Murrell's guilt. The incriminating fact in an investigation either by the grand jury or a petit jury could only be established by the testimony of a witness or witnesses who had knowledge of its existence. If he had no knowledge, then he could impart none to the grand jury. If he had it, and falsely testified he had none, then he committed perjury. It was not for him to speculate upon the materiality of his knowledge. For aught he knew, he might have been able to furnish the very link which was necessary to enable the grand jury to procure full and satisfactory evidence of Murrell's guilt. Because, as already said, one witness had deposed to the existence of the fund of \$75,000 deposited by Stock and Murrell, the power of the grand jury to further inquire for evidence as to the knowledge of other witnesses was in no manner exhausted; and it does not lie in defendant's mouth to say that the

evidence sought from him would have been cumulative. It not infrequently happens that one witness before the grand jury is either dead or beyond the boundaries of the state when the cause is called for trial, and it was the part of wisdom for the grand jury to obtain all the material evidence available, and not to rely upon Stock's evidence alone. A jury is not bound to believe or convict any man upon the unsupported testimony of another, and particularly if that other be a particeps criminis; and, if defendant had knowledge which, as said by Judge Sherwood in *State v. Day*, 100 Mo. 249, 12 S. W. 365, was "circumstantially material, or tended to support and give credit" to the other evidence adduced in the investigation, and falsely swore he did not know of such fact, he committed perjury. The indictment is not open to the charge of immateriality.

Counsel are not altogether agreed as to the insufficiency of the indictment. On the one hand, it is urged that the pleader has failed to allege a good charge of perjury, because he has not also included a good technical charge of bribery of Murrell by Stock, and that it has failed to charge the one material inquiry open to the grand jury, to wit, the agreement between Stock and Murrell as to the official action or vote of the latter, and that, unless defendant was possessed of knowledge of the agreement between Stock and Murrell that Murrell should act corruptly, there was nothing material to which appellant could testify. On the other hand, another of the counsel insists that it would have been sufficient to have alleged simply that a charge of bribery was pending before the grand jury against Murrell, and that it became material to inquire whether \$75,000 had been placed in the Lincoln Trust Company's vaults in connection with said bribery, and that defendant upon his oath falsely swore that he did not know of, nor had he heard of, the existence of the said \$75,000 deposited in the Lincoln Trust Company for the purpose of influencing or bribing or corrupting any member of the house of delegates for his vote or influence in the passage of said ordinance, without alleging all the particulars necessary to make a good indictment for bribery also. We are inclined to take this latter view, but, for reasons already said, we do not agree that the indictment is repugnant for the reason that the knowledge of defendant was immaterial because it had been alleged that it had been "developed" that in pursuance of an agreement between Stock and Murrell \$75,000 had been deposited in the trust company. It was material for the grand jury to obtain all the competent evidence necessary to convict Murrell of said bribery, and the mere fact that one or even two witnesses had so testified before the grand jury did not deprive the grand jury of its jurisdiction to obtain other material evidence to establish that charge should they indict Murrell, nor that

Faulkner's knowledge of that fact was immaterial. It was his knowledge which would have made him a material witness, if any such he had.

2. Again, objection is made that the indictment is repugnant in its allegations, because the pleader had averred that it had been "developed" before the grand jury that the \$75,000 had been deposited, and that it became material to the issue of Murrell's guilt to ascertain that appellant had knowledge of said \$75,000, and the purposes for which it was to be used. The contention is that, because it was alleged that it had been "developed" that the \$75,000 had been deposited by Murrell and Stock, that fact ceased to be an issue before the grand jury. In a word, that because some witness had disclosed the fact of the deposit of the \$75,000 by Stock and Murrell, the grand jury were bound to stop their investigation, and make no further endeavor to obtain evidence which would corroborate and strengthen that which they already had, and, while averring it was material, shows it was not. On the contrary, it was the plain duty of the grand jury to sift the matter thoroughly, and procure all the material evidence they could to substantiate the charge; and peculiarly was it incumbent on them to do so because the state was bound to establish the guilt of Murrell beyond a reasonable doubt. "Developed" does not signify that the fact of the bribery was so fully determined that it would not take testimony to establish it before a petit jury. On the contrary, the word itself, in the connection in which it is used, signifies an unfolding of the crime.

3. The court, on application therefor by the state, made an order for a special jury to try the case. The regular jury commissioner thereupon selected the list from the general register of jurors in the city, and did not draw them from the wheel in the manner of ordinary juries, and of this defendant complains on the ground that in every part of the state all kinds of juries, grand, petit, special, and ordinary, are required to be drawn by lot, and thus citizens of St. Louis are denied a right secured to citizens of all other portions of the state, to wit, the right to have their juries selected by chance. As to special juries, counsel have overlooked the statute which governs all parts of the state, including St. Louis, and provides that: "Either party to a cause pending in the circuit court or court of common pleas or the criminal court of any county or city and triable by a jury shall be entitled as of course to an order for a special venire on motion made therefor three days before that on which the case is set for trial. * * * This section shall apply to cities having over three hundred thousand inhabitants as fully as to all other parts of the state." The law governing special juries, therefore, is not special, and makes no invidious distinction in the case of St. Louis.

There is no conflict between sections 3791 and 6566, Rev. St. 1899. The first secures this right to any litigant in any circuit or criminal court in the state, and section 6566 merely provides the machinery in cities having more than 100,000 inhabitants. In those cities having a jury commissioner it is made his duty, as he may be directed by the court, to select the names of persons for the special jury, and furnish them to the sheriff or other officer to summon them. But, as pointed out by this court in *State v. Withrow*, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43, a special jury is not a jury drawn by chance from a wheel, but is one selected by the proper officer in the exercise of judgment and discretion; and the defendant established by his evidence on the motion to quash the venire that the jury commissioner did select men for this and other special juries because of their good citizenship, and did not draw them by chance from the wheel. It is clear that the jury commissioner did not mistake the ruling of this court in the *Withrow* Case. This court, in *State v. Leabo*, 89 Mo. 247, 1 S. W. 288, held that, if the motion for a special venire is made three days before the day set for trial, the court has no discretion, and it would constitute error to deny the special venire. We can add nothing to what was said in *State v. Withrow*, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43, either as to the proper method of selecting special juries or the constitutionality of it. We can discover no infringement of our Constitution in either provision cited.

4. Much is said in the briefs of defendant in regard to the failure to serve defendant's counsel with a copy of the panel of the special venire. From the argument made it would seem that counsel claim that they were entitled to at least 24 hours' inspection of the panel before being required to proceed with the examination of jurors on their voir dire. We do not think this a proper construction of our statute governing this case. Section 2623, Rev. St. 1899, provides that a list of jurors who have been found by the court to be qualified to sit as such in his case shall be delivered to the defendant in the cases specified in the first subdivision of section 2619 at least 24 hours before the trial—that is to say, in cases in which "the offense charged is punishable with death or imprisonment in the penitentiary not less than life"; and in the cases specified in the second subdivision of said section at least 12 hours before the trial—that is, if the offense be punishable in the penitentiary not less than a specified number of years, and no limit to the duration of such imprisonment is declared; "in other cases, before the jury is sworn if such list be required." In this case the punishment prescribed is not exceeding seven years and not less than two years, so that it falls within the clause which prescribes that defendant shall have a list of the panel before the jury is sworn, if he requires it.

Reading section 2623 in connection with section 6566, it will be seen there is no conflict between the two. The latter provides that a list shall be made out and delivered to each party, and the former designates the time which shall be given the defendant before he shall be required to make his challenges. We have carefully read the evidence on this point and the finding of the court. The first order for a special venire was for 50 jurors and was returnable on the 17th of July. The jury commissioner made out five lists of the panel, and handed them to the court, who gave one to the sheriff to serve, and kept the others until the 17th. On Thursday morning, the 17th, the judge handed three of the lists to the clerk, who handed one to the counsel for the state and another to counsel for defendant. The jury was not called until the lists had been handed to the respective counsel. On Thursday, it appears, counsel for defendant insisted on the full number of jurors being summoned, and thereupon the court ordered the jury commissioner to select 50 more jurors returnable July 21, 1902. The counsel were served with copies by the clerk on the 21st just as they had been on the 17th. Counsel for defendant made the point that the sheriff must deliver the lists, but the court overruled his contention, and he duly excepted. On the 21st the first 12 were called to the jury box to be examined on their voir dire, and were examined by both sides, and found competent, and at this point the court adjourned until Tuesday, July 22, 1902, at 10 o'clock, and the whole venire were duly cautioned as to their duties and obligations. On the reconvening of court on Tuesday counsel stated to the court that the sheriff on the preceding day had been calling from the panel ordered on Thursday, and not from the first 50, and they therefore moved the court to complete the list from the first list, which motion the court overruled. The sheriff called the list which he used in its regular order. When counsel for defendant required 100 jurors to be summoned before proceeding with the examination of the jurors, the additional 50 became as much a part of the list as those first summoned. The court's attention was not called to the fact that the sheriff was calling the list that was returned on the 21st of July until 12 jurors had qualified. At that point defendant insisted on changing the order, and on calling the first list from that time on. It is not asserted that there was any difference in the character of the jurors on the second list of 50 and those on the first, or that they would have been more favorable to defendant. The whole number had been summoned from which to obtain a panel of qualified jurors. It is not even suggested that any member of the panel of 24 jurors found competent was for any reason incompetent.

The statutes providing for summoning jurors have been so often held to be merely directory that it is scarcely necessary to cite

decisions. *State v. Jennings*, 98 Mo. 493, 11 S. W. 980, and cases cited; *State v. Williams*, 186 Mo. 307, 38 S. W. 75; *State v. Albright*, 144 Mo. 638, 46 S. W. 620; *State v. Chas. May* (decided by this court Feb. 3, 1903) 72 S. W. 918. Counsel had the lists, and it was not necessary that they should have been served on them by the sheriff. In a somewhat extended practice we have never known the list to be furnished counsel by any one but the clerk. Had counsel been attentive to their written lists, they could have ascertained that the sheriff was calling the second list, and it was their duty to object during the first day's examination of the jurors on their voir dire. Having permitted 12 of that list to qualify, they had no absolute right then to turn to another list. Under all the circumstances it was a matter within the wise discretion of the court, and it is apparent no harm has resulted, as there is no objection in the record to any individual juror on the panel finally selected from which the jury was chosen to try this case.

5. We are thus brought to the errors assigned on the admission of evidence. This can best be disposed of in groups.

The first objection is general, to wit, to all that evidence which went to establish the averments in the indictments that Murrell was actually bribed by Stock to pass the Suburban bill or Ordinance No. 44, on the ground that it was entirely immaterial; that the true and only issue in the case was whether defendant "knew of the existence of the seventy-five thousand dollars deposited in the Lincoln Trust Company for the purpose of influencing or bribing any member of the house of delegates"; that whether the charge of bribery against Murrell was true or false, and whether the charge that the money had been deposited was true or false, if the same was being investigated by the grand jury, and defendant was a witness before said grand jury, and falsely, knowingly, and corruptly testified to any matter material to said inquiry, he was guilty of perjury, whether Murrell was guilty or innocent. We think this is a fair statement of defendant's position on this general mass of evidence which tended to show Murrell was in fact guilty of the bribery which was under investigation by the grand jury, and we think, moreover, that after the state had established that the circuit court was in lawful session, and that a grand jury had been impaneled, charged, and sworn therein, and William H. Lee had been duly appointed foreman thereof by the court, and that defendant was summoned before said grand jury, and sworn to testify the truth, the whole truth, and nothing but the truth, in answer to any question that might be propounded to him, and a member or members of the grand jury had testified that at that time a charge of bribery against Murrell was being investigated by said jury in which it was asserted that \$75,000 had been deposited in the Lincoln Trust Company by

Stock and Murrell under an express agreement between Stock and Murrell that, if said Ordinance 41 was passed by the house of delegates and the city council and signed by the mayor, the said sum would be turned over to said Murrell for his own use and benefit, and for the benefit of other members of the house of delegates he claimed to represent, and that in the course of said investigation defendant was asked touching his knowledge of the deposit of said \$75,000 for the purpose of bribing said Murrell and other members of said house of delegates, and that he swore he had no knowledge thereof, then the pertinent and material issue was to prove the falsity of his evidence. To establish this, the testimony of Paul Reiss as to conversations had by him with defendant, tending to prove that defendant had a conversation with him while walking west on Olive street, in St. Louis, some time in December, 1901, in which defendant told him that he understood that a brewer named Stock held a key to a box in the Lincoln Trust Company, and that the boys interested in the proposition were a desperate lot, and, unless the matter was fixed up, they would make trouble, and otherwise indicated a knowledge of said fund of \$75,000 and the purpose to use it to bribe certain members of the house of delegates, was material and competent. To this extent, we think, no serious objection is urged to the testimony, but when the state undertook to make the further necessary proof required in all prosecutions of perjury, to wit, to corroborate Reiss by producing corroborative evidence, it offered evidence tending to prove that Stock was the representative of the Suburban Railroad, and that Murrell had approached him, and made propositions to secure the passage of Bill No. 44, or the Suburban ordinance, for \$75,000; that in pursuance of these negotiations the \$75,000 was in fact deposited in the Lincoln Trust Company under an express agreement between Stock and Murrell that, when the ordinance had been passed by both houses of the municipal assembly and signed by the mayor, said sum would be turned over to Murrell. There was also proof of the pendency of the bill in the house of delegates, and then evidence was offered to show that a combine or confederation consisting of a majority of the house of delegates existed, and that defendant was a member of that combine. To all of this evidence defendant, as already said, objected, first, because it was irrelevant and immaterial to the issue on trial, and, second, because it had not first been shown that the so-called combine was for a corrupt purpose, and that, notwithstanding the evidence tended to show Murrell's guilt, it did not and had not connected defendant with the corrupt agreement of Stock and Murrell; that, as to him, at least, it was pure hearsay. Bearing in mind now that the grand jury was investigating the charge of bribery against Murrell and the discovery of the \$75,000 in the safe deposit

box on a charge of perjury against defendant for falsely swearing he knew nothing of said \$75,000, the fact of bribery was pertinent, as it was the necessary predicate of his alleged knowledge, but its pertinency and materiality, so far as defendant was and is concerned, depended on his knowledge thereof. Unless his knowledge was shown by evidence sufficiently corroborative of that of Reiss, no conviction could be had. In *Greenleaf on Evidence* it is laid down: "In proof of the crime of perjury, also, it was formerly held that two witnesses were necessary, because otherwise there would be nothing more than the oath of one man against another, upon which the jury could not safely convict." 1 *Greenleaf, Ev.* § 257. This court, in *State v. Heed*, 57 Mo. 254, adopted his language as its own, as to the relaxation of that rule, as follows: "But this strictness has long since been relaxed; the true principle of the rule being merely this: that the evidence must be something more than sufficient to counterbalance the oath of the prisoner and the legal presumption of his innocence. The oath of the opposing witness, therefore, will not avail, unless it be corroborated by other independent circumstances. But it is not precisely accurate to say that these additional circumstances must be tantamount to another witness. * * * The additional evidence need not be such as, standing by itself, would justify a conviction in a case where the testimony of a single witness would suffice for that purpose, but it must be strongly corroborative of the testimony of the accusing witness; or, in the quaint but energetic language of Parker, C. J., 'a strong and clear evidence, and more numerous than the evidence given for the defendant.'" *State v. Mooney*, 65 Mo. 494; *State v. Reeves*, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349. So that, while the evidence of the deposit of the \$75,000, and the corrupt purpose for which it was raised and placed in the safety box, was competent, because this was the very fact the grand jury were investigating, and, if it had not existed, the alleged falsity of defendant's evidence was without any basis whatever, the state was bound to prove by evidence in addition to that of Reiss, and corroborative thereof, that defendant knew of such fund and its criminal purpose. To do this the state offered, and the court admitted over the objection of defendant, evidence tending to prove that defendant was a member of what was termed "the combine" in the house of delegates. If the state had shown that this combine was for a corrupt purpose, and that a conspiracy had been entered into to pass this ordinance, then, of course, what Murrell said and did in furtherance of said conspiracy would bind this defendant, if he was shown to have been a member of such conspiracy.

But here we are confronted with the insistence that there was no proof of a combination for corrupt or unlawful purposes.

The evidence established that defendant was a member of the house of delegates, one branch of the municipal assembly, and that Murrell was also a member of the same house; that 19 members of that body ordinarily voted together on various matters and ordinances under consideration by that body; that these 19 men were denominated "the combine" by the city press and by their fellow members; that they were in the habit of meeting in a room adjoining the chamber in which the house of delegates met; and that, being a majority, they could and did largely control the legislation of that body; but the evidence did not show that the Suburban bill, or Bill No. 44, was ever discussed by said 19 at any time, or that defendant was ever present when such discussion, if any, took place, or that the question of their obtaining \$75,000, or any other sum, was ever considered by them when defendant was present, or at any other time. It is conceded by the learned counsel for the state that the mere fact that defendant was a member of the house of delegates was not evidence tending to prove that defendant knew that Murrell had bargained to receive \$75,000 for the passage of said Bill No. 44, or the Suburban ordinance, but their insistence is that the fact that he was a member of, or generally voted with, the 19, is evidence that he knew of Murrell's corrupt agreement. It is not pretended that Murrell ever named the defendant as one of the members of the house of delegates who was to receive a part of the \$75,000, but, if he had, it is obvious such a declaration on Murrell's part would not be binding on defendant unless there was proof that defendant was a member of a conspiracy to demand said money as the price of the passage of said bill or ordinance. Counsel cite us to the case of *People v. O'Neil*, 109 N. Y. 251, 16 N. E. 68, but in that case two of the aldermen testified to the forming of the illegal combination for controlling the grant of a franchise on Broadway; that thirteen of the aldermen, constituting a majority of the board, met, and discussed two propositions that were made to them, and one of them urged that they should accept the offer of surface railroad, viz., \$500,000 in cash. The report of that case (page 255, 109 N. Y.) then states: "After some discussion upon the subject by the various members present, all present (of whom defendant was one) voted to accept the proposition of surface company, and each should receive \$22,000 for his vote. They afterwards met, and appointed the man to receive the money." In that case the unlawful conspiracy was established, the participation of the defendant therein; and the court ruled that what the different aldermen afterwards did in pursuance of this corrupt agreement was evidence against the defendant, who was a party to it, and also that the acts and proceedings of the board in which the defendant participated were competent

as throwing light on the prior conduct of defendant, and to corroborate the testimony of the accomplices. No doubt whatever is entertained that that decision was correct. But in this case no combination other than to control the organization of the house of delegates was established. No witness testified to any such corrupt agreement and combination as was shown in the *O'Neil* Case, supra. We have read the evidence with great care, and, so far as Stock's evidence as to Murrell's statement to him goes, it included all of the house of delegates. Murrell did not assume to represent 19, only, of the members, and did not specify those whom he assumed to represent by name. He never saw defendant in connection with the deposit, and never told him of it.

When we come to the character of the combine, and the purposes for which it was organized, it appears that Holtcamp, himself a delegate in the house, testified there was an organization in the house, commonly called "a combine." He would not say it was organized particularly to control Suburban legislation, but they practically controlled all legislation; that there were 19 members of it. When interrogated as to their meeting place, he answered that he saw some of their meetings in a retiring room adjoining the house. Asked if other members, not in the alleged combine, went into that room, he said he could only speak for himself. He happened in there once or twice. Nothing particular was said while he was in there. This witness named defendant as one of the nineteen. Asked if he ever saw this defendant come out of the room where the combine met, said he had no recollection of ever having seen him do so. He could only say he was a member by his counseling and voting with the 19. Defendant had never talked with him about the matter. On cross-examination he stated he could not say that defendant was ever present in the private room on any given occasion. In the first organization of the house defendant cooperated with witness in the election of Tamblin as speaker, and then, after a reorganization, ousting Tamblin, defendant went with the combine, whom he had up to that time opposed. Witness stated that his organization or combine went to pieces because some of them would not agree to vote as a unit on bills. Asked the purpose of his organization, witness answered nothing "beyond the fact that all were expected to vote together on bills." There was no agreement or suggestion at any time to do any unlawful or corrupt act. He knew of nothing that defendant did beyond voting and counseling with the 19 after the reorganization. Mr. Sturdevant, another delegate, testified substantially as Holtcamp did, but would not say he ever saw defendant come out of the room when the combine met during the consideration of the Suburban bill. He knew nothing of any meeting of defendant with

the combine for the purpose of influencing legislation upon the Suburban bill. Mr. Parker, likewise a member, testified that defendant was regarded as a member of the combine, but could not state that defendant ever attended one of their meetings when the Suburban bill was before the house, or participated with them in connection with it. This witness testified he was in the organization that controlled the house while Tamblin was speaker. He would not say that Faulkner always voted with the combine. Occasionally the witness himself voted as defendant did. The witness' combine was only for legitimate business, to further the general welfare of the city and each member's ward. Reiss testified that the organization at one time was for the purpose of having officers friendly to the mayor, so far as appropriate legislation was concerned.

In view of this evidence it is insisted by the state that the inference is irresistible that this combine of 19 were to receive the \$75,000; and, as defendant was shown to be one of them, he necessarily knew of the corrupt fund and its purpose, and therefore this evidence was sufficient corroboratory proof to overbalance the evidence of defendant before the grand jury that he did not know of the \$75,000 bribery fund. After a careful consideration of it, we are unable to adopt such a view. This is a criminal prosecution for a felony. The law presumes the defendant innocent until his guilt is established beyond a reasonable doubt. We agree that his guilt may be established by circumstantial evidence, but these circumstances must be consistent with defendant's guilt, and be inconsistent with his innocence. Now, while this evidence tended to prove defendant was a member of "a combine" in the house of delegates, or an agreement of certain members to vote together, there is not a word anywhere in it that shows the conspiracy was for the corrupt purpose of accepting bribes to further legislation. The witnesses who testified to defendant's being in the combine admitted they were also in similar combines to maintain a certain organization of the house as against a rival faction, and that defendant was in their combine, but they one and all scouted the suggestion that thereby they were bound together for any illegal or immoral or corrupt purpose. While partisanship very often leads men to an unreasonable support of both men and measures, it is going entirely too far to say that, because men go into conventions and caucuses, and thereby bind themselves to abide their conclusions, they thereby commit themselves to every illegal and corrupt act which some member of that caucus or convention may commit, and that they should be held to have a guilty knowledge of such illegal and corrupt act. So, in this case, while it is a legitimate inference from the testimony that the 19 members of the house did have an organization binding them to

vote together on all questions, and that by so doing they disregarded that duty to the city and their constituents which every representative owes to carefully consider each measure brought before him, and vote upon it as his own independent judgment dictates, and solely upon its merits, it is not, therefore, to be presumed that it was a combination for bribery or other corrupt purpose, and that, because one of their number is shown to have accepted a bribe, that it is an irresistible, or even a reasonable, inference or presumption that all the others knew of the bribe, and were to participate in its fruits. Much as such combines are to be condemned, the mere fact of their existence does not justify the presumption that they are necessarily for corrupt purposes. It is entirely within reason to conceive of a number of persons agreeing to do an act not criminal in itself, and that one of their number should afterwards do or agree to do a corrupt act entirely distinct from that which they had agreed to do; and if he does so the others not consenting thereto are not responsible for his independent criminal conduct, and this is true even if the agreement was to do one character of criminal act, and he should do a different one. Thus Hawkins, in his Pleas of the Crown, long ago laid it down that: "If a man command another to commit a felony on a particular person or thing, and he do it on another—as to kill A., he kills B., or burn the house of A. and he burn the house of B., or to steal an ox and he steal a horse, or to commit a felony of one kind and he commit another of quite a different nature, as to rob J. S. of his plate as he is going to market, and he break open his house in the night and then steal the plate—it is said the commander is not an accessory, because the act done varies in substance from that which was commanded." 2 Hawkins, P. C. (Curr. Ed.) c. 29, §§ 21, 22. So that, if the evidence has shown a conspiracy to extort a bribe as the price of the passage of the ordinance known as the "Suburban Bill," and that defendant was a member of that conspiracy, the subsequent conduct of Murrell during the continuance of such conspiracy in arranging for the delivery of the bribe would have been binding on defendant, and Murrell's act would have been his act, and the fact that he was a member of such a conspiracy would have been strong corroborative evidence of his knowledge of the bribe money, and the purposes for which it was to be used. Such was the case in *People v. O'Neill*, 109 N. Y. 251, 18 N. E. 68; but when the state merely showed in this case that he was a member of the combine who controlled legislation in the house of delegates, and failed to show by any witness or evidence allunde that the purpose of said combine extended to the corrupt purpose of extorting bribes to secure the passage of bills, and particularly the Suburban

bill, it fell short of showing a conspiracy that would render defendant liable or responsible for Murrell's corrupt act, and necessarily failed to show such knowledge of his corrupt bargain with Stock as would convict him of perjury in testifying that he did not know of the \$75,000 and the purposes for which it was to be used.

In our opinion, the bare fact that defendant was a member of the so-called combine in the house of delegates, without having shown that the purpose of said combine was to extort or obtain a bribe to pass the Suburban bill, was insufficient by itself to show knowledge on the part of defendant of the \$75,000, and the corrupt purpose for which it was to be used, and when the court subsequently instructed the jury in its fourth instruction that the mere fact that defendant was a member of the house of delegates was of itself no evidence that defendant knew that the \$75,000 was deposited by Stock and Murrell, the jury might well have concluded that the mere fact that he was a member of the combine, without the further proof that it was formed and existed for the corrupt purpose of extorting or receiving bribes, was sufficient corroboratory evidence of such knowledge, and corroborated Paul Reiss, the accusing witness. The state should have been required to go further, and show that this combination was for the corrupt and illegal purpose of obtaining a bribe to pass the Suburban ordinance, and that defendant was a member thereof, with knowledge of its purposes. In the absence of such additional proof, the defendant was not bound by any statement by Murrell or Stock, made in his absence, and without his assent, to the effect that the \$75,000 was deposited under an agreement to procure the passage of the Ordinance No. 44 through the house of delegates.

6. Considering now the specific objections of defendant to certain testimony, we note first the assignment that the court erred in permitting Paul Reiss to testify to a conversation had with him by one Julius Lehman in May, 1901, regarding the \$75,000, because it was the statement of a third person in no manner authorized to speak for or bind defendant, and in his absence; and, secondly, because it was a privileged communication of Lehman to his attorney. The admission of Lehman's statement to Reiss came about in this manner: Reiss had testified to defendant's statements to him in regard to the \$75,000 on two different occasions, and to his statement to defendant that he (Reiss) had heard the story, but that knowing Stock as he had he discredited Stock's doing such a thing. On redirect examination the prosecuting attorney asked the following question: "You have stated that when this deposit in the Lincoln Trust Company was referred to that you said you had heard the story. Now, I ask you how and from whom you heard it, if any one?"

To this question counsel for defendant interposed the objections that it was pure hearsay, and could in no way affect defendant, and, moreover, was a privileged communication. The argument on the part of the state was that, as counsel for the defendant had asked Reiss in regard to his statement to defendant, "Did you tell him how you became familiar with the story?" and Reiss had answered, "I don't know that I did," that this was an insinuation that the witness had received his information from Stock, and for that reason the state proposed to show now from whom he did receive his information, to wit, from Lehman, a member of the house of delegates, a member when defendant was, and a member of the combine. Counsel for defendant insisted that no such insinuation was made; that the sole purpose of their question was to show he did not get it from defendant. The prosecuting attorney, however, insisted it was also competent to show that Lehman, a member of the combine, had gone to Reiss, and tried to get him to effect a compromise with Stock in behalf of the combine, and to show the purpose of the combine was not merely to control legislation, but for the purpose of receiving money for votes—an illegal purpose. As to the first proposition, we are clear that no foundation was laid for it in the cross-examination of Reiss. He was not asked from whom he received the information which he told defendant he had heard and discredited. As defendant had not invoked this hearsay, it was obviously incompetent and highly prejudicial to allow the state to introduce it on the claim that Reiss was entitled to tell from whom he had heard it. He had already detailed at length all that defendant had told him, and beyond all cavil it was contrary to elementary principles and improper to permit him to tell the jury what some one else had told him in the absence of defendant. The defendant could not be bound by what Lehman in his absence, and without defendant consenting thereto, had told Reiss some six months previously. As to Lehman being a member of the combine, the same reason exists for excluding his statement to Reiss, so far as this defendant is concerned as we have held existed against Murrell's statements, until it had first been established that this defendant was a member of a corrupt conspiracy with said Lehman and others to extort a bribe for the enactment of this bill or ordinance. Lehman's statement, so far as this defendant was concerned, was pure hearsay, and inadmissible, and in no way binding on defendant, and the circuit court erred in admitting it over the protest of defendant.

We are referred by counsel for the state to *State v. Walker*, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133, and *State v. Melrose*, 98 Mo. 594, 12 S. W. 250, but those cases merely announce the familiar rule that the time when the proof of the conspiracy must be of-

ferred is somewhat in the discretion of the court; but the doctrine is reaffirmed in those cases, as it is everywhere else, that "it is necessary to show a combination or conspiracy in order to make the acts and declarations of one the acts and declarations of all," and, while it is sometimes permissible, on the undertaking of the prosecuting officer that he will later on show the conspiracy, to permit declarations and acts of one, made and done in the absence of the others, before the conspiracy is fully proved, the rule is everywhere qualified with the proviso that "the proof shall afterwards be made." As already said, no other proof in this record supplied this failure to prove the criminal conspiracy afloat, so as to render Lehman's statements admissible against this defendant. If the prior criminal combination had been shown, his statement, if otherwise competent, would have been competent in chief, and not at all dependent upon the cross-examination of Reiss; or, if sufficient evidence of the criminal purposes of the combination had been shown to justify the court in submitting the question to the jury, it would have been competent for the jury to find the purpose of the combine to have been to exact bribes; but, after a careful consideration, we are of opinion that the mere fact that the defendant was one of the controlling faction in the house, and usually voted with them, does not create a presumption that the said organization had, with his knowledge, combined to commit bribery or receive bribes for their votes; nor that there is any presumption, because Murrell bargained for the bribe, that all the others, or this defendant, knew it, or should be presumed to know it. We may have a suspicion that such was the case, but the defendant was on trial for his liberty, and we cannot indulge in suspicions in a matter so grave and so far-reaching in its ultimate effect in the administration of the criminal law. We think, moreover, the court should have gone farther than it did, and not merely instructed the jury that the fact that defendant was a member of the house of delegates was no evidence of his knowledge of the \$75,000 deposited by Murrell and Stock, but that the fact that he was one of the majority who ordinarily voted together was by itself no evidence of his knowledge of said bribe.

7. But again, it is insisted that Lehman's statement to Reiss was a privileged communication by a client to his attorney, to which contention the state answers it was not privileged, because Lehman was attempting to have Reiss further the crime of bribery, and become accessory after the fact to that crime. The defendant replies that it is only those communications made by the client to his attorney before the commission of the crime for the purpose of being guided and helped in the commission of it that are not privileged, and that in this case the

crime was complete, to wit, the criminal agreement to vote for the passage of the Suburban bill, before Lehman consulted Reiss, and the conspiracy ended. The evidence of Reiss was that Lehman attempted to get Reiss to undertake to bring about a settlement for the \$75,000, or part of it, which Stock had deposited in the Lincoln Trust Company for "the boys," himself among the number. In a word, it was an effort to employ Reiss to secure the fruits of a promised bribe, which had not yet been realized. The general rule, both in England and in the United States, is well summed up in *Crisler v. Garland*, 2 S. & M. 136, as follows: "Communications from clients to attorneys are privileged on the ground of public policy with a view to the safe and proper administration of justice. The protection is not qualified by any reference to proceedings pending or in contemplation. It is adopted out of regard to the interest of justice, and from the necessity of free, unrestrained intercourse between counsel and client. It is better, in our judgment, to adhere to the rule in a broad and liberal sense than to weaken its force by exceptions." This is a fair statement of the law in civil cases, and also in regard to communications made by a client to his attorney in the defense of a criminal prosecution; but there is an exception as broad as the rule itself, to wit, communications made by a client to an attorney before the commission of a crime, and for the purpose of being guided or helped in its commission, are not privileged. In *Queen v. Cox*, 14 L. R. Queen's Bench Division, 153, all the English decisions on this question received the most careful consideration of the 10 judges of the High Court of Justice, and the opinion was delivered by Mr. Justice Stephen, with the full concurrence of all the justices. The three rules deduced and affirmed from these authorities are tersely stated by Judge Hurt in *Orman v. The State*, 22 Tex. App. 604, loc. cit. 616, 3 S. W. 468, 58 Am. Rep. 662: "First. To be privileged, the communications must pass between the client and his attorney in professional confidence, and in the legitimate course of professional employment of the attorney. Second. If the communications are by the client made to the attorney before the commission of the crime, and for the purpose of being guided or helped in its commission, they are not privileged. Third. Nor does the fact that the attorney was wholly without blame in any particular whatever affect the second rule." Measuring the communication made by Lehman to Reiss by this first rule, it is entirely plain that Lehman was not consulting Reiss for the purpose of defending him against a pending or anticipated prosecution for the bribery disclosed. Was it a communication by clients to attorney in professional confidence, "in the legitimate course of professional employment of the attorney?" Sec-

tion 4059, Rev. St. 1899, which renders "an attorney incompetent to testify concerning any communication made to him by his client in that relation or his advice thereon, without the consent of such client," is merely declaratory of the common law, and in no manner affects the exceptions to the general rule excluding such communications. This court has ruled that the rule does not extend to nor shelter advice concerning or assistance in proposed infractions of the law. *Hickman v. Green*, 123 Mo., loc. cit. 188, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39. Lord Brougham's statement of the rule at common law in *Greenbough v. Gaskell*, 1 M. & K. 101, is generally accepted: "If, touching matters that come within the ordinary scope of professional employment, they receive a communication in their professional capacity either from a client or on his account, and for his benefit in the transaction of his business, or, which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the paper in any court of law or equity, either as a party or a witness." This is accepted by *Greenleaf* as the correct statement of the rule. 1 *Greenleaf*, § 237. But, as said by Judge Stephen, it has no reference to communications by a client to his attorney in furtherance of a crime or fraud. The reason on which the rule rests is that "it is out of regard to the interests of justice, which cannot be upholden and the administration of justice which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings." But, as said by the same learned judge in *Queen v. Cox & Railton*, 14 Q. B. Div., loc. cit. 167: "The reason on which the rule is said to rest cannot include the case of communications criminal in themselves, or intended to further any criminal purpose, for the protection of such communications cannot possibly be otherwise than injurious to the interests of justice and to those of the administration of justice. Nor do such communications fall within the terms of the rule. A communication in furtherance of a criminal purpose does not come into the ordinary scope of professional employment." The eminent judge then remarks that Lord Brougham did not have the exception as to communications criminal in themselves, or intended to further any criminal purpose, before him, or he would have noted them as exceptions; but remarks that the caution with which he worded the principle has the same effect. Proceeding in the examination of the point under consideration he comments upon *Gartside v.*

Outram, 26 L. J. (Ch.) 113, decided by Lord Hatherley, then Sir W. Page Wood. In that case certain wool brokers sought to restrain a man who had been their sale clerk from disclosing their transactions. He replied they were fraudulent. The Vice Chancellor said: "Confidential communications involving fraud are not privileged from disclosure." "The true doctrine is that there is no confidence as to the disclosure of iniquity. You cannot make me the confidant of a crime or a fraud, and be entitled to close up my lips upon a secret which you have the audacity to disclose to me relating to any fraudulent intention on your part. Such a confidence cannot exist;" and quotes as his own language of Sergeant Tisdal: "If he is employed as an attorney in any unlawful or wicked act, his duty to the public obliged him to disclose it. No private obligation can dispense with the universal one which lies on every member of society to discover every design which may be formed contrary to the laws of society to destroy the public welfare." To the same effect is *Regina v. Orton, Cockburn, C. J., Shorthand Notes*, vol. 3, p. 9381.

Applying the foregoing principles to the case in hand, we may confidently assert by way of exclusion: First. *Lehman* had not, and was not endeavoring to, employ *Reiss* to defend him against a pending or anticipated prosecution for bribery. Secondly. This communication was not made by *Lehman* to *Reiss* before the commission of the bribery, and for the purpose of being guided or helped in its commission, because at that time the bribery was complete, since, according to *Reiss, Lehman* and his associates had, under an agreement with *Stock*, already agreed to give their votes for the passage of the Suburban bill in consideration of the promise of the \$75,000 deposited in the trust company, and were just as guilty as if each of them had received his pro rata share thereof. Third. If the communication was not privileged, it must be because it did not come within the protection of the rule itself, which renders a communication between attorney and client privileged only when made between them in professional confidence, and in the legitimate course of professional employment of the attorney. In a most admirable discussion of this question by Judge *Ellison* in *Hamil & Co. v. England* (K. C. App.) 50 Mo. App. 338, it is said that there is now no substantial disagreement of what the rule is, but the difficulty is in the application of the terms "ordinary scope of professional employment" and "professional capacity." The rule does not exclude all that passes between client and attorney, but that only which passes between them in professional confidence. So that, so far as this particular case is concerned, the admissibility of the testimony of *Reiss* depends upon whether *Lehman's* statement to him of the deposit of \$75,000 for "the boys," alias cer-

tain members of the house of delegates, including himself, and seeking Reiss' assistance in adjusting a compromise so that he and his associates could get their bribe, can be said to fall within the ordinary scope of the professional employment of attorneys at law. Everywhere the English and American courts have in true professional pride pronounced that it is no part of attorney's employment to advise or hold professional communication as to the manner of committing a felony or fraud, nor to devise means to avoid the punishment which such conduct justly merits. As said by Mr. Justice Stephen with the concurrence of all the English judges in *Queen v. Cox et al.*, 14 Q. B. L. R. 153, "If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object." Conceding that the crime of bribery was complete, so far as the criminal agreement to pass the ordinance in consideration of the \$75,000 was concerned, it is plain that the proposition of Lehman to Reiss was to aid in obtaining the promised bribe, which was being withheld by Stock, and was no less iniquitous and degrading, so far as the attorney was concerned, than if his aid had been sought in the first instance. Lehman knew, and was bound to know, and Reiss, the attorney, knew, that Lehman's claim against Stock or the Suburban Company was one which no attorney could enforce in any court. No judicial tribunal would have listened to such a proposition for an instant, and the attorney advancing it would have deserved disbarment. It was a bald offer to divide the fruits of crime with the attorney, if the latter could secure them. Lehman seems to have fully appreciated this, because he only asked Reiss to bring about a compromise with Stock, well knowing, as he must be presumed to know, that such a retainer was not and could not fall within the scope of the legitimate professional employment. Indeed, he prefaces his communication with the suggestion that, "now that you have been elected a member of the house of delegates, you can be of considerable service to me and my friends in the house of delegates." It was not as attorney that he desired his services, but as a member of the house of delegates, a position which he supposed would readily secure him consideration at the hands of Mr. Stock, or those whose representative he was.

But, conceding that Lehman intended to employ Reiss, because he was attorney at law, to secure the corrupt fund deposited to pay him and his associates for their votes in passing the bill, can it be held to be a professional communication to Reiss in a professional capacity? Wherein does it differ in its iniquity from a communication made with reference to a proposed infraction of the law? We have seen that it is now the settled law that the latter is not privileged.

and the former differs merely in degree. In each case the attorney is consulted as to a matter which in no lawful sense is a matter of professional duty. He can no more be employed to assist one criminal in requiring or inducing his confederate in crime to disgorge the price of his crime, than to advise and devise means for executing it in the first instance. Neither being a matter in which there can be professional confidence, and neither within the scope of professional employment, neither is privileged. It follows that this objection, so far as Lehman was concerned, was not tenable, but the statement should have been excluded on Faulkner's objection, because, in the absence of proof of a conspiracy between this defendant and Lehman and Murrell and others to pass the bill in consideration of the bribe, and made in the absence of this defendant, was hearsay, and inadmissible.

8. We come now to the exceptions urged against the instructions of the court. In its first instruction, the court directed the jury that if they found from the evidence "that, after being sworn by the foreman of the grand jury, and before said grand jury, he, the defendant, did then and there falsely swear and testify under oath that he did not know of and had never heard of the existence of the \$75,000 deposited in the Lincoln Trust Company, and if you further find from the evidence that in truth and in fact the defendant did, at the time he so testified under oath, well know, aside from any information he may have acquired through the newspapers, of the existence of the said \$75,000, and that said sum was deposited in a lock box in the safe deposit vault of said Lincoln Trust Company, and that when he so swore and testified under oath he willfully and corruptly testified falsely, they would find him guilty of perjury," etc. The objection is, first, that it submitted to the jury whether defendant committed perjury by swearing he had never heard of the existence of said \$75,000, whereas the indictment does not negative the truth of his evidence that he had not heard of said fund, but assigns as perjury only that "in truth and in fact he well knew of the existence of said sum." It requires no discussion to demonstrate that there is a radical distinction between knowing a fact and merely having heard of its existence. That the pleader recognized this is apparent in that he only charges that the defendant testified falsely that he did not know of the \$75,000, and does not allege perjury in his testimony that he had not heard of it. Now, it is at once obvious that in submitting to the jury whether defendant falsely and corruptly testified he had not heard of said \$75,000, the court submitted an issue not tendered in the indictment. Under the Constitution of this state, "In all criminal prosecutions the accused shall have the right * * * to demand the nature and cause of the accusation." Section 22, art. 2, Const. Everywhere it is held that the assignment of

the perjury is an absolutely essential part of an indictment for that crime; whether at common law or under our constitutional guaranties. The assignment of the perjury is that part of it which expressly alleges the falsity of the testimony given by the accused. This is a rule of criminal pleading that goes to the very substance of things. Hence the general averment that the defendant swore falsely upon the whole matter of the oath is not sufficient, but the indictment must proceed by particular averment to negative that which is false, and the prosecution is bound, in assigning the perjury, only to negative such parts as he can falsify, admitting the rest. *Gibson v. The State*, 44 Ala. 28; *Wharton's Amer. Crim. Law*, § 2259. The necessity for such averment arises out of the settled rule that every fact and circumstance necessary to constitute the offense must be specifically set forth in the pleading, and that facts not averred cannot be proved, or go for nothing if proved. *People v. Gates*, 13 Wend. 311; *People v. Miller*, 2 Parker, Cr. R. 197; *Com. v. Still*, 83 Ky. 277; *Gabrielsky v. The State*, 13 Tex. App. 428. Applying these universal principles of criminal pleading, it is plain that, unless we deny the defendant his right to be informed of the nature and cause of the accusation against him in an indictment for perjury, he is entitled to be told in the indictment wherein and to what extent the statements alleged to have been made by him were false, that he may know what he is to answer, because the presumption is that what is not charged in the indictment does not exist, and hence when in this case the pleader only negatives the defendant's evidence that he did not know of the \$75,000, and nowhere negatives his evidence that he had not heard of it, so far as the indictment goes, this is an admission or concession that his testimony that he had not heard of the \$75,000 was true, and hence, when the court submitted the issue whether it was false, it framed an issue not in the indictment. The court had no power in this manner to supply by its instructions an averment not in the indictment, and permit, as it did, a conviction on a charge not included therein. This was reversible error. *State v. Smith*, 119 Mo. 447, 24 S. W. 1000; *State v. Hesselstine*, 130 Mo., loc. cit. 475, 32 S. W. 988. Under this instruction the defendant might have been convicted on the charge that he had not heard of the \$75,000, whereas no perjury is assigned on that part of his evidence.

Another objection made to this instruction is that it impliedly, at least, authorized the jury to find that defendant knew of said \$75,000 if he had heard of it by rumor or otherwise than by reading of it in the newspapers. We think this is also a fair criticism of this instruction on this point. It is true the court required that the defendant should know, and as the evidence of the stenographer of the grand jury showed beyond a doubt that defendant testified he had read of it in the

newspapers, and the court properly cautioned the jury that such information was not knowledge under the indictment, we do not think that, by excluding what he had read in the papers the court cured the error of submitting to the jury whether defendant had falsely sworn he had not heard of the \$75,000 otherwise than by reading of it in the newspapers.

In this connection the propriety of the refusal of the fourth instruction requested by defendant must be determined. That instruction is in these words: "No. 4. The jurors are instructed that unless they believe beyond a reasonable doubt, from all the evidence in the case, that the defendant, on January 31, 1902, had personal knowledge, or had heard prior to January 31, 1902, or learned from John K. Murrell or Philip Stock, of the existence of \$75,000 deposited in the Lincoln Trust Company for the purpose of influencing, bribing, or corrupting any member of the house of delegates for his vote or influence in the passage of Council Bill No. 44, then defendant is not guilty of the offense charged, and that it is your duty to acquit the defendant; and the court in this connection further instructs you that personal knowledge is not knowledge derived from gossip, rumor, or hearsay, but is knowledge which one has from the exercise of his own senses, and that in this case, unless defendant saw Philip Stock and J. K. Murrell, or either of them, deposit \$75,000 in a box in the Lincoln Trust Co., he had in law no knowledge that \$75,000 was deposited in the Lincoln Trust Company, unless said Philip Stock or J. K. Murrell told him that said money was so deposited." This embodies a distinct proposition from that in the first instruction for the state. In the latter the jury were required to find knowledge aside from newspaper publications. Defendant, in this instruction, requests the court to specifically define the sources of knowledge, and in what it consists. This instruction, so far as it goes, is correct, but, as the state was proceeding on the theory of a conspiracy, the instruction should have gone farther, and stated the further alternative: "Or that defendant at and prior to the deposit of said \$75,000 by said Stock and Murrell was and had been a member of a criminal conspiracy or combine to obtain said sum under an agreement with said Stock in consideration of their votes to pass said Suburban ordinance, and that said Murrell was also a member thereof; in which case, if they so find, the defendant would be chargeable with knowledge of the acts of said Murrell, and of the knowledge possessed by said Murrell during the continuance of and in furtherance of said unlawful conspiracy."

9. Error is asserted in refusing the fifth instruction requested by defendant, as follows: "No. 5. The court instructs the jury that if they believe from the evidence that the grand jury within and for the body of the city of St. Louis that was convened on Janu-

ary 30, 1902, had instructed the circuit attorney or assistant circuit attorney to prepare indictments against Charles Kratz and J. K. Murrell on or prior to January 30, 1902, that then the testimony of the defendant could not have been material to the investigation of any complaint against said Kratz and Murrell, and that said defendant, when he testified before said grand jury, could not have testified to anything material to the charge against said Kratz and Murrell, and you should find the defendant not guilty." The fact that the grand jury had voted to indict Kratz and Murrell prior to defendant's giving his testimony before that body, and prior to the return of the indictment into open court, in no manner affects the defendant's responsibility for the falsity of his evidence given before said grand jury in the further investigation of the case, or its materiality. It was entirely competent for the grand jury to continue their investigation to ascertain all the legal, competent, and material evidence in regard to said charge against Kratz and Murrell, or either of them. Notwithstanding they had voted to indict Kratz and Murrell, it was within their power to have reconsidered such vote, and refused to find a true bill. The only limitation on their power to require witnesses to be brought before them is contained in section 2498, Rev. St. 1890, which prohibits them, "after the finding and returning of any indictment," from requiring any person known or believed to be a witness for the person so indicted to be summoned before them except upon the written order of the judge of the court into which such indictment has been returned. Until such indictment is returned in open court, signed by the prosecuting attorney, and attested by the foreman, it is not an indictment.

10. By far the most important question raised by defendant's appeal is found in the third instruction prayed by him, in the following words: "No. 3. The jurors are instructed that under the Constitution of the state of Missouri no person can be compelled to testify against himself in a criminal case, and that if you believe from the evidence that on the 31st day of January, 1902, the grand jury of the state of Missouri within and for the body of the city of St. Louis were investigating a charge against this defendant, and he was summoned to appear before them, and that upon said hearing he was not notified that he could not be compelled to testify against himself, and that said grand jury compelled him to so testify, that then the defendant, in giving testimony at such time before such grand jury, could not be guilty of perjury, and it is your duty to acquit the defendant." It is obvious that there are at least two, if not three, distinct legal propositions involved in this instruction. The first is an old and time-honored maxim of the common law, "Nemo tenetur seipsum accusare" (No one shall be com-

pelled to accuse himself). As said by Judge Barclay in *State ex rel. Atty. Gen. v. Simmons Hardware Company*, 109 Mo. 125, 126, 18 S. W. 1125, 15 L. R. A. 676: "To fully grasp its meaning, we must note its place in the history of the law as one of the most important of the rules of procedure that express the fundamental difference between the criminal practice prevailing in continental Europe and that of countries which trace their laws, as we do, to the English source. In the former the accused is required to submit to a rigid official examination touching the charge against him. In the latter such an examination is positively forbidden. The reason of this difference is found in that higher regard for the personal rights of the individual citizen which obtains in countries following the English common law, and to which is traceable the growth of that independent spirit which has secured to the people of those countries so large a share of liberty, and placed them in the vanguard of the world's progress." In Missouri it forms one of the sections of our Bill of Rights and organic law. "No person can be compelled to testify against himself in a criminal cause." In every state of the Union a similar provision is found in its Constitution. It is also firmly embodied in the Constitution of the United States. The courts have jealously enforced it in all cases in which it was properly invoked. Mr. Justice Bradley, in *Boyd v. United States*, 116 U. S., loc. cit. 631, 6 Sup. Ct. 524, 29 L. Ed. 746, voiced the sentiment of all American courts and lawyers when he said: "Any compulsory discovery by extorting the party's oath or compelling the production of his private books and papers to convict him of crime or to forfeit his property is contrary to the principles of free government. It is abhorrent to the instincts of an Englishman. It is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom." In our own jurisprudence, from the first volume of our Reports down to the last, the same principle has been fearlessly announced and adhered to. It is not to be abandoned to subserve the exigencies of any particular prosecution. Constitutional safeguards which have resisted the assaults of monarchical power for centuries in England, and withstood momentary clamor in this country throughout our national existence, are not to be flittered away at the demand of those who have apparently studied the fundamental principles of our free institutions to little advantage, when they demand that this universal principle of the common law and this constitutional guaranty of our federal and all the state Constitutions shall be abrogated because it may prove an inconvenient barrier to the investigation of some flagrant crime or crimes. It was framed by James Madison as it appears in the

federal Constitution, and no American statesman or lawyer has ever advocated its repeal.

So far as this instruction announces this obvious and just principle of law, it is unquestionably correct, but its application to the facts of this case is another matter. Having announced the exemption from being compelled to testify against himself, the instruction proceeds to submit to the jury whether the grand jury was investigating a charge against the defendant. Learned counsel insist that this is apparent from his examination, and have reproduced the examination of the stenographer, Buck, and of defendant, before the grand jury, from which it appears the defendant was summoned as a witness before the grand jury in the investigation of the charge of bribery against Kratz and Murrell; that he was closely questioned as to his knowledge of the combine in the house of delegates, its purposes; and from the nature of the questions put to him it may be inferred that the grand jury or circuit attorney suspected him of being a party to the bribe agreed upon between Stock and Murrell. It also appears that the defendant disclaimed all knowledge of the said bribe, and denied that he was a member of any corrupt combine. At no time did he decline to answer on the ground that it would or might incriminate himself. It further appears he was not advised or notified that he need not answer any question put to him if he thought it might tend to criminate him. In support of the proposition that because the grand jury suspected the defendant was a party to the corrupt agreement between Stock and Murrell, and still persisted in questioning him as to his knowledge of it without advising him of his privilege, the defendant could not be convicted of perjury, even though he knowingly and willfully testified falsely on that matter, counsel refer us to various cases, which we have examined. The first is that of *State v. Young*, 119 Mo. 520, 24 S. W. 1038. That was a prosecution for murder. The defendant, an ignorant boy, had been summoned before the coroner, and required to testify as to his presence in the vicinity of his father's house on the night of the homicide. Afterwards, on his trial on an indictment for murdering his father, what he testified to before the coroner was admitted against him as his admissions, and this was assigned as error. After a full review of all the attainable cases, we ruled that his testimony thus obtained without notifying him of his privilege, and after he was suspected, was not a voluntary admission, and was inadmissible on his trial for murder. Whether he could have been tried for perjury if he had falsely testified was not involved in the record, and, of course, was not passed upon. It was, however, ruled that, if the defendant had voluntarily testified, and not by compulsion, his statements would have been evidence, even though it had been a preliminary

trial of himself for the murder. *State ex rel. v. Simmons Hardware Co.*, 109 Mo. 118, 18 S. W. 1125, 15 L. R. A. 676, arose on an information by the Attorney General under the act of 1889 (Laws 1889, p. 96, § 1), for the punishment of pools, trusts, and conspiracies, and upon the refusal of the defendant to answer under oath the letter of the Secretary of State as to whether it had merged its business in or with any trust, etc. The defendant challenged the constitutionality of the law requiring it to answer under oath touching a matter which might form the subject of a criminal prosecution against it or its officers, and it was unanimously held that under section 23, art. 2, of our Constitution, it could not be compelled to testify against itself. It asserted its privilege, and refused to so testify, and its position was sustained. No question as to whether its officers could have been prosecuted for perjury, and convicted if they had falsely sworn in answer to such inquiry, was in the case. *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, arose on a habeas corpus, wherein the petitioner had been imprisoned for refusal to answer a question which would have subjected him to a prosecution for a violation of the interstate commerce act of Congress. He claimed his privilege and exemption, and he was discharged by the Supreme Court of the United States. The question of his liability if he had falsely testified was not in the case. *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, was an information under the customs revenue laws, and the District Court, under the fifth section of the act of 1874 (18 Stat. 187, c. 391 [U. S. Comp. St. 1901, p. 2019]), required the defendant to produce an invoice, and it was ruled the act was unconstitutional in that it required him to testify against himself. In *Cullen v. Commonwealth*, 24 Grat. 624, the defendant was asked by the grand jury to state whether he knew of a certain duel, and he declined to answer, because his answer would tend to criminate him. On his refusal the hustings court committed him to jail. The Court of Appeals of Virginia discharged him on habeas corpus, because the act of the Legislature of Virginia invaded his constitutional right to refuse to give evidence tending to criminate himself. No question of his liability for perjury for false testimony was involved or decided. *People v. Mondon*, 103 N. Y. 211, 8 N. E. 496, 57 Am. Rep. 709, was a prosecution for murder, and the prisoner, an ignorant Italian laborer, unfamiliar with the English language, was called as a witness before the coroner's jury, and examined by the district attorney and coroner. He was indicted, and his testimony on the inquest was offered against him, and the Court of Appeals of New York ruled his answers were not voluntary, and were inadmissible. To the same effect is *People v. McMahon*, 15 N. Y. 384; but in neither case was the question now raised in any manner decided. In

People v. Mondon, 103 N. Y., loc. cit. 221, 8 N. E. 496, 57 Am. Rep. 709, the court says: "When a coroner's inquest is held before it has been ascertained that a crime has been committed, or before any person has been arrested charged with the crime, and a witness is called and sworn before the coroner's jury, the testimony of that witness, should he afterwards be charged with the crime, may be used against him on his trial; and the mere fact that at the time of his examination he was aware that a crime was suspected, and that he was suspected of being the criminal, will not prevent his being regarded as a mere witness, whose testimony may be afterwards given in evidence against himself. If he desires to protect himself, he must claim his privilege." *State v. Clifford*, 86 Iowa, 550, 53 N. W. 299, 41 Am. St. Rep. 518, holds that the involuntary admissions of one made under oath before a grand jury in respect to an offense for which he is then under arrest, and without being informed of his rights in the premises, or of the effect of his testimony, are not competent evidence against him upon a subsequent trial under the indictment for such offense. *Emery's Case*, 107 Mass. 172, 9 Am. Rep. 22, was one in which the witness claimed his privilege before a joint committee of the Senate and House of Massachusetts. He was imprisoned for refusal to answer, and was discharged on habeas corpus by the Supreme Court of Massachusetts. One other case, not in the printed brief, is *U. S. v. Edgerton* (D. C.) 80 Fed. 374. This is a case in the District Court of Montana. The decision was made on a motion to quash an indictment, first, because one Flynn, an expert witness, was permitted to remain in the grand jury room, and hear the testimony of other witnesses, and examine them; second, that while investigating the offense for which the defendant was indicted, he was called as a witness before the grand jury to testify as to that offense, without being informed or knowing that his own conduct was the subject under inquiry. The court quashed the indictment on both grounds, and for other reasons also, it would appear. While not the opinion of a court of last resort, the case appears to have been well decided. It is in line, certainly, with the reasoning upon which the other cases cited depend.

It is intolerable that one whose conduct is being investigated for the purpose of fixing on him a criminal charge should, in view of our constitutional mandate, be summoned to testify against himself, and furnish evidence upon which he may be indicted. It is a plain violation both of the letter and spirit of our organic law. Such a practice cannot be too strongly condemned and scrupulously avoided by those intrusted with the administration of the criminal law, but it is obvious at a glance that this case, like all the others cited, does not meet the question before us. 1 Greenleaf, Ev. § 225, treats merely of the

manner of the examination of the prisoner and voluntary confessions. Cooley on Constitutional Limitations is cited to the effect that the proceeding to establish guilt shall not be inquisitorial, and that the peculiar excellence of the common-law system of trial over that which has prevailed in other civilized countries consists in the fact that the accused is never compelled to give evidence against himself. The other textbooks cited only confirm the foregoing adjudicated cases. It will be observed that the principles to be extracted from them are, first, that the witness cannot be compelled to criminate himself; second, that it is his personal privilege to decline to testify, and he may voluntarily waive it; third, that if compelled to testify after arrested, or before arrest, before a coroner's jury, after he is suspected, his admissions are not voluntary, and cannot be used against him on a subsequent trial for that offense; and such is the force of *State v. Young*, 119 Mo. 517, 24 S. W. 1038. But the point which we are to determine is whether a witness, not under arrest for a crime, and summoned before a grand jury in the investigation of the guilt of others, can fall to claim his privilege or waive it, and testify falsely, and be absolutely exempt from a prosecution for perjury for such false swearing. The proposition, reduced to its last analysis, is that, as no person can be compelled to testify against himself, he may waive his privilege, testify falsely, and yet incur no liability for perjury. In another form it may be stated that, since he cannot be compelled to incriminate himself, and as by testifying falsely he does incriminate himself by committing perjury, therefore he cannot be prosecuted for it. Two answers readily suggest themselves to this proposition that the witness in such circumstances is justifiable in committing perjury, and they are these: First, he may refuse to answer, and, if the court shall deny his privilege, and commit him, he can be released on habeas corpus; or, second, if he yield to the order of the court, and testify truthfully, and his truthful evidence leads to his indictment, it cannot be used against him on the trial, and, if it is improperly admitted, the appellate court will reverse the trial court. So that two lawful avenues are open to him by which he may avoid the road to perjury and a prosecution therefor. The point has received careful consideration in our sister states. Thus, in *Mackin v. The People*, 115 Ill. 812, 3 N. E. 222, the Supreme Court used this language: "Assuming the answers to the questions propounded to defendant would have disclosed criminal conduct on his part, it was his privilege to decline to answer, and his refusal could not have been made the basis of any prosecution against him. Of course, no one can be compelled to give evidence against himself, and the law secures to every one, when testifying in any legal proceeding, whether before the grand jury or in the trial court, the privilege

to answer or decline to answer, if, in his opinion, the answers to the questions would tend to disclose matters that might criminate him. The privilege secured is, however, a personal one, and, if he shall waive it, and elect to testify, he must do so with as much truth and candor as if testifying concerning other matters as to which he is bound to answer; and, if his testimony is willfully false, perjury may be assigned upon it. *State v. Maxwell*, 28 La. Ann. 361. It has been held on various occasions that, where a party is erroneously sworn in his own behalf, perjury might be assigned upon his testimony if false. *Chamberlain v. People*, 23 N. Y. 85, 80 Am. Dec. 255." *Van Steenberg v. Kortz*, 10 Johns. 167; *Pratt v. Price*, 11 Wend. 128. Again, in *State v. Turley*, 153 Ind. 345, 55 N. E. 30, the defendant was indicted for perjury. In the course of the opinion the court says: "It may be that appellee could not have been required to answer any questions in regard to statements made by him, if any, concerning his bribing or offering to bribe the engineer, or to testify to anything connected therewith, if he had declined to answer on the ground that his answer would tend to criminate him; but when he testified, if his testimony, or any part thereof, was false, he is subject to prosecution for perjury, the same as any other witness." *Gillett's Crim. Law*, § 691; *Anon.*, 3 Salkeld, 248; *Croke, Eliz.* 486. In *State v. Maxwell*, 28 La. Ann. 361, the error alleged was "that the assignment of perjury is upon a question which the state had no legal right to ask, and which the witness could have refused to answer"; to which the court responded: "If the answer would criminate the witness, he might refuse to answer, and the court would not compel a response. Here the witness made no objection." The judgment was affirmed. *Greenleaf*, in his work on *Evidence*, vol. 3, § 191, says: "The competency of the witness to testify, or the fact that he was not bound to answer the question propounded to him, or the erroneousness of the judgment founded upon his testimony, are of no importance. It is sufficient if it be shown that he was admitted as a witness, and did testify." In *State v. Terry*, 30 Mo. 368, the prosecution was for perjury committed before the grand jury in falsely swearing the defendant did not know of any person who had bet upon any game of cards in the last 12 months in Cole county. On the part of defendant it was urged "that the defendant could not be compelled to answer; that, if erroneously compelled to testify, perjury could not be assigned upon his answer; and that, having answered voluntarily, there can be no better foundation for an assignment of perjury than if forced." But Judge Scott rejected the proposition, and affirmed the judgment. *Com. v. Turner*, 98 Ky. 528, 33 S. W. 88.

The one case cited by counsel which they assume goes to the extent of holding that,

if a witness is required by a grand jury or court to testify to facts tending to criminate him, perjury cannot be assigned on such evidence, is *Pipes v. The State*, 26 Tex. App. 318, 9 S. W. 614. It is true there is a dictum to that effect in that case, but Judge Hart says no such state of facts appeared in that case, and hence it is lacking in weight as authority. Profound as is our respect for the learned judge who wrote that opinion, this obiter is not convincing. In our opinion, because a court requires a witness, even erroneously, to testify to a matter which he is justified in refusing to answer, is no ground for charging the court with having compelled him to testify to that which is false. It may be and is wrong to require him to testify to the truth if it would incriminate him, but it cannot be said that, merely because it wrongfully requires him to answer, it compels him to testify falsely. If he answers truthfully, he cannot be punished for perjury; and, as already said, he has two modes of redress if called upon to testify to that which is privileged. He may decline, and claim his privilege, and have his redress by habeas corpus, if imprisoned; or, if he yields, and saves his exception, he can appeal, and have the judgment reversed, as is often done. In this case he made no claim of privilege, and it is everywhere ruled this is a personal privilege which he may waive, and must be held to have waived when he voluntarily answers without objecting that it would criminate him. *State v. Douglas*, 1 Mo. 527, and cases cited. Our conclusion is that the instruction goes too far, and was properly refused.

11. We see no occasion for following counsel in their learned discussion of what constitutes the corpus delicti in perjury. The court, in its first instruction, properly defined the elements of the offense, save in submitting to the jury whether defendant falsely testified that he had not heard of the \$75,000. He next properly instructed the jury as to the amount of proof necessary to convict.

12. There was no error in refusing defendant's sixth instruction, which required the jury to find defendant not guilty, unless they found beyond a reasonable doubt that Stock was employed to secure the passage of the Suburban bill "by direction and authority of the board of directors of said Suburban Railroad Company to secure the passage of said ordinance." This is predicated that no officer of the company was authorized to employ any one to do any illegal act for said company without direct authority of the board of directors. We answer that the board had no such authority itself. It was not a case against the corporation. The evidence was carefully guarded by the court in its sixth instruction, and it was overwhelming, so far as the criminal conduct of Stock and Murrell was concerned, to establish that Stock was the representative of the company, through its president, Turner; and, so far as the

bribery was concerned, it needed no formal action of the board. The board was not indicted or on trial. The evidence fully sustained the charge that Stock was the criminal agent, working in the interest of the company under the direct orders and the full cognizance of the executive head of the company. There was no substantial variance in the proof from the allegation of the indictment.

The same may be said of defendant's seventh instruction. The court fully instructed the jury that the evidence of the agreements between Stock and Murrell and Turner was admitted solely to establish whether such a deposit was made, and its purposes, and that by itself "It does not tend to prove, and should not be considered by you as tending to prove, that the defendant had any knowledge of such deposit."

Again, it is insisted the court erred in refusing defendant's instruction which is as follows: "The court instructs the jury that the true test of whether the alleged testimony given by the defendant before the grand jury was material is this: Was it of such a character that, if true, it would have properly influenced the action of said grand jury in any material matter affecting the alleged investigation by them as to whether one John K. Murrell had been guilty of bribery? And, if the jury find from the evidence that the alleged testimony could not properly have influenced the action of said grand jury with reference to said action, then it is wholly immaterial whether it was true or false, and the jury should find the defendant not guilty." The court had already instructed the jury that, if defendant did know of said deposit, and the corrupt purposes for which it was made, and falsely testified before the grand jury that he did not know of it, he was guilty. To have given defendant's instruction would have submitted to them whether in law the question was material, and contradicted its own instruction. The materiality of the evidence was a question of law, which the court could not have properly submitted to the jury. There was clearly no error in refusing it.

The tenth instruction asked by defendant was correct, but was fully covered by the court's instruction as to the quantum of evidence required to convict of perjury, and to that extent there was no error in refusing it; but the court's eighth instruction contains the same vice already noted in its first instruction, to wit, that it submitted to the jury a question of fact whether defendant had falsely sworn that "he had never heard of the existence of the \$75,000 alleged to have been deposited," or "had ever heard of the existence of the aforesaid \$75,000." Otherwise that instruction was well enough, but, for the error pointed out, was reversible error, because no such assignment of perjury was averred in the indictment.

We have now gone through all the alleged

errors. It remains only to note the evidence tending to establish the agreement between Stock and Kratz as to the bribery of certain members of the council. That evidence was wholly irrelevant to the issue in this case, and its effect could only have been to prejudice the minds of the jury, and impress them with the appalling extent to which corruption had crept into the municipal government of the city. It should have been excluded.

We have unavoidably been compelled to make this opinion of great length, but the importance of the questions raised and so ably discussed by counsel must be our excuse for so doing. This record contains so much uncontradicted evidence of venality that it is little wonder that decent people of all classes are appalled at its extent. The sole consideration of this court necessarily has been to determine whether the defendant was convicted in compliance with the laws of the state. The crime charged is one of the most heinous known to our criminal jurisprudence. If guilty, the defendant should be punished; but it is the high and solemn duty of this court, from which we shall not shrink, to require and exact that, however guilty he may be, he shall be punished only after having been accorded every right and guaranty which the organic and statute law of the state secures to him, and not only him, but to every other person charged with crime, before he can be deprived of his liberty.

We have kept in mind that we are an appellate court. With questions of fact, as such, we have nothing to do, save only to see that there was sufficient legal evidence thereof to be submitted to the jury. The questions of law have received our most careful consideration, and, for the errors pointed out, the judgment must be and is reversed, and the cause remanded to be tried in accordance with the views we have expressed.

FOX and BURGESS, JJ., concur.

STATE v. LEHMAN.*

(Supreme Court of Missouri, Division No. 2.
May 19, 1903.)

PERJURY—MATERIALITY OF TESTIMONY—INVESTIGATION OF GRAND JURY—MATTER INCRIMINATING WITNESS—INSTRUCTIONS—EVIDENCE—OBJECTION MADE TOO LATE—SPECIAL JURY—METHOD OF DRAWING.

1. Under the statutes on the subject, the defendant in a criminal case has no right to have a special jury drawn by chance.

2. An objection to testimony as relating to a privileged communication comes too late when made by motion to strike out after examination and cross-examination without objection.

3. The fact that at the time certain testimony was given before a grand jury that body had already voted to indict in the case under consideration, though they had not actually done so, but were still considering the case, does not render such testimony immaterial, so as to be incapable of supporting a charge of perjury.

*Rehearing denied June 9, 1903.

† See Criminal Law, vol. 14, Cent. Dig. § 1640.

4. The fact that a witness before a grand jury is compelled to testify concerning matters incriminating himself does not excuse him for testifying falsely as to such matters.

5. Where an indictment for perjury alleged that defendant falsely testified that he did not know of a certain deposit, when "in truth and fact he knew of such deposit," an instruction authorizing conviction if defendant had ever heard of the deposit was erroneous.

Appeal from St. Louis Circuit Court; O'Neill Ryan, Judge.

Julius Lehman was convicted of perjury, and appeals. Reversed.

Thos. B. Harvey, Chester H. Krum, Jno. A. Gernez, and Thos. J. Rowe, for appellant. Edward C. Crow, Atty. Gen., C. D. Corum, and Jos. W. Folk, for the State.

GANTT, J. At the December term, 1901, of the circuit court of the city of St. Louis, in Division No. 8 thereof, the grand jury of said city preferred an indictment against the defendant, Lehman, for perjury. As the said indictment is word for word in the same form as the indictment against Harry A. Faulkner, in which an opinion has been handed down on this day, save and except the name of the defendant is substituted for that of said Faulkner, it is deemed unnecessary to set it out in full. The defendant moved to quash the same on the same grounds, practically, that were urged in the argument of these causes in this court, and the motion was overruled, and defendant excepted.

A special venire was ordered on the application of the state, and on its return the defendant moved to quash it, because not summoned and selected according to law, and because contrary to the general spirit of our laws, and in violation of section 22, art. 2, of the Constitution of Missouri, guarantying an impartial jury, etc. On the hearing of this motion it was admitted the jury commissioner selected the jurors from the general petit jury list, and had no separate list of jurors of more than ordinary intelligence, and they were not selected by lot or chance, but the commissioner exercised his judgment in making the selection from the general list of jurors subject to jury duty in said city. The court overruled this motion, and defendant excepted. On the trial of this defendant substantially the same evidence was introduced by the state as to the organization of the municipal assembly of St. Louis, that John K. Murrell and defendant were members of the house of delegates in 1900 and 1901, and the pendency in the assembly of an ordinance known as "Council Bill No. 44," giving and granting certain privileges and franchises to the St. Louis & Suburban Railway Company. The evidence as to the proposition of Murrell to Stock, who represented the Suburban in the matter of getting the franchise, and the corrupt agreement by which Murrell agreed that, if Stock would deposit \$75,000 in the Lincoln Trust Company, to be paid Murrell and other members

of the house of delegates, for whom he claimed to be acting, when the ordinance was passed and signed by the mayor, was shown by the same evidence as that detailed in the opinion in *State v. Faulkner*, 75 S. W. 116. The evidence as to the deposit by Stock and Murrell of the \$75,000 in the said trust company was the same also. After the ordinance passed the council and was sent to the house of delegates, an injunction was issued by the circuit court of the city of St. Louis enjoining the house of delegates from taking any action thereon. While this injunction was still pending, the house of delegates expired by limitation of law, a new house being elected. The evidence tended to show, however, that Murrell and defendant and other members of the old house, whose names were not designated save as "the boys," insisted that they were entitled to the \$75,000, which claim Stock repudiated. It was in evidence that Murrell then, about the 18th of January, 1902, proposed to accept one-half of the sum, and Stock declined to do more than pay any expenses Murrell had incurred in the matter, whereupon Murrell said to him, "the grand jury will take hold of it." In April or May, 1902, the defendant, Lehman, a member of the house of delegates, had a conversation with Paul Reiss, according to the evidence of Reiss, who was also a member of the house of delegates. Reiss was a lawyer, with an office in the Wainwright building, in St. Louis, and prior to this conversation had been retained by defendant in some insurance litigation and some other minor matters. After settling Reiss' fee for the insurance suits, according to Reiss, the defendant, Lehman, said to him: "By the way, I want to consult you concerning a matter which interests the boys of the old house. It is a matter a lawyer ought to take hold of, and, now you are a member of the house, you are best qualified to take this matter up." Thereupon he asked Reiss if he knew one Philip Stock. Reiss told him he did not. Lehman said: "You must know him. He is a prominent brewer, with offices in the Lincoln Trust building." Reiss told him he did not know Philip Stock, a brewer; that he was positive that no brewer had an office there; but that he did know Philip Stock, and defendant said, "That must be the man." He then proceeded to tell Reiss that said Stock had a key to a box in the Lincoln Trust Company, which he said contained \$75,000, and this was to go to "the boys" when the Suburban bill had become a law, and asked Reiss whether or not he would see Stock, and bring about a settlement concerning the sum. Reiss told him he would not act in the matter, and, further, he thought he must be mistaken in the party, Stock; that he knew him, and did not believe he would be connected with any matter of this kind. He further stated that the bill had not become a law because of the injunction, but that "the boys" were always ready to carry out their part of the contract,

or words to that effect. No objection was made to this evidence in chief on the ground that it was a privileged communication, or for any other reason, nor at the cross-examination of the witness, until after a further examination by the court and counsel for defendant, and then Judge Harvey moved the court to strike out the testimony of Reiss, because it had been developed on cross-examination of the witness that the facts were learned under circumstances that made the communication privileged. The court overruled this motion, and defendant excepted. Various witnesses testified in behalf of defendant that his general reputation for truth and veracity, honesty and integrity, was good. F. C. Gadsdorf testified he was present when the defendant gave Reiss a check for \$400 in payment of his services as his attorney; that Lehman and Reiss were together probably 10 or 15 minutes; that he heard their entire conversation, and nothing whatever was said about the \$75,000 being in the Lincoln Trust Company, or anywhere else, or in regard to Philip Stock's connection with that money. Defendant testified in his own behalf, and denied all knowledge of the deposit of the \$75,000, and denied in toto the conversation to which Reiss testified. Other specific evidence may be noted in the opinion.

1. The indictment is not open to the objections urged against it of immateriality of the testimony upon which the perjury was assigned and of repugnancy. We have fully discussed both of these propositions in *State v. Faulkner*, which was argued in connection with this case, and adhere to the conclusions therein reached.

2. The defendant's motion to quash the special venire was properly overruled. Special juries were allowed by the common law, and our Constitution nowhere denies that right. Under the general statute of this state the right to have a special jury drawn by chance is nowhere guaranteed. Given the right to a special jury, it was entirely competent for the Legislature to provide the method, so long as the Constitution was not otherwise violated. This whole question was so fully discussed in *State ex rel. v. Withrow*, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43, we do not feel called upon to again enter upon a defense of the statute. That case was reaffirmed in *State v. Hamey*, 168 Mo. 167, 67 S. W. 620. The very object of the statute is to allow the officer who makes the selection to exercise his best judgment, instead of drawing at random from the whole list of jurors. As said in *State v. Faulkner*, there is no conflict between the special act applicable to St. Louis and the general statute of the state. The Revised Statutes of the United States recognize the right to special juries, and provide they shall be selected as provided by the laws of the state in which the jury is required. Rev. St. U. S. § 806 [U. S. Comp. St. 1901, p. 626].

3. As to the evidence of Reiss, we have

already fully expressed our views in *State v. Faulkner* that it was not a privileged communication. It was not a communication as to a matter or employment within the legitimate scope or province of professional employment. See authorities cited in *State v. Faulkner*. But there is this additional reason why the admission of this testimony is not reversible error in this case: No objection whatever was made to it when it was offered in chief, nor until after the defendant had fully cross-examined the witness. The motion to exclude came too late. We cannot agree with the learned counsel for defendant that the fact that Reiss had been Lehman's attorney, and the circumstances under which the communication was made, was disclosed for the first time on the cross-examination. His relationship was as apparent when he was testifying in chief as it was on the cross-examination. Having permitted him to testify without objection, and having cross-examined him thoroughly, the defendant was too late with his motion to exclude. *Hickman v. Green*, 123 Mo. 173, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39; *State v. Hope*, 100 Mo. 347, 13 S. W. 490, 8 L. R. A. 808; *Maxwell v. R. R.*, 85 Mo. 95; *Hume v. Hopkins*, 140 Mo., loc. cit. 76, 41 S. W. 784; *State v. Marcks*, 140 Mo. 688, 699, 41 S. W. 973, 43 S. W. 1095, and cases cited. Of course, when neither the form of the question nor the preliminary answers of the witness disclose the incompetency of the witness or his evidence, and the opposite party, as soon as it appears to him, promptly moves to exclude it, he is not in default. *State v. Foley*, 144 Mo. 618, 619, 46 S. W. 733. But he is not permitted to speculate upon the evidence, and, after finding it adverse, then moved to exclude. This is the settled doctrine in this state.

4. The proposition advanced in *State v. Faulkner* that, because the grand jurors testified that at the time defendant was sworn and testified before them they had already voted to indict Murrell, is also pressed in this case on the ground that any evidence he might then have given on the subject of the deposit of \$75,000 was wholly immaterial, because that fact had already been established. But for the reasons given in *Faulkner's Case* we hold that the mere fact that they had voted to indict Murrell in no manner divested their authority to continue the investigation of Murrell's offense up to the time, at least, of the returning the indictment into court; and it appears beyond all cavil that when defendant was being examined they were still investigating the charge against Murrell, and the indictment had not been signed by the foreman and returned into court. Until that time, there was no indictment in law against Murrell. It was their duty to inquire and ascertain all the competent witnesses to establish the truth of their indictment, and they were not bound to content themselves with Stock's evidence. While

Stock had testified before them, it was still open to him to refuse to testify as to his own part in the bribery transaction when the case was called against Murrell; and, even if he testified, the jury were at liberty to weigh his evidence as an accomplice in the crime, and the state was bound to prove Murrell's guilt beyond a reasonable doubt, and, if the grand jury could find other witnesses to establish the charge, they were at liberty and required to do so. The inquiry was material, and, if defendant knew of the deposit, the sources of his knowledge were important.

5. As to various objections to the evidence of the transaction between Turner, Stock, and Murrell, that evidence was admitted solely for the purpose of proving that the deposit was made by them, and in fact existed, and the court expressly so limited it in its sixth instruction. Neither was there any error in proving the pending of the ordinance for the passage of which the bribe was put on deposit, nor the fact that the house of delegates was enjoined. This evidence threw light on the motive for the crime charged.

6. It is insisted in this case, as it was in Faulkner's Case, that the court should have given defendant's instruction to acquit the defendant if the grand jury were investigating a charge against defendant at the time he testified before them, and was not notified by them that he could not be compelled to testify against himself. We have examined every authority cited by defendant, and all those we could find in an independent investigation, and, as said in Faulkner's Case, we find no decision which goes to the length contended for by defendant. An examination of the record discloses that every grand juror who testified on this matter distinctly and positively asserted they were investigating the Murrell and Kratz cases when they examined defendant. The Murrell investigation had disclosed that he assumed to act for other members of the house. It was not to be assumed or presumed that every member of the house was a party to the bribery. It was certainly competent to call members of that body to ascertain if Murrell had falsely charged them with being in the conspiracy with him, and their positions as delegates would naturally suggest that they would be the persons most likely to have observed Murrell's conduct, or have heard admissions made by him. While it is absolutely clear that no court or grand jury can compel any person to testify against himself, and while it is against positive constitutional guaranties and against all of our instincts and notions of fairness, right, and propriety that the person who is under investigation should himself be called as a witness without advising him that his conduct is being investigated, and while any incriminating evidence thus obtained from him cannot be used against him in an indictment for the crime which such evidence tends to prove, the further

proposition that, because the prosecuting attorney and the grand jury, or even the circuit court, should erroneously require him to testify, he cannot commit perjury in so doing, is a new and distinct one, to wit, that, because of such error on the part of the grand jury, the defendant is justified in committing willful and corrupt perjury. He at no time objected to testifying, and did not claim his privilege. We think that the great weight of authority and reason alike is opposed to such a doctrine. It is one thing to refuse to answer a question the answer to which would criminate the witness, and when compelled by the order of a court of competent jurisdiction to answer under protest, and another to say that, merely because a court erroneously requires an answer, the witness is at liberty to commit perjury. As we pointed out in *State v. Faulkner*, there are always two legal avenues open to a witness so situated by which he may avoid committing perjury. If, as his counsel insist, he was aware the grand jury suspected him of being implicated in the bribery with Murrell, then he knew enough to decline to criminate himself, and he could have declined to answer; and if the grand jury had persisted, and the circuit court had committed him, he could have been relieved on habeas corpus; or, on the other hand, if he had, under those circumstances, testified to anything criminating, it is clear that under our ruling in *State v. Young*, 119 Mo. 520, 24 S. W. 1088, such incriminating evidence could not have been admitted against him on an indictment for bribery based on his evidence, and, if it had, the judgment would have been reversed. But because he is wrongfully required to testify it is not true or sound to say that he is thereby compelled to commit perjury. If he testifies truthfully, and it criminales him, he cannot be guilty of perjury; nor can his admissions be admitted against him on a trial for the offense about which he testified. While in this particular in this case the record shows he was not being investigated, but Murrell was, we are still of the opinion that, if he had been, he was not justified in committing perjury. While the United States District Court, in one of the cases cited, goes to the length of holding that a motion to quash should be sustained, if truly made, if the witness be indicted for the offense about which he was examined, it did not hold, nor do we think anywhere in the range of English or American decisions, outside of the dictum in *Pipes v. State*, 26 Tex. App. 318, 9 S. W. 614, any adjudication can be found which holds, one guiltless of perjury under such circumstances, and the instruction so declaring was properly refused. See authorities cited on this point in *Faulkner's Case*.

7. We are thus brought to the instructions in the case. The second instruction given by the court of its own motion authorized the jury, if they found from the evidence that the defendant, before such grand jury, "did

then and there falsely swear and testify under oath that he did not know of and had never heard of the existence of the said \$75,000 deposited in the Lincoln Trust Company, and if you further find and believe from the evidence that in truth and in fact the defendant did at the time he so testified well know aside from any information he may have acquired through the newspapers of the existence of the said sum of \$75,000, and that said sum was deposited in a box in the safe deposit vault of the Lincoln Trust Company, and that when he so swore and testified under oath (if you believe and find from the evidence he did so swear) he willfully and corruptly testified falsely, you will find him guilty," etc. While varying somewhat from the form of the instruction condemned in *Faulkner's Case*, it is evident that, like the instruction in that case, it submitted the issue of the falsity of defendant's evidence as to whether he had ever heard of said \$75,000, whereas the indictment on which he was tried assigned no perjury on that part of his testimony, but alleges only that "in truth and fact he knew of said deposit," etc. Under this instruction the jury might have believed that he did not know, but had heard from some source other than the newspapers, of said deposit, and, so believing, would have been justified by this instruction in convicting him of perjury for falsely swearing he had never heard of it. The court had no right to submit an issue not tendered by the indictment, and, so doing, clearly erred. See authorities cited in *Faulkner's Case*. Had the court limited this instruction as it did the third instruction for the state, it would have avoided this error.

The fourth instruction for the state was misleading, in that it left the inference that the fact that defendant was a member of the combine would of itself have been evidence of his knowledge, without further qualifying it by requiring the jury to find the criminal purpose and object of said combine, as pointed out in *Faulkner's Case*.

The first instruction is open to the verbal criticism made that it requires that Murrell and Stock made an "undertaking," but this can be easily remedied on another trial. It should have been submitted whether Murrell, in consideration of a promise or undertaking by Stock to deposit said sum, etc.

The sixth instruction was correct.

The seventh instruction for defendant should have been given. Notwithstanding the proof that Stock and Murrell entered into the agreement and deposited the \$75,000, in the absence of defendant's knowledge thereof it in no way established defendant's guilt. His knowledge was the material fact upon which guilt could alone be based.

The fourth instruction asked by defendant should have been given with the modification required in *Faulkner's Case* to the fourth instruction asked by defendant in that case. With this additional qualification, any state-

ment made to him by Murrell or Murrell and Stock to the effect they had so deposited it, would have been knowledge to which the grand jury would have been entitled, and would have been direct evidence against Murrell.

The sixth instruction for defendant was properly refused for reasons given in *Faulkner's Case*.

Learned counsel have earnestly argued that there was no material evidence tending to corroborate the evidence of Reiss. As this judgment must be reversed, and the cause remanded, for error in the instructions of the court, it would be manifestly improper in us to express our opinion as to the weight of the evidence. There was evidence sufficient to submit the case to the jury.

The judgment is reversed, and the cause remanded for a new trial in accordance with the views above expressed.

BURGESS and FOX, JJ., concur.

BARTLETT v. TINSLEY.

(Supreme Court of Missouri, Division No. 2,
June 9, 1903.)

DOWER—RIGHT TO DOWER—CONVEYANCE BY
HUSBAND ALONE—POSSESSION BY
HUSBAND—NECESSITY.

1. Rev. St. 1889, § 8839, providing that lineal and collateral warranties, with all their incidents, are abolished, but the heirs and devisees of every person having made any covenant shall be answerable thereon to the extent of the lands descended or devised to them in the cases and in the manner provided by law, and devisees shall be answerable to the same extent as provided by law in case of heirs, does not estop a widow from claiming dower in lands conveyed, during the marriage, by her husband alone, until the claims for damages for the breach of the covenant of warranty contained in the deed are satisfied, especially in view of section 4525, declaring that no deed executed by a husband without the assent of his wife, evidenced by her acknowledgment, shall prejudice the dower rights of the wife.

2. Where a deed conveying land is absolute on its face, the right of the widow of the grantee to dower cannot be defeated by parol proof tending to establish a trust in favor of the grantor.

3. Under the express provisions of Rev. St. 1889, § 4535, a widow is entitled to dower though there may have been no actual possession of the land by the husband.

Appeal from Circuit Court, Pike County;
D. H. Eby, Judge.

Action by Harriet Bartlett against Thomas L. Tinsley. From a judgment for plaintiff, defendant appeals. Affirmed.

Ball & Sparrow and N. W. Morrow, for appellant. J. H. Blair & Son, for respondent.

Statement of Case.

FOX, J. This was a suit instituted by Harriet Bartlett, widow of William H. Bartlett, deceased, for the assignment of dower in lots 1, 2, 5, and 6 in block 19 in William

¶ 2. See *Dower*, vol. 17, Cent. Dig. § 48.

Luce's addition to the city of Louisiana, Pike county, Mo. It was instituted on the — day of May, 1898, and tried in December, 1898. There was judgment for plaintiff, a motion for a new trial, arrest of judgment, and appeal duly perfected.

The lots in question are a part of a tract of 70 acres conveyed to William H. Bartlett, husband of respondent, by deed from his mother, Elizabeth Mann, and his stepfather, Marshall Mann, dated April 22, 1822, the consideration being parental love and affection. On the 4th day of February, 1830, respondent was married to the said William H. Bartlett, and on the 18th day of March, 1830, the said Bartlett executed a power of attorney, in which he was not joined by respondent, vesting his attorney with full power and authority to sell and convey the said tract of land. The same was sold under the power given, and a deed executed to one Edward Charless on the 10th day of November, 1830. The deed contains the following covenant of warranty: "And I, the said Bartlett, doth further covenant and agree for himself, his heirs, executors and administrators to warrant and defend said title in the said Edward Charless free from all claim or claims, or by any person in, through, or by him the said Bartlett, or in, through or by any other person or persons whatsoever, or by any nature whatever in the premises fully and completely." The appellant claims title through mesne conveyances from Charless, and about which there is no controversy. W. H. Bartlett, husband of plaintiff, died at Yonkers, N. Y., on the 11th day of February, 1893, leaving a large estate. Plaintiff testifies that she knew about the execution of the power of attorney by her husband to Mann shortly after their marriage; that she was not asked to sign it. It sufficiently appears from the pleadings and evidence in the cause that the property in question is situated in Luce's addition to the city of Louisiana, embracing the resident portion of said city.

The letter of Mann, requesting power of attorney from W. H. Bartlett, was introduced in evidence. It is as follows:

"Louisiana, February 20th, 1830.

"Dear William: A short time after I wrote to you I tuck a notion to go to Tennessee, and just got home last nite, and I received your favor of the 27th December, which gave me great pleasur to hear from you. When I was in Tennessee I formed an acquaintance with a lady, an old made about thirty years of age. I set in to coting of her and got her consent to marry, and I am to return back and marry her in May next. She is a verray fine woman, strict methods and has about 12 or 15 slaves and sum money. She is not as well accomplished as I would wish; I would have married her when I was there but my embarresments kept me from it and if you will doo me the favor to let me sell this peas of land that you have hear it will cler me of my embarresments.

I can get a good price for it and I will do more than double reward you for your goodness in so doing. I can sell my property hear in town, but I do not wish to sell it for I wish to have a home to grow too when I marry, or I can sell Tom, but to sell him is like parting with a child; and if you conclude to let me sell the lands hears is the Number and description of the land enclosed in the within letter. Yours and your ladys company would be verray gratifying to me if I could have the pleasur of enjoying that happiness. Sanders got a fall from a horse about two weeks a gow and it had liked to killed him. He got hold of your letter that you wrote to me and he accused me of writing to you but I denied it. I wish you to not let him now anything about my writing to you concerning his conduct, him and me will start in a few days on board of ower boat to Fever river. I wish to get out of my embarresments before I marry for I doo not wish to deseave the person that I am going to marry as she is not acquainted with my circumstances all tho she is very well acquainted with my fathers family for she lives about two miles from them. Pheby and Sam Shaw sends their best respects to you and Mrs. Bartlett. Sanders and my best love to Mrs. Bartlett nothing more at present but remains yours sincerely,
M. Mann.

"W. H. C. Bartlett.

"N. B. Pleas send me a power of attorney to sell the land if you can grant me the favor that I requested of you and I will give you any security what you may request.

"W. H. C. B.

M. Mann."

The power of attorney was executed by Bartlett as requested; but his wife, now the respondent, did not join in such instrument. Marshall Mann, in pursuance of the power of attorney executed and delivered to him, conveyed the land to one Charless. There was some testimony tending to show that Bartlett had never been in the actual possession of the land in which the dower of the plaintiff is sought to be admeasured, and that neither Marshall Mann nor Bartlett had any property at the time of the execution of the deeds introduced in evidence, and that Mann was financially embarrassed. It is disclosed by the record that a jury had been impaneled to try this case, and at the close of the evidence, by agreement of parties, the jury was discharged, and the cause submitted to the court.

Appellant prayed the court to give instructions as follows: "The court instructs the jury that under the pleadings and all the testimony given in evidence in the case the verdict should be for the defendant. The court instructs the jury that if you believe from the evidence in the case that the conveyance from Marshall Mann and wife of April 22, 1822, to W. H. Bartlett, read in evidence in this case, was made by said Mann not for the purpose of conveying the ownership of said property to said Bartlett, but for the purpose

of having said Bartlett hold the title for him, the said Marshall Mann, and that the same was so held by said Bartlett until the execution by him of the power of attorney, read in evidence in this case, of date November 15, 1830, from said Bartlett to said Mann, and that the same was executed by him for the purpose of reinvesting said Mann with the title to said land for his own use and benefit, or for the purpose of permitting him to dispose of the same for his own use and benefit, in accordance with the original purpose of the conveyance of said land from Mann to Bartlett as hereinafter stated, then the verdict should be for defendant." Which instructions the court refused to give. To which ruling and action of the court defendant duly excepted at the time and saved his exceptions.

Upon the submission of the cause to the court, it made the following finding and entered the decree as herein quoted:

"Thursday, December the 15th, 1898. Harriet Bartlett, Plaintiff, v. Thomas L. Tinsley, Defendant. Suit for the Assignment of Dower. Now at this day come the parties by their counsel, and, a jury having been waived by said parties all and singular, the matters are submitted to the court, which, having been seen and heard, the court doth find that the plaintiff, Harriet Bartlett, on the 4th day of February, A. D. 1830, married William H. Bartlett at the city of Newport, in the state of Rhode Island; that she lived with him thereafter as his wife until the time of his death; that the said William H. Bartlett died on the 11th day of February, A. D. 1893, in the city of Yonkers, county of Westchester, state of New York. The court further finds that during the existence of said marriage William H. Bartlett was seised and possessed in fee simple of the following real estate, situated in the county of Pike and state of Missouri, to wit: Beginning at a stake on the west boundary line of the county commissioner's land, from which stake a white oak 24 inches in diameter bears north, 89 degrees east, 52 links, and a white oak 18 inches in diameter bears north, 75 degrees west, 47 links; thence runs west 35 chains and 70 links to the west boundary line of section number 18 at a stake from which a white oak 14 inches in diameter bears north, 62 degrees east, 5 links, and a dogwood 6 inches in diameter bears south, 6 degrees east, 13 links; thence south 14 chains and 70 links with said line to a black oak; thence east 20 chains to a stake; thence south 7 chains and 10 links to a stake on the south boundary line of said section; thence east with said line to the quarter section corner; thence north 18 chains to a stake on the commissioner's line; thence with said line to the place of beginning—containing 70 acres, and being a part of said section 18 in township 54, range 1 west. The court further finds that during the existence of said marriage, to wit, on the 15th day of November,

75 S.W.—10

A. D. 1830, said William H. Bartlett, by his lawful attorney in fact, one Marshall Mann, sold and conveyed said real estate to one Edward Charless in fee simple, and that the plaintiff was not a party to said conveyance, and that she did not then nor at any other time relinquish, convey, or otherwise dispose of her right to dower in said real estate. The court further finds that said land has been subdivided into what is known as 'Luce & McAllister's Addition,' and 'William Luce's Addition' to the city of Louisiana, in the county of Pike, state aforesaid, and said additions have been divided and laid out into streets, lots, and blocks duly numbered, and plats thereof giving the dimensions of said lots and blocks were duly filed in the office of the recorder of deeds of the said county of Pike, as required by law; and that the defendant, Thomas L. Tinsley, is, and was at the time of the institution of this suit, in possession of the following part of said estate, claiming to own the same in fee simple as a remote grantee of said William H. Bartlett, to wit: Beginning at the southeast corner of block 19 of William Luce's addition to the city of Louisiana, Missouri, which is also the northwest corner of Georgia and Fourteenth streets of said city; thence northward on the west line of Fourteenth street one hundred and fifty feet; thence westward parallel with Georgia street one hundred and twenty feet; thence southward parallel with Fourteenth street one hundred and fifty feet to the north line of Georgia street; thence eastward on the north line of Georgia street to the place of beginning—the same being lots five and six and thirty feet off of the south ends of lots one and two in block number 19 of William Luce's addition to the city of Louisiana, Pike county, state of Missouri. The court further finds that the plaintiff is entitled to dower of the one-third part of the real estate above described, and which the defendant is in possession of and claiming as his own, to hold and enjoy same during her natural life; and that on the 2d day of December, A. D. 1893, the plaintiff demanded of the defendant that he assign, admeasure, and set apart to her her said dower interest in said real estate, and that the defendant failed and refused so to do, and wrongfully deformed her of her dower therein. Wherefore it is adjudged and decreed by the court that the plaintiff is entitled to dower in said real estate, and that she is seised of the one-third part thereof for and during her natural life, and that she recover the damages that may be assessed for the wrongful deformation of her dower interest in same. It further appearing that said real estate is not susceptible of division without great injury thereto, the appointment of commissioners to assign and admeasure dower is by the consent of the parties hereto waived. It is therefore considered and adjudged by the court that the plaintiff have and recover of the defendant all costs and charges in and about

this cause laid out and expended, and ordered that execution may issue therefor."

From this decree appellant, in due form, has prosecuted his appeal.

Opinion.

The contentions of appellant, as disclosed by this record, are: (1) The husband of appellant was never seised of an estate in fee of the premises in question. He merely held them in trust for another. (2) The property was conveyed by deed of general warranty by the husband of respondent in 1830, which was not executed by the wife, and her inchoate right of dower, if she had any, constituted a breach of the covenant at the time it was made. (3) The husband died in 1893, and the dower right of the widow, if any, was subject to the provisions of section 8839, Rev. St. 1889, which operates as an estoppel against the widow until all claims for damages for breach of the covenant contained in Bartlett's deed are ascertained and satisfied. (4) Parties resident in this state should not be compelled to go into a foreign jurisdiction in order to hunt up property to satisfy any damages sustained by the breach of a covenant of warranty in the conveyance of land located here.

It will be observed that this case presents identically the same questions involved in the case of *Bartlett v. Ball*, 142 Mo. 28, 43 S. W. 783. However, it is to be noted that, while the same questions are involved in this controversy as were in that, the precise question as is presented by the declarations of law prayed for in this case were not urged in the *Ball* Case. Counsel for appellant very earnestly and ably presents the questions disclosed by the record, and challenges the correctness of the legal conclusions reached by Judge Sherwood in the case of *Bartlett v. Ball*, supra, and requests this court to review that case. The contention in this case that plaintiff is estopped, under the provisions of section 8839, Rev. St. 1889, until all claims for damages for breach of the covenant contained in Bartlett's deed by attorney in fact are ascertained and satisfied, was the main question presented in the case of *Bartlett v. Ball*, supra. Sherwood, J., fully discussed that feature of the controversy, and, that we may fully appreciate his review of the authorities and the conclusion reached, we here quote from his opinion on that subject. He says: "The law of 1825 (volume 1, revision of that year, page 333), when speaking of a widow's seeking enforcement of her dower, declares: 'Nor shall she be entitled to dower in any lands, tenements or hereditaments, until all just debts due or to be due by her deceased husband have been paid.' This law was repealed in 1835. Touching this law it has been ruled that it has no bearing in favor of any one except a creditor of the estate, to whom, of course, a debt is owing. As the matter is concisely put in *Thomas v. Hesse*, 34 Mo. 13, 84 Am. Dec. 66: 'The meaning of

the law is that, among claimants of rights against the estate of a deceased husband, creditors claiming payment of their just debts are to be preferred to the widow claiming dower.' In the present instance defendant does not pretend to occupy the attitude of a creditor, and certainly a third person cannot set up those debts as a bar to the widow's dower. Id. In *Walker's Adm'r v. Deaver*, 79 Mo., loc. cit. 678 et seq., Phillips, C., speaking of the husband's liability on his covenant of warranty in circumstances like the present, said, 'The covenant created an obligation, but not a debt.' See, also, *Nanson v. Jacob*, 88 Mo., loc. cit. 343 [6 S. W. 246, 3 Am. St. Rep. 531], as to the distinction to be taken between a claim for money 'due' and one based on unliquidated damages. Besides, in the answer of defendant, there are no breaches of the covenant against incumbrances assigned, nor is it alleged that an eviction had occurred in consequence of any such breach, nor that an action had been brought for dower, judgment recovered, and that judgment satisfied. There could be no breach of the covenant against incumbrances until something of the sort aforesaid had occurred as the basis whereon to assign such breach, unless it were a breach occurring at the time of making the covenant, for which only nominal damages would have been recoverable. *Walker v. Deaver*, supra, and cases cited. There are other reasons for doubting whether plaintiff is either estopped or barred from maintaining her action. At common law the heir was not bound by the obligation of his ancestor, only when expressly named; so that in an action against him as heir the averment was necessary that he was named in and bound by the obligation; and, in addition to that, another requisite to recovery was that he should have assets by descent sufficient to meet the demand. And the same doctrine prevailed as to the necessity of expressly mentioning a devisee in a covenant in order to bind him. *Rawle on Cov.* [5th Ed.] §§ 309, 311, 312; *Tiedeman, Real Prop.* [Enlarged Ed.] § 856. Nor could the land be followed in his hands. He took the land clear of all liabilities. Id.; *Plasket v. Beeby*, 4 East, Rep. 485; *Flunket v. Penson*, 2 Atk. 290. Upon this feature the learned author already cited observes: 'To prevent the injustice of a devise depriving a specialty creditor of means of satisfaction, the second section of the statute of fraudulent devises (3 Will. & Mary, c. 14), reciting that many persons, after having bound themselves, and their heirs, had died seised of lands, and to the defrauding their creditors had devised the same, so that the creditors had lost their debts, declared that all wills, etc., should be taken, as against such creditors and their executors, etc., to be void and of no effect; and the third section gave the creditors a right of action upon their specialties against the heir and devisee jointly, and the devisees were made liable in the same manner as heirs,

notwithstanding alienation by them.' *Hawley* on Cov. § 311. In *Sauer v. Griffin*, 67 Mo. 654, it was held that an action could not be maintained on the bond of the testator against the devisee, nor the land devised followed in the hands of the latter, and that in this regard we were then governed by the provisions of the common law. This was in 1878. At the next revising session of the Legislature the statute law on this subject (Rev. St. 1845, p. 220, c. 32, § 8; 1 Rev. St. 1855, p. 856, c. 32, § 8; Gen. St. 1863, p. 442, c. 108, § 7) was amended by the passage of section 3944, Rev. St. 1879, which is now section 8839, Rev. St. 1889, which is the following: 'Lineal and collateral warranties, with all their incidents, are abolished; but the heirs and devisees of every person who shall have made any covenant or agreement, shall be answerable, upon such covenant or agreement, to the extent of the lands descended or devised to them, in the cases and in the manner prescribed by law [and devisees shall be answerable to the same extent as provided by law in case of heirs].' The words in brackets indicate the amendment. As under our laws of administering estates the obligations of the decedent, whether testate or intestate, bind the assets of the estate in the hands of the heir, no matter what form those obligations may assume, and as the section quoted makes a devisee equally answerable with an heir, it must be held, speaking in a general way, that the defect previously existing in the law was cured by the amended section. But further observations on that section and its application to the facts of this particular case are thought to be pertinent. It is to be noted that the covenant in question, though it mentions heirs, does not mention devisees, so that under the common law then prevalent it is clear that the devisee was not bound by that covenant at the time of its execution. Under these considerations the question arises whether the section under comment is applicable in any event to this covenant, and, if so applicable, whether it would not be retrospective in its operation. A law is always construed to be prospective 'unless the Legislature has so explicitly expressed its intention to make the act retrospective that there is no place for a reasonable doubt on the subject.' *Black's Const. Law*, par. 198, p. 544. See, also, *Leete v. Bank*, 115 Mo. 184, 21 S. W. 788, and cases cited; *Id.*, 141 Mo. 574, 42 S. W. 1074. Nor is it to be forgotten that retrospective laws are forbidden ex nomine by our state Constitution, and when this is the case it is immaterial whether or not the act interferes with vested rights. *Cooley's Const. Lim.* (6th Ed.) pp. 454, 455; *Black's Const. Law*, par. 197, p. 543. There is nothing, however, in the section which gives indication of other than prospective operation. If it did, it would contravene the Constitution. The aspect of the section is altogether toward the

future. It lets 'the dead past bury its dead.' And, as the wife's right to dower is inchoate, it is expectancy, and does not become vested until the death of the husband, it follows, of course, that such right may be modified or entirely abolished by the Legislature without contravening any vested right protected by the organic law. *Black's Const. Law*, 430, 431; *Cooley, Const. Lim.* 440, 441, and cases cited; *Venable v. Railroad*, 112 Mo. 103, 20 S. W. 483, 18 L. R. A. 68. But it is not thought that the section under consideration was intended to affect, obstruct, or defeat the inchoate dower right of a wife, or such right when it becomes absolute in a widow by reason of her husband's death. The Legislature of this state, over fifty years ago, enacted the following section in regard to dower: 'No act, deed or conveyance, executed or performed by the husband, without the assent of his wife, evidenced by her acknowledgment thereof, in the manner required by law to pass the estates of married women, and no judgment or decree confessed by, or recovered against him, and no laches, default, covin or crime of the husband, shall prejudice the right and interest of the wife, provided in the foregoing sections of this act.' Rev. St. 1835, p. 228, § 7. This section has remained on our statute books ever since. Rev. St. 1845, p. 431, c. 54, § 8; 1 Rev. St. 1855, p. 670, c. 56, § 13; Gen. St. p. 521, c. 130, § 18; Rev. St. 1879, § 2197; Rev. St. 1889, § 4525. It is inconceivable that the Legislature should so sedulously and for so many years guard the inchoate and vested dower right of wife or widow by the strong and explicit terms of the above section, and yet in 1879 adopt a section which would absolutely defeat that right, should the wife become a devisee. See the forcible observations of *Gantt, P. J.*, on section 4525, in *Blevins v. Smith*, 104 Mo., loc. cit. 590, 591, 16 S. W. 213, 13 L. R. A. 441. We are therefore of the opinion that a reasonable construction of the two sections requires that, in so far as the widow's dower is concerned, but no further, she may still be a devisee, and her mere dower right remain unaffected. This construction, we think, best comports with the legislative intention. Furthermore, the law of 1825, already quoted, relates only to 'just debts due or to be due'; and in England, upon a similar statute, it was ruled that, as it only spoke of 'debts and actions of debt,' that an action could not be maintained against a devisee of one who had given 'covenants for title.' *Wilson v. Knubley*, 7 East, 134. To remedy this, an amended law was passed, which included 'covenants' as well as 'debts.' Moreover, it will not be presumed that the Legislature intended that the act of 1825 should operate beyond the boundaries of this state, and, had such been the intention, it would have been wholly inoperative. *Wilson v. Railroad*, 108 Mo. 588, 18 S. W. 286, 32 Am. St. Rep. 624, and cases cited; *State v. Gritzner*, 134 Mo. 512, 36 S.

W. 39. In no point of view, therefore, can the judgment recovered by defendant be permitted to stand."

We have carefully reviewed the authorities cited in the opinion, and find that they fully support the conclusions reached. The opinion is an able and exhaustive review of the authorities upon that subject, and is a full and fair discussion of the point presented. If the views there expressed and the conclusion reached as to the estoppel of a widow in her claim of dower needs any additional emphasis, we will quote the positive and emphatic position taken by this court in the case of *Blevins v. Smith*, 104 Mo., and incidentally referred to by the learned judge in the *Ball* Case. The court very forcibly announced the rule as to the interpretation of our statute in respect to dower. It said, speaking through Gantt, J.: "We have, by statute, adopted the common law in regard to dower. Lord Coke says: 'There be three things highly favored in law—life, liberty, and dower.' Chief Justice McKean, in *Kennedy v. Nedrow*, 1 Dall. 415 [1 L. Ed. 202], asserts that 'dower is a legal, an equitable, and moral right. It is favored in a high degree by the law, and, next to life and liberty, held sacred.' Strong as these terms are, they are strengthened by our statute. Section 4525, Rev. St. 1889: 'No act, deed or conveyance executed or performed by the husband without the assent of the wife, evidenced by her acknowledgment thereof, in the manner required by law to pass the estate of married women and no judgment or decree confessed by or recovered against him, and no laches, default, covin or crime of the husband, shall prejudice the right and interest of the wife, provided in the foregoing sections of this chapter—that is to say, the sections securing the widow her common-law and statutory dower. Now, at common law, and by our statute reaffirming it, 'the right of dower attaches whenever there is a seisin by the husband, during the marriage, of an estate of inheritance, and, unless it is relinquished by the wife in the manner prescribed by law, it becomes absolute at the husband's death.' 'It is a right in law fixed from the moment the facts of marriage and seisin concur, and becomes a title paramount to that of any person claiming under the husband by subsequent act.' *Grady v. McCorkle*, 57 Mo. 172 [17 Am. Rep. 676]." We see no reason for departing from the law as declared by the court in *Bartlett v. Ball*. It is comparatively a recent utterance of this court, correctly declares the law, and finds support both in reason and authority.

This leaves but one question to be noticed; that is, the contention that Bartlett simply held the land in suit in trust for Marshall Mann, hence did not have such an estate in the land as would entitle the respondent to dower. In other words, it is claimed that, while the deed to Bartlett from Mann was

absolute on its face, and conveyed an estate in fee, yet the facts in this case would warrant the conclusion that there was implied trust. There is no writing, so far as the record in this case discloses, creating a trust; hence, if any effort was made by the parties at the time to attach a trust to this land, it must have been done by parol. If the conveyance of this land by Mann to Bartlett was a gift, the rule announced by Thornton on Gifts would apply. It is there said in the text: "A gift by a deed absolute on its face will defeat a parol trust or reservation in the donor's favor. It has the effect of an unconditional gift, the trust being void." This is not that character of case in which a parol trust, even if positively shown, could defeat the claim of the widow for dower. If Marshall Mann was alive, and in possession of this land, under a reconveyance to him by Bartlett without his wife joining in the conveyance, in a suit against him for the assignment of dower he would clearly be estopped from asserting a parol trust in his favor. As against this widow of Bartlett, the appellant and his grantors, by virtue of Marshall Mann's deed, succeeded only to the rights that he had. It cannot be said that they were innocent purchasers. The deeds were all of record. First, the deed from Marshall Mann and wife to Bartlett, conveying an absolute title to this real estate; the power of attorney from Bartlett to Mann without his wife being joined; the deed from Mann as attorney in fact for Bartlett to Charles, with no relinquishment of dower by the wife. All of these purchasers had constructive notice of these deeds, and notice as to whose interests were conveyed to them. We have examined the evidence in this cause, and, even viewing it in the most favorable light for appellant, we think it absolutely fails to establish a trust. There are many cases in equitable jurisprudence where, on account of fraud or mistake, resulting trusts are declared upon parol evidence. *Wels v. Heitkamp*, 127 Mo. 23, 29 S. W. 709; *Price et al. v. Kane*, 112 Mo. 412, 20 S. W. 609. This does not belong to that class of cases. The deed from Marshall Mann and wife to Bartlett was absolute on its face, and for this court to announce the precedent from the facts in this case that a parol trust existed, and that Bartlett was simply a trustee, and thereby defeat his widow's claim of dower, would not be in harmony with the letter or spirit of our statute on that subject.

There was no error in the refusal of the trial court to give instruction No. 2, asked by the defendant.

W. H. Bartlett died in 1893; hence the law in force at the time her dower interest attached was section 4535, Rev. St. 1889, which provides: "The widow shall have dower of real estate, although there may have been no actual possession or recovery of possession by the husband in his lifetime,

and although the same may have been held by him as joint tenant, or tenant in common, or copartner." It is apparent from this section that no actual possession on the part of Bartlett was necessary in order to entitle the widow to dower. *Davis v. Evans*, 102 Mo. 164, 14 S. W. 875.

We have carefully considered all the facts in this case as disclosed by the record, and we are of the opinion that the findings of the trial court were correct, and its judgment will be affirmed. All concur.

ORDELHEIDE v. WABASH R. CO.

(Supreme Court of Missouri, Division No. 2.
June 9, 1903.)

RAILROADS—LIABILITY FOR FIRES—CONTRACT TO HOLD HARMLESS—PUBLIC POLICY.

1. A contract by a railroad company to relieve itself from liability for fire in a building, communicated thereto by its negligence, is not against public policy; not being with a passenger or shipper, or in regard to a contract of carriage.

Appeal from Circuit Court, Montgomery County; E. M. Hughes, Judge.

Action by E. F. Ordelheide against the Wabash Railroad Company. The St. Louis Court of Appeals reversed a judgment for plaintiff, and on a dissent of one of the judges the cause was transferred to the Supreme Court. Judgment of circuit court reversed.

Geo. S. Grover, Geo. Robertson, and G. Pitman Smith, for appellant. A. H. Drunert, J. D. Barnett, H. W. Johnson, and C. W. Wilson, for respondent.

GANTT, J. This appeal is in this court by virtue of a dissent of one of the judges of the St. Louis Court of Appeals. It was argued and submitted, but, owing to the fact that a case growing out of the same fire was pending in the court in banc, it was deemed best to await the opinion of the whole court on some of the questions involved in both appeals. The opinion of the court in banc will be found reported in *Wabash R. Co. v. Ordelheide*, 72 S. W. 684.

The pleadings and agreed statement of facts upon which this case was determined in the circuit court and Court of Appeals are fully set out in the opinion of Judge Bland in the St. Louis Court of Appeals, 80 Mo. App. 357, and we adopt the same, as follows:

"The petition is as follows:

"Plaintiff states that the defendant is a corporation duly incorporated under and by virtue of the laws of the state of Missouri, and was at the time of the grievance herein-after mentioned, as such corporation, the owner and occupier of a certain railroad, together with depots, switches, side tracks, and facilities for receiving and unloading

freight, stock, and goods, which said railroad runs through the counties of Warren and Montgomery, in the state of Missouri, and, as said corporation, was at said time operating, working, managing, and running its said railroad by its agents, servants, and employees, and using thereon its locomotives, engines, cars, and trains; that on or about the 6th day of April, 1895, the plaintiff was the owner of a certain building, used as a warehouse, elevator, or grainhouse, together with horse power, belting, and all appliances and machinery necessary and required to run, work, and operate the same, which said building, with the said horse power, belting, appliances, and machinery therein, stood adjoining or near by the depots, switches, side tracks, at or near the defendant's station or depot at Wright City, in said Warren county, all of which was of the value of two thousand dollars; that on or about said date the defendant so carelessly and negligently operated, worked, run, and managed its said railroad, and carelessly and negligently used thereon defective and insufficient locomotives and engines, and so carelessly, negligently, and unskillfully operated, worked, and managed and run its locomotives, engines, cars, and trains on its said switches, railroad, and side tracks, that fire escaped from its locomotives and engines, and was communicated to plaintiff's said building, warehouses, elevator, or grainhouse, and the same, together with said horse power, belting, and appliances and machinery therein as aforesaid, were damaged and destroyed, to plaintiff's damage in the sum of two thousand dollars. Wherefore, by reason of the premises, the plaintiff says he is damaged in the sum of two thousand dollars, for which and costs of suit he asks judgment."

"Defendant answered as follows:

"Now comes the defendant in the above-entitled cause, by its attorneys, and, for its answer to the petition of plaintiff therein filed, admits that it is, and was on the 6th day of April, 1895, a corporation duly incorporated under and by virtue of the laws of the state of Missouri. Defendant denies each and every other allegation contained and set forth in plaintiff's petition. For other and further answer to the petition of the plaintiff, defendant says that on or about the 1st day of November, 1892, the plaintiff herein entered into a certain written and printed agreement with the defendant for the lease of certain ground then belonging to the defendant in Warren county, Missouri, in said agreement described, for the purpose of erecting thereon a certain grainhouse, said agreement expiring, under its terms, on or about the 31st day of October, 1897, which said agreement was in words as follows, to wit:

"This agreement, made and entered into this first day of November, A. D. 1892, by and between the Wabash Railroad Co., party of the first part, and E. F. Ordelheide, of

¶ 1. See *Contracts*, vol. 11, Cent. Dig. § 475; *Railroads*, vol. 41, Cent. Dig. § 1665.

Wright, in the county of Warren, and state of Missouri, party of the second part.

““Witnesseth, that the said party of the first part, for and in consideration of the sum of one dollar per annum, in advance, to said party of the first part paid by said second party, and upon the express condition and stipulation that said second party shall assume all risk of fire from every cause, and shall hold and keep harmless said first party from any and all damages whatsoever, from fire or any other cause, to any building or buildings that may be erected on the land herein leased, or their appurtenances or contents, which guarantee enters into and forms part of the consideration that induces said first party to make this lease; and for the further covenants and agreements hereinafter contained on the part of the second party to be kept and performed, hereby grants unto the said second party the right to occupy and use for the purposes of grainhouse, the following described part of the grounds of the said party of the first part, at Wright, county of Warren, and state of Missouri, to wit: At a point on the west line of South street, twenty-three (23) feet north of the center of the Wabash main track; thence northward along the south side of South street forty-five (45) feet to the north line of Wabash right of way; thence westward along the right of way line one hundred and ten (110) feet; thence southward at right angle thirty-eight (38) feet to a point seven and one-half ($7\frac{1}{2}$) feet north of the center of the Wabash house track; thence eastward parallel to the house track, and seven and one-half ($7\frac{1}{2}$) feet from the same, to the point of beginning.

““And said first party further covenants to and with said second party, that said second party shall have the right to occupy and use such portions of land, selected and designated as aforesaid, for the location of said grainhouse, for and during the full term of five (5) years from the date of this agreement, unless the occupancy of said premises shall be sooner terminated in the manner hereinafter provided.

““And the said second party covenants and agrees with the said party of the first part, to pay all taxes that may be assessed on said grainhouse and the herein leased premises, and to conduct the business of storing and forwarding grain or other property, according to such rules as the party of the first part may prescribe in relation to such business at its stations generally.

““And the said second party hereby further agrees for himself, his heirs or assigns, that they hereby assume all risk of fire, from any cause whatsoever; that if any insurance is effected during the continuance of this lease or any renewal thereof by said second party, or any party interested therein, on said grainhouse or the contents thereof, that said second party will, before such insurance is effected, exhibit this lease to the agent or agents, officer or officers of the insurance company or

companies through whom said grainhouse is to be insured, and procure the endorsement hereon of said agent or agents, officer or officers, and also upon the policies of insurance issued by them or any renewal thereof, to the effect that said insurance company will not, under any circumstances, bring or cause to be brought any claim or action at law against the party of the first part, its successors or assigns, for damages occurring during the term of this lease, or any renewal thereof, by fire or otherwise, to the said grainhouse or appurtenances erected on said land, or to the contents thereof.

““And it is hereby mutually agreed between the parties hereto, that in case said grainhouse shall, at any time during the continuance of this agreement, be destroyed by fire or otherwise, the contract shall not cease and determine by reason thereof, but the said second party shall be allowed thirty (30) days within which to rebuild the same; and in case the said grainhouse shall not be, by said second party, rebuilt in all respects equal to one so destroyed, within thirty days from the time of the destruction by fire or otherwise, then this contract shall, at the option of the party of the first part, cease and determine, and be no longer binding upon the parties thereto.

““And the party of the second part also further agrees with the party of the first part, that he will remove said grainhouse from off the grounds of said party of the first part at any time during the aforesaid term of five years (5) after having received from the said party of the first part — days' notice to do so.

““And the party of the first part agrees to recognize said grainhouse as the property of the party of the second part, and permit him to remove the same, at any time, from the premises of the party of the first part.

““And it is also expressly understood between the parties hereto, that at expiration of the time mentioned for the continuance of the right herein granted to the second party, the said second party shall have reasonable time for removing said grainhouse from off the ground of the party of the first part, said removal to be at the expense of said second party; and till such removal, the provisions of this lease regarding damages occasioned by fire, or otherwise, shall remain in full force and virtue.

““And said second party hereby agrees that he will not sublet said leased land nor assign nor transfer this agreement without the consent in writing of the general manager of the party of the first part, endorsed hereon, and subject to all the conditions, covenants, limitations and restrictions of this lease, and that he will use said leased land for no other purpose than that contemplated by the terms of this contract.

““And the said second party hereby further agrees to paint all buildings erected by him on the herein leased premises a color in

conformity with the uniform color established by said party of the first part for its buildings generally.

"And it is distinctly understood and agreed between the parties hereto that in case the second party shall make default in any of the covenants on his part, to be kept and performed, or shall insure said grainhouse on said leased land without procuring the endorsement hereon, as hereinbefore provided in that respect, then in that case it shall and may be lawful for the said first party, its assigns, successors, agent or attorney, at its election, to declare this agreement at an end, and into or upon said premises, with the said grainhouse and appurtenances hereon or any part thereof, to enter with or without process of law, and the said second party or any persons occupying said premises and said grainhouse or appurtenances, to expel, remove and put out, using force as may be necessary for that purpose, and occupy and possess said premises, and hold and occupy the grainhouse and appurtenances thereon till they can be removed or the conditions of this lease shall have been complied with by said second party; but no action or proceeding under this paragraph by the party of the first part shall in any manner release the party of the second part from the obligations and duties assumed as regards damages occasioned by fire, or otherwise, as provided for in this agreement of lease."

"Further answering, defendant says that, for the various considerations named in said agreement, the plaintiff herein agreed to assume, and by said contract did assume, all risk of fire to his property then or thereafter to be located upon defendant's land as aforesaid, from any cause whatever, and that under said agreement, for said consideration, the plaintiff further assumed all risk of fire from every cause, and undertook and agreed to hold and keep harmless the defendant from any and all damages whatsoever from fire or any cause to any building or buildings that might be erected upon said land, or their appurtenances and contents. Wherefore defendant says that plaintiff ought not to have or maintain this case, and, having fully answered, prays to be discharged, with its costs."

"The issues were submitted to the court on the following agreed statement of facts, to wit:

"It is hereby agreed by and between the parties hereto as follows:

"First. That the property sued for is correctly described in the petition, and was of the value therein stated, and was destroyed by fire on the day, at the place, and in the manner alleged in the petition.

"Second. That the lease between the parties thereto, E. F. Ordeltelheide and the defendant, Wabash Railroad Company, dated on the 1st day of November, 1892, running five years from the date thereof, was executed

by said parties as therein set forth, and that a correct and true copy of said lease is set out in the defendant's answer herein, and proof thereof is hereby dispensed with in this case.

"This agreement shall constitute a part of the record in the above-entitled cause, and may be introduced in evidence in support of a demurrer, motion to strike out, reply, or other pleadings to be hereafter filed by the plaintiff in said cause, or upon trial thereof."

The petition alleges and the agreed statement of facts admits that the building of plaintiff was constructed on defendant's right of way under a contract in which plaintiff expressly stipulated that the plaintiff "would assume all risk of fire from any cause whatsoever"; that the warehouse was destroyed by fire negligently put out by defendant's servants. The stipulation is comprehensive enough to include within its terms fire caused by defendant's own negligence; but plaintiff insists that, however broad the language, it cannot cover defendant's negligence, because a common carrier cannot contract against its own negligence, such a contract being against public policy, and therefore void. In *Insurance Co. v. C. & A. Ry. Co.*, 74 Mo. App. 89, Judge Smith, in a most satisfactory opinion, ruled that a contract of lease substantially like this was not violative of public policy. He says: "None of the property so destroyed was in process of transportation by defendant, none of it was awaiting delivery by the defendant to its consignees after transportation, and none of it had been received by the company for transportation. The elevator and warehouse and the property in it bore the same relation to the carrying business of the defendant that the store and contents of any merchant or commissionman would bear to it. Neither the lease, nor the relation of the property to the defendant, arose out of the discharge of any duty imposed upon it by its position as a common carrier, or by its character of a quasi public corporation. The fact that defendant is a common carrier has no place in this case." A similar contract was sustained in *Rutherford v. Wabash Co.*, 48 S. W. 921, 147 Mo. 441. The Court of Appeals in this case, through Judge Bland, after a review of the authorities on this subject, held this contract did not contravene public policy; and this court in banc, in *Wabash R. Co. v. Ordeltelheide*, 72 S. W. 684, held this identical contract was not against public policy, not being a contract with a passenger, employé, or shipper with regard to a contract of carriage, nor contravening any duty devolved upon it by law to its employes. Section 1111, Rev. St. 1899, which renders every railroad company liable for damages, irrespective of negligence, to every person whose property may be injured or destroyed by fire communicated directly or indirectly by locomotive engines in use on said railroad, expressly au-

thorizes the railroad companies to procure insurance against such damages. In *Wabash R. Co. v. Ordelhelde*, 72 S. W. 684, this court in banc held that this contract was one of indemnity against loss occurring by fire set out by the engines of defendant, and it was not against public policy to allow it to make such a contract with plaintiff. We are satisfied with the reasoning and conclusions reached by the court in banc in construing this contract, and they must control this case also. The views therein expressed are in accord with the decision of the Supreme Court of Iowa in *Griswold v. Ill. Central R. R.*, 57 N. W. 843, 24 L. R. A. 647, and *Hartford Fire Ins. Co. v. Ry. Co.*, 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193; *Stephens v. Ry. Co.*, 109 Cal. 86, 41 Pac. 783, 29 L. R. A. 751, 50 Am. St. Rep. 17. We deem it unnecessary, in view of these decisions, to repeat the reasons given at length. The company had the option to lease or to refuse to lease, and if it did lease to plaintiff, and stipulated for indemnity from damages caused by its negligence in firing the property of plaintiff placed upon its right of way by its permission, that contract in no way relieved it from the discharge of any duty to the public, or to any passenger or shipper or any employé, that the law or public policy imposed upon it.

It results that the judgment of the circuit court must be, and is, reversed. All concur.

McFARLAND v. MISSISSIPPI RIVER & B. T. RY. CO.

(Supreme Court of Missouri, Division No. 2.
June 9, 1903.)

RAILROADS—FIRES—DAMAGES AND PENALTY —WHO ENTITLED TO RECOVER—STATUTES— CONSTITUTIONALITY—INSTRUCTIONS.

1. Rev. St. 1889, § 2614, requires railroads to keep their rights of way clear of dry vegetation and undergrowth, so as to prevent fires, and provides that "any corporation * * * failing to comply with the provisions of this section shall incur a penalty not to exceed five hundred dollars, and be liable for all damages done by said neglect of duty." *Held*, that the penalty, as well as the damages, were recoverable by the person aggrieved by a failure to comply with the statute.

2. Rev. St. 1889, § 2391, provides that, "whenever a fine or penalty is or may be inflicted by any statute of this state for any offense, the same may be recovered by indictment or information notwithstanding another or different remedy for the recovery of the same may be specified in the law imposing the fine, penalty or forfeiture. Provided, that in all cases the fine, penalty or forfeiture shall go to the state, county, corporation, person or persons to whom the law imposing the same declares it shall accrue." *Held*, that the failure to comply with the requirements of section 2614 was not an offense, within the meaning of section 2391, and hence did not give the state a right to sue in its own name for a recovery of the penalty imposed thereby.

3. In an action against a railroad for damage by fire, the jury were instructed to find for plaintiff if they found that defendant failed to cause all dead and dry vegetation and under-

growth on its right of way to be removed, and, by its agents and servants, while operating a locomotive, "permitted sparks and fire to escape from said locomotive and set fire to the grass, stubble, and combustible matter on and in the vicinity of its said road, and which said fire escaped to the adjoining premises and * * * destroyed" plaintiff's property. *Held* not objectionable as not requiring a finding that the fire began on the right of way, and thence escaped to plaintiff's property.

4. The instruction was not objectionable as not requiring the jury to find that the failure of defendant to clear off the right of way was the proximate cause of plaintiff's injury, or that the fire was communicated by reason of dead and dry grass.

5. Rev. St. 1889, § 2614, does not violate the fourteenth amendment to the Constitution of the United States, providing that no state shall deprive any person of property without due process of law, or the clause of the Constitution of Missouri providing that private property shall not be taken for private use.

Appeal from Circuit Court, St. Francois County; Jas. D. Fox, Judge.

Action by J. L. McFarland against the Mississippi River & Bonne Terre Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Huff & Sleeth, for appellant. Pipkin & Swink, for respondent.

BURGESS, J. The petition in this case is in two counts. The first count is as follows: "Plaintiff states that W. F. Mitchell is, and was at all the times hereinafter mentioned, the owner of certain premises in the county of St. Francois, being the premises on which the said W. F. Mitchell then and now resides; that plaintiff had located on said premises of W. F. Mitchell, with his knowledge and consent, twenty-six cords of wood; that on the 6th day of September, 1899, defendant was and is a corporation owning and operating a railroad in and through the county of St. Francois, state of Missouri; that the railroad of defendant runs through the said premises of W. F. Mitchell; that on the 6th day of September, 1899, a certain locomotive was in use on said railroad, and was then and there attached to and drawing a train of cars at the point where said road runs through the premises of the said W. F. Mitchell; that said locomotive was so defectively and improperly built and constructed, and was so carelessly, negligently, and unskillfully managed by the agents, servants, and employes of defendant in charge thereof, that sparks of fire escaped from said locomotive and set fire to the grass, stubble, and combustible matter on and in the vicinity of its said road, and which said fire escaped to the adjoining premises of the said W. F. Mitchell, and burned, consumed, and destroyed a large amount of cord wood located thereon, and belonging to the plaintiff, to wit, twenty-six cords of wood, of the value of fifty-two (\$52) dollars, to the damage of plaintiff of fifty-two (\$52) dollars, for which plaintiff asks judgment." The second count is an action under section 2614, Rev. St.

1889, for penalty for the failure of defendant to comply with said statute, in this: "Said company failed between the 1st and the 15th days of August, 1899, and between the 5th and 25th days of October, 1899, to cause all dead or dry vegetation and undergrowth upon the right of way occupied by said railroad company about one and one-half miles north of the 'Junction,' a station on said road, and at a point adjacent to the farm and property of the said W. F. Mitchell, to be cleaned off, or burned up or removed; that, by reason of the failure of the said defendant company to comply with the statute aforesaid, said defendant, by its agents and servants, on or about the 6th day of September, 1899, while operating a locomotive engine on its said road, where it runs through the said W. F. Mitchell's farm aforesaid, which said engine or locomotive was so defectively and improperly built and constructed, and was so carelessly, negligently, and unskillfully managed by the agents, servants, and employés of defendant in charge thereof, that sparks of fire escaped from said locomotive, and set fire to the grass, stubble, and combustible matter on and in the vicinity of its said road, and which said fire escaped to the adjoining premises of the said W. F. Mitchell, and burned, consumed, and destroyed a large amount of cord wood thereon, and belonging to the plaintiff, to his damage. That said plaintiff, by virtue of section 2614, Rev. St. Mo. 1889, is entitled to the penalty therein provided, to wit, five hundred dollars, and therefore asks judgment for the sum of five hundred dollars and costs." The answer is first a general denial, and then proceeds as follows: "And for other separate and distinct defense to plaintiff's pretended cause of action, defendant, still denying that plaintiff suffered any damage as alleged in his petition, says that on the date alleged in the petition there was a fire near defendant's right of way that burned and destroyed certain property which it is alleged belonged to plaintiff, and that the same fire at the same day and time burned certain other property, belonging to other parties, and that said other parties are also demanding against this defendant judgment for said damages so alleged to have been suffered by them, and also, under the provisions of section 1110, Rev. St. 1899, are each demanding a penalty not exceeding \$500 because of such damage. Wherefore defendant says that there is a nonjoinder of parties plaintiff herein, and that plaintiff can recover nothing herein, by way of penalties, without joining in the same action all who suffered from said fire. Defendant further says that the said statute (section 1110, Rev. St.) is unconstitutional, in that the same attempts to take the property of the defendant for private use without just compensation, and imposes upon defendant an excessive penalty, and is an unjust discrimination against this defendant." The trial resulted in a verdict and judgment in

favor of plaintiff on the first count in the sum of \$39, and on the second count in the sum of \$130. Defendant in due time filed motion for new trial and in arrest, which being overruled, it appeals.

The facts are substantially as follows: On the 6th day of September, 1899, plaintiff was the owner of cord wood of the value of \$39, which was corded up on the land of one W. F. Mitchell, by and with his consent, within 40 feet of defendant's right of way. On that day the wood was consumed by fire, which, the evidence tended to show, was occasioned by the negligence of defendant in the management of its train, in consequence of which fire escaped from its engine, setting the grass upon its right of way on fire, which had not been burned off between the 1st and 15th of August, 1899, as required by statute, and thus communicated to plaintiff's wood.

The court, at the request of plaintiff, and over the objection of defendant, instructed the jury as follows:

"(1) The court instructs the jury that this action is brought to recover damages done to the cord wood of plaintiff, in the first count, for fifty-two dollars, and in the second count for the penalty, as provided in section 1110, Rev. St. 1899, for failure to clear and burn off the right of way, in any sum not exceeding five hundred dollars.

"(2) The court instructs the jury that if they believe from the evidence that the defendant, the Mississippi River & Bonne Terre Railway Company, on or about the 6th day of September, 1899, while running its locomotive steam engines, cars, and coaches on its line of road in St. Francois County, Missouri, through its servants, agents, and employés, permitted the sparks and fire to escape from its engine or engines, and set fire to the grass, stubble, and combustible matter on and in the vicinity of its said road, and from thence escaped to the adjoining premises of plaintiff, and burned, consumed, and destroyed cord wood belonging to plaintiff, you will find for the plaintiff, and assess his damages at such sum as you may find was the reasonable value of the property consumed, not exceeding fifty-two dollars.

"(3) The court instructs the jury that under the laws of this state all railroad companies are required, and it is made their duty, to cause all dead or dry vegetation or undergrowth upon the right of way occupied by said railway company to be cleaned off and burned twice each year, for the purpose of preventing the spread of fire and the destruction of property, to wit, between the 1st and 15th day of August and between the 5th and 25th day of October in each year. Therefore, if you find from the evidence in this cause that the defendant, the Mississippi River & Bonne Terre Railway Company, failed between the 1st and 15th days of August, 1899, to cause all dead and dry vegetation and undergrowth upon the right of way occupied by said railway company, about one

and one-half miles north of the Junction, a station on its said road, at a point adjacent to the farm of W. F. Mitchell, and where said railroad runs through the farm of W. F. Mitchell, to be cleaned off and burned off, or removed, and that defendant, by its agents and servants, on or about the 6th day of September, 1899, while operating a locomotive engine where it runs through W. F. Mitchell's farm aforesaid, permitted sparks and fire to escape from said locomotive, and set fire to the grass, stubble, and combustible matter on and in the vicinity of its said road, and which said fire escaped to the adjoining premises of W. F. Mitchell, and burned, consumed, and destroyed the wood of plaintiff located thereon, and that said wood was placed there by permission of the said W. F. Mitchell, to the damage of plaintiff, you will find the issues for the plaintiff, and assess the penalty at a sum not exceeding five hundred dollars."

The following instructions were asked by defendant and refused, to wit:

"(1) The court instructs the jury that, under the pleadings and evidence, the plaintiff cannot recover on the second count of the petition, and your verdict must be for the defendant on said second count.

"(2) The court instructs the jury that this action being brought under what is now section 1110, Rev. St. Mo., and the fire which is alleged to have destroyed plaintiff's property having occurred before the time in which defendant was required to clear off its right of way the second time in the year 1899, defendant cannot recover in this action on the second count thereof, and your verdict on that count must be for the defendant.

"(3) The court instructs the jury that the plaintiff is not entitled to recover on the second count set out in his said petition, for the reason that the penalty sued for in said second count is excessive, and in violation of section 25 of article 2 of the Constitution of the state, and that said section 1110 of the Revised Statutes of Missouri of 1899, upon which said second count is based, is therefore null and void, and because said section is also in violation of the first section of fourteenth amendment to the Constitution of the United States, in that it deprives the defendant company of the property without due process of law, and without just compensation or any compensation whatever, and denies to the defendant, a citizen of the state of Missouri, the equal protection of its laws, as afforded to other citizens of this state, and is therefore void; and the jury will return a verdict for the defendant on said second count."

It may be conceded that the act in question is penal in its character, and must be strictly construed, and that its purpose was to enforce the performance of a duty imposed by statute upon railroad corporations. But it does not necessarily follow that a person who is damaged by reason of the failure

of a railroad company to comply with the provisions of the act may not sue for and recover part or all of the penalty. It is true that no part of the penalty is in express terms given by the statute to the person suffering the damage, or that any part of it is given to an informer, or that any informer is authorized to sue in his own name, or to cause a suit to be brought by the state. The evident purpose of the Legislature was "for the purpose of preventing the spreading of fire and the destruction of property" of the adjacent property owners, and to afford them ample redress for damages sustained by fires occasioned by the nonobservance of the provisions of the statute by such companies. It was never for one moment contemplated by the lawmakers that the penalty might be sued for or collected by any other person than the person damaged, which is clearly indicated by the language used. It says: "And any corporation, company or person failing to comply with the provisions of this section shall incur a penalty not to exceed five hundred dollars, and be liable for all damages done by said neglect of duty." It is clear from the language employed that the penalty imposed by the statute is for the benefit of persons damaged, and that the penalty is incident to the damages, for the statute says, "shall incur a penalty not to exceed five hundred dollars, and be liable for all damages done by said neglect of duty"; thus clearly indicating that no one who has not sustained damages can sue for the penalty. In passing upon this question in *Scott v. Mo. Pac. Ry. Co.*, 38 Mo. App. 523, it is said: "The exact language of the statute is that 'any [railroad] corporation, company or person failing to comply with its provisions shall incur a penalty not to exceed five hundred dollars, and be liable for all damages done by said neglect of duty.' Liable to whom? To the state or the county or the person who has suffered from the neglect of duty. The damages, indisputably, are recoverable by the aggrieved, and why not the penalty as well? There is nothing in the language which we have just quoted that justifies the conclusion that the damages are to be recovered by the aggrieved party, and the penalty by the state or county for the use of the county school fund. If the Legislature had so intended, it would have been so expressed in the statute itself. The statute being penal, in the absence of any constitutional restriction the Legislature may lawfully make a disposition of the penalty imposed by it as will, in its discretion, best subserve the purposes of the enactment. Instead of giving the whole penalty to the state or the county, or dividing it and providing for a qui tam action, the whole penalty is given to the party who has been injured; and the method adopted is, no doubt, the most efficient one for the enforcement of the statute."

But defendant contends that section 2391, Rev. St. 1899, certainly gives the right to

the state to sue in its own name for the recovery of this penalty. That statute provides that, "whenever a fine or penalty is or may be inflicted by any statute of this state for any offense, the same may be recovered by indictment or information notwithstanding another or different remedy for the recovery of the same may be specified in the law imposing the fine, penalty or forfeiture. Provided, that in all cases the fine, penalty or forfeiture shall go to the state, county, corporation, person or persons to whom the law imposing the same declares it shall accrue." It will be observed that the fine, penalty, or forfeiture inflicted by the statute under consideration is for an offense which may be covered by indictment or information, and not a "breach of the laws established for the protection of the public, as distinguished from an infringement of mere private rights; a public violation of law; a crime; *alias*, sometimes, a crime of the lesser grade, or misdemeanor." 17 Am. & Eng. Encyc. of Law, 36. It is plain, therefore, that the statute imposing a duty, and fixing penalties for a failure to perform, is not an offense, within the meaning of the statute, but the mere infringement of private rights, not punishable by indictment or information, and therefore not within the meaning of section 2391, *supra*. The statute does not entitle an injured party to recover absolutely the entire amount of the penalty, but any part or all of it to be determined, of course, by the court or jury, the limit being \$500; and, although there may be a number of persons damaged by reason of the failure of a railroad company or corporation to comply with the statute, the penalty, all told, cannot exceed the sum indicated for the same neglect of duty—in other words, the same fire; and the plaintiff who first brings his case to judgment, and recovers judgment for part or all of the penalty, will be entitled to the preference over all others, and so on, until judgment is recovered for the full amount. The defendant can then show, in any subsequent case growing out of the same negligent act, the prior judgment in reduction of the amount of any subsequent claim for the same neglect for which it may be liable, and so until the limit is reached.

Instruction numbered 3 given for plaintiff is complained of upon the ground that it did not require the jury to find that the fire began on the right of way of the road, and thence escaped to the plaintiff's property, did not require the jury to find that the failure to clear off the right of way was the proximate cause of plaintiff's injury, and did not tell the jury that only in the event the fire was communicated by dead and dry vegetation and undergrowth would the defendant be liable. But the instruction is not open to the first objection interposed, because it does require, in so many words, that the fire begin "on and in the vicinity of said road." Nor is the instruction susceptible to the ob-

jection that it does not require the jury to find that the failure of defendant to clear off the right of way was the proximate cause of plaintiff's injury, or that the fire was communicated by reason of dead and dry grass. The instructions, when taken together, presented the issues very fairly to the jury, and the evidence was amply sufficient to sustain the verdict.

Therefore, being unable to perceive wherein the statute upon which plaintiff grounds the second count of his cause of action is unconstitutional, because violative of the fourteenth amendment to the Constitution of the United States, or of that clause of the Constitution of this state which provides that private property shall not be taken for private use, we affirm the judgment.

GANTT, P. J., concurs. FOX, J., not sitting.

SCHNEIDER v. PATTON et al.*

(Supreme Court of Missouri, Division No. 2.
March 17, 1903.)

FRAUDULENT CONVEYANCES—ACTION TO SET ASIDE — PRAYER — RELIEF—AMENDMENT — FRAUDULENT GRANTEE—LIABILITY—NECESSARY PARTIES — FINAL JUDGMENT — NEW TRIAL.

1. While, under the general prayer for relief, a party may have any relief to which he may show himself entitled, such relief must be founded on and consistent with the allegations in the bill, and not such as may be proven at the trial.

2. Plaintiff, the assignee of certain judgments, alleged in his petition that the judgment debtor and one of the defendants owned certain real estate in equal shares; that they sold the same, taking notes secured by a trust deed on the property for the purchase price; that the trust deed was foreclosed after the rendition of the judgments, and the title taken by defendant, for the purpose of aiding the judgment debtor in delaying and defrauding his creditors; that defendant thereafter sold part of the land, taking a note in part payment therefor, and held the same in trust for the debtor. The petition then prayed that the conveyance by defendant be set aside, and the debtor's interest in the land be subjected to the lien of the judgments. *Held*, that the fact that during the trial plaintiff amended his petition, by adding an additional prayer "for such personal judgment against defendant as may be proper and legal," did not convert the petition into one charging defendant as a fraudulent grantee, and liable in equity to a personal judgment in plaintiff's favor.

3. As the petition in no way intimated, nor contained any allegations from which it would be inferred, on what account, if at all, a personal judgment against defendant would be asked, such judgment was unauthorized.

4. The court found that before the filing of the petition defendant turned over to the debtor the latter's share of the proceeds of the sale of the land. *Held* to discharge defendant from liability therefor.

5. In an action by a judgment creditor against a fraudulent grantee to set aside a conveyance of real estate by the judgment debtor for fraud, and to subject it to the payment of the judgment, the judgment debtor is not a necessary party.

6. A decree required, among other things, that within five days defendant indorse, assign,

*Rehearing denied June 9, 1903.

and transfer a promissory note to the clerk of the court, to be held by the latter, for the use and benefit of plaintiff, until the further order of the court, and that, on failure to comply within the time named, plaintiff should have judgment against him for the face value of the note, with interest. It further decreed costs in plaintiff's favor. *Held* a final judgment, and a motion for a new trial was properly made after its rendition and before entry of judgment against defendant for the face value of the note.

7. The fact that the court thereafter made some changes in the decree did not rob it of its integrity as a final decree.

8. The decree was none the less final because defendant failed to comply therewith, and a final judgment was rendered against him for the face value of the note, with interest.

Appeal from Circuit Court, Buchanan County; A. M. Woodson, Judge.

Action by J. George Schneider against Bernard Patton and another. Judgment for plaintiff, and defendants appeal. Reversed.

Stauber, Crandall & Strop and H. M. Ramey, for appellants. Jas. W. Boyd, for respondent.

BURGESS, J. This is a suit by a judgment creditor of one Thomas Maney, the object of which is to subject certain lands and lots of land owned by said Maney to the lien and payment of certain judgments held and owned by the plaintiff against him. The amended petition, omitting caption, is as follows:

"Plaintiff for his amended petition states: That on or about the 3d day of October, 1893, the state of Missouri, at the relation and to the use of Francis T. Conrad, recovered judgment in the circuit court of Buchanan county, Missouri, against Thomas Maney and others, for the sum of \$13,413.97, which said judgment was based upon the bond of James Walsh, as administrator of the estate of Thomas Conrad, deceased, which said bond was in the sum of sixty-five thousand dollars; but the amount of the recovery for the breach of said bond was the sum hereinabove stated. That on or about said date the state of Missouri, at the relation and to the use of Martha Clark, recovered judgment in the said court against Thomas Maney and others on the same bond, for the breach thereof, the sum of \$7,613.51. And the state of Missouri, at the relation and to the use of Agnes Conrad, about said date, recovered in said court judgment against said Thomas Maney on said bond, for damages on account of the breach of said bond, the sum of \$7,613.51. That on or about the 31st day of August, 1894, each and every one of the said judgments were duly and legally, for value received, assigned and transferred by the relators therein and respective owners and holders thereof to J. George Schneider, the plaintiff herein. That on or about the 25th day of September, 1896, the lien of said judgment on the said real estate of Thomas Maney was duly and legally revived by an order and judgment of this court, duly

and legally made in each one of said cases, upon writs of scire facias duly and legally served in due time upon the defendants in said cases, respectively; and the lien of said judgment upon the real estate of said Thomas Maney has been continuously alive and in full force and effect ever since the 3d day of October, 1893. That the plaintiff is now the owner and holder of the aforesaid judgments, and the respective liens thereof, and all the rights and interests pertaining to said judgments and liens. That the aforesaid bond of said Walsh as administrator of the estate of Thomas Conrad, deceased, upon which the said judgments were rendered, was executed on the — day of —, 1885. That on or about the 11th day of March, 1889, the Brick & Terra Cotta Manufacturing Company, a corporation, executed to Thomas F. Ryan its certain deed of trust, whereby it conveyed to said Thomas F. Ryan, as such trustee, certain real estate, situated in the county of Buchanan and state of Missouri, described as follows: Five (5) acres of land described and surveyed as follows: Beginning at a point in the middle of Weston avenue, on the south line of the northwest quarter of section number twenty-nine (29), in township fifty-seven (57), of range number thirty-five (35), as shown by the plat of Sulphur Springs; running thence northeasterly, with said avenue, fourteen hundred and eighty-two (1,482) feet to a point; running thence west, parallel with the south line of said quarter section, to the east line of the St. Joseph & Iowa Railroad's right of way; thence running south and east far enough to include five acres of land (exclusive of said avenue), which shall be bounded on the east by said avenue and on the west by the said St. Joseph & Iowa Railroad's right of way; also lots numbered fifty-one (51), fifty-two (52), fifty-three (53), fifty-four (54), and fifty-five (55) of Sulphur Springs, as is shown by the plat filed in the recorder's office of Buchanan county, Missouri, on the 22d day of December, 1858, by F. W. Smith, the said lots and land containing nine and forty hundredths ($9\frac{40}{100}$) acres, more or less—to secure the payment to Bernard Patton and Thomas Maney the sum of \$18,144.42, being five promissory notes, each for the sum of \$3,628.80. That each one of said promissory notes so secured was executed and made payable to the joint order of Bernard Patton and Thomas Maney, and bore interest from the date thereof at the rate of 8 per cent. per annum. That at the time said judgment was rendered, and ever since that time, said Thomas Maney was and has been largely indebted, was totally insolvent, and an execution against him was and would be totally unavailing and useless; and during said time, as hereinafter stated, he has attempted to fraudulently conceal his property, so as to hinder, delay, and defraud his creditors and avoid the payment of his debts. That on or about January 1, 1896, said Maney did, with

the fraudulent purpose of cheating, hindering, and delaying his creditors, and especially the plaintiff herein, assign and transfer to defendant Bernard Patton all his rights, title, and interest in and to the five promissory notes and deed of trust, and said defendant Patton took and received said Maney's right, title, and interest in and to said notes and deed of trust, for the purpose of aiding and assisting said Thomas Maney to hinder, delay, and cheat and defraud his creditors, and especially said plaintiff. That said Thomas Maney's interest in and to said notes amounted to and was one-half part thereof, all of which said defendant Patton obtained and received as aforesaid, without paying or agreeing to pay any consideration whatever therefor, and solely for the purposes aforesaid. That on or about February 2, 1895, the said real estate was sold by said trustees under and by virtue of said deed of trust, and at said sale the defendant Patton bid for and purchased it at and for the price and sum of \$13,600, and received a deed from said trustee for, said land, for the joint use and benefit of himself and said Thomas Maney, and with the fraudulent purpose, on his part and on the part of said Thomas Maney, to conceal said property from the lien of plaintiff's judgments, and to hinder, delay, cheat, and defraud the plaintiff herein, and prevent him from collecting his said debts from said Maney. That said Maney's interest in and to said land was and is an undivided one-half part thereof. That said Bernard Patton paid no consideration whatever for the said lands, and he obtained a deed therefor from said trustee by giving to said Brick & Terra Cotta Manufacturing Company, in accordance with the understanding and agreement between him and said Maney, credit upon said promissory notes, which, as above stated, belonged to him and Thomas Maney, jointly in equal proportions. That on or about April 17, 1895, the said Bernard Patton obtained and received from the said Brick & Terra Cotta Manufacturing Company a deed of conveyance, purporting to convey to him another and different tract of land from that hereinabove described, situated in Buchanan county, Missouri, and described as follows: All of block one (1), Sulphur Springs, as subdivided by Martin D. Myers, by his plat entered of record in the records of deeds of Buchanan county, January 24, 1889; also all the ground in said addition, being north of Myers street in said addition, and south of the land now or formerly owned by the Brick & Terra Cotta Manufacturing Company, in the northwest quarter of section twenty-nine (29), in township fifty-seven (57), of range thirty-five (35), being the same property conveyed by Milton D. Myers to the Brick & Terra Cotta Manufacturing Company, by deed dated October 25, 1889, and now of record in the land rec-

ords of Buchanan county, Missouri. That he (the said Bernard Patton) paid no consideration whatever for said lands, except to give the said Brick & Terra Cotta Manufacturing Company a credit upon said notes herein above described, jointly owned by him and said Thomas Maney. That said land was, by an understanding by and between Bernard Patton and Thomas Maney, purchased by said Bernard Patton for the joint use and benefit of himself and Thomas Maney, and with the joint means, as hereinabove stated, of himself and Thomas Maney, and for the use and benefit of himself and Maney; and that he purchased said land, and took a deed therefor to himself, then, with the fraudulent purpose on his part, and on the part of said Thomas Maney, to conceal said property and real estate from the lien of plaintiff's judgments, and to hinder, delay, cheat, and defraud the plaintiff herein, and prevent him from collecting his said judgments, or any part thereof, from said Maney. That all the said lands hereinabove described, including the lands last hereinabove described, the said Bernard Patton purchased with the joint means of himself and said Thomas Maney, each one of them paying half of the purchase price thereof, and the said deeds purporting to convey said lands to Bernard Patton were taken and received by said Bernard Patton with the fraudulent purpose and intention on his part, and on the part of said Maney, of hindering, delaying, cheating, and defrauding said Maney's creditors, and especially this plaintiff, and for the purpose of hindering and delaying this plaintiff in the collection of his said judgments, or any part thereof. That the defendant Patton, in order to further assist said Maney in his object and purpose aforesaid, on or about the 29th day of July, 1896, executed a deed purporting to convey to defendant Dennis Curtin an undivided one-half part of the said lands, for the pretended consideration, as expressed in said deed, of the sum of \$4,500. Said deed to Curtin was, however, made and executed without any consideration therefor, except the sum of twenty-five hundred dollars (\$2,500), which sum was then paid by said Curtin to Bernard Patton, who took and received said sum with the fraudulent intent and purpose on his part, and on the part of said Maney, of concealing it from Maney's said creditors, and to cheat, hinder, delay, and defraud his creditors, and especially this plaintiff, and was obtained and secured by said Dennis Curtin, with the full knowledge on his part of the aforesaid fraudulent plans and scheme on the part of said Maney and Patton, with the knowledge of the facts hereinbefore stated. That the said Bernard Patton and Dennis Curtin hold an undivided one-half of said lands in trust for the use and benefit of the said Thomas Maney, and in order to conceal it from his creditors, and to prevent the lien of plaintiff from attachment thereto, and securing it to the payment of

said judgment debts. That, on or about the time when said Patton executed said paper purporting to convey to defendant Curtin said undivided one-half of said land, the defendant Curtin executed to said Patton a paper purporting to be a promissory note for the sum of twenty hundred dollars (\$2,000), which he claimed to be for deferred payment for said land, and then and there executed to said Bernard Patton a paper purporting to be a mortgage or deed of trust upon said land, for the pretended purpose, as in said paper stated, of securing said Patton the payment of said promissory note, which note has never been paid.

"Wherefore plaintiff prays the court for an order, judgment, and decree: (1) That the conveyance of said half of said lands by Bernard Patton to said Dennis Curtin, and the alleged mortgage or deed of trust, executed by said Dennis Curtin to Bernard Patton, be set aside. (2) That the defendants be declared to hold said half of said land in trust for the payment of the said judgment of the plaintiff. (3) That the said half of said land belonging to Maney be subjected to the lien of the plaintiff's said judgments, and sold for the purpose of applying the proceeds thereof to the payment of the plaintiff's said judgments. (4) For such personal judgments against defendants as may be proper and legal. (5) For all proper relief."

To this petition the defendants Patton and Curtin filed answer, which, omitting caption, and names of attorneys, is as follows:

"Come now defendants in the above-entitled cause, and for answer to plaintiff's petition deny each and every allegation therein contained; and, further answering, defendants say that the true judgments mentioned in the petition have been paid, and that all the title the plaintiff may have had at any time by virtue of the assignments therein mentioned was in trust for defendants in said judgments, Lutz and Fuelling, and not otherwise."

Respondent filed reply to said answer, which, omitting matters of form, is as follows:

"Now comes plaintiff, and for reply to defendant's amended answer herein denies each and every allegation of new matter therein contained. Plaintiff further alleges that said Lutz and Fuelling were and are sureties in said judgments, and that defendants in said judgments, to wit, Thomas Maney, Benjamin Ulman, Philip Rogers, and John Francis Smith, were and are co-sureties of said Lutz and Fuelling in said judgments, and all the defendants in said judgments were and are sureties thereon of one James Walsh, who was and is the principal in said judgments. That the judgments of revival of said judgments mentioned in the petition constitute an adjudication that nothing was paid on said judgments prior to the rendition of the said judgments of revival; and the question of any such prior payments is and has been

adjudicated against the defendants herein, and to the effect that no payments were ever made on such judgments prior to their revival, except the payments of costs as stated in said judgments of revival."

The facts are stated by defendants to be substantially as follows:

"In 1889, and prior to that date, one Thomas Maney and defendant Bernard Patton had been associated together in the brick business, and were the owners of the greater portion of the land described in plaintiff's petition; each owning an undivided one-half interest in said land. In January of that year they sold and conveyed said land to the Brick & Terra Cotta Manufacturing Company, a corporation, and on the 11th day of March said company executed and delivered to said Maney and Patton its five promissory notes, each for \$3,638.83, aggregating in all \$18,194.40, being for the purchase price of said lands, and the appliances, tools, implements, etc., which were on said premises and used in the manufacture of brick. Said notes bore interest from date at 8 per cent., and were due in one, two, three, four, and five years after date, and were secured by deed of trust executed to Thomas F. Ryan, Esq., on the land conveyed to said company. The deed of trust was in usual form, with powers of sale in the trustee. At the time of the sale of this land to said company there was included in the sale a large amount of personal property, consisting of tools, wheelbarrows, and other appliances for the manufacture of brick, which belonged to Patton, and in which Thomas Maney had no interest, of the value of \$2,000, and which was sold to said company at that price, which price for said personal property was included in said five notes from said company to said Patton and Maney. In January, 1893, and before the rendition of the Conrad-Clark judgments hereinbefore mentioned, Patton became liable for the payment of \$2,000 for Thomas Maney, on account of notes to John Lemon, curator of Milton and John Tootle, minors; and the said five notes given by said Brick & Terra Cotta Company to Patton and Maney were indorsed by Thomas Maney and given to Patton to secure him on account of said \$2,000 liability. Patton retained and held said notes and Maney's interest therein as security for said \$2,000, which he was afterwards, and before the commencement of this suit, compelled to pay. About the 2d day of February, 1895, the Brick & Terra Cotta Company having defaulted in the payment of said notes and interest, Thomas F. Ryan, the trustee, advertised the land under the deed of trust, and sold it, and at said sale Patton, being the highest and best bidder, purchased said land at and for the price of \$15,600, and received a deed therefor. The said trustee's sale and deed were regular and in due form. The amount for which Patton purchased the land at said sale was credited on said notes, paying off two of said notes and the larger

part of the third note. Under the arrangement between Patton and Maney at the time of the trustee's sale, the title was taken in the name of Patton, and he was to hold the land subject to the same conditions that he had theretofore held the said five promissory notes. Patton afterwards purchased of the Brick & Terra Cotta Manufacturing Company a strip of land adjoining the land purchased by him at said trustee's sale, and paid for it by delivering to said company its unpaid notes aforesaid; this last purchase being made under the same arrangement that was made with reference to the land that was purchased at the trustee's sale. Said company, upon the surrender to it of its unpaid notes, delivered to said Patton a deed conveying to him said land, and this last piece or parcel of land, together with the land mentioned in said deed of trust by said company, covers all the land described in the petition. Afterwards, on the 29th day of July, 1896, before the commencement of this suit, Patton sold and conveyed to Dennis Curtin an undivided one-half interest in all this land, in consideration of \$4,500. Curtin paid cash \$2,500, and gave his promissory note for \$2,000, bearing interest at ——— percent, and due ——— after date. At the time of the sale of this land to Curtin by Patton, the said Thomas Maney and Patton had had no settlement. At the time of the sale of this land to Curtin by Patton, and for many years prior thereto, one Daniel T. Lysaght had transacted Maney's business, and was also a friend of Patton. At the time of the sale to Curtin of the one-half interest in said real estate, the \$2,000 note, which was given by Curtin to Patton as a part of the purchase price for said real estate, was held by Patton for the purpose of reimbursing himself on account of the money advanced by him in behalf of Maney on the Lemon-Tootle note above referred to. The balance of the purchase price, which amounted to \$2,500, was disposed of as follows: The expenses of the trustee's sale were paid, leaving a net balance of about \$2,800. This money, long prior to the institution of this suit, and shortly after the sale to Curtin, was turned over by Patton to Daniel T. Lysaght, for the purpose of being held by said Lysaght until such time as Maney and Patton could arrive at a settlement of all unsettled matters then existing between them, to all of which Maney at the time agreed; but Lysaght, prior to the institution of this suit, and prior to any settlement of these unsettled matters between Patton and Maney, turned said money over to Maney. At the time of the sale of a half interest in the aforesaid real estate by Patton to Curtin it was understood, between Maney and Patton and Curtin, that the sale of said half interest to said Curtin embraced all right or interest which said Maney had in said real estate, and the court in its findings of fact found that this sale to Curtin was a sale of all of said Maney's interest as aforesaid.

The evidence tended to show that the sale by Patton to Curtin was for full value and fair, and that Curtin made the purchase in good faith, and the court by its finding and judgment so declared. After the sale of the land by appellant and Maney to the Brick & Terra Cotta Manufacturing Company, and after the transfer by Maney of his interest in the five notes of said company to Patton, to wit, on the 3d day of October, 1893, the three judgments set out in the record in favor of the State of Missouri, at the relation of Francis Conrad, and State of Missouri, at the relation of Martha Clark, and State of Missouri, at the relation of Agnes E. Conrad, were rendered. These judgments were rendered on the bond of James Walsh, against him and the other defendants therein named as sureties; but if Maney was indebted to any one, except Patton, at the time of the sale of this land to the Brick & Terra Cotta Company, or at the time of the transfer of Maney's interest in the said five notes, the evidence entirely fails to show it. The Conrad-Clark judgments, obtained against Walsh et al., above referred to, were, prior to September 25, 1896, transferred to respondent Schneider, and upon the 25th day of September, 1896, were revived by judgments of the Buchanan county circuit court. These judgments of revival were rendered after Patton had conveyed this land to defendant Curtin, and after the \$2,500 received from Curtin had been turned over to Maney aforesaid. After the revival of these judgments, plaintiff, on the ——— day of December, 1896, sued out executions on them, and Patton was duly and regularly summoned as garnishee in said cause. In said Buchanan county circuit court interrogatories were in due time filed, and Patton filed under oath his answer to said interrogatories, to which said answer plaintiff filed denial. Said garnishment proceeding was still pending in said Buchanan county circuit court, and undetermined, at the time of the trial of the case. In the answer filed to the interrogatories propounded in the above garnishment proceeding, a full and complete disclosure was made of all the facts as above stated with reference to Patton's acquisition of said real estate, how he held it, the sale of Maney's interest in the aforesaid real estate, Curtin's purchase thereof, and the disposition of the proceeds of said sale, and thereafter this suit was filed. The petition is an ordinary bill in equity. It alleges that the land described in the petition was sold to the Brick & Terra Cotta Manufacturing Company, and that the notes taken for the purchase price were assigned to Patton to defraud Maney's creditors; that Maney owned an undivided one-half interest in said notes, and that Patton purchased a part of the land at trustee's sale, and also purchased the other land from the said Brick & Terra Cotta Manufacturing Company for the use of himself and Maney, and paid for the same with said notes; that he took a deed for said land

to himself to cheat and defraud Maney's creditors, and that in furtherance of said scheme he sold an undivided one-half of said land to Curtin; that Curtin bought for the purpose of aiding said Maney and Patton to cheat and defraud Maney's creditors; that Curtin paid \$2,500, and executed a paper purporting to be a note for \$2,000, and another paper purporting to be a deed of trust to secure said pretended note; that said pretended note and deed of trust were without consideration and in fraud of Maney's creditors. It also charged that Curtin was holding said half interest in said real estate for the use and benefit of Maney, and prayed that the conveyance of said half of said land by Patton to said Curtin, and the alleged mortgage or deed of trust executed by said Curtin to Patton, be set aside; that the defendants be declared to hold said half of said land in trust for the payment of the said judgment of the plaintiff; that the said half of said land belonging to Maney be subjected to the lien of plaintiff's said judgment, and be sold for the purpose of applying the proceeds thereof to the payment of plaintiff's said judgments. The petition also contained the usual general prayer for equitable relief, and upon the trial of the cause, and after the introduction of evidence, the plaintiff amended his petition by making the following additional prayer, to wit: 'For such personal judgments against the defendant as may be proper and legal.'"

The court made an elaborate finding of facts as follows:

"The court finds, as matter of fact: That on or about the 11th day of March, 1889, and prior thereto, the defendants, Bernard Patton and Thomas Maney, held and owned as tenants in common, in equal shares, each owning an undivided half, the following described real estate, situated in the county of Buchanan, state of Missouri, to wit: Five acres of land, described and surveyed as follows: Beginning at a point in the middle of Western avenue, on the south line of the northwest quarter of section No. twenty-nine, in township fifty-seven, of range thirty-five, as shown by the plat of Sulphur Springs; running thence northeasterly, with said avenue, one thousand four hundred and eighty-two feet, to a point; thence west, parallel with the south line of said quarter section, to the east line of the St. Joseph & Iowa Railroad Company's right of way; thence south and east far enough to include five acres of land, exclusive of said avenue, which shall be and is bounded on the east by said avenue, and on the west by said St. Joseph & Iowa Railroad Company's right of way; also lots numbered fifty-one, fifty-two, fifty-three, fifty-four, and fifty-five of Sulphur Springs, as shown by the plot filed in the recorder's office of the county of Buchanan, state of Missouri, on or about the 22d day of December, 1858, by F. W. Smith. That on March 11, 1889, while said Bernard Patton

and Thomas Maney were still the owners and holders of said real estate, they (the said Bernard Patton and Thomas Maney, sold and conveyed the said lands to the Brick & Terra Cotta Manufacturing Company, a corporation duly incorporated under and by virtue of the laws of the state of Missouri, for the sum of \$8,144.42; and to secure the payment to them of said sum they obtained, received, and took from the said Brick & Terra Cotta Manufacturing Company, at that time, five promissory notes, each for the sum of \$3,628.80, made payable to Bernard Patton and Thomas Maney, and to their order, and to secure the payment of said five promissory notes said Bernard Patton and Thomas Maney then and there obtained, accepted, and received a deed of trust to said lands, executed by the said Brick & Terra Cotta Manufacturing Company, whereby said lands were conveyed to Thomas F. Ryan, as trustee, for the purpose of securing the payment of said five promissory notes. That each one of said notes is dated St. Joseph, Mo., March 11, 1889, and they were, by their terms, due and payable in one, two, three, four, and five years, respectively, from their date, at the rate of 8 per cent. per annum. That when said notes were executed they were left by Thomas Maney in Bernard Patton's possession for safe-keeping, without any indorsement of them by Thomas Maney. That thereafter, about the year 1891, the said Thomas Maney indorsed said notes and left them in the possession of Bernard Patton; but there was no consideration for the indorsement of them by Thomas Maney, except as hereinafter stated. That on the 3d day of October, 1893, the state of Missouri, at the relation and to the use of Francis T. Conrad, recovered judgment in the circuit court of Buchanan county, Mo., against Thomas Maney and others, for the sum of \$13,413.97. That at said date the state of Missouri, at the relation and to the use of Martha Clark, recovered judgment in the said court against said Thomas Maney and others for the sum of \$7,613.51. That at said date the state of Missouri, at the relation and to the use of Agnes E. Conrad, recovered judgment in said court against Thomas Maney and others for the sum of \$7,613.51. That each one of said three judgments was recovered on account of the breach of the bond of James Walsh, as administrator of the estate of Thomas Conrad, deceased, which said bond was signed by Thomas Maney and others, and was for the sum of \$65,000, and was executed on the 15th day of August, 1885. That after the rendition of said judgment, and before the revivor thereof, on or about November 13, 1893, the said Francis T. Conrad, for value received, assigned and transferred the said judgment rendered in his favor to George T. Hoagland. That on or about August 31, 1894, the said George T. Hoagland, for value received, assigned and transferred the judgment last

aforesaid to J. G. Schneider, plaintiff herein. That on or about November 13, 1893, the said Martha A. Clark, for value received, assigned and transferred the said judgment rendered in her favor to George T. Hoagland. That on or about August 31, 1894, the said George T. Hoagland, for value received, assigned and transferred the last-mentioned judgment to J. G. Schneider, plaintiff herein. That on or about November 13, 1893, the said Agnes Conrad, for value received, assigned and transferred the judgment aforesaid rendered in her favor to George T. Hoagland. That on or about August 31, 1894, the said George T. Hoagland, for value received, assigned and transferred the last-mentioned judgment to J. G. Schneider, plaintiff herein. That on the 25th day of September, 1896, the lien of said three judgments on the real estate of Thomas Maney and others was duly and legally revived in favor of J. G. Schneider, plaintiff herein, who was at said time the owner of all three of said judgments, by order and judgment of said court duly and legally made in each one of said three cases upon writs of *scire facias*, duly and legally served upon each one of the defendants in said cases, respectively; and the lien of said judgments upon the real estate of Thomas Maney has been continuously in full force and effect ever since the 3d day of October, 1893. That plaintiff herein, J. G. Schneider, was, when said judgment liens were revived, the owner and holder of the judgments aforesaid and the revived liens thereof, and he is still the owner and holder of said judgments, and all the liens and rights which accrue under said judgments to the owner and holder thereof. That ever since the 3d day of October, 1893, when the said three judgments were rendered against Thomas Maney and others, said Thomas Maney has been insolvent, except as to property concealed, if any, from his creditors and the plaintiff in said judgments, and the executions issued thereon have never been able, since said judgments were rendered, to enforce payment thereof, or of any one of said judgments, against Thomas Maney; nor have the owners and holders of said judgments, or either of them, ever been able to compel said Thomas Maney to pay any sum whatever of said judgments, or any one of them, and the said Thomas Maney has never paid any sum on said judgments or any one of them. That on January 28, 1893, the Irish-American Building Association, with James Horgan, Thomas Maney, Bernard Patton, and Michael Sheridan as makers with it, executed its promissory note for the sum of \$8,000 to John S. Lemon, curator of the estate of Milton Tootle, Jr., and John Tootle, minors, due and payable one year from the date thereof. That the payment of said note was, at the time it was given, secured by deed of trust on the building known as 'Columbia Hall,' which said deed of trust was executed by the Irish-American Building Association.

That the said mortgages on the Columbia Hall to secure the payment of said Lemon-Tootle note of \$8,000 was a second mortgage, and was subject to a mortgage for \$25,000, given before that date. That said mortgage for \$25,000 is the first mortgage on the said Columbia Hall, and still remains unpaid, and bears interest at the rate of 8 per cent. per annum. That, when said note for \$8,000 was executed, the said James Horgan, Thomas Maney, Bernard Patton, and Michael Sheridan were stockholders, owning the capital stock, of the Irish-American Building Association. That when payment of said \$8,000 note was demanded, the — day of —, 1895, the said Thomas Maney failed to pay any part thereof, and on account of his failure to pay any part of said note the said Bernard Patton had to pay, on account of said Thomas Maney's liability on said note, the sum of \$2,000, about January 30, 1893. That on account of the failure to pay said note when it was due the said property known as the 'Columbia Hall' was sold under said mortgage on January 16, 1895, and Bernard Patton became the purchaser thereof for himself, James Horgan, and Michael Sheridan; and on account of his payment on said \$8,000 note of the sum of \$2,000 for Thomas Maney, the said Bernard Patton, by agreement with Maney, took Maney's stock in the said association as collateral security to secure to him from Thomas Maney the repayment of said sum of \$2,000. That the stock in said Irish-American Building Association then owned by Thomas Maney amounted to one-fifth of the entire stock in said association, and when, after the purchase of said property by said Bernard Patton under said deed of trust, the said Association was reorganized, said Patton conveyed said Columbia Hall to the new association, and the said Thomas Maney became and was entitled to one-fifth of the stock in the new association, called the 'Irish-American Investment Company,' and Bernard Patton became and was the holder of said Thomas Maney's stock therein as collateral security to secure to said Bernard Patton the payment of said sum of \$2,000 paid by him for said Thomas Maney on said \$8,000 note. That the capital stock of said association is of the value of — thousand dollars. That when Thomas Maney indorsed the five promissory notes hereinabove mentioned, of the sum of \$3,628.80 each, and left them in the possession of Bernard Patton, said Thomas Maney, notwithstanding said indorsement, continued to own one-half interest in and to said notes, except the claim of Bernard Patton in and to said notes as collateral security to secure to said Bernard Patton the said sum of \$2,000 afterwards paid by him for Thomas Maney on the Lemon-Tootle note aforesaid. That for the indorsement of said notes by Thomas Maney Bernard Patton paid no consideration whatever, other than to receive them as collateral to secure to him the payment of said sum of \$2,000. That said

five notes were indorsed by said Maney in blank and delivered, and left with the defendant Bernard Patton, with the fraudulent purpose on the part of Maney and Patton of cheating, hindering, and delaying Thomas Maney's creditors, and especially the plaintiff in these judgments, as to the excess in the amount of said notes over and above the sum of \$2,000 to become due from Maney to Patton on account of said Lemon-Tootle note, and prevent the plaintiff in these judgments in collecting them, or any part of them, from him, the said Maney; and the defendant Bernard Patton took and received said Maney's right, title, and interest in and to said notes and deed of trust for the purpose of aiding and assisting said Thomas Maney to hinder, delay, and defraud his creditors, and especially this plaintiff, and the plaintiff in said judgments, as to all of Maney's right, title, and interest in and to said five promissory notes, except the said sum of \$2,000 paid by Patton on the said Lemon-Tootle note. That on or about February 2, 1895, the said land and real estate described in the petition was sold by Thomas F. Ryan as trustee under and by virtue of the said deed of trust, and at said sale the defendant Bernard Patton purchased said lands and real estate at and for the price of \$15,600, and received a deed of conveyance therefor from the said trustee. That said Bernard Patton bid for, purchased, and obtained a deed from said trustee to convey to him said land, with an agreement and understanding by and between him and Thomas Maney that he (the defendant Bernard Patton) should at said sale purchase said land and hold it for the joint use of himself and Thomas Maney, in equal proportions, except that by said agreement Thomas Maney's interest should be subject to the payment to Bernard Patton of said sum of \$2,000 paid on account of the Tootle-Lemon note, and with the fraudulent purpose on the part of said Bernard Patton, and on the part of said Thomas Maney, to preserve said Thomas Maney's right, title, and interest in and to said property, in excess of the sum of \$2,000 as hereinabove stated, from the lien of plaintiff's judgments, and to hinder, delay, cheat, and defraud Maney's creditors, and especially the plaintiff herein, and to prevent him (the plaintiff) from collecting his said judgments, or any part thereof, from Thomas Maney. That the said Bernard Patton did at said trustee's sale purchase said lands described in the petition, and receive a deed thereto from said trustee for himself and Thomas Maney, and the said Patton admits in this case that he purchased said lands for himself and Maney, and that each one was by said purchase to obtain an undivided half interest therein, and Maney's half interest therein was to be, and was by said agreement between them, subject to the said claim of \$2,000 hereinabove mentioned. That said Bernard Patton paid said sum of \$15,600 bid by him for said land at said sale by the can-

cellation of two of the aforesaid promissory notes, and by giving a credit upon a third one of said notes for the sum of \$4,999.29, which said note at said time belonged to Thomas Maney and Bernard Patton, each of them owning a half interest therein, except that Maney's half interest therein was subject to the payment of said sum of \$2,000; and the only consideration which said Bernard Patton paid for said lands, when purchased by him at said trustee's sale, was the cancellation of said two notes and giving a credit of \$4,999.29 upon the third one of said notes. That, when said Bernard Patton received said trustee's deed for said land, he and the said Maney then and there and thereby became the owners thereof, and Maney's interest in and to said land by virtue of said deed of trust and the sale thereunder, and the conveyance to said Bernard Patton, and payment of the purchase price in the manner aforesaid, became, and was, and still is, an undivided half part thereof, subject only to the payment of said sum of \$2,000 on account of said Tootle-Lemon note. That the other two of said five promissory notes were, after said purchase of said lands at said trustee's sale, still held by Bernard Patton for himself and said Thomas Maney, each owning a half interest therein, and Thomas Maney's half thereof was, by said agreement between said Patton and Thomas Maney, to be subject to the payment of the said sum of \$2,000 by said Thomas Maney on account of the amount, as hereinbefore stated, being paid on the Tootle-Lemon note. That with these two said promissory notes the said Bernard Patton purchased another tract of land, on or about the 17th day of April, 1895, of the value of \$2,000, which said tract of land is described as follows: All of block one, Sulphur Springs, as subdivided by Martin D. Myers, by his plat entered of record in the recorder of deeds' office in said Buchanan county, on July or January 24, 1889; also all land or ground in said addition, being north of Myers street in said addition, and south of the land now owned, or formerly, by the said Brick & Terra Cotta Manufacturing Company, in the northwest quarter of section twenty-nine, in township fifty-seven, of range thirty-five, being the same property conveyed by Milton D. Myers to the Brick & Terra Cotta Manufacturing Company, by deed dated October 25, 1889, and now on record in the land records of Buchanan county, Mo., which said tract of land is situate in said county. That said last-mentioned tract of land was at said time purchased by said Bernard Patton for the joint use and benefit of himself and Thomas Maney, and the purchase price thereof was paid by Bernard Patton with the money and means belonging to himself and Thomas Maney jointly, and by said purchase of said land on the part of said Bernard Patton the said Thomas Maney became the owner of one-half interest in and to said tract of land, subject alone to the aforesaid claim

against him of the sum of \$2,000 paid by said Bernard Patton on account of said Lemon-Tootle note; and the said Maney paid one-half of the purchase price of said tract of land, subject to said claim of \$2,000. That said Bernard Patton took the deed to said land to himself alone for the purpose on his part, and upon the part of the said Maney, of fraudulently conceding the excess of said Maney's interest, over and above the said sum of \$2,000, in and to said tract of land, from said Maney's creditors, and with the fraudulent purpose to hinder, delay, cheat, and defraud said Maney's creditors, and especially the plaintiff in this case. That the undivided half of said land last above described was included in and conveyed by the deed from Bernard Patton to Dennis Curtin, dated July 29, 1896; and it was also conveyed by and included in the said deed of trust executed by Dennis Curtin to secure to Patton payment of said note for \$2,000, and this tract of land was included in said deed and deed of trust in the same manner and with the same intent and purpose that the tracts of land purchased by said Patton at the sale of Ryan as trustee were included therein. That when said Patton received said promissory notes from said Maney, and when they were indorsed to him by Maney to secure the payment of the said sum of \$2,000, on account of the Lemon-Tootle note, he (said Patton) did not take them with the intent to cheat or defraud Maney's creditors, but in good faith to secure him against loss on Maney's account on said Lemon-Tootle note, and which was done long prior to any of the fraudulent acts done by Patton and Maney as hereinbefore stated. It was a separate and distinct transaction. That on or about the 29th day of July, 1896, the defendant Bernard Patton executed a deed conveying to Dennis Curtin an undivided half part of said lands, which he had purchased February 2, 1895, at the sale of Thomas F. Ryan, trustee, for the alleged consideration, as expressed in said deed, of the sum of \$4,500, which said one-half was that belonging to Thomas Maney. That the said deed to Dennis Curtin was made and executed by Bernard Patton with the object, intent, and purpose of concealing Thomas Maney's interest in and to said land in excess of the said sum of \$2,000, and for the purpose of assisting Maney to cheat, hinder, delay, and defraud his creditors, and especially this plaintiff. That said Dennis Curtin, at the time he accepted said deed of conveyance, purchased said undivided half of said land in good faith and for full value, without any knowledge of any fraudulent intent on the part of said Bernard Patton or Thomas Maney. That when said Dennis Curtin purchased said half interest in and to said land, on or about the 29th day of July, 1896, he executed to Bernard Patton his promissory note for \$2,000 as the unpaid part of the purchase price of said interest in said land conveyed to him by Patton, and he ex-

ecuted at said time a deed of trust on said land to said Patton to secure the payment of his said promissory note. That the said promissory note has not been paid by said Dennis Curtin, and it is now held by Bernard Patton. That when said Dennis Curtin purchased said part of said real estate the cash payment made by him to Bernard Patton amounted to the sum of \$2,500. That the said Bernard Patton never held Maney's interest in and to said five promissory notes as collateral security to secure the payment to him by Maney of any sum whatever, except the said sum of \$2,000 paid by Patton for Maney on the Lemon-Tootle note, and there never was any agreement made between Maney and Patton that Patton should hold said five promissory notes, or any of them, as collateral for any other sum, except said sum of \$2,000, and the said Thomas Maney was not at any time herein mentioned indebted to said Bernard Patton in any sum, except in said sum of \$2,000 paid by Patton on the Tootle-Lemon note. That in July, 1896, when said Patton sold said half interest in said part of said lands herein first described to Dennis Curtin, Thomas Maney was not indebted to said Bernard Patton over and above the sum of \$2,000, the amount paid by Patton on the said Tootle-Lemon note. That as a further security to said Bernard Patton for the payment to him of said sum of \$2,000 paid by him on the Tootle-Lemon note, he holds Maney's right, title, and interest in and to one-fifth of the capital stock of said Irish-American Association, which is of little or no value.

"The court further finds that, within a few days after the defendant Bernard Patton executed said deed to Dennis Curtin, the said Bernard Patton paid over to Thomas Maney, through Daniel Lysaght, out of the proceeds of the sale of said interest to said Curtin, the sum of \$2,300, and that said payment of said sum of \$2,300 was then and there made by Bernard Patton to Thomas Maney, through said Lysaght, with the fraudulent intent and purpose on the part of both Patton and Maney to hinder, delay, cheat, and defraud Maney's creditors, and especially this plaintiff, out of Maney's interest in said property. The other \$200, the balance of the \$2,500 cash payment made by Curtin, was used in paying expenses of executing the deed of trust given to Thomas Ryan. The court further finds that payments have been made upon the three judgments hereinabove described, at the dates and in the sums stated, as follows: June 15, 1896, \$2,500; June 22, 1896, \$1,545; August 3, 1897, \$1,455.45; February 16, 1898, \$3,025.73. That after the payment of the said sums there now remains due and unpaid on said three judgments the sum of \$6,748.55. That on the 2d day of October, 1898, the state of Missouri, at the relation and to the use of Ed L. Conrad, recovered in the circuit court of this county judgment

for \$5,542.41 against James Walsh, Thomas Maney, Ferdinand Lutz, Louis Feulling, and others, on the said bond of said Walsh as administrator as aforesaid. This judgment was, on November 13, 1894, for value received, assigned and transferred by Ed L. Conrad to George T. Hoagland; and on the — day of —, 1894, said George T. Hoagland assigned and transferred said judgment to J. G. Schneider, plaintiff herein. That the state of Missouri, at the relation and to the use of Charles A. Conrad, recovered in the circuit court of Buchanan county, Mo., on October 2, 1893, judgment for \$3,985.72 against James Walsh, Thomas Maney, Ben Uhlman, and Louis Feulling, on the said bond of said Walsh as administrator as aforesaid. This judgment was on March 24, 1894, assigned by said Charles A. Conrad to John F. Tyler and Christian Hubacher, and it was on June 29, 1894, assigned by John F. Tyler and Christian Hubacher to Ferdinand Lutz and Louis Feulling, two of the judgment debtors in said judgment."

The court then declared the law to be as follows:

"(1) The court declares the law to be that the lien of plaintiff's judgment extended to all of Maney's right, title, and interest in and to all the lands described in the findings of fact, whether his interest was shown by deed of conveyance to him, or whether it was held in the name of Bernard Patton, for the use and benefit of Maney. The lien of a judgment in this state extends to all the debtor's right, title, and interest in and to his real estate in the county wherein said judgment is rendered, whether said interest be legal or equitable. (2) That when Bernard Patton purchased the lands described in the special findings with the means, under the circumstances, for the purpose, and with the design as stated therein, then he took said land, under the law, as a trustee for the use and benefit of plaintiff's said judgments, and he thereby became liable to plaintiff to the extent of Maney's undivided one-half part of said lands, or their proceeds, or so much thereof as might be sufficient to pay off plaintiff's said judgments. (3) Bernard Patton cannot even hold Thomas Maney's half interest in said lands, or the proceeds thereof, to secure the payment of any sum which Maney owed him, because of such fraudulent design and transactions. The plaintiff is therefore entitled to a decree in this case, subjecting Maney's said interest in said land, or the proceeds thereof, to the payment of his said judgments, more fully described in the findings of fact, in the manner and form as hereinafter stated. (4) Dennis Curtin, being a purchaser of Maney's interest in said land from said Patton in good faith, for a full consideration, without any notice or knowledge of Patton's and Maney's fraud, acquired a good and perfect title to Maney's interest in and to said real estate, subject, however, to his ob-

ligation to pay the \$2,000 and interest thereon, when due—the balance of the unpaid purchase price of said lands, as hereafter stated. (5) The plaintiff is entitled to a judgment and decree in his favor against Bernard Patton for the sum of \$2,300, and 6 per cent. interest thereon from July 29, 1896, to this date, which is \$354.57, making a total of \$2,654.57; and the plaintiff is entitled to a further judgment and decree against the defendants, requiring said Dennis Curtin to pay the \$2,000 note executed by him to Bernard Patton, with the interest thereon, to the plaintiff at the maturity thereof, and that said Bernard Patton, within five days from this date, indorse, assign, and transfer, without recourse, said \$2,000 note to the clerk of this court, to be held by him for the use and benefit of the plaintiff, until further ordered by the court. In case Bernard Patton fails or refuses to so transfer said note to the clerk, then plaintiff will be entitled to a personal judgment against him for the full face value of said note, and interest thereon since January 28, 1899. The plaintiff is entitled to be subrogated to all the rights of the beneficiary, Bernard Patton, in and to said note, and the deed of trust executed by said Dennis Curtin on said real estate to secure the payment thereof."

The following decree was then rendered:

"It is therefore ordered, adjudged, and decreed that the plaintiff have and recover of the defendant Bernard Patton the sum of \$2,300, with the interest thereon from July 29, 1896, to this date, which said interest, being the sum of \$354.57, making the amount \$2,654.57 as the sum herein ordered, adjudged, and decreed that the defendant Bernard Patton pay to the plaintiff herein, with interest thereon from this day at the rate of 6 per cent. per annum, which said sum is to be applied as part payment on plaintiff's said three judgments against Thomas Maney and others. It is further ordered, adjudged, and decreed that the defendant Dennis Curtin pay to the plaintiff, at the maturity thereof, his said promissory note, dated the 29th day of July, 1896, executed by him to Bernard Patton for \$2,000, as the unpaid part of the purchase price of said interest in said land conveyed to him by the said Patton, which said note, by its terms, becomes due and payable February 4, 1899, and bears interest, payable semiannually after the date thereof, until paid, at the rate of 7 per cent. per annum, the payment of which said note of \$2,000 is secured by a deed of trust, executed on the 29th day of July, 1896, by defendant Dennis Curtin, conveying the interest said Curtin purchased of and in and to said lands for that purpose. It is further ordered, adjudged, and decreed that the defendant Bernard Patton, within five days from this date, indorse, assign, and transfer, without recourse on him, said \$2,000 note to the clerk of this court, to be held by said clerk for the use and benefit of the plaintiff, until the further

order of this court. It is further ordered, adjudged, and decreed that the plaintiff be, and he is hereby, subrogated to all the right, title, and interest of Bernard Patton in and to said \$2,000 note, and in and to the deed of trust executed by said Dennis Curtin to secure the payment of said note. It is further ordered, adjudged, and decreed that in case the defendant Bernard Patton fails or refuses to indorse, assign, and transfer said \$2,000 note to the clerk of this court, in accordance with this order and decree, within five days from this date, the plaintiff herein shall have and recover of said Bernard Patton the full face value of said note, which is \$2,000, together with the interest thereon up to January 28, 1899, to be applied as part payment in plaintiff's said three judgments against said Thomas Maney and others. It is further ordered, adjudged, and decreed that plaintiff have and recover of defendants his costs in this behalf expended."

And thereupon, and on the 26th day of January, 1899, and within four days of the rendition of said judgment, and during the same term of court, defendant Patton filed his motion for new trial in words and figures as follows:

"Comes now the above-named defendant Bernard Patton, and moves the court to set aside its findings of fact and law, and its judgment thereon rendered, in this cause, and as grounds therefor states: (1) That the findings and judgment of the court should, under the pleadings and evidence, have been for the defendant. (2) That the said findings and judgment are against the evidence. (3) That the said findings and judgment are against the law and the evidence. (4) That the court erred in admitting illegal, irrelevant, and incompetent evidence offered by plaintiff against the objection of defendant. (5) That the court erred in excluding proper, legal, and competent evidence offered by defendant. (6) That the court erred in holding as a matter of law that the lien of the three judgments described in the petition, or either of them, was in force, as against this defendant, at the time of the institution of this suit. (7) That the court erred in holding that under the evidence the judgments described in the petition, or either of them, were the property of plaintiff at the time of the institution of this suit. (8) That the court erred in holding that the said judgments, or either of them, were unsatisfied at the time of the bringing of this suit. (9) That the court erred in holding that the lien of the judgments described in the petition, or either of them, attached to, or became or was, a lien or charge upon any interest of Maney in the lands described in the petition, or any of them, or on the notes and mortgage of the St. Joseph Brick & Terra Cotta Company, described in the petition. (10) The court erred in holding as a matter of law, under the pleadings and evidence, that lands described in the petition, or any interest of Maney therein, were ever at any

time charged with or subject to the lien of the judgments described in the petition. (11) That the court erred in holding as a matter of law that the plaintiff has any interest in or right to the note from defendant Curtin to defendant Patton, described in the petition. (12) That the court erred in holding as a matter of law that the plaintiff is entitled to judgment against this defendant for the sum of \$2,300 and interest thereon, or any other sum. (13) That the court erred in holding as a matter of law, under the pleadings and evidence in this case, that this defendant is not entitled to the sum of \$2,000 and interest out of the proceeds of the sale to Dennis Curtin, mentioned in the petition and evidence. (14) That the court erred in finding that this defendant was guilty of any act, or had any intention at any time, to hinder, delay, or defraud the plaintiff, or any other creditor of Maney. (15) That the court erred in finding that there was no consideration for the transfer and indorsement to defendant of the five notes of the St. Joseph Brick & Terra Cotta Company, except as stated by the court in its finding of fact. (16) That the court erred in holding that Maney indorsed and transferred the five notes of the Brick & Terra Cotta Company to this defendant for the purpose of hindering, delaying, or defrauding plaintiff, or any other creditor. (17) That the court erred in holding that this defendant bid for or obtained the land described in the petition, or any part thereof, at the trustee's sale of Thomas F. Ryan, for the purpose of concealing the interest of Maney in the same, or to hinder, delay, or defraud any creditor of Maney. (18) That the court erred in finding that the sale of the land described in the petition to the defendant Curtin was made by defendant Patton for the purpose of concealing the interest of Maney therein, or for the purpose of assisting Maney to cheat, hinder, delay, or defraud the plaintiff, or any other creditor. (19) That the court erred in finding that this defendant never held the five notes of the St. Joseph Brick & Terra Cotta Company for the purpose of securing the payment of any other debt than the sum of \$2,000, due on the Tootle-Lemon note. (20) That the court erred in finding that \$2,300 was paid by this defendant to Daniel Lysaght with the intention, on the part of either this defendant or Maney, to hinder, delay, cheat, or defraud any creditor of said Maney."

And afterwards, and during the same term of court, at which said term the motion for a new trial was filed, to wit, the January term, 1899, the court, upon consideration of said motion for a new trial, overruled said motion, and modified the judgment theretofore rendered herein, which order overruling said motion and modifying said judgment was in words and figures as follows, to wit:

"Now, at this time, the motion for a new trial in this case, coming on to be heard, is by the court taken up, heard, considered, and overruled; and the parties to the suit being

present in court, and it appearing to the court that the defendant Bernard Patton has failed and refused, and still fails and refuses, to deliver, indorse, or transfer to the clerk of this court, as heretofore ordered and decreed during this term of this court, the said promissory note for \$2,000, dated July 29, 1896, executed to Bernard Patton by Dennis Curtin, as and for the unpaid part of the purchase price of the interest in said land conveyed to said Curtin by said Patton, it is hereby ordered, adjudged, and decreed that the defendant Bernard Patton is liable to plaintiff for the full face value of said note, which is the sum of \$2,000, and also for the interest thereon from July 29, 1896, to this date, at the rate of 7 per cent. per annum, which interest amounts to the sum of \$350, making the amount of said Bernard's liability to the plaintiff, as shown by the evidence in this case, on account of said note, the sum of \$2,350. And now, in accordance with said Bernard Patton's absolute liability to the plaintiff for the amount, principal and interest, of said promissory note, the order, judgment, and decree rendered in this case on the 23d day of January, 1899, during this term of this court, is hereby so modified as to deprive the said Bernard Patton of any further option on his part to deliver, indorse, assign, or transfer said note to the clerk of this court; and it is hereby ordered, adjudged, and decreed that the order, judgment, and decree herein rendered on the — day of January, 1899, during this term of this court, be, and the same is hereby, modified in accordance with this order of the court, and that the said judgment is so modified as to conform it to the order of the court now made, declaring said Patton's liability on the said \$2,000 note to be absolute, and said order, judgment, and decree, as modified, is as follows: It is therefore ordered, adjudged, and decreed that the plaintiff have and recover of the defendant Bernard Patton the sum of \$2,300, with interest thereon from July 29, 1896, to this date, which said interest is the sum of \$354.57, making the amount of \$2,654.57 herein ordered, adjudged, and decreed that defendant Bernard Patton pay to plaintiff herein on account of the sum fraudulently paid by him to Thomas Maney. And it is further ordered, adjudged, and decreed that the plaintiff have and recover of defendant Bernard Patton the further sum of \$2,350, the amount due on account of the said Dennis Curtin note, making a total of the amount which is hereby ordered, adjudged, and decreed that the plaintiff recover of the defendant Bernard Patton of \$5,004.57, with interest thereon from this date at the rate of 6 per cent. per annum, which said sum is to be applied as part payment of plaintiff's said three judgments against Thomas Maney and others, and that plaintiff have execution against the defendant Bernard Patton for said sum of \$5,004.57 and interest thereon."

To such order, overruling said motion for a new trial and modifying the judgment theretofore rendered, the defendant Patton at the time objected and excepted. And afterwards, and during the same term of court at which said motion for a new trial was overruled, defendant Patton filed his affidavit for an appeal in this case, which was allowed.

The petition in this case is an ordinary bill to set aside as fraudulent certain deeds to real estate described in the petition, upon the ground that they were made by the grantor, Maney, with the fraudulent intent and purpose of evading the payment of certain judgments against him, of which plaintiff is the assignee, and to subject the land to the lien of said judgments, while the judgment rendered is a personal judgment against defendant Patton for the amount of money turned over by him to Lysaght, and by Lysaght to Maney, prior to the institution of this suit, and directed Patton to assign and turn over, for the use of plaintiff, to the clerk of the circuit court, the promissory note executed by the defendant Curtin to Patton within five days, and, in the event of Patton failing to so assign and turn over said note to the clerk of the court, judgment was rendered against him for the amount of said note and interest, which, including the amount paid by Patton to Lysaght for Maney, amounted to the sum of \$5,004.57, for which judgment was rendered.

No principle is better settled than, unless a judgment is responsive to the issues presented in the pleadings, it is erroneous. *Ross v. Ross*, 81 Mo. 84. It is equally as well settled that a party cannot state one cause of action in his petition and recover upon another, but that the decree which is awarded him must be authorized both by the facts stated in the petition and by the proof. *Reed v. Bott*, 100 Mo. 62, 12 S. W. 347, 14 S. W. 1089. In *Irwin v. Chiles*, 28 Mo. 576, it is said that "a party is not entitled to a judgment on a finding of facts different from any theory of the case set up in the petition or answer." In *Harris v. Railroad Co.*, 37 Mo. 310, it is said: "The statute permits a party to amend his petition, after his evidence has been given, to make it conform to the proofs; but no such thing was attempted in this case. It then presents the singular spectacle of declaring for one cause of action and obtaining judgment for another and different cause. Such a course of procedure is destructive of all certainty in pleading, and can neither be tolerated nor encouraged." The same rule is announced in *Newham v. Kenton*, 79 Mo. 382.

While, under the general prayer for relief, a party may have any relief to which he may show himself entitled, such relief must be founded on and consistent with the allegations in the bill, and not such as may be proven at the trial. *McNair v. Biddle*, 8 Mo. 257. The fact that plaintiff amended his petition during the trial, by adding to the

prayer for general relief an additional prayer, "for such personal judgments against the defendant as may be proper and legal," did not enlarge upon or broaden the allegations of the petition or the prayer for general relief, nor convert the petition into one charging Patton as fraudulent grantee, who therefore took said land as a trustee for the use and benefit of plaintiff to the extent of his judgments, and must account for the property or its proceeds, and hence is liable in equity to a personal judgment in favor of plaintiff for the amount of Maney's indebtedness to him. But the bill proceeds upon no such theory. Upon the contrary, it is drawn with the view and purpose of divesting Curtin's title, and to subject the land standing in his name to the payment of plaintiff's judgment.

The allegations of the petition which charged fraudulent conduct on the part of Patton are that he held certain notes which belonged to Maney in his name, which he used for the purpose of paying for real estate, and that he held said real estate under and by a secret arrangement for the benefit of Maney, and that for the purpose of assisting Maney he transferred said property to Curtin, are mere matters of inducement leading up to the averment which attempts to connect Curtin with said fraud; that is, that Curtin was holding certain real estate of Maney's to cover it up from his creditors. The petition in no way intimates, nor does it contain any allegation from which it can be inferred, upon what account, if at all, a personal judgment would be asked against Patton. It must, therefore, follow that the petition does not authorize the judgment, and as the court found and held Curtin's title good, and this was the only issue, there was nothing left upon which to predicate the decree rendered.

Moreover, we are unable to see how, in this proceeding, defendant Patton can be held liable to plaintiff, and a personal judgment rendered against him in favor of plaintiff for the money which Patton turned over to Maney before the filing of the petition in this case. In *Swift v. Holdridge*, 10 Ohio 232, 36 Am. Dec. 85, it is said: "An honest man will not take a fraudulent conveyance. If a man holds property fraudulently conveyed, as soon as he comes to a sense of his moral duty, he will restore it to those to whom it belongs. He ought to give it back to him from whom he received it, that it may be applied to his debts if wanted, or to his benefit if not wanted for this purpose. The law to discourage frauds does not compel him to restore it to the fraudulent grantor, yet no man will retain it for a moment who desires the reputation of honesty or possesses the sense of justice. The relation between him and the creditors of the debtor is different. There are no express obligations between them, no promise to be accountable to them, no obligation to restore

to them; but the creditor ought to receive his debt, and the law gives him a claim to the property, and it charges the fraudulent holder as trustee in consequence of his possession. The trust is not expressly created by contract, but it arises by operation of law, in consequence of his having in his hands that which ought to be applied to the creditor's debt. It depends, therefore, on the possession of the property. The character of cestui que trust does not belong to the general creditor until he has shown himself entitled to the debtor's property, and, if the fraudulent holder has in good faith divested himself of that which he could not retain without dishonesty before the right of the creditor has accrued, there is nothing remaining upon which to raise a trust, and the relation of trustee to anybody subsists no longer. The court will lend to the judgment creditor any aid in their power to reach the property of his debtor in the hands of his fraudulent assignee, or to subject any debts, securities, rights, equities, or choses in action within his power, and will exact a rigorous account of the disposition of anything he may have fraudulently received; but, if he has parted with what he fraudulently received before the rights of the creditors are fixed by judgment and by the filing of his bill, he must be exonerated from further liability." In *Walt on Fraudulent Conveyances* (3d Ed.) § 176, it is said: "Though a party may have intended to defraud the creditors of a debtor by taking and converting his property into cash, such intent is rendered harmless by his delivering the proceeds of the sale to the debtor or his authorized agent. If the party has accounted to the debtor for the proceeds of the property before proceedings are taken against him by the creditor, he cannot be forced to account for it over again."

It is insisted that, as plaintiff had commenced garnishment proceedings against defendant Patton before the institution of this suit against him, he cannot during the pendency of those proceedings ask the interposition of a court of equity; that, having elected to pursue his remedy at law, his election was final until the termination of those proceedings. But no such matter is pleaded, and, in order to be available, this should have been done.

It is said that Maney is a necessary party to this suit, and that the judgment should be reversed because he is not made a party defendant. As to whether or not a fraudulent grantor is a necessary party defendant in an action brought by his judgment creditors against the fraudulent grantee to set aside the conveyance of real estate for fraud and to subject it to the payment of the judgment, the authorities are in great conflict and irreconcilable. In this state, however, it has been held that, as the fraudulent grantor could be prejudiced in no way, in a legal sense, by a determination which

subjected the property to the payment of his debts, which had already irrevocably passed beyond his control, he has no interest in the suit, and therefore is not a necessary party. *Merry v. Fremon*, 44 Mo. 518; *Jackman v. Robinson*, 64 Mo. 289.

Plaintiff claims that no motion for new trial was filed after final judgment, and therefore there is nothing before the court for review, save the record proper. It appears from the record that on the 23d day of January, 1899, the court found its conclusions of fact. It then gave some declarations of law. It then ordered, adjudged, and decreed that plaintiff recover of defendant Bernard Patton the sum of \$2,300, with interest up to that time, amounting to \$2,654.57. It further ordered and decreed that the defendant Bernard Patton, within five days from that date, indorse, assign, and transfer, without recourse on him, the \$2,000 note which he held on Dennis Curtin to the clerk of the court, to be held by the clerk for the use and benefit of plaintiff until the proper order of the court, and that plaintiff be subrogated to all the right, title, and interest of Bernard Patton in said \$2,000 note and deed of trust executed by Dennis Curtin to secure the payment of said note. It was further ordered, adjudged, and decreed that, in case the defendant Bernard Patton should fail or refuse to indorse, assign, and transfer said note to the clerk of the court, in accordance with the order, within five days from that date, the plaintiff therein should have and recover of Bernard Patton the full face value of said note, which is \$2,000, together with interest thereon up to January 28, 1899, to be applied as part payment on plaintiff's three judgments against Maney and others. On the 26th day of January the motion for a new trial was filed. On the 4th day of February this motion was overruled, and as part of the same order a final judgment was rendered against appellant, not only for the \$2,654.57, but for the further sum of \$2,350, the amount due on account of the Dennis Curtin note, making a total amount adjudged against him of \$5,005.57. Plaintiff says that the order made on the 23d of January, 1899, was not a final judgment. No execution could have been issued thereon. It defined the respondent's rights, and simply declared that, unless the defendant Patton within five days deposited the Dennis Curtin note with the clerk, in accordance with the order, a final judgment would be rendered against him. This order was certainly not a final judgment. No final judgment was rendered until February 4, 1899, and the judgment rendered on that date is the only judgment in this case.

State ex rel. v. Klein, 140 Mo. 502, 41 S. W. 895, was a condemnation proceeding, in which the defendant had been awarded \$87,510 by the commissioners, which had been paid and received by him, and on appeal

to the circuit court this award was reduced to \$47,900 by the jury, and the plaintiff filed a motion asking for judgment for the excessive payment, or for \$39,610. This motion was sustained, but the court further ordered that such sum should not bear interest, nor should execution issue therefor or be a lien upon defendant's real estate, "until the further order of the court." Held, that this was not a final judgment; that a final judgment means one that can be enforced by execution—one that bears interest and is a lien on real estate. *City of St. Louis v. Boyce*, 130 Mo. 572, 31 S. W. 594, and *Railroad v. Railroad*, 94 Mo. 535, 6 S. W. 691, are the same kind of cases, and the ruling the same.

It is very clear that no final judgment had been rendered in either of these cases at the time of filing motions for new trial, but is such the fact in the case at bar? If there was anything in the decree which was rendered before the motion for new trial was filed, tending to show that a final decree had not been rendered at the time the motion for new trial was filed, it is that part of it which required defendant Patton, within five days from the time the decree was rendered, to indorse, assign, and transfer, without recourse on him, the \$2,000 note, executed by Curtin to him, to the clerk of the court, to be held by said clerk for the use and benefit of the plaintiff, until the further order of the court, and, in the event of his failure to do so within the time indicated, the plaintiff should have and recover of Patton the full face value of said note, which is \$2,000, together with the interest up to January 28, 1899. It was also further ordered, adjudged, and decreed that plaintiff have and recover his costs in this behalf of defendant. The fact that this decree provides that, if Patton did not turn over the note in question to the clerk of the court within five days, when at the same time it was also provided in the decree that, in the event of his failure to do so, plaintiff shall have and recover of said Bernard Patton the full face value of said note, which is \$2,000, together with interest thereon up to January 28, 1899, and that costs were then adjudged against defendants, clearly shows that it was then a final decree, with the privilege to defendant Patton of complying with it in five days by turning over the note to the clerk, during which time an execution could not have issued upon it, but at any time thereafter, in the absence of a showing by Patton that he had turned over the note as directed, plaintiff could have sued out an execution on the judgment without further action on the part of the court, unless a supersedeas had been granted to prevent it. And the fact that the court thereafter made some changes in the decree did not rob it of its integrity as a final decree.

In 1 Black on Judgments (2d Ed.) § 41, in speaking of the finality of decrees, it is

said: "Another case, coming much nearer to a satisfactory definition, holds that a final decree is not necessarily the last decree rendered, by which all proceedings in the case are terminated, and nothing is left open for the future judgment of the court; but it is a decree which determines the substantial merits of the controversy, all the equities of the case, though there may remain a reference to be had, or the adjustment of some incidental or dependent matter." *Walker v. Crawford*, 70 Ala. 567. In *Travis v. Waters*, 1 Johns. Ch. 84, it is held that a decree on a bill for specific performance, on the coming in of the master's report, as to the quantity of land to be conveyed and the payments made, directing the balance due to be paid, and the conveyance to be executed, is a final decree. "So it has been held that a decree that defendants should assign a certificate of lands to the plaintiff, provided he should, before a given day and after a tender of the assignment, pay a certain sum of money to them, is a final decree." 1 Black on Judgments (2d Ed.) § 43.

It is clear that, if Patton had turned the note in question over to the clerk within five days from the date of the decree as therein provided, no one would gainsay the fact that the decree was final when entered upon the record of the court, with a limited time to Patton to comply with its terms, which did not in any way affect its finality; and, if this be so it is none the less final because he failed to turn over the note as required by the decree.

For the reasons intimated, the judgment should be reversed, and the cause remanded. It is so ordered. All of this division concur.

GATES v. TEBBETTS.

(Court of Appeals at Kansas City, Mo. June 8, 1903.)

MORTGAGES — FORECLOSURE — DEFICIENCY JUDGMENT—FOREIGN STATUTE—EFFECT.

1. A note and mortgage were given in Nebraska at a time when the statutes of that state (Code Civ. Proc. § 848) provided that after a decree for foreclosure no proceedings should be had at law for the recovery of the debt secured by the mortgage. *Held*, that a judgment foreclosing the mortgage under this statute was a bar to a subsequent action in another state on the mortgage note.

Appeal from Circuit Court, Jackson County; W. B. Teasdale, Judge.

Action by Henry B. Gates against C. E. Tebbetts. From a judgment for plaintiff, defendant appeals. Reversed.

J. D. McCue, for appellant. Karnes, New & Krauthoff, for respondent.

BROADBUSH, J. The plaintiff sued to recover on a certain principal note and coupons executed by defendant and his wife in the

state of Nebraska on the 1st day of June, 1897, and made payable in the state of Illinois. The debt was secured by a mortgage on certain lands situated in the former state. The defense is that when said notes became due, on the 16th day of July, 1900, the plaintiff instituted an action in chancery in the district court of Gage county, Neb., the county in which the land described in said mortgage was situated, to foreclose said mortgage, in the manner prescribed by the statutes of the state; that in said proceedings personal service was had upon defendant's wife, Ella F. Tebbetts, and service by publication upon this defendant. Thereafter, and on the 11th day of February, 1901, by the consideration of said court and upon an accounting had, it was found by said court that there was due the said plaintiff on the principal note and interest coupons thereto attached the sum of \$1,455.98, for which sum and costs judgment was entered in said cause; and it was further adjudged and decreed, if the defendants failed for the period of 20 days thereafter to pay the plaintiff the said sum of money so adjudged to be due, together with interest thereon, that the equity of redemption of said defendants, and each of them, be foreclosed, and said mortgaged premises be sold, and an order of sale be issued to the sheriff of Gage county, Neb., commanding him to sell the said real estate as upon execution, and to bring into court the proceeds thereof, to be by the court applied in satisfaction of said judgment. Defendant further says that thereafter an order of sale was issued to the sheriff of said county of Gage, in the state of Nebraska, pursuant to the judgment, decree, and order of said court in said action, commanding him to sell said real estate as upon execution, and thereafter, on the 16th day of December, 1901, the sheriff, pursuant to the said command, did offer the real estate for sale, and did sell the same to the plaintiff therein, he being the highest bidder therefor, as will more fully appear by the copy of the record of proceedings in said cause attached to the original answer filed herein, and marked "Exhibit A," and herein referred to as part of this answer, as fully and to the same extent as if pleaded herein. Defendant further says that at the time of the execution of the said notes and mortgage, as well as at the time of the proceedings in said cause in the district court of Gage county, Neb., the following provisions of the statutes of Nebraska were in full force in said state; that is to say, the hereinafter quoted sections were part of the Code of Civil Procedure of said state, to wit:

"Sec. 845. All petitions for the foreclosure or satisfaction of mortgages shall be filed in the district court in chancery, where the mortgaged premises are situated.

"Sec. 846. Whenever a petition shall be filed for the foreclosure and satisfaction of a mortgage, the court shall have power to de-

cree the sale of the mortgaged premises, or such part thereof as may be sufficient to discharge the amount due on the mortgage and cost of suit."

"Sec. 848. After such petition shall be filed, while the same is pending, and after a decree rendered thereon, no proceedings whatever, shall be had at law for the recovery of the debt secured by the mortgage, or any part thereof."

Defendant further says that prior to the execution of said note and mortgage there had been a provision of the Code of Civil Procedure of Nebraska, which provision was "section 847" thereof, which provided:

"When a petition shall be filed for the satisfaction of a mortgage, the court shall not only have the power to decree and compel the delivery of possession of the premises to the purchaser thereof, but, on the coming in of the report of sale, the court shall have power to decree and direct the payment by the mortgagor of any balance of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises, in cases in which such balance is recoverable at law; and for that purpose may issue the necessary execution, as in other cases, against other property of the mortgagor."

Defendant says that said last-mentioned section of the Code was repealed by an act of the Legislature of the state of Nebraska, approved May 14, 1897 (Laws 1897, p. 378, c. 95), and was not in force at the time of the rendition and entering of the judgment in the case of Henry B. Gates against the defendant Ella F. Tebbetts and this defendant in the district court of Gage county, Neb., as hereinbefore stated. And defendant further says that by the provisions of said sections 845, 846, and 848, as hereinbefore set forth, and the proceedings in foreclosure had in pursuance thereof, as hereinbefore stated, the said debt became discharged and extinguished, and the said plaintiff forever barred from maintaining an action at law to recover upon the debt secured by the mortgage, as hereinbefore set forth. Defendant further says that at the time of the commencement of said action to foreclose said mortgage in the district court of Gage county, Neb., in chancery, the plaintiff could have had an action under said statutes at law to recover upon the said notes, but, having elected to proceed in chancery, he became and was barred from any action at law on said note.

The plaintiff filed his motion for judgment on the pleading, which the court sustained, and judgment was accordingly rendered, from which defendant appealed.

The contention of defendant is that the Nebraska statute was a part of the contract in suit, and by its terms and provisions, the plaintiff having elected to foreclose his mortgage in that state, he is barred from prosecuting an action on the notes for the residue unpaid, not only in the state where the con-

tract was made, but also in any other jurisdiction.

In *Bronson v. Kinzie*, 1 How. 321, 11 L. Ed. 143, it was held that: "A state law passed subsequently to the execution of a mortgage, which declares that the equitable estate of the mortgagor shall not be extinguished for twelve months after sale under a decree in chancery, and which prevents any sale unless two-thirds of the amount at which the property has been valued by appraisers shall be bid therefor, is within the clause of the tenth section of the first article of the Constitution of the United States, which prohibits a state from passing a law impairing the obligations of contracts." And the opinion further holds that: "Whatever belongs merely to the remedy may be altered according to the will of the state, provided that the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself."

In *Ruhe v. Buck*, 124 Mo. 178, 27 S. W. 412, 25 L. R. A. 178, 46 Am. St. Rep. 439, it was held that: "Where a nonresident creditor sues a married woman in this state he is entitled to such remedies only as the *lex fori* affords." In that case the plaintiff sought to attach the property of a married woman on a debt contracted in Dakota, where the law authorized attachment proceedings against married women. The court held that a married woman could not be sued by attachment in actions of law in Missouri, and that the decisions had been uniform in that respect. The court clearly defined its position in the following language, viz.: "Our courts administer justice without distinction according to the modes prescribed by the state, and those who seek them must take such remedies as are prescribed." And, further, the court said: "The rule which recognizes the binding force of the contract where made has never gone to the extent of attaching to it the local remedies and carrying them into another jurisdiction, but it is left to each nation and state to enforce such contract according to its own laws." The question decided referred alone to the remedy, and that the contract brought with it into this state the *lex loci contractus*, but not the *lex fori*.

If the question in the case at bar was one alone of remedy, the foregoing authority would be conclusive. The answer of defendant does not ask the court to administer him justice according to the forms and mode of procedure of the Nebraska Code, but he asks the court to give effect to said Code in so far only as it affects his rights under the contract. In *St. Louis Type Foundry v. Jackson*, 128 Mo. 119, 30 S. W. 521, the court gave effect to a Kansas statute declaring that certain judgments should become dormant if execution is not sued out within five years from their rendition. The

holding was that, by the Kansas statute, "all remedy was taken away, which is never done without an intention to destroy the right." The substance of section 848 of the Nebraska code is that after a decree on the mortgage no proceedings whatever shall be had at law for the recovery of the debt secured, or any part thereof. It is insisted by appellant that the rule adopted in said last-named case applies to this, in that, the remedy being taken away, the right itself is destroyed. And we believe the rule does apply, and governs the case at bar.

In *Moore v. Luce*, 29 Pa. 260, 72 Am. Dec. 629, where the effect of the statute of limitations was in question, the court said: "It is a mistake to suppose that the person barred by the statute of limitations loses nothing but his remedy." In *McCracken County v. Mercantile Co.*, 84 Ky. 344, 1 S. W. 585, in speaking of an action barred by the statute of limitation, the court adopted the language of Blackstone, that "wherever there is a legal right there is a legal remedy," and that "the want of right and the want of remedy are the same thing." The ruling in *St. Louis Type Foundry v. Jackson*, supra, was approved in *Berkley v. Tootle*, 163 Mo. 584, 63 S. W. 681, 85 Am. St. Rep. 587, and the language of the opinion quoted and adopted.

The question naturally presents itself, could a Nebraska court, in view of the statute pleaded as a bar to this action, after the rendition of said decree in another action, render judgment on the notes in suit? Certainly not, if the statute itself was valid, which is not denied. This being conceded, it must also be conceded that, there being no right of action in the *lex loci contractus*, there could be none in the *lex fori*. Under the authorities, our conclusion is that the Nebraska statute was a part of the contract itself; and did not alone pertain to the remedy, and, that remedy being denied, the right is destroyed.

The respondent insists that under the rulings of the courts of this state the notes are separate contracts from that of the mortgage, and that therefore a decree foreclosing the mortgage could not affect plaintiff's right to maintain a separate action on them. Admitting such to have been the holding of the courts of Missouri, it does not necessarily follow that respondent's conclusion is sound. We cannot see how the question could be affected thereby.

The defendant also pleads the statutes of the state of Illinois as a defense to a part of the interest included in said coupon notes, which he claims is usurious under said statute; but as it is admitted that the contract in suit is governed by the laws of Nebraska, and not those of Illinois, that part of his answer may be conceded as if eliminated from his defense.

For the reason given, the cause is reversed and remanded. All concur.

MCCORMACK v. HENDERSON.*

(Court of Appeals at Kansas City, Mo. June 8, 1903.)

REAL ESTATE AGENTS—RIGHT TO COMMISSIONS—PROCUREMENT OF PURCHASER—EVIDENCE—INSTRUCTIONS—SUBSTANTIAL COMPLIANCE WITH CONTRACT.

1. Where an agent employed to sell real estate procures a customer, he is entitled to his commissions, though the sale is finally consummated through negotiations by an agent sent by the prospective purchaser to the seller.

2. A real estate agent obtained a purchaser, and while carrying on negotiations with him he told the agent that he thought the latter could get the property for him cheaper, and that he wanted him to go and see the seller again, which the agent refused to do. *Held*, that the mere refusal to see the seller again did not constitute an abandonment of the agency, so that the agent could not recover commissions for a subsequent sale to the same purchaser, consummated by the owner personally.

3. In an action by a real estate agent for commissions, in which it was claimed that plaintiff had abandoned his agency, an instruction that if the jury believed he had abandoned the agency he could not recover, though faulty for failure to state the specific facts alleged to constitute the abandonment, could not have harmed defendant.

4. Where an owner of real estate engaged an agent to sell the same, fixing the price at \$18,500, and the agent procured a purchaser who finally bought direct from the owner for \$1,000 less than the lowest price at which the owner had authorized the agent to sell, there was a substantial compliance with the contract entitling the agent to commissions.

Appeal from Circuit Court, Jackson County; James Gibson, Judge.

Action by E. L. McCormack against Ernest L. Henderson. From a judgment for plaintiff, defendant appeals. Affirmed.

Grant I. Rosenzweig, for appellant. Henry L. McCune, for respondent.

BROADDUS, J. This is a suit by plaintiff to recover of defendant commission for the sale by him as a real estate agent of a certain lot, and dwelling house thereon situate, in Kansas City, Mo., belonging to the defendant. The evidence tended to show that plaintiff, having learned that defendant wished to sell said property, called on defendant in the month of November, 1901, to secure the agency to sell it; that he was told by defendant that other agents were trying to sell it, but that, if plaintiff would sell it or produce a customer, he would pay him a commission; that defendant priced the property at \$20,000, but stated that he would take considerably less; that the commission was to be the usual one of 2½ per cent. on the amount of the sale; that plaintiff at once advertised the property for sale in the *Kansas City Star* and in the *Journal*, and called on several persons whom he knew to be in the market for the purpose of purchasing homes, and tried to sell to them; that learning that one Robert McClintock had sold

*Rehearing denied June 22, 1903.

¶ 4. See *Brokers*, vol. 8, Cent. Dig. §§ 66, 68, 88, 87.

his house on or about February 17, 1902, he called on him and gave him a description of defendant's property, told him the price, and asked him if he would not go and look at it, which he agreed to do; that McClintock's wife and daughter had previously seen the advertisement of the property in the newspapers, but that he had never seen it himself; that plaintiff went to defendant's office to get the key to the house, at which time he told him that he had got a purchaser, and informed him that it was McClintock; that on the next day he met McClintock with his wife and daughter at the house, and showed them the property, at which time plaintiff offered the property to McClintock for \$19,000; that McClintock again went to see the property; that after having seen it he made an offer of \$17,000 for it, which offer plaintiff reported to defendant, when defendant said it was not enough; that, on the Saturday following, the plaintiff called on McClintock again, when the latter made some objection to the barn, but said he would think it over, and asked plaintiff for his card, and told him that he might conclude to raise his offer, and that if he bought the property he would buy it through plaintiff; that plaintiff reported the interview to defendant, who told him not to press the sale too hard, as McClintock might think they were too anxious to sell; that plaintiff called upon McClintock several times, and at one time gave him a picture of the house; that on one of these occasions McClintock was not at home, but that he left his card, on which he had written that he was going out of town for a few days; that he left town on Monday and returned on Friday; that during his absence one C. F. McGregor, a friend of McClintock's, went to the latter's restaurant for lunch, and was told about the property by McClintock, but that defendant was asking too much for it; that McGregor went to defendant at McClintock's request and as his representative; that McClintock had already decided that he wanted the house, and that McGregor's mission to defendant was only for the purpose of getting the price; that McGregor submitted to defendant the highest price McClintock would pay; that the negotiation finally resulted in defendant fixing the price at \$17,500, which McClintock agreed to pay, and it was sold to him at that price. This sale was effected during plaintiff's absence from the city. The evidence further developed the fact that McClintock took offense at some language used by plaintiff to him, for which reason he was determined not to buy through his agency. The defendant's evidence tended to contradict that given, but, as the errors claimed are those of law, the finding of the jury upon the facts is not a proper matter of inquiry here. The finding was for the plaintiff, and defendant appealed.

Admitting the full force of the testimony, the defendant contends that the plaintiff did

not make out a case sufficient to entitle him to go to the jury.

Instructions numbered 1 and 2, given by the court in behalf of plaintiff, stated the law of the case. They are as follows: "(1) If the jury find from the evidence that plaintiff's agency was the procuring cause of the negotiations between defendant and McClintock which finally resulted in the sale of defendant's property to McClintock, then the plaintiff is entitled to recover, even though the jury may further find that the negotiations were consummated through another agent, and even though said other agent has been paid by defendant. (2) If you believe that McGregor went to Henderson as McClintock's representative, and concluded a sale at a lower price than McClintock had offered through plaintiff, this fact would not of itself deprive plaintiff of his right to recover, if you believe from the evidence and instructions given you that plaintiff is entitled to recover."

The decisions in this state are numerous to the effect that, "where real estate has been placed in the hands of an agent for sale and he is the procuring cause, he is entitled to his commission." *Wright & Orrison v. Brown*, 68 Mo. App. 577; *Stinde v. Blesch*, 42 Mo. App. 578; *Bell v. Kaiser*, 50 Mo. 150; *Tyler v. Parr*, 52 Mo. 249. And these same authorities hold that he is entitled to his commission, though the sale was consummated through direct dealings between the principal and the purchaser. We have only cited a few of the many decisions in Missouri to that effect.

The evidence quoted certainly tends to show that the efforts of the plaintiff were the procuring cause of the sale, notwithstanding defendant consummated it himself with McGregor, who was, in fact, the agent of the purchaser. If it was through plaintiff's efforts—of which there can be no doubt—that McClintock came to the conclusion to purchase, the fact that he became dissatisfied with plaintiff, and made the arrangement to purchase through McGregor, did not have the effect of depriving plaintiff of his right to commission for his services. The evidence that McClintock had concluded to buy the property before he ceased negotiations with plaintiff was clear.

Defendant has cited numerous decisions which he claims are to the effect that the agent must disclose the customer's name to the principal, among which are *Hayden v. Grillo*, 35 Mo. App. 650, and *Stinde v. Scharff*, 36 Mo. App. 15. These two cases do not support his claim. On the contrary, as to cases like the one at bar the appellate courts of this state hold that it is immaterial whether the agent discloses the name of the purchaser prior to the time of closing the sale. *Millan v. Porter*, 31 Mo. App. 563; *Tyler v. Parr*, 52 Mo. 250; and *Goffe v. Gibson*, 18 Mo. App. 4.

The defendant asked eleven instructions, all

of which were refused except those numbered 2 and 3. It is urged specially that the court erred in refusing to give instruction No. 7, which was intended to be explanatory of instruction No. 5 given by the court of its own motion. Instruction 5 is as follows: "If you believe from the evidence that plaintiff abandoned the negotiations with McClintock, and after such abandonment by plaintiff Mr. McGregor took up the matter, and it was McGregor's efforts that were the procuring cause of the sale to McClintock, then your verdict will be for the defendant." No. 7 is as follows: "The jury are instructed that if McCormack told McClintock that he would not try to get a lower price than \$18,500, and declined to see Henderson for that purpose, then the same constituted an abandonment of McClintock as a customer, and McCormack cannot recover commission for a subsequent sale made to McClintock at \$17,500." The latter instruction, if it had been given, would have been misleading. The evidence did not justify it. The only evidence in reference to the matter was that of McClintock, who, in testifying, said: "I told him [McCormack] I did not believe he was trying to sell it to me; he was not treating me fair. I believe he could sell it cheaper; he could get it cheaper if he would go and see him again. He said he would not go; he said he was not going to see him; and he said he would not see him, either." He was then asked if he and plaintiff both did not get impatient. He answered, "Yes, sir." He thought plaintiff ought to try and get the property cheaper for him, and did not think he would try to do so. He was then asked the question, "That was what you wanted?" and answered, "Yes, sir;" and, "He gave it up, and he said so. He said, 'I would not fool with you, and try and sell you anything.'"

The fact that plaintiff declined to see defendant, at the instance of McClintock, in order to get him to reduce his price upon the property, would not of itself have justified the court in giving said instruction. He might have so declined with propriety, as he was not McClintock's agent, without any intention of abandoning his agency, much less without doing so. It is true that said instruction given by the court on its own motion on the question of abandonment was faulty, as it did not submit to the jury the particular facts and circumstances from which such abandonment might have been inferred. *Link v. Westerman*, 80 Mo. App. 592; *Henry v. Bassett*, 75 Mo. 89. But as said instruction was not given at the instance of plaintiff, and which was antagonistical to his claim, and which could not by any means have prejudiced the defendant, it was, as to him, a harmless error. He should have submitted a proper instruction including all the facts upon the question, and left it to the jury to say whether, under all the evidence, the plaintiff did abandon his agency. It is not admissible to single out certain facts up-

on which to predicate a finding, thereby excluding all the other facts and circumstances in proof. *State v. Hibler*, 149 Mo. 478, 51 S. W. 85; *State v. Rutherford*, 152 Mo. 124, 53 S. W. 417; *Chappell v. Allen*, 38 Mo. 213; *Rose v. Spies*, 44 Mo. 20; *Copp v. Hardy*, 32 Mo. App. 588.

It is true that defendant's lowest price for which he authorized plaintiff to make the sale was \$18,500, and that it was in fact sold for \$17,500 by defendant himself. But as the evidence tended to show that plaintiff's contract was to sell, or procure a purchaser, he substantially complied with his contract. *Wright v. Brown*, supra; *Stinde v. Blesch*, supra; *Tyler v. Parr*, supra; and *Crone v. Trust Co.*, 85 Mo. App., loc. cit. 607. We do not find any conflict in the decisions of this state on the question as intimated by the defendant. We believe the case was properly tried, and that the finding under the law is supported by the evidence.

For the reasons given, the cause is affirmed. All concur.

McLEAN v. KANSAS CITY.

(Court of Appeals at Kansas City, Mo. June 8, 1903.)

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS—KNOWLEDGE OF DEFECT—SUFFICIENT ALLEGATION—INSTRUCTIONS.

1. Where there is no conflict as to the existence of a fact, assuming its existence in the instructions is not prejudicial error.

2. In an action against a city for injuries alleged to have been caused by a defective sidewalk, an allegation that the defendant carelessly and negligently permitted such defects to remain was sufficient, after verdict, as an allegation of knowledge of the existence of the defect for a reasonably sufficient length of time to repair the same.

Appeal from Circuit Court, Jackson County; Jno. W. Henry, Judge.

Action by Ella A. McLean, as administratrix, against Kansas City. From a judgment for plaintiff, defendant appeals. Affirmed.

R. J. Ingraham and J. J. Williams, for appellant. W. H. Wallace, T. B. Wallace, and W. C. Culbertson, for respondent.

ELLISON, J. Plaintiff was injured on one of defendant's sidewalks, in consequence of such walk being negligently permitted to become and remain in a state of decay and unsafety. She brought her action for damages against defendant, and recovered. 81 Mo. App. 72. The present action was begun by the husband for loss of service. He having died, she, as administratrix, was made plaintiff, and recovered in the trial court.

There are but two objections advanced against the judgment: One, that the petition does not state a cause of action, and the other that the instructions were erroneous in assuming matters in controversy. Nel-

¶ 2. See *Municipal Corporations*, vol. 38, Cent. Dig. § 1714; *Pleading*, vol. 39, Cent. Dig. § 1473.

ther of them is well taken. A fair and reasonable interpretation of the instructions, as framed by plaintiff, does not disclose that any issuable matter was assumed. The matter said to be assumed was that plaintiff's wife was thrown down and injured. As to that fact, the evidence does not disclose any dispute, and therefore, even if it had been assumed, it would not have been reversible error. *Burlington Bank v. Hatch*, 98 Mo. 377, 11 S. W. 789.

The objection to the petition is that it does not state that the city had known of the defective walk for a reasonably sufficient length of time to repair the same. Such statement is not made in direct terms. But the statements which are made are sufficient to necessarily embrace the allegation said to be necessary. The petition fully sets out the defective condition of the walk, and alleges that the defendant carelessly and negligently suffered and permitted such defects to remain, whereby the plaintiff's wife was injured. This was sufficient after verdict. *Hurst v. City of Ash Grove*, 96 Mo. 168, 9 S. W. 631, and cases cited. That case and others to be found in plaintiff's brief conclusively determine the point against defendant.

There was one other objection to the instructions, viz., that the jury were not confined to the loss of the wife's household services. We are, however, satisfied that, taking the instructions together, the jury could not have been misled in that respect, and that no other than household services could have been understood as a loss to plaintiff.

No substantial objection has been shown to the judgment, and it is accordingly affirmed. All concur.

KANSAS CITY v. OPPENHEIMER.*

(Court of Appeals at Kansas City. Mo. May 25, 1903.)

CITIES—LICENSE FEES—INSURANCE COMPANIES—TAX ON AGENTS.

1. Under Rev. St. 1899, § 8048, providing that the agent or agents of any insurance company doing business in a city having a population of more than 100,000 inhabitants, in addition to the tax on premiums as provided for in preceding sections, shall also pay to the collector of said city, if it shall so declare by ordinance, not more than \$100 per year, for the use of said city, which sum shall be in full for and in lieu of all taxes and licenses which said city may possess the power to impose on such agencies, such a city has no power to require the payment of a tax by individual insurance agents, in addition to a \$100 license tax imposed upon the local agencies of the companies employing such agents.

Appeal from Criminal Court, Jackson County; John W. Wofford, Judge.

Proceeding by Kansas City against George Oppenheimer for violation of a city ordinance. From a judgment of acquittal, the city appeals. Affirmed.

J. L. Morgan, for appellant. W. C. Culbertson, for respondent.

SMITH, P. J. The plaintiff is a city having a population of more than 100,000 inhabitants. It has a special charter, which was framed and adopted in conformity to the requirements of section 16, art. 9, of the Constitution of the state. By that section such charter was required to "always be in harmony with and subject to the Constitution and laws of the state." By subdivision 10 of section 1, art. 9, of said charter, the mayor and common council were given the power by ordinance "to license, tax and regulate insurance companies and insurance agents." The plaintiff passed an ordinance (No. 20,298) which provided that "every person, firm or corporation hereinafter described in this section shall procure from the city a license, and every person, firm or corporation engaged in any occupation, shall procure a license from the city." The fee required by the section was as follows, to wit: "Insurance company, \$100.00 per year; insurance agent, solicitor, sub-agent or broker, \$25.00 per year." Section 8043, Rev. St. 1899, requires that every insurance company not organized under the laws of this state shall annually pay a tax upon all premiums received on account of business done in this state at the rate of 2 per cent. per annum, in lieu of all other taxes, except as provided in article 8. Section 8044 requires that such companies shall, on or before a certain time in each year, make a return to the Superintendent of the Insurance Department, and that upon the receipt of such returns that officer shall assess the said 2 per cent. tax against them, which they are required to pay into the State Treasury, where one half of the amount thereof shall go into the general revenue fund of the state, and the remaining half shall be placed to the credit of the county foreign insurance fund. Section 8046 requires the State Auditor to apportion to the counties, on the basis of the number of children in each town, as shown by the last enumeration certified to the Superintendent of Public Schools, on which the school moneys are apportioned and distributed, all the moneys to the credit of the county foreign insurance tax fund. Section 8047 provides, when the said fund is received by the county treasurer, how the county courts shall distribute the same amongst the incorporated cities and towns in the county. Section 8048 provides that "the agent or agents of any such insurance company doing business in any city in this state having a population of more than one hundred thousand inhabitants, in addition to the tax on premiums as above provided for against such companies, shall also pay to the collector of the said city, if said city shall so declare by ordinance, on or before the first day of February of each and every year, not more than the sum of one hundred

*Rehearing denied June 22, 1903.

dollars for the use of said city, which sum shall be considered in full for and in lieu of all taxes and licenses which said city may possess the power to impose on such agencies; and such collector shall, upon such payment being made, issue to such agent or agents, a license in the name of such city, to do the business of such agency for one year, which license shall be renewed from year to year, if demanded." The foreign insurance company for which the defendant was the agent in said plaintiff city had a license for which it had paid plaintiff \$100. The defendant refused to take out a license as agent for the term covered by the license of his company, and he was accordingly prosecuted for a violation of said Ordinance No. 20,298, already referred to, but was acquitted in the criminal court, from where the plaintiff city brought the cause here by appeal.

The question raised by the appeal is whether or not the said Ordinance No. 20,298 is in substantial harmony with section 8048 of the statute, or, expressed in another way, whether the former contravenes the latter. It is a well-established principle of the common law that the ordinances of a municipal corporation, to be of any validity, must be consistent with its charter and the General Statutes of the state creating it, and not repugnant to the legislative policy of that state. *Kansas City v. Hallett*, 59 Mo. App. 160, and authorities there cited. And it is also a rule that where it can be seen that the exercise of any jurisdiction by the corporation can clearly be brought within the scope of the grant without a violation of the Constitution, or a conflict with the laws of the state, then there can be no objection to its exercise. *Kansas City v. Neal*, 49 Mo. App. 72; *St. Louis v. Bentz*, 11 Mo. 61; *St. Louis v. Schoenbusch*, 95 Mo. 618, 8 S. W. 791. It is clear that, if the statute be left out of consideration, the passage of the ordinance was the exercise of a power within the charter grant. The latter confers the power to license, without more. The former (section 8048) comes in and prescribes the terms. The charter provision and the statute are, in effect, two statutes, which are in pari materia, and must be construed together. When so construed, it will be seen that the power given by the charter to license is qualified or restricted by the statute. The city, in exercising the power to license, can go no further than to declare by ordinance that any foreign insurance company doing business within its territorial limits, in addition to the tax on premiums, as provided in sections 8043, 8044, 8045, and 8046, shall also pay to its collector on the 1st day of February of each and every year the sum of \$100 for its use, and that such sum shall be considered in full for and in lieu of all taxes and licenses which it has the power to impose on such agencies. While the language employed in said section 8048 is not as clear and explicit as it might be, still we think

that it sufficiently appears therefrom that the purpose the Legislature had in view in its enactment was to require foreign insurance companies to pay an annual license tax of not exceeding \$100, which should be in full for and lieu of all taxes and licenses the city is authorized to impose on such companies or their agents for any one year. The power of the city to tax such companies or their agents is exhausted when it passes the declaratory ordinance required by the statute. It has no power by ordinance to require the payment by such companies or their agents of any other or different tax or fee. It follows that the passage of an ordinance like that in issue, requiring such companies to pay an annual license tax of \$100, and also its agents to pay a further license of \$25 each, is manifestly the exercise of a power greatly in excess of that permitted to it by the statute. How can it be said that such an ordinance is in harmony with the statute, or not repugnant to the legislative policy of the state? The ordinance so far contravenes the restriction imposed by the statute on the power of the city, under its charter, to tax and license foreign insurance companies and insurance agencies, that we must hold it invalid.

It results that we must approve the action of the criminal court, and affirm its judgment. All concur.

COOK v. STROTHER.

(Court of Appeals at Kansas City, Mo. June 8, 1908.)

EVIDENCE—DISPUTED WRITING—COMPARING SIGNATURES—OBJECTIONS TO QUESTIONS—INSTRUCTIONS.

1. Under Rev. St. 1899, § 4679, permitting a comparison by witnesses of a disputed writing with a writing proved to be genuine, the signature of a person who is not charged to be in any way connected with a forgery cannot be introduced for comparison.

2. Where, on the introduction for comparison of the admitted signature of a witness, objection is specially made to the form of the question, and not to the competency of the evidence, complaint cannot be made on appeal of the substance of the evidence.

3. Plaintiff cannot complain of an instruction submitting the question of an alteration of a note without a qualification that the alteration was made by him or with his consent, where he has invited the omission by requesting a finding for him, unless defendant has established that the note, since its delivery, has been changed.

Error to Circuit Court, Jackson County; W. B. Teasdale, Judge.

Action by Marion J. Cook against John D. Strother, administrator of the estate of Enoch Cook, deceased. From a judgment in favor of defendant, plaintiff brings error. Affirmed.

J. W. Clements and Paxton & Rose, for plaintiff in error. J. Allen Prewitt, for defendant in error.

ELLISON, J. This is an action on a promissory note alleged to have been executed by Enoch Cook in his lifetime. The defendant administrator prevailed in the trial court. The defense made was that the deceased never executed the note, and that it had been altered after the signature while in plaintiff's possession.

The two chief errors noted in plaintiff's brief relate to the comparison of the admitted signature of a witness, James M. Cook, with the signature on the note. Under the statute (section 4679, Rev. St. 1899) it is not only proper to show in evidence, for comparison, some admitted signature of the party alleged to have executed the note, but you may also show for comparison some admitted signature of the party (if any) who is accused of the forgery. *Bank v. Hoffman*, 74 Mo. App. 203. This, of course, does not authorize the introduction of signatures of a party who is not charged to be in any way connected with the forgery. The witness James M. Cook is not shown by the record to be connected with the note in such way as to justify the introduction of the signature for the purpose stated. But the evidence was received without objection, and therefore is not a ground of error. There was an objection and exception, but the objection was specially put as to the "form" of the question asked, and not to the competency of the evidence. Such objection only goes to the form of the question, and does not entitle the objector to afterwards, on appeal, complain of the substance. An objection of that kind justifies the trial court in assuming that the competency of the evidence, in matter of substance, was not disputed.

The other objection relates to defendant's instruction No. 2. The matter of complaint is that that instruction submitted the question of the alteration of the note while in plaintiff's possession, and directed that, if it was so altered, the finding would be for the defendant, without a qualification that such alteration must have been made by plaintiff or with his consent. Conceding all of plaintiff's criticism, he cannot be heard to complain, for the reason that it is an error invited or joined in by him. In his first instruction it is declared that the note was prima facie evidence of an indebtedness, provided it was believed that the note was executed by the deceased, and the finding should be for plaintiff, "unless the defendant has established by a preponderance of the evidence that since it was made and delivered the note has been changed." It is thus seen that plaintiff invited the omission complained of in defendant's instruction by first getting one in his own favor in which he makes the same omission.

We have considered plaintiff's argument on this branch of the case, but find ourselves unable to agree with him. It is not possible, within the bounds of reason, giving to lan-

guage its meaning as commonly understood, to find any practical difference, on the point in controversy, between the two instructions.

The judgment should be affirmed. All concur.

SMITH, P. J., and BROADDUS, J., concur.

MOORE v. SOUTHWEST MISSOURI ELECTRIC RY. CO.*

(Court of Appeals at Kansas City, Mo. June 8, 1903.)

PERSONAL INJURIES—CLAIM FOR DAMAGES—EVIDENCE—NURSE HIRE—QUOTIENT VERDICT.

1. Where the petition in an action against a street car company for personal injuries alleged that, on account of the injuries, plaintiff was compelled to hire nurses to wait upon him, and prayed judgment for a lump sum, evidence of the amount paid out by plaintiff as nurse hire was admissible, though there was no specific sum claimed therefor.

2. The jury in a personal injury case voted 10 for plaintiff and 2 for defendant, and thereafter each jurymen put down on paper the amount each considered the plaintiff ought to recover, and divided the total by 12, the quotient being \$467. The verdict returned, however, was a majority verdict for \$500, 10 agreeing thereto. *Held*, that it did not appear that the verdict was arrived at improperly.

Appeal from Circuit Court, Jasper County; J. D. Perkins, Judge.

Action by A. B. Moore against the Southwest Missouri Electric Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

McReynolds & Halliburton, for appellant. Thomas & Hackney, for respondent.

ELLISON, J. The defendant is a street car company operating an electric street railway in the city of Carthage. Plaintiff suffered personal injuries through a collision of one of the cars with his buggy, in which he was driving along the street. The judgment in the trial court was for the plaintiff. Plaintiff was driving along the street in the daytime, going ahead of the car, and in the same direction. He was driving so close to the track that the car could not pass without striking his buggy, and it did strike it at the hind wheel with sufficient force to tilt it up and turn the plaintiff out. There was evidence tending to support the charge that defendant's motorman was negligent in not avoiding the collision. And so there was evidence tending to support the countercharge that plaintiff was careless and negligent. To this charge and countercharge the jury has responded in favor of the plaintiff, and we cannot interfere, unless there has been some error in the trial.

It is first objected that evidence of the amount paid out by plaintiff as nurse hire

*Rehearing denied June 22, 1903.

¶ 1. See Damages, vol. 15, Cent. Dig. § 445.

was improperly admitted, under the allegation of the petition; it being insisted that, as no specific sum was claimed on that account, none should be recovered. The petition alleged that "plaintiff's said injuries are of a permanent character, and continue to cause him suffering and pain, and will continue to cause him suffering during his natural life, and that he has been, and will hereafter be, permanently incapacitated from pursuing his ordinary employment; that on account of said injuries he was compelled to incur and did incur great expense for medical attendance, and was compelled to hire nurses to wait upon him and care for him in his illness, and while he was confined to his bed and to his room, to the plaintiff's injury and damage in the sum of two thousand dollars, for which sum, together with costs, plaintiff prays judgment." This was a claim for nurse hire, and that such hire, together with the injury, made up the damage. We think that, under the ruling of the Supreme Court, the evidence was properly received. *Smith v. Ry. Co.*, 119 Mo. 246, 23 S. W. 784; *Gurley v. Ry. Co.*, 122 Mo. 141, 26 S. W. 953.

Instructions were given for either side which very fully covered the theory of each, and we think that, when all are considered, no substantial criticism can be justly made of them. The first for plaintiff submits that if plaintiff was driving along in the same direction with the car, which was coming behind him, and so close to the track that the car could not pass without collision, and that the motorman saw plaintiff in said situation, or might have seen him if he had been on a vigilant lookout, and that, after seeing him, the motorman, by the exercise of care, could have stopped the car or slackened its speed so as to have avoided the collision, and neglected to do so, and that plaintiff was in the exercise of reasonable and ordinary care, the verdict should be in his favor. The second was on the duty of the motorman, on seeing plaintiff's situation, to have warned him by sounding the bell, and that if he did not do so until too late for plaintiff, by diligence, to get out of the way, and by reason of failure to so warn him the collision occurred, the finding should be for plaintiff. The third was based on the theory that, though the jury might believe that plaintiff was negligent in driving so close to the track without looking back to see if a car was approaching, yet, notwithstanding, if the motorman saw his dangerous situation, or with proper care might have seen it, and could have stopped or slackened speed in time to have avoided a collision, the plaintiff could recover. These properly set forth the case on plaintiff's theory, and they were supplemented by several which clearly put the defendant's theory to the jury.

The only point made on its instructions is the error assigned in not giving that one

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which was a demurrer to the evidence. This is on the general ground that the motorman was not shown to have been guilty of any negligence. If the testimony offered by the plaintiff is to be believed (and since the verdict we must accept it as true), there was ample evidence to sustain a finding of negligence, both in failing to ring the bell in time, and to get his car under sufficient control to have avoided the injury. The authorities cited by defendant are not in cases sufficiently like this in essential facts as to make them applicable—notably, that of *Culbertson v. Ry. Co.*, 140 Mo. 35, 36 S. W. 834.

One of the grounds in support of the motion for new trial is based on the authority of *Sawyer v. Ry. Co.*, 37 Mo. 263, 90 Am. Dec. 382, and *Sharp v. Ry. Co.*, 114 Mo. 94, 20 S. W. 93, and sets out misconduct of the jury after retiring to consider the case. It was shown by reliable and trustworthy evidence: That the jury selected a "chairman" or foreman and a secretary. That they committed to paper found in the jury room a part of their deliberation. From this it appears that they voted 10 for plaintiff, and 2 for defendant. That they then put down the amount each considered the plaintiff ought to recover. Two put nothing, and the remaining 10 put down sums ranging from \$1 to \$2,000. That the total of \$5,601 was divided by 12, leaving a quotient, as put down by them, of \$467. Under this there appears the following: "Yes—10. No—3." This was perhaps a vote on the result made by the addition and division just referred to, evidently an error of 1 being made in the number voting. But the verdict returned was a majority verdict for \$500, 10 agreeing thereto. From that fact it is certain that those returning the verdict did not agree to the result obtained in the manner aforesaid; that they must have finally found the verdict by a conclusion come to by some other means. We have no right, therefore, to find that the verdict was not the result of a proper consideration of the case.

The judgment is affirmed. All concur.

DAY v. FARLEY.

(Court of Appeals at Kansas City, Mo. June 8, 1903.)

SALES—PAYMENT.

1. Plaintiff contracted to purchase a tombstone of defendant, the latter agreeing to accept \$15 worth of barber work in part payment. After the barber work had been performed, defendant offered to furnish the tombstone, but plaintiff failed to select the same. *Held*, that plaintiff could not recover for the work done.

Appeal from Circuit Court, Pettis County; Geo. F. Longan, Judge.

Action by W. L. Day against Frank L. Farley. From a judgment for plaintiff, defendant appeals. Reversed.

Shain & Barnett, for appellant. E. C. White and Bruce Barnett, for respondent.

ELLISON, J. Plaintiff is a barber, and brought this action to recover \$15, the value of work done for defendant in shaving him. The answer set up that plaintiff and defendant had a contract whereby defendant sold to plaintiff a tombstone for \$50, of a style to be selected by plaintiff. That of the said price he was to accept \$15 worth of barber work (here sued for) as a part payment. That said barber work was done under such contract, and that he has at all times been ready and willing to furnish the tombstone, but that plaintiff, although often requested, has failed to make selection thereof as he agreed. There was evidence tending to show the foregoing, but the court gave the jury a peremptory instruction to find for plaintiff, on the ground that such showing was no defense.

The case should have been submitted to the jury. Judging from the briefs of counsel, the peremptory instruction was given on the ground that the matters stated constituted an executory contract, and that defendant could only have an action of damages. We are, however, of the opinion that the authorities cited by plaintiff are not applicable to this character of case. The case is no more nor less than if plaintiff had contracted for the tombstone and had paid on the purchase price \$15 in cash. It ought not to be contended that in such case he could recover back the money, in face of defendant's willingness and offer to carry out the contract. Plaintiff is relying upon rules of law which, it seems to us, are without application to the case.

The judgment is reversed, and cause remanded. All concur.

ANDREWS v. W. R. STUBBS CONTRACTING CO.

(Court of Appeals at Kansas City, Mo. June 8, 1903.)

ACCORD AND SATISFACTION—EVIDENCE—CONSIDERATION—ACCEPTANCE.

1. Where a seller of grain sent the buyer a statement of account, and the latter sent a check stated to be for the balance in full of account as per attached statements, which deducted a certain amount because of a shortage in the number of bushels shipped, and the check was accepted by the seller, there was an accord and satisfaction.

Appeal from Circuit Court, Jackson County; J. H. Slover, Judge.

Action by C. O. Andrews against the W. R. Stubbs Contracting Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Meservey, Pierce & German, for appellant. Elijah Robinson and Harris Robinson, for respondent.

¶ 1. See Accord and Satisfaction, vol. 1, Cent. Dig. §§ 76, 77.

ELLISON, J. This is an action on an account for oats sold by the plaintiff to the defendant. At the close of plaintiff's case the trial court sustained a demurrer to the evidence, and judgment was rendered for defendant.

It appears that defendant bought of plaintiff, delivered at different times, a number of car loads of oats. The price of oats advanced 15 cents per bushel, and defendant asserted that thereafter plaintiff delivered seven car loads which were short the number of bushels they should have contained. Plaintiff sent to defendant a statement of his account showing balance due of \$7,360.80. Defendant thereupon deducted therefrom the sum of \$632.70, and inclosed to plaintiff a check for \$6,728.10, with a letter stating that that sum was the "balance in full of account as per attached statements." The letter informed plaintiff that defendant had deducted \$632.70 from the account which he had rendered, giving as a reason for such deduction the shortage aforesaid, which, at 15 cents per bushel, made the amount deducted. Plaintiff received the check and drew the money thereon.

From the foregoing it is apparent that the trial court's action in sustaining the demurrer to the evidence for plaintiff was correct. Defendant's claim of damages to be deducted from the amount of the account claimed by plaintiff made it a disputed account. Pollman Coal Co. v. St. Louis, 145 Mo. 651, 47 S. W. 563. And when defendant inclosed its check as balance in full, accompanied by a statement showing such to be a balance in full, as explained in such statement, and plaintiff accepted such check, drawing the money thereon, he thereby accepted the condition of its being in full settlement and discharge of the account. St. Joseph School Board v. Hull, 72 Mo. App. 403, and cases cited. And such was declared to be the law by Judge Gantt in Pollman Coal Co. v. St. Louis, supra.

The judgment is affirmed. All concur.

EVANS v. MARION MIN. CO.

(Court of Appeals at Kansas City, Mo. June 8, 1903.)

CORPORATIONS—OFFICERS—AUTHORITY—INJURIES TO SERVANT—MEDICAL ATTENDANCE.

1. The president and general manager of a corporation has authority to bind it to pay for medical services rendered by a physician in attending one of its employes, hurt in the course of his work through the negligence of the corporation.

Appeal from Circuit Court, Jasper County; Hugh Dabbs, Judge.

Action by M. H. Evans against the Marion Mining Company. From an order setting aside a nonsuit and granting a new trial, defendant appeals. Affirmed.

¶ 1. See Corporations, vol. 12, Cent. Dig. § 1612.

Thos. Dolan, for appellant. Cole & Burnett, for respondent.

ELLISON, J. Oscar Abbott, John Lackey, and George Williams were employes of defendant, a mining corporation. While engaged in the line of their duty and employment, they were injured through the negligence (as plaintiff charges) of defendant. As to Abbott, at least, the president and general manager of the defendant company requested the plaintiff, who is a physician, to attend him in his professional capacity. This the plaintiff did, and, defendant refusing to pay the bill rendered, he brought the present action. The petition is in three counts, one for services to each employe. Whether there was evidence that defendant's president authorized the services rendered to the other two employes need not be considered, since, if he did, our disposal of the case as it refers to Abbott will apply to the others. At the trial the court directed a verdict for defendant, and plaintiff, by leave, took a nonsuit. On his motion the court set aside the nonsuit and granted a new trial. The defendant thereupon appealed.

The sole question presented is whether defendant's president and general manager had authority to bind it for medical services rendered by a physician in attending one of its employes, hurt in the course of his work through the negligence of the defendant. In support of the proposition that he has no such authority, we are cited to the cases from this state of *Brown v. Ry. Co.*, 67 Mo. 122, *Mayberry v. Ry. Co.*, 75 Mo. 492, and *Tucker v. Ry. Co.*, 54 Mo. 177, as well as the case of *Spelman v. Gold Mining Co.*, 26 Mont. 76, 68 Pac. 597, 55 L. R. A. 640. In the *Brown* Case a division superintendent directed a druggist to furnish a woman with medicine, who had been hurt by a railroad locomotive. It was held that, as there was "no proof offered of the duties of such officer," the court could not take judicial notice of them. In the *Mayberry* Case a railroad physician was held not authorized to contract, in the railway's name, for board and lodging for an employe injured on the company's road. In the *Tucker* Case a station agent and a conductor were held not to have authority to engage a physician to attend a brakeman injured by the company's train. In none of these cases, including that from Montana, did it appear that the injury happened through the negligence of the defendants sought to be held liable, and we therefore do not regard them as supporting defendant's position in the present case. Neither do we regard them as authority applicable for the further reason that the officers representing the defendants were of much inferior grade to that of president and general manager. In this case we must assume that Abbott was injured through the negligence of defendant. It was, therefore, liable to him for the damage occasioned by the injury, in-

cluding the expense of a physician. It was directly interested in seeing that such injuries were not made worse by lack of medical attention, and that the suffering and other ill consequences should be lessened in every proper way. Its president and general manager, who is necessarily in charge of its general interests and welfare, was certainly not acting outside his duties when he was doing that which was lessening the damages for which he found it had become liable. In support of the view here expressed, we cite *Cinn. Ry. Co. v. Davis*, 126 Ind. 99, 25 N. E. 878, 9 L. R. A. 503; *Pacific Ry. Co. v. Thomas*, 19 Kan. 256; *A. & P. Ry. Co. v. Reisner*, 18 Kan. 458; *U. P. Ry. Co. v. Beaty*, 35 Kan. 268, 10 Pac. 845, 57 Am. Rep. 160; *Toledo Ry. Co. v. Rodriguez*, 47 Ill. 188, 95 Am. Dec. 484; *Cairo Ry. Co. v. Mahoney*, 82 Ill. 73, 25 Am. Rep. 299.

The judgment, with the concurrence of the other judges, is affirmed.

HEMPHILL v. KANSAS CITY.*

(Court of Appeals at Kansas City, Mo. May 25, 1903.)

CITIES—DEFECTIVE SIDEWALK—PERSONAL INJURIES—PLEADING—INSTRUCTIONS.

1. Where a petition in an action against a city for personal injuries alleged to have been caused by a defective sidewalk alleged that the boards were loose and rotten, the stringers in a loose condition etc., an instruction that the verdict should be for plaintiff if the jury found that the sidewalk was in an unsafe and dangerous condition for travel was not erroneous as a departure from the pleading, because describing the alleged defective condition in more general terms than those employed by the pleading.

Appeal from Circuit Court, Jackson County; L. H. Waters, Special Judge.

Action by Hannah Hemphill against Kansas City. From a judgment for plaintiff, defendant appeals. Affirmed.

R. J. Ingraham and J. J. Williams, for appellant. Bird, Madden & Pope, for respondent.

SMITH, P. J. Action to recover damages for personal injuries.

The petition, amongst others, contained the following paragraph, that is to say: "That plaintiff on or about July 4, 1901, and at about 9:30 p. m. of said day, while walking south and along and upon said sidewalk at or near said numbers 1739 and 1741 Holly street, and on which the boards were loose and rotten and the stringers in a loose condition, and in which and at which point there were holes and openings as aforesaid, and while the plaintiff was in the exercise of ordinary care and caution, and without said plaintiff having any knowledge of the defective, unsafe, and dangerous condition of said sidewalk, she stepped into one of said

*Rehearing denied June 22, 1903.

openings between the boards or planks of said sidewalk, and by reason of the loose and defective condition of the boards or planks and stringers of said sidewalk, and that one of the boards or planks in said sidewalk was projecting edgewise above the other boards, one of her feet was caught by said upturned board, and caused her to be tripped and thrown with great force and violence upon said sidewalk, causing concussion of the brain, badly sprained her right hand and wrist, and broke some of the bones in her right wrist, and bruised and sprained her left hand, bruised her right side, and injured her internally, causing injury to her stomach and a severe shock to her nervous system, from all of which she has been made sick, sore, and disabled, and made to suffer great bodily pain and mental anguish, and will cause her to suffer in the future, and her ability to earn a livelihood has been greatly impaired," etc.

There was an answer filed, and a trial of the issues to a jury in the court below, which resulted in judgment for the plaintiff, from which defendant appealed here, assigning as the grounds for reversal that the court erred in its action in giving for plaintiff instructions 1, 3, 4, and 6. By No. 1 it instructed the jury that if it found from the evidence that the sidewalk on the east side of Holly street, between West Seventeenth street and West Eighteenth street, and in front of lots numbered 1739 and 1741 Holly street, of said Kansas City, was on the 4th day of July, 1901, in an unsafe and dangerous condition for travel thereon by the public, and that a sufficient time had elapsed between the time said sidewalk became defective, in case it found it was defective, and the time of the injury to plaintiff, for the city, by the exercise of reasonable diligence, to have discovered and repaired said sidewalk prior to the time of the accident, and if it found that the plaintiff, while lawfully traveling along said sidewalk, in the exercise of ordinary care, was thrown and injured by reason of the unsafe and dangerous condition of said sidewalk, then its verdict should be for the plaintiff. This instruction correctly expressed the law applicable to the case made by the evidence. *Badgley v. St. Louis*, 149 Mo., loc. cit. 133, 50 S. W. 817, cited by the defendant, will be seen, by reference to it, to be in its facts unlike this, and for that reason it cannot be invoked as a guiding precedent. In a somewhat similar case this instruction was impliedly approved by the Supreme Court. *Perrette v. Kansas City*, 162 Mo. 244, 62 S. W. 448. *Baustian v. Young*, 152 Mo. 318 (loc. cit. 326), 53 S. W. 921, 75 Am. St. Rep. 462, may be cited as an authority also upholding the action of the court in giving it.

The defendant further objects that, as the allegation of the petition is that the sidewalk was in a defective, unsafe, and dangerous condition; that, at the place therein where plaintiff was hurt, "the boards were

loose and rotten, and the stringers in a loose condition," etc.; and as the said instruction told the jury that the verdict should be for plaintiff if it found that the sidewalk was at that place "in an unsafe and dangerous condition for travel thereon," etc.—there was a departure of the latter from the former, and a widening of the issue which was not permissible. Certainly, an instruction which enlarges or restricts the issue in an essential particular would be erroneous. *Bank v. Murdock*, 62 Mo. 70. But as the evidence in the present case tended to support the allegations of the petition, we cannot discover that, because the said instruction was not as specific as the petition, there was any departure in the latter from the former, or any resulting prejudice to defendant.

The plaintiff's third is in theory substantially the same as her first, and what has been said in respect to the propriety of the action of the court in giving it applies with equal force to her third.

The fourth, while a mere abstraction, is nevertheless not erroneous nor calculated to mislead.

Nor do we think the plaintiff's sixth is subject to the defendant's criticism that it assumes the facts therein referred to.

The instructions taken in their entirety fairly submitted the case to the jury, whose verdict must stand, and the judgment thereon be affirmed. All concur.

OARR v. PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA.

(Court of Appeals at Kansas City, Mo. June 8, 1903.)

ACCIDENT INSURANCE—INJURY WHILE DELIRIOUS—RECOVERY UNDER POLICY—CONSTRUCTION OF POLICY—PREVIOUS INSURANCE—MISREPRESENTATIONS—WAIVER.

1. Where one holding an accident policy falls from a window in delirium, the delirium is the proximate cause of the injury.

2. Under an accident policy providing that the insurance does not cover injuries received in consequence of being or having been under the influence of, or affected by, or resulting directly or indirectly, in whole or in part, from, disease or bodily infirmity, recovery cannot be had for a fall from a window while delirious, whether the delirium be regarded as the proximate or remote cause of injury.

3. In construing an accident policy providing that the insurance shall not cover injuries received while under the influence of, or resulting directly or indirectly from, intoxicants, sunstroke, vertigo, hernia, or any disease or bodily infirmity, the phrase "disease or bodily infirmity" will not be limited by the preceding specific exceptions, they not being related to each other.

4. A misrepresentation, in applying for accident insurance, as to previous insurance, is waived where the company's agent had knowledge of the truth.

5. Under an accident policy providing that the insurance shall not cover injuries received while under the influence of disease or bodily infirmity, recovery cannot be had for injuries from a fall while under the influence of disease.

Appeal from Circuit Court, Jackson County; Wm. B. Teasdale, Judge.

Action by Michael T. Carr against the Pacific Mutual Life Insurance Company of California. Judgment for plaintiff, and defendant appeals. Reversed.

J. C. Rosenberger, for appellant. Frank P. Walsh and E. R. Morrison, for respondent.

BROADBUSH, J. Plaintiff's suit is on an accident policy, to recover for injuries received by him during the life of said policy. The policy was issued on the 15th day of July, 1899, and the plaintiff was injured in March, 1900. Proper proof of loss was made, and the controversy at the trial arose as to defendant's liability under the evidence.

The first defense is that it was provided in said policy that "it did not insure or cover injuries, fatal or otherwise, received while or in consequence of plaintiff being or having been under the influence of, or affected by, or resulting directly or indirectly, in whole or in part, from, intoxicants, anaesthetics, vertigo, sleepwalking, or any disease or bodily infirmity, and that whatever bodily injuries were sustained by plaintiff were received while or in consequence of plaintiff being or having been under the influence of, or affected by, or resulted directly or indirectly, in whole or in part, from vertigo or sleepwalking, or disease or bodily infirmity." The second defense is that it was provided in said policy that "in case of injuries * * * intentionally inflicted upon the insured by himself or by any other person, or inflicted upon himself or received by him while insane, the measure of this company's liability shall be a sum equal to the premium paid, the same being agreed upon as full in liquidation of all claims under this policy," and that whatever injuries were sustained by plaintiff were intentionally self-inflicted, or were received by him while insane, in which case the liability of plaintiff, by the terms of the policy, is limited to the total amount of premiums paid by plaintiff to the defendant. The third defense is that in plaintiff's application for said policy he "willfully, falsely, and fraudulently warranted in said application that he had never received indemnity for accident, and that no accident policy ever issued to him by any other company had been canceled, when in truth and in fact plaintiff had theretofore received indemnity from another insurance company in which he had been insured, which company had canceled the policy held by plaintiff by reason of the number and character of the claims made by plaintiff; that plaintiff received indemnity from said company for alleged accidents on three separate and distinct occasions prior to the date of his application to this company"; and that defendant would not have issued the policy in suit, except for said representations. The

evidence tended to show that, prior to the issue of the policy in controversy, plaintiff had been insured in another insurance company against accidents, and that he had received indemnity from such company for accidents suffered, and that his policy for that reason had been canceled; but it was shown that the agent who contracted with plaintiff, and issued the policy herein, was fully informed thereof at and prior to the time plaintiff signed said application. It is fully agreed that at the time plaintiff was injured he was confined in a hospital at Pittsburg, Kan., on account of sickness known as "la grippe"; that he was suffering, too, from a high fever; and that he was mentally unconscious, and had no knowledge as to how he became injured. His delirium was so great that at times he had to be restrained by force, for fear of his doing injury to himself or to others. His nurse testified that on the morning of his injury she left the plaintiff in his bed in his room for a few moments, that when she returned he had left his bed, and that she rushed to the window, looked out, and saw him falling. He fell a distance of about twenty feet. His injuries were serious, and he did not return to consciousness until about four days thereafter. When plaintiff was testifying, he was asked if he was able to state any circumstances as to how or what caused him to get out of the window, to which he answered: "No, sir; I do not." He was also asked: "You were unconscious from the sickness from which you were suffering?" His answer was: "Yes, sir." The doctor in attendance said he was delirious. Section three of the policy reads as follows: "(3) This insurance does not cover disappearances, nor any injury, fatal or otherwise, of which there is no visible mark upon the body, nor any such injury resulting from dueling or fighting, from exposure in war or in riot, from voluntary or unnecessary exposure to danger, medical or surgical treatment, except when amputation rendered necessary by an injury received within the period of this policy is made within ninety days from date of accident, nor injuries, fatal or otherwise, resulting from poison or anything else, consciously or unconsciously, accidentally or otherwise, taken, administered, absorbed or inhaled, nor injuries fatal or otherwise received while or in consequence of being or having been under the influence of or affected by or resulting directly or indirectly in whole or in part from intoxicants, anaesthetics, narcotics, sunstroke, freezing, vertigo, sleepwalking, fits, hernia, orchitis or any disease or bodily infirmity, nor any injury, fatal or otherwise, received while violating law, resisting arrest or fleeing from justice." At the close of plaintiff's case the defendant interposed a demurrer to the evidence, which was overruled. The jury returned a verdict for plaintiff for \$543.43. The defendant appealed.

The defendant's contention is that, under the evidence, about which there is little or no dispute, the court should have peremptorily instructed the jury to find in its favor. The plaintiff contends that the plaintiff's sickness was not the proximate cause of his injury. In *Lawrence v. Accident Ins. Co.*, L. R. 7 Q. B. D. 216, the facts were that the plaintiff, while on a railroad platform, was suddenly seized with a fit, which caused him to fall off of the platform and onto the railway track. A locomotive engine passing at the time ran over his body, causing injuries from which he died. It was held that the proximate cause of his injury was in being run upon by the train, and not the fit. And if a man while fording a river is seized with a fit, and falls therein and is drowned, the proximate and immediate cause of his death was not the fit, but the drowning in the river. *Winspear v. Ins. Co.*, 6 Q. B. D. 42. If a man, while sick with a disease, is riding upon a car, and is suddenly thrown against one of the seats and is injured, the proximate and immediate cause of his injury is the being thrown against the seat, and not the disease. *Aetna Ins. Co. v. Hicks* (Tex. Civ. App.) 56 S. W. 87. If a man, emaciated and weak, while riding in a carriage is suddenly overcome by his weakness, and injects morphine into his body by means of a needle, and extreme inflammation follows, the proximate and immediate cause of his injury is not the morphine, but the puncture of his body by the needle. *Bailey v. Casualty Co.*, 8 App. Div. 127, 40 N. Y. Supp. 513. If a man suffering from fatty degeneration of the heart is injured by a fall, and his death is thereby caused by heart failure, shock, and injury, the proximate and immediate cause of his death is the fall, and not his condition of fatty degeneration of the heart. *N. W. Ass'n v. Shryock*, 54 Neb. 250, 74 N. W. 607, 39 L. R. A. 826. The principle of these cases can be distinguished from the one at bar, except that of *Lawrence v. Ins. Co.*, in which it was held that the man who, while fording a river, was seized with a fit, and fell and was drowned, did not owe his death proximately to the fit, but to the drowning. This seems to be in point. According to the theory of the court, the fit only caused him to fall into the water, which of itself did not injure him directly, but it was the drowning that was the immediate and proximate cause of his injury and death. And it is contended in the case at bar that it was not the sickness of plaintiff, that caused him to fall or jump out of the window, that was the proximate cause of his injury, but the immediate cause was the fall itself. We must confess that we are not impressed with the ruling in that particular case. But we can appreciate the theory that if the individual is sick, and he merely suffers from an accident which happens to him while sick, but is not brought about as a result of such sickness, the sickness is neither the proximate nor re-

mote cause of his injury, and that in some instances like those cited the sickness may be the remote, but not the direct and proximate, cause of an injury. But the question presented under the terms of the policy is not whether the plaintiff's sickness was the proximate and immediate cause of his injury, but whether the injury was directly or indirectly caused by his disease. We have respectable authorities construing policies of similar provisions. In *Com. Ass'n v. Fulton*, 79 Fed. 423, 24 C. C. A. 654, it was held that, under a policy of accident insurance which provides that it shall not extend to, nor cover, accidental injuries or death resulting from or caused, directly or indirectly, wholly or in part, by disease in any form, there can be no recovery for the death of the insured if he had a disease, but for which death would not have resulted from the accident. To a similar effect was the ruling in *Nat. Ass'n v. Shryock*, 73 Fed. 774, 20 C. C. A. 3; *Hubbard v. Ins. Co.* (C. C.) 98 Fed. 932; *Sharpe v. Ass'n*, 139 Ind. 92, 37 N. E. 353. But the conditions of the policy go further still, viz., that if an injury be received, directly or indirectly, in whole or in part, while or in consequence of the insured having been under the influence of, or afflicted by, any disease or bodily infirmity, the defendant was not to be liable for such injury. It has been held that such a provision was proper and reasonable. *Shader v. Ry. Pass. Assur. Co.*, 66 N. Y. 441, 23 Am. Rep. 65; *Standard Ins. Co. v. Jones*, 94 Ala. 434, 10 South. 530. It is contended by respondent that such a construction would practically nullify an accident policy, besides being contrary to all reason. There is some force in this position, but what are the courts to do in such cases? We can only construe the contract as we find it. The parties had a right to so contract, as there is no law prohibiting such, and it does not appear to be ultra vires. Until the Legislature places a limit upon the right of life insurance companies to make contracts limiting their liability to the minimum, the courts are bound to recognize them as they find them.

It is contended that as the policy in question provides that the appellant shall not be liable for injuries resulting directly or indirectly, in whole or in part, from intoxicants, anaesthetics, narcotics, sunstroke, freezing, vertigo, sleepwalking, fits, hernia, orchitis, or any disease or bodily infirmity, the latter clause, "any disease or bodily infirmity," is limited by the preceding exceptions, viz., intoxicants, etc. In *Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304, the court declared the rule to be that "language, however general in its form, when used in connection with a particular subject-matter, may be presumed to be used in subordination to that matter, and will be construed and limited accordingly." In *St. Louis v. Laughlin*, 49 Mo. 559, the rule was stated thus: "It is an established rule of construction, where general

words follow particular ones, to construe the former as applicable to the things or persons particularly mentioned." In *State ex rel. v. Corkins*, 123 Mo. 56, 27 S. W. 363, the rule as stated was held to apply only where the particular words are of the same nature or kind. See, also, *State v. Phelan*, 66 Mo. App. 548. The particular words referred to are not all of the same nature or kind. There is no kinship between the words "orchitis, hernia, freezing, and sunstroke," and no sort of relationship between them and the words "intoxicants, sleepwalking, narcotics," etc. These words being of different genera, the meaning of the general words "any disease or bodily infirmity" remains unaffected by their connection with them.

The defendant insists, also, that plaintiff cannot recover on account of breach of warranty set out in its answer—that he had never made any claim against any other company for accident indemnity, and that no accident policy ever held by him had been canceled. Yet, as the agent of the defendant knew at the time he prepared the application and delivered the policy that plaintiff had made claim against another accident company for indemnity, and that an accident policy held by him had been so canceled, the transaction amounted to a waiver of said warranty. *Bush v. Ins. Co.*, 85 Mo. App. 155; *James v. Association*, 148 Mo. 1, 49 S. W. 978; *Springfield Laundry Co. v. Ins. Co.*, 151 Mo. 90, 52 S. W. 238, 74 Am. St. Rep. 521.

In view of what has already been said, it is unnecessary to notice defendant's second defense.

For the reasons given, we are of the opinion that plaintiff's injury was the direct result of his sickness; and whether it was or was not is immaterial, for it cannot be denied that it was not at least the indirect result of his condition. In either event the defendant would not be liable, under the terms of the policy. And we are further of the opinion that, by the terms of said policy, defendant was exempted from liability by reason of the fact that said injury occurred while plaintiff was under the influence of disease.

The cause is reversed. All concur.

FARR v. ADAMS EXP. CO.*

(Court of Appeals at Kansas City, Mo. May 25, 1903.)

EXPRESS COMPANY—LOSS OF PACKAGE—PLEADINGS AND PROOF—VARIANCE.

1. Where a petition alleges that the defendant express company received a package addressed to plaintiff, and by its negligence the goods were lost, proof that, through negligent failure to deliver, the package was retained by the company until destroyed by a fire, which was not negligently caused, constitutes a variance.

*Rehearing denied June 22, 1903.

Appeal from Circuit Court, Jasper County; J. D. Perkins, Judge.

Action by M. E. Farr against the Adams Express Company. Judgment for plaintiff, and defendant appeals. Reversed.

J. W. McAntire, for appellant. Basom & Buckley, for respondent.

ELLISON, J. Plaintiff charged that defendant express company received a package addressed to plaintiff at Joplin, Mo., and negligently failed to deliver the same. The judgment was for plaintiff. The petition charges that a party at Kansas City delivered to defendant a package addressed to plaintiff at Joplin, Mo., and that "by the carelessness and negligence of defendant said goods were lost and destroyed," and therefore never delivered to plaintiff. There was evidence in behalf of plaintiff from which it may be properly inferred (though it was not alleged) that the package was addressed to plaintiff at his street number in Joplin. The evidence in behalf of defendant tended strongly to show that there was no street number on the address. Defendant sent a postal addressed to plaintiff at Joplin, without street number, notifying him of the arrival of the package. Nothing was heard from him, and the package was retained by defendant until its office and contents, including the package, were destroyed by fire. It is agreed by the parties that the destruction was by fire, and that the fire was not through defendant's negligence. Defendant's demurrer to the evidence should, therefore, have been sustained.

If plaintiff relied upon a negligent failure to deliver promptly, and thereby have avoided the fire, he should have so alleged in such way as to connect that act with the destruction. By alleging merely that the package was negligently destroyed, and the evidence showing the destruction was by a fire not attributable to negligence, his case fails. His specific charge of negligence is that defendant negligently permitted the package to be destroyed. The burden was on him to prove this, when in fact there was no such proof. *Chitty v. Ry. Co.*, 148 Mo. 64, 49 S. W. 868; *McCarty v. Rood Hotel*, 144 Mo. 397, 46 S. W. 172; *Dianhi v. Ry. Co.*, 139 Mo. 291, 40 S. W. 890.

The judgment is reversed. All concur.

In re COGGSHALL.

(Court of Appeals at Kansas City, Mo. June 8, 1903.)

CONTEMPT OF COURT—VIOLATION OF INJUNCTIONS—ACTUAL NOTICE.

1. One violating an injunction, with knowledge of it, may be punished for contempt, though not a party to the injunction suit, or served with process in it; actual notice being sufficient service within Rev. St. 1899, § 3643, making it contempt if any person violate an injunction after it is served on him.

¶ 1. See *Injunction*, vol. 27, Cent. Dig. §§ 448, 458.

Application by Guy R. Coggs shall for discharge under writ of habeas corpus. Petition denied.

Noyes, Heath & Walls, for petitioner. F. E. Burroughs and R. E. Morrison, opposed.

SMITH, P. J. Application for a discharge from imprisonment under the writ of habeas corpus. The case may be stated in about this way, to wit: That one Leo Rice filed a petition in the circuit court against A. W. Grigsby et ux., the object of which was to enjoin and restrain them, the defendants, their servants or employés, or any one for them, or in their name and behalf, from interfering with plaintiff, his employés, or assigns, in any way whatever, in taking care of certain stock, consisting of horses and cows, from feeding and from taking feed upon the premises wherewith to feed them, from attempting to redispense of their interest in the lease or leased premises, and from doing anything to injure the dairy business, etc. Upon this petition a temporary restraining order was made by the judge of one of the divisions of said court in substantial conformity to the prayer thereof. The defendants were served with the injunction process. It appears that Coggs shall, the petitioner herein, and the defendant had rented of one Burge a certain inclosed pasture, which they used in common for the pasturage of their milch cows. It further appears, that they each resided in different houses situate in the pasture, and conducted thereat separate dairy establishments. It still further appears that the defendants had mortgaged their property to said Leo Rice, the plaintiff, and had made default in the payment of the mortgage debt, in consequence of which the plaintiff took possession of the property with the former's consent; but that, notwithstanding this, the defendants afterwards undertook to exercise dominion over the same, and to ignore and disregard the plaintiff's rights therein; and to restrain such behavior the restraining order already referred to was awarded against them. The petitioner was not a party to said injunction proceeding, nor was he in any sense an agent or employé of the defendants: A few hours after the restraining order had been served on the defendants, they met the petitioner, and informed him of the issue of the injunction, and immediately after this the petitioner turned the cows claimed by the plaintiff out into the highway. This fact being brought to the attention of the court over which the judge issuing the injunction presided, a notice was issued by it to the petitioner to at a certain time and place, and then and there, show cause, if any he had, why he should not be punished for contempt in violating the said injunction process. The petitioner appeared, and at the hearing the facts established were about as we have stated. It was then further disclosed that the petitioner had some under-

standing with Burge to the effect that, if the defendants discontinued the common use of the pasture with petitioner, he should have the exclusive use of it. The petitioner, it seems, testified that, as the defendants were no longer the owners of the cows, but that the plaintiff was, he did not think the latter had any right to the pasture, and so turned his cows out. The court found the petitioner guilty of violating the injunction, and ordered him to pay a fine of \$50; and, in default of the payment thereof, that he be attached by his body, and confined in the county jail for a period of 10 days, as a punishment for said contempt, and that the sheriff take his body in custody, etc. The writ was directed to the sheriff, who has made return thereto.

One of the questions raised by the return and reply is whether or not, since the petitioner was not a party to said injunction suit, nor served with process therein, he was rightfully adjudged guilty of contempt for a violation of the injunction. *Ex parte Lennon*, 166 U. S., loc. cit. 554, 17 Sup. Ct. 658, 41 L. Ed. 1110, was where the petitioner was not a party to the bill, which was brought to enforce compliance with the interstate commerce act, and to compel railway companies to comply with said act in certain particulars, and to enjoin them from refusing to receive from the complainant certain cars for transportation, etc., to which the petitioner was not a party, nor served with process of subpoena, nor had notice of the application made by the complainant for the injunction, nor was he served by the officers of the court with such injunction. The court held that these facts were immaterial, so long as it was made to appear that he had notice of the issue of the injunction. To render a person amenable to an injunction, it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor have been actually served with a copy of it, so long as he appears to have had actual notice; citing *High on Injunct.* § 1444; *Mead v. Norris*, 21 Wis. 312; *Wellsey v. Mornington*, 11 Beav. 181. No reason can be seen why this rule has not application to the facts of this case. If the petitioner had not admitted in his testimony that he had actual notice of the injunction before his interference with the plaintiffs' property, I think it may be fairly inferred from the other facts to which he testified. It seems to me that, as the case is one where the petitioner failed to purge himself of the contempt charged, for the purpose of vindicating its power and maintaining its dignity the court could not do less than impose the punishment specified in its order. It is true section 3643, Rev. St. 1899, provides that, "if any person disobey or violate an injunction after it is served on him," etc.; but actual notice of the injunction in cases of this kind is all the service required. The statute is not to the contrary.

The petitioner further insists that the commitment is void under section 1619, Rev. St. 1899, which requires that whenever any person shall be convicted for any contempt, as specified in chapter 14, Rev. St. 1899, the particular circumstances of his offense shall be set forth in the order or warrant of commitment. Section 1616 of that chapter provides that every court of record shall have power to punish as for criminal contempt any person guilty of willful disobedience of any process or order lawfully issued or made by it. The order of commitment here fully meets the said statutory requirement. It shows, too, that the proceeding which resulted in the order accorded with the established practice in such cases. *Ex parte Mason*, 16 Mo. App. 41; *Ex parte Millett*, 37 Mo. App. 76. It is obvious the matters set out in the order of commitment "in point of law amount to contempt," as required by section 3579, Rev. St. 1899. The jurisdiction to make the order of commitment cannot be questioned, and, as the punishment imposed was within the statutory limit, I am unable to discover any ground upon which he is entitled to a discharge under section 3578, Rev. St. 1899.

After consultation with my associates, I have reached the conclusion that it is my duty to deny the petition for the discharge, and to remand the petitioner to the custody of the sheriff (section 3576, Rev. St. 1899), and which is so ordered.

STUMBO et ux. v. DULUTH ZINC CO.*

(Court of Appeals at Kansas City, Mo. June 8, 1903.)

ACTION FOR DEATH—INSTRUCTION ON DAMAGES—EXCESSIVE VERDICT—MASTER AND SERVANT—SAFE PLACE TO WORK.

1. In an action against an employer for negligently causing an employee's death, error in instructing that it was the duty of defendant to furnish plaintiffs' son a reasonably safe place in which to work is cured by adding that if the jury believed that the place where the son was working was not reasonably safe, "but was dangerous," etc., plaintiffs should recover.

2. In an action by parents for negligently occasioning the death of their son, an instruction that the measure of damages is the "reasonable value to the plaintiffs" of the son's services is not subject to criticism for not substituting the "probable amount they would have received from his earnings."

3. Plaintiffs' son, for whose death they sued, was 18½ years old. He was healthy, industrious, and intelligent, and was earning \$2 a day. There was evidence that he assisted his mother in the housework, and that his earnings mostly went to the family; but defendant's evidence tended to show that he frequented a gambling house and was inclined to spend his money foolishly. On a previous trial, the jury returned a verdict for \$1,500. *Held*, that a judgment for that amount would not be disturbed as excessive.

Appeal from Circuit Court, Barton County; H. C. Timmonds, Judge.

Action by John J. Stumbo and wife against the Duluth Zinc Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Thomas & Hackney, for appellant. H. W. Currey and Thos. J. Roney, for respondents.

BROADBUD, J. The plaintiffs, father and mother of Francis Stumbo, bring this action for damages alleged to have been sustained by them by reason of the death of their said son while in the employ of defendant. It was admitted that at the time of his death he was earning \$2 per day, and there was evidence that the son assisted his mother in the work about the house, and that his earnings mostly went to the family. There was evidence that the son was healthy, industrious, and intelligent, and that he lacked two years and six months of obtaining his majority at the time of his death, which occurred on the 27th day of August, 1900. The plaintiff was in the employ of defendant as a miner, and it was alleged that he came to his death by reason of defendant's negligence. There was evidence tending to sustain and rebut the allegation. Defendant also introduced evidence to show that deceased frequented a gambling house, and was inclined to spend his money foolishly and to gamble, and that deceased was guilty of contributory negligence. The jury returned a verdict for plaintiffs in the sum of \$2,118. The defendant filed motions for new trial and in arrest of judgment, which the court overruled; but before rendering judgment the court ordered plaintiffs to enter a remittitur of \$618 of this verdict. The plaintiffs refused to enter the remittitur. The court, however, gave judgment for only \$1,500—\$618 less than the amount of the verdict. Defendant appealed.

Defendant contends that certain instructions given on behalf of plaintiffs were erroneous, and that the verdict of the jury was excessive.

Instruction No. 1 given for the plaintiffs is as follows: "It was the duty of the defendant to furnish plaintiffs' son a reasonably safe place in which to work. If you shall believe from the evidence that by reason of the condition of the roof in the mine the place where plaintiffs' son was working was not a reasonably safe place in which to work, but dangerous; and if you shall further believe from the evidence that such dangerous condition was known to the defendant, or by the exercise of ordinary care on its part such dangerous condition would have been known to the defendant, and that plaintiffs did not know of such dangerous condition; and if you shall further believe from the evidence that by reason of such dangerous condition the roof of said mine fell upon and killed plaintiffs' son while he was in the exercise of ordinary care on his part—then you should return a verdict for the plaintiffs." One of the objections to

*Rehearing denied June 22, 1903.

the instruction is that it made it the absolute duty of the defendant to provide a reasonably safe place for the deceased to work, whereas the law only required it to use ordinary care to provide such a place. It is true, therefore, that the criticism is well founded, and, if the after words of the instruction did not cure the error, it would perhaps be misleading. The part objected to is a mere abstract statement of the law, which may be disregarded if the instruction in the succeeding parts applies the law properly to the proof. We think it does, as follows: "If the jury shall believe from the evidence that by reason of the condition of the roof in the mine the place where plaintiffs' son was working was not a reasonably safe place in which to work, but was dangerous, and if you shall further believe from the evidence that such dangerous condition was known to defendant," etc. A similar instruction was held good in *Bradley v. Railway Co.*, 138 Mo., loc. cit. 307, 308, 39 S. W. 763, and in *Knight v. Sattler L. & Z. Co.*, 91 Mo. App., loc. cit. 579.

The further objection is made to said instruction that "the court assumed that the deceased was killed while he was in the exercise of ordinary care." This objection is wholly untenable. The instruction in plain language requires the jury to find the deceased was in the exercise of ordinary care.

Instruction No. 2, given as a guide to the jury in estimating plaintiffs' damages, was objected to because it was told that the measure of plaintiffs' damages was the reasonable value to them of the services of their son, whereas the true measure of damages was the probable amount they would have received from his earnings during minority, less necessary expenses of board and lodging, etc. In *Leahy v. Davis*, 121 Mo. 227, 25 S. W. 941, it was held that the measure of the parents' damages for the loss of a minor child was "the value of the child's services during his minority, and burial and other expenses, if any, incurred by his death or sickness, less the expense of his support and maintenance during that time." In *Parsons v. Railway Co.*, 94 Mo., loc. cit. 296, 6 S. W. 464, the court, in passing upon a similar question, used the following language: "An intelligent jury, from common experience, may determine approximately, in any given case, what would compensate a parent for all pecuniary losses sustained by reason of the death of the minor child; but unless they are distinctly informed that such compensation is to be limited to the value of the child to its parents during the period of its minority," etc. This language is like that used in the instruction. There is no real difference in the language of the two cases last cited. They both practically mean the same thing. And it seems to us that the term "reasonable value to the plaintiffs of the services of the son" would be certain-

ly as definite as the "probable amount they would have received," etc.

The defendant further contends that the verdict of the jury was excessive. The trial court entertained the same opinion and reduced it to the amount of \$1,500, which, in its opinion, was not excessive. It seems that there was a former verdict in this case in favor of plaintiffs for \$1,500, which was set aside for some cause not stated in the record. It thus appears that, in the opinion of two juries and the judge who tried the case, the verdict as it now stands is not excessive. It not appearing that the jury was actuated by passion or prejudice, and as there is no charge that the judge was other than strictly impartial, we feel it a duty, under the circumstances, to defer to their judgment.

For the reasons given, the cause is affirmed. All concur.

KANSAS CITY PAPER BOX CO. v. AMERICAN FIRE INS. CO.*

(Court of Appeals at Kansas City, Mo. June 8, 1903.)

FIRE INSURANCE — CONCURRENT POLICIES — DAMAGE TO PROPERTY — ADJUSTMENT.

1. A fire policy contained a provision that the insurer should not be liable for a greater proportion of any loss than the amount of insurance should bear to the whole insurance. The property insured was situated in different buildings, and numerous other policies covering the same property provided that, in case of loss, the policies should attach in each building in such proportion as the value in each building bore to the aggregate value of the property insured. The property was damaged by fire to an amount less than its whole value. *Held*, that the provisions of these other policies, as to the mode of adjustment with respect to each building, could not be considered in ascertaining the proportion of payment to be made by the insurer in the first policy, but that it was liable only as stipulated therein.

Appeal from Circuit Court, Jackson County; James Gibson, Judge.

Action by the Kansas City Paper Box Company against the American Fire Insurance Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Jas. O. Rieger, for appellant. Ed. H. Yates and M. A. Fyke, for respondent.

ELLISON, J. This is an action on a policy of fire insurance, in which the judgment in the trial court was for the defendant.

The policy sued on contained the following insurance clause: "\$500.00 on their stock of paper boxes and packages, manufactured, unmanufactured, and in process of manufacture, together with all material and supplies usual to a paper box manufactory. All while contained in the two-story brick composition roof building situated Nos. 108 and 110 West Third street, Kansas City, Mo." And it also

*Rehearing denied June 22, 1903.

contained the following condition: "This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property; and the extent of the application of the insurance under this policy, or the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for reinsurance shall be as specifically agreed hereon."

There were on the property at the time of the fire policies aggregating \$9,750, each one of which described the property insured in exactly the same language as does the policy sued on. On ten of the policies the assured permitted the insurance companies to attach a pro rata clause reading as follows: "It is hereby agreed that in case of loss this policy shall attach in each building or division in such proportion as the value in each building or division bears to the aggregate value of the subjects insured. Attached to policy No. _____ of the _____ Insurance Co. _____, Agents." This clause was not attached to the policy sued on, nor to three others.

Fire damaged the insured property to the amount of \$5,500 on January 19, 1897. On January 29, 1897, the respondent company paid to the appellant \$282.05, said sum being $\frac{100}{9750}$, or $\frac{2}{33}$, of \$5,500, the amount of the loss. This amount was arrived at in accordance with the provisions of the condition, made a part of the policy sued on, which fixed the measure of the company's liability at "such proportion of the loss on the described property * * * as the amount hereby insured shall bear to the whole insurance, whether valid or not, covering such property."

The contention made by plaintiff is that the pro rata clause above set out, which it permitted ten of the companies (not including defendant) to attach to their policies, providing for a mode of adjustment and of ascertainment of loss in each building, should be considered in ascertaining the proportion of payment which should be made by this defendant. But we are wholly unable to understand why its additional qualifying contract with other insurance companies, made without defendant's concurrence or knowledge, ought to have any influence on defendant's contract. There can be no more reason for allowing plaintiff's contention than there would have been, had it entered into a contract with those other companies in any other respect changing their relation to the property insured or their liability in case of loss. The defendant can only be dealt with by the courts under the terms of its own contract.

The judgment rendered by the trial court

was the only one which could be rendered, and it will consequently be affirmed. All concur.

VIERTEL v. VIERTEL.*

(Court of Appeals at Kansas City, Mo. May 11, 1903.)

DIVORCE—CONNIVANCE—FORMER DECREE—ALIMONY.

1. It being shown that the date of the affidavit for appeal, prior to date of judgment, was a mistake, appeal will not be dismissed for want of a proper affidavit, but correction of the error will be allowed.

2. Connivance of a husband at an act of adultery of his wife will not bar his obtaining a divorce for a subsequent act of adultery.

3. That a decree dismissing a suit for divorce for one act of adultery shall not be a bar to a later suit for a prior act of adultery, it must be shown that plaintiff did not know of such act when he brought his first suit.

4. Alimony to cover outlay for attorney's fees and other costs will be allowed appellant in the appellate court, though her appeal is unsuccessful; it appearing to have been taken in good faith, and not being entirely without merit.

Appeal from Circuit Court, Cooper County; James E. Hazell, Judge.

Suit by John F. Viertel against Elizabeth Viertel. Decree for plaintiff. Defendant appeals. Affirmed.

L. E. Durham and W. O. Thomas, for appellant. John & J. W. Cosgrove, for respondent.

BROADDUS, J. The plaintiff has moved to dismiss the appeal herein on the ground that a proper affidavit was not made authorizing the appeal. The record shows that the judgment appealed from was rendered on June 7, 1902, but the affidavit for appeal is dated June 5th, two days prior thereto. The defendant insists that in fact the affidavit was made after rendition of judgment, and that the dating of the same on June 5th was a clerical error; and to support this insistence, she has filed the affidavit of the attorney who wrote it, and the affidavit of the notary public who swore the affiant, that it was made after the judgment was rendered. These affidavits stand uncontradicted. Defendant asks that the error be corrected, as it was merely clerical. The court, finding this to be the fact, allows defendant to correct such error; this being the practice. *Cooley v. Railway Co.*, 149 Mo. 487, 51 S. W. 101, and cases there cited. The motion of the plaintiff—respondent here—to dismiss the appeal is therefore overruled.

The suit is for divorce, and was commenced on the 9th day of November, 1901. The allegations in the petition are that the defendant had been guilty of such indignities and unbecoming conduct as to render plaintiff's condition intolerable, and that she had committed adultery at various times and places

*Rehearing denied June 22, 1903.

¶ 2. See *Divorce*, vol. 17, Cent. Dig. § 152.

during and since July 1, 1900, with one Evelyn Coonfare, and with one Chris Parker in the year 1897. The answer admitted the marriage, but denied all the other averments of the petition. Defendant also pleaded a judgment of the circuit court and of this court between the parties as a bar to plaintiff's right to recover. The evidence went to show that the defendant had committed both the acts of adultery charged, and there was also some evidence tending to prove the charge of indignities and unbecoming conduct. The defendant put in evidence the judgment of the former suit just mentioned, which is reported in 86 Mo. App. 494. The court found that defendant had been guilty of the charges of adultery, that she had referred to plaintiff on the streets of Boonville by calling him a vile and opprobrious name, and that she had spoken of him and of his father and mother with contempt and in a vulgar and coarse manner. The court thereupon granted plaintiff a decree of divorce, with the care and custody of the minor child, named Paul. It is an admitted fact that the former suit, reported in 86 Mo. App. 494, was founded upon a charge of adultery committed by defendant at various times during the years 1898 and 1899 with one Derrindenger, subsequent to the charge of adultery in this case with Parker, but prior to the charge of adultery with said Coonfare. The former suit was dismissed by the trial court, and the judgment was affirmed here. This court there held that the acts charged to have been committed by the defendant were connived at by the plaintiff.

It is contended by defendant that, as the act of adultery charged to have been committed with said Coonfare occurred since the one charged to have been committed with said Derrindenger, the court having found that plaintiff connived at the latter, he was precluded under the law ever thereafter of obtaining a divorce for the same cause. "A husband who connives at one act of adultery by his wife cannot complain of any subsequent act with the same or another participes criminis." 2 Bishop on Mar. & Divorce, p. 116. "A husband who connives at or assents to adultery by his wife with one person will be deemed as assenting to it with others, and will not be entitled to a divorce for a subsequent act of adultery with a different person." Hedden v. Hedden, 21 N. J. Eq. 61. In Woodward v. Woodward, 41 N. J. Eq. 224, 4 Atl. 424, the rule as stated in 1 Pomeroy on Eq. Juris. § 399, was adopted, viz.: "The iniquity which deprives a suitor of a right to justice in a court of equity is not general iniquitous conduct, unconnected with the act of defendant which the complaining party states as his ground or cause of action; but it must be evil practice or wrongful conduct in the particular matter or transaction in respect to which judicial protection or redress is sought." Although the court recognized the rule in Hedden v. Hedden, supra, the ap-

plication of the rule as stated by Mr. Pomeroy, supra, shows that the court had some misgivings on the question. Mr. Nelson, in his work on Divorce and Separation (volume 1, § 486), has this to say: "It is doubtful whether these rulings will be followed by modern courts, for it deprives the husband of the right of repentance and reform, and leaves the wife to commit adultery without fear of divorce."

It is a very harsh rule, to say the least about it, and the only theory upon which it can be supported is that a husband who consents to an act of adultery of his wife has fallen so low in his moral nature as to be forever unable to repent and reform. And it must be admitted that the degradation of such a man is profound. Yet there are other conditions in which he may be found, equally deplorable. Still, it ought not to be the policy of the law to cut off the husband from all inducement to reform, nor, as it were, to license the wife to continue her shameful practices freed from all restraint; and the rule of equity that, when a litigant comes into court, it must be with clean hands, refers only to the matter to be litigated, and no other should be also applied to cases of this character. We feel constrained, for these reasons, to hold that plaintiff is not debarred from asserting his right to a divorce on account of the defendant's adulterous conduct with said Coonfare, notwithstanding it occurred since the former suit, in which it was held he had connived in her adultery with said Derrindenger; it not appearing that he in any way was participes criminis. And it may be said that such connivance by the husband of an act of adultery committed by the wife with one person, on the ground of which a bill for divorce filed by him has been dismissed, is not an absolute bar to a divorce for a prior act of adultery committed by her with another person, and not known to the husband at the time he brought his former suit. Morrison v. Morrison, 142 Mass. 361, 8 N. E. 59, 56 Am. Rep. 688; Bishop on Mar. & Div. p. 116.

But the defendant's contention is that the evidence does not support the charge of the former act of adultery. The trial court, however, found that it did, and we must confess that the evidence was rather convincing to that effect. No one can read the opinion in the former case, and evidence here, without being thoroughly convinced that the defendant was at all times during her history, as so disclosed, almost wholly insensible to her duties as a wife, and shamelessly reckless in her conduct with other men. Taking into consideration her almost open adultery with Derrindenger and Coonfare, and the strong circumstantial evidence in her connection with Parker, the conclusion is very persuasive that her criminal act with Derrindenger was not the first.

The court found that plaintiff, at the time he brought his first suit, was unaware of

the former infidelity. We have examined the testimony, and it does not appear that any evidence was offered to show such fact. The plaintiff himself failed to state whether or not he was in possession at said time of any knowledge of such prior adultery. It devolved on him to prove that at the time he brought his said former suit for divorce he included his whole case, and he will not be permitted to open up the same subject of litigation in respect to matters which might so have been brought forward. "All the issues that might have been raised and litigated in any case are as completely barred by the final decree therein as if they had been directly adjudicated and included in the verdict." *Donnell v. Wright*, 147 Mo. 639, 49 S. W. 874. Under the rule, the plaintiff was not entitled to a decree against his wife for the alleged act of adultery with said Parker, as it was a matter for litigation in said former suit.

The defendant asked the trial court for alimony to prosecute her appeal, which was denied. She renews her claim in this court. There is no doubt about the power of an appellate court to adjudge alimony. *State ex rel. Dawson v. St. Louis Court of Appeals*, 99 Mo. 216, 12 S. W. 661. Defendant's appeal, though unsuccessful, seems to have been taken in good faith, and, as we have seen, was not entirely without merit; and, such being the case, we believe she ought to be allowed a reasonable sum to compensate her for her outlay for attorney's fees and other costs. It is therefore adjudged that plaintiff pay to the clerk of this court the sum of \$200 within 20 days, to the use of the defendant herein. Upon plaintiff's compliance with this order, the cause will stand affirmed. All concur.

SMITH, P. J., and ELLISON, J., concur.

BANK OF LIBERAL v. ANDERSON.*

(Court of Appeals at Kansas City, Mo May 25, 1903.)

FRAUDULENT CONVEYANCE—CHATTEL MORTGAGE—RETENTION OF POSSESSION—PRIVILEGE OF SALE—SUFFICIENCY OF EVIDENCE—REFUSAL OF NEW TRIAL—EXCEPTION—SUFFICIENCY OF RECORD.

1. Evidence in attachment, on an issue as to fraud towards creditors in defendant's execution of a chattel mortgage, examined, and held to show an agreement between defendant and his mortgagee that defendant should retain possession and sell portions of the property for his own use and to pay other creditors.

2. Where there is an understanding between the parties to a chattel mortgage that the mortgagor, who retains possession, may sell the portions of the property to pay other creditors, the mortgage is to his own use and a fraud on creditors.

3. Where a bill of exceptions recites that a motion for a new trial was overruled, and that

a record entry was made showing it to be overruled, and that exceptions were duly taken, the preservation of an exception is sufficiently shown.

Appeal from Circuit Court, Barton County.

Action by the Bank of Liberal against Martin Anderson. From a judgment dissolving an attachment, plaintiff appeals. Reversed.

Thurman, Wray & Timmonds, for appellant. Van Pool & Martin and Cole, Burnett & Moore, for respondent.

ELLISON, J. The plaintiff brought its action against defendant on a promissory note, and sued out an attachment in aid. On a trial of the plea in abatement the verdict was for defendant, and the attachment was thereupon dissolved.

The principal cause of attachment alleged was that defendant had fraudulently conveyed his property so as to hinder and delay his creditors. The evidence showed that defendant was largely indebted; that he owed the plaintiff and certain implement dealers doing business as Conrad Bros., besides several other debts. The immediate or principal cause of the attachment was a chattel mortgage given by defendant to the Conrads on September 8, 1900, to secure six notes, aggregating \$225, being the purchase price of two McCormick Corn Binders. The notes were to fall due a few months apart, in sums ranging from \$15 to \$45. The first, for \$15, was to become due in a few days from date, and the last, for \$40, in two years thereafter. To secure these notes the defendant executed the chattel mortgage on all his personal property and growing crops, including nine head of horses, two milch cows, one heifer, and one steer, four farm wagons, 125 acres of Kaffir corn, 75 acres of Indian corn, the two machines to secure the payment of which the mortgage was given, and a variety of other farm property, in all aggregating, according to defendant's testimony, a value of between four and five thousand dollars. The mortgage provided that defendant might retain possession of the property, but any sale, disposal, or depreciation thereof should be cause of forfeiture.

The testimony given by Conrad and by defendant himself is all that need be considered in order to dispose of the case. It was substantially as follows: That defendant, having bought one machine of the Conrads, in a few days concluded that he needed another in order to harvest his Kaffir corn. He went to one of the Conrads to make the purchase, but was informed that he must give a chattel mortgage, and he replied that he would give one on all his property. That in naming over the property, perhaps half in value of what he finally gave, Conrad said that was sufficient, but defendant put it all in and Conrad accepted it. We will not attempt to set out all the evidence of these two parties, for it is sufficient to say of it that it shows beyond doubt they had a verbal understanding that defendant might sell at least a large part of the prop-

*Rehearing denied June 23, 1903.

¶ 2. See *Chattel Mortgages*, vol. 9, Cent. Dig. §§ 864, 412.

erty, and use it in the payment of debts due other creditors than Conrad, as well as otherwise for his own benefit. Conrad said on recross-examination by Mr. Thurman: "Q. What was going to be done with the Kaffir corn? A. He told me he was going to thresh it. Q. What was he going to do with it? A. Sell it. And he told me at that time, he said — He mentioned some debts that he had to pay, and he said, 'I will come out all right in it.' Q. Was there anything said about the other corn, and what he was going to do with it? A. No, sir. Q. He was going to use it — thresh his Kaffir corn and pay it on his debts? A. That is the way I understood it. Q. It was not to be paid on your debt? A. Nothing said about that. Q. You understood that he was cutting this corn and going to pay it on his debts, 'so he come out all right'? A. Yes, sir. Q. You understood that at the time this mortgage was executed? A. Yes, sir; but understand that he wanted these notes in payments. Q. He wanted your notes in payments? A. Yes, sir. Q. They were put in payments? A. Yes, sir. Q. Run way long up until 1902? A. Yes, sir; two or three years. Q. There was nothing said about what he was going to do with the Indian corn? A. No, sir; I don't remember of his saying anything about any Indian corn—that is, about what he was going to do with it. Q. What did you expect him to do with the Indian corn? A. I expected him to do with it whatever he wanted to. I expected to let him take it and do what he pleased with it. As long as he met his obligations with me, I didn't expect to touch it. Q. You expected to let him do just as he pleased with all the property that was mortgaged as long as he met his obligations with you? A. Yes, sir. Q. That was the understanding between you and him? A. Yes, sir." He then said, in answer to a question on redirect examination by Mr. Cole, that: "I didn't say I had any understanding with him. I say, this is my understanding: That I took the mortgage on that stuff to secure these notes; that he was to take the stock and crop, and do the best he could with it towards meeting his debts. Q. Was there any understanding that he could dispose of any of this property without applying it on the debt? What I mean is, did you and him have any understanding that the property that was mortgaged to you could be sold by him? A. The corn. Q. Without accounting for it on the claim? A. The corn. He was to take that and dispose of it. Q. This growing corn in the field? A. Yes, sir. By the Court: Q. Do you mean Indian corn and Kaffir corn, too? A. Yes, sir. Q. He could sell that and dispose of it without applying on your debt? A. If he paid up the paper that he owed to me. Q. If he paid up all the paper, or the paper that was due? A. The paper that was due."

The defendant testified: "Q. I will ask you whether or not, after the mortgage was executed, if there was any understanding, or any

agreement, about how you should dispose of the property that was mortgaged? A. There was no agreement 'about how, but Henry [Conrad] said when I went home, 'Now, you have got two machines; you have got good stock. Go take care of that Kaffir corn and take care of that stock. Thresh that Kaffir corn, and pay me my money, and balance you can have for use on your place, and do as you are a mind to about it.'" He further said that he expected to thresh the Kaffir corn, sell it, and pay Conrad's first note falling due, and then the plaintiff's. He further said, in answer to a question of what he was going to do with the Indian corn, that: "I would do, I reckon, like other farmers would—shuck it and crib it. Q. Selling it when you got ready, or did you intend to keep it? A. Well, to keep and sell both, of course; keep it or sell it either, just as I saw proper. Q. Were you at that time using it, along about the first of September? A. I was feeding the stock with it—cows and horses. Q. You expected to gather it and sell it when you got ready, just like any other farmer? A. Yes, sir."

The entire face of the defendant's testimony shows that he expected to use the property, or portions of it, by sale, for the purpose not only of paying the Conrad debt as the notes fell due, but also his other debts. Now, when there is an understanding that the mortgagor who retains possession of the property may sell it, or portions of it, for the purpose of paying debts other than that named in the mortgage, it is a conveyance to his own use, and consequently fraudulent. It is not for him and his chosen mortgagee to first incumber his property, and then provide, verbally or otherwise, how it may be used for other creditors. While he may prefer a creditor if he chooses, he must do so in some proper way, whereby such creditors and their rights and preferences may be known. In two cases in the St. Louis Court of Appeals, in opinions by Judge Bland, it is expressly ruled that an understanding that the mortgagor might sell the mortgaged property and apply the proceeds on the claims of his other creditors was a conveyance to his own use. *Hardware Co. v. Riddle*, 84 Mo. App. 276; *Dry Goods Co. v. McLaughlin*, 78 Mo. App. 578.

The plaintiff asked an instruction which peremptorily directed a verdict for plaintiff under the evidence which we have discussed. It should have been given.

2. But it is suggested that no exception was taken to the court's action in overruling the motion for new trial. The abstract shows that the bill of exceptions recited that the motion for new trial was overruled. The bill further recited that a record entry was made showing it to be overruled, and that exceptions were duly taken. While this was rather unusual language to use in a bill of exceptions, yet it makes the fact sufficiently appear in the bill.

The judgment is reversed, and cause re-

manded, with directions to enter judgment sustaining the attachment. The other judges concur.

BRAKE v. KANSAS CITY.

(Court of Appeals at Kansas City, Mo. June 8, 1903.)

MUNICIPAL CORPORATIONS—DEFECTIVE CONSTRUCTION OF SIDEWALK—NOTICE—MEASURE OF DAMAGES—LOSS OF TIME—SUFFICIENCY OF ALLEGATION—INSTRUCTIONS—WARRANT IN EVIDENCE—MARRIED WOMAN—CONDITION IN LIFE—PROPRIETY OF CONSIDERATION—EXCESSIVE VERDICT.

1. A city is charged from the beginning with notice of the negligent construction of a sidewalk, and is under a continuing duty to repair it.

2. A petition in a personal injury case alleging that plaintiff has been, and still is, partially disabled from attending to her work and household affairs, substantially alleges damages from loss of time.

3. Where there is no evidence of the value of the time lost, or which will probably be lost, by reason of a personal injury, an instruction allowing a recovery therefor is error.

4. An instruction, in a personal injury action by a married woman living apart from her husband, authorizing the jury to consider "any direct and necessary damages resulting from the injury," is not objectionable as permitting a recovery for plaintiff's loss of ability for sexual intercourse or to bear children; there being no suggestion in the evidence that such loss would result.

5. Permanent injury to the uterus, and likelihood of a recurrence of retroversion, are proper to be considered in estimating damages from a personal injury.

6. In an action for injuries to a married woman who is living apart from her husband, and supporting herself by her own labor, an instruction permitting consideration of her age and condition in life, in assessing damages, is proper.

7. A married woman, living apart from her husband and supporting herself by her own labor, as a stenographer, fell and sustained retroversion of the womb; her injury being painful and probably permanent, with likelihood of a recurrence of retroversion in case she continued her occupation. She was incapacitated for housework or sewing, and suffered much if her work as stenographer was prolonged. *Held*, that a verdict for \$1,500 was not excessive.

Appeal from Circuit Court, Jackson County: J. H. Slover, Judge.

Action by Vinnie F. Brake against Kansas City. Judgment for plaintiff, and defendant appeals. Reversed.

R. J. Ingraham and L. E. Durham, for appellant. Fred Griffith and Elmer E. Hairgrove, for respondent.

BROADBUSH, J. The plaintiff's suit is for damages alleged to have been sustained by reason of the negligence of the defendant in constructing and maintaining an unsafe sidewalk on St. John avenue, one of defendant's streets. The plaintiff, a married woman living separate and apart from her husband, claims that at about 7 o'clock on

the evening of the 23d of November, 1900, while she was lawfully using said sidewalk, in the exercise of due care, she fell to the ground, by reason of the absence of light, and by reason of the unsafe and dangerous condition of said walk, and was severely injured. The evidence showed that the plaintiff, who was a stenographer and typewriter, and dependent wholly upon her own labor for support, while passing over the sidewalk in question in company with her sister, fell off said walk into the street. The sidewalk was constructed of wooden stringers and planks, and, at the point where plaintiff fell, it was about two feet higher than the street. When she fell off the walk, plaintiff struck the ground, and then fell into a gulley still several feet lower than the surface of the street. There was no street light at the point in question, and it was very dark—so dark, according to plaintiff's evidence, that she could not see the walk. The evidence was that plaintiff was careful, and that the fall was not the result of negligence on her part. The evidence further tended to show that plaintiff's injury is located in her womb, and that she suffered greatly, still suffers, and that it is doubtful if she will ever entirely recover, and that, while she is able to carry on her business as stenographer and typewriter, she suffers much if the work is prolonged, and that she is incapacitated from doing housework, and is unable to sew. It was shown that plaintiff only lost about two days' service at her business, and there was no evidence as to the value of her time so lost, or that of any prospective loss of time in the future. Dr. Pinckard, her attending physician, testified that her injury consisted of a retroversion of her womb, which he restored to its natural position, but that retroversion will probably reoccur if she continues her present occupation. The defense was contributory negligence on part of plaintiff. It was shown that the walk was practically new, as it had been constructed only about two months, and that plaintiff passed over it daily, and knew its condition and that of the street. The jury returned a verdict for plaintiff for \$1,500.

Defendant contends that the court erred in giving certain instructions in behalf of plaintiff. Instruction No. 3 is said to be subject to the objection that it did not properly direct the jury as to the time allowed the city to repair the defective sidewalk. It must be admitted that said instruction is somewhat faulty in that respect, but the error was of no consequence. The suit is founded, not upon the negligence of the city in failing to repair its sidewalk, but for its negligent construction, in which case it was charged with notice from the beginning, and which it was under a continuing duty to repair. *Barr v. City of Kansas*, 105 Mo. 550, 16 S. W. 483; *Hanford v. City of Kansas*, 103 Mo. 181, 15 S. W. 753.

[1. See *Municipal Corporations*, vol. 26, Cent. Dig. § 1642, 1643.

Instruction No. 4 is objected to for the assigned reason that it was not confined to the pleadings, and that it is in the nature of a roving commission to the jury to assess damages. It is as follows: "The court instructs the jury, if it finds for the plaintiff, it will assess damages in favor of the plaintiff in a sum not exceeding \$3,000; and, in fixing the amount of such damages, it will take into consideration any direct and necessary damages resulting from the injury, if any; and the jury will also consider the age of the plaintiff, her condition in life, the nature and extent of the physical injuries inflicted, if any, the bodily pain and mental suffering endured, the loss of time, and the expenses of the treatment of the injuries, if any, and any and all such damages, if any, which it appears from the evidence will reasonably result from such injuries in the future." In *Edwards v. Ry. Co.*, 79 Mo. App. 257, it was held, as the petition neither directly nor inferentially pleaded loss of time and wages, an instruction that submitted to the jury the question as to plaintiff's damages arising from loss of time and wages was reversible error. *Slaughter v. Ry. Co.*, 116 Mo. 269, 23 S. W. 760; *Mason v. Ry. Co.*, 75 Mo. App. loc. cit. 9. The petition in the case at bar does not in direct terms allege damages for loss of time, but it does allege that she "has been, and still is, partly disabled from attending to her work and household affairs." In our opinion, the allegation amounts substantially to an allegation of damage for loss of time. There was no evidence of the value of the loss of her services occasioned by the injury. In *Murray v. Ry. Co.*, 101 Mo. 236, 13 S. W. 817, 20 Am. St. Rep. 601, and *Rhodes v. Nevada*, 47 Mo. App. 499, it was held that for ordinary labor—such, for instance, as that of a nurse—the jury were competent to estimate its value; but these cases were afterwards overruled in *Cobb v. St. Louis & Han. R. Co.*, 149 Mo. 609, 50 S. W. 894, and *Slaughter v. Ry. Co.*, 116 Mo. 269, 23 S. W. 760. It follows that said instruction, in so far as it related to damages for loss of time, both in the past and that which would result in the future, was error.

The further criticism of said instruction is that its language, that the jury might "take into consideration any direct and necessary damages resulting from the injury," authorized it to go beyond the demands of the petition, "into the field of opinion and speculation." And it is urged by way of argument that under said instruction the suggestion was to the jury that it might find damages "for any loss of plaintiff's ability to enjoy sexual intercourse or to bear children." The evidence tending to show the direct and necessary damages caused by the injury was the pain and suffering she endured, the partial inability to perform

labor as compared with her prior condition, loss of time, and the expense of medical attention and treatment, and the continuation of these conditions in the future. There was no suggestion in the evidence that has been called to our attention that there would be any loss of ability for sexual intercourse, or that she would be unable to bear children; and it is not stated that counsel for plaintiff, during the progress of the trial, suggested such matters as proper subjects for the consideration of the jury. For these reasons, we do not think it reasonable to conclude that the jury took into consideration such matters. But as the attending physician entertained the opinion that the injury to plaintiff's uterus was permanent, and retroversion would reoccur in the future, it seems to us that the jury might, with the utmost propriety, have taken those things into consideration in estimating plaintiff's damages as reasonable results of her injuries in the future.

Said instruction is further criticised because the jury were told that, in estimating plaintiff's damages, they might take into consideration her age and condition in life. The case of *Ross v. Kansas City*, 48 Mo. App. 440, does not sustain defendant's objection. There the plaintiff was a feme covert, and the jury were told that she could not recover for loss of time and expense of treatment, because these were elements of damage that went to the husband. But the plaintiff's condition in life was a matter of inquiry in *Russell v. Columbia*, 74 Mo. 480, 41 Am. Rep. 325; she being a feme sole, and entitled to loss of time occasioned by the injury and expense of treatment. In *Ross v. Kansas City*, supra, the court intimates that, in cases of permanent injuries or life-long infirmities and suffering, the plaintiff's condition or situation in life might be a proper subject for the jury to consider in estimating the damages, and we can see no good reason to the contrary. The plaintiff, although a married woman, was dependent upon her own labor for support, and paid her own doctor's bills. Practically, for the purposes of this case, she was in no better condition than a feme sole. It was therefore peculiarly appropriate that the jury should be instructed as to her age and condition in life. And as her injuries are likely to be permanent, or at least of long continuance, attended with more or less suffering, we think it clear that her condition in life was a proper subject of inquiry.

It is also contended that the damages are excessive, and that the court committed error in giving instructions 5 and 8 for plaintiff. We do not think there is anything in such contentions of sufficient importance for consideration.

For the reason given, the cause is reversed and remanded. All concur.

GARVEN v. CHICAGO, R. I. & P. RY. CO.
(Court of Appeals at Kansas City, Mo. June 8, 1908.)

MASTER AND SERVANT—SERVANTS NOT UNDER MASTER'S CONTROL—INJURIES TO THIRD PERSONS—LIABILITY OF MASTER—PETITION—SCOPE OF RECOVERY—INSTRUCTIONS.

1. The rule that, where a person is injured by the negligence of the servants and agents of a master, the latter is not liable, if at the time such servants are under the control and orders of another, does not apply where the master does not resign full control of the servants.

2. Plaintiff, a fireman on a switch engine belonging to one road, was injured in a collision with one of defendant's trains, on a track belonging to a third road, over whose tracks defendant ran some of its trains under a contract with such third road. There was evidence tending to show that defendant's trains were under the control of the third road while on the latter's tracks, and also evidence that they were run under the joint rules of the latter company and defendant. *Held*, that a peremptory instruction that plaintiff could not recover was properly refused.

3. The refusal of defendant's request for an instruction submitting the hypothesis of its servants being under the sole control of the other road was harmful error, there being evidence to support the instruction.

4. The petition charged generally that defendant's train was carelessly and negligently run against the engine on which plaintiff was engaged, and further averred that defendant was guilty of specified acts of negligence; the last one being that its servants failed to become aware of the presence of the engine on which plaintiff was riding. *Held*, that an instruction submitting the question whether defendant's employes became aware of the presence of such engine in time to have enabled them by care to have stopped the train was properly refused.

Appeal from Circuit Court, Jackson County; James Gibson, Judge.

Action by Don Garven against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

M. A. Low, W. F. Evans, and Frank P. Seabee, for appellant. C. E. Burnham, for respondent.

ELLISON, J. The plaintiff was a fireman in the employ of the Chicago & Alton Railway Company, and while on one of its engines, running on the tracks of another road, viz., the Union Pacific Railway Company, it collided with one of defendant's trains, then being run over the Union Pacific track, whereby plaintiff was seriously injured. The plaintiff prevailed in the trial court. The evidence disclosed that the defendant runs its trains west out of Kansas City, Mo., over the tracks of the Union Pacific Railway Company under a contract between them, and that the engine on which plaintiff was riding was a switch engine, engaged in switching, and at the time was on the same track. There was evidence tending to show that defendant's trains, while running out of Kansas City over the tracks of the Union Pacific, were under the control, direction, and orders of the latter company. There was also evi-

dence given, by the general superintendent of the latter company, that such trains were run under the joint rules of that company and the defendant; that is to say, under the rules of that company, adopted by the defendant, and issued by it jointly with that company. Defendant asked a peremptory instruction that plaintiff could not recover.

1. It is undoubtedly true that where some third person is injured by the negligence of the servants and agents of a master, yet if, at the time of the act of negligence, such servants are under the control and orders of another, the master of the servants cannot be held for such negligence. The authority at the time to control is the test. *Hilsdorf v. St. Louis*, 45 Mo. 98, 100 Am. Dec. 352; *Smith v. Railway Co.*, 85 Mo. 418, 55 Am. Rep. 380; *Byrne v. Railway Co.*, 61 Fed. 605, 9 C. C. A. 666, 24 L. R. A. 693; *Brady v. Railway Co.*, 114 Fed. 100, 52 C. C. A. 48, 57 L. R. A. 712; *Atwood v. Railway Co.* (C. C.) 72 Fed. 447.

2. But we conceive that rule to be founded on the fact that such servants are under the sole or exclusive control of another. If the master retains joint supervision or control, the reason upon which the rule is based ceases, and the case is placed without the influence of the rule. The rule itself is founded on the principle that a master's liability results from his right of control and direction of his servants, and that therefore, in those acts of negligence of the servant, committed while the servant is not under the master's control, liability does not attach. So that, if the master does not resign full control of his servant, his liability for the negligent act has not been severed. Since, as before stated, there was evidence tending to show a joint control, the trial court was right in refusing the peremptory instruction.

But defendant asked a further instruction (No. 5) submitting the hypothesis of its servants being under the control of the Union Pacific alone, and not under its control, and this was refused. By such action the court committed harmful error against defendant, since there was evidence tending to support the instruction.

3. The fifth instruction for plaintiff submitted the question whether "defendant's employes became aware of the presence on the track of the Chicago & Alton switch engine * * * in time to have enabled them" by care to have stopped the train, etc. Defendant contends that no such negligence was charged. The petition contained a general charge that the defendant's train was carelessly and negligently run against the Chicago & Alton engine, on which plaintiff was engaged. Plaintiff claims, on the authority of *Dickson v. Ry. Co.*, 104 Mo. 503, 16 S. W. 381, that the instruction was proper under such general charge. The difficulty with such claim is that thereafter the petition specially avers that "the defendant was guilty of the following acts of carelessness, negligence, and

unskillfulness, and that some one, or more, or all, of such acts of carelessness, negligence, and unskillfulness was, or were, the direct, immediate, and proximate cause or causes of plaintiff's said injury, to wit: setting out five distinct causes, neither of which is the one submitted in the instruction. The fifth and last act of negligence charged was that defendant's servants failed to become aware of the presence of the engine on which plaintiff was riding. The negligence submitted was clearly not the negligence thus specifically charged. And, since plaintiff saw fit to charge specifically just what acts of negligence caused the accident, he cannot, under the general allegation, prove something not among those named, and the Dickson Case is therefore not applicable. That a plaintiff is confined to the grounds of negligence pleaded is thoroughly settled. *Cunningham v. Journal Co.*, 95 Mo. App. 47, 68 S. W. 592; *Gurley v. Railway Co.*, 93 Mo. 445, 6 S. W. 218; *Ely v. Railway Co.*, 77 Mo. 34; *Bohn v. Railway Co.*, 106 Mo. 429, 17 S. W. 580.

For the reasons aforesaid, the judgment will be reversed, and cause remanded. All concur.

HAINES v. PEARSON.*

(Court of Appeals at Kansas City, Mo., May 25, 1903.)

NEGLIGENCE—PLEADING AND PROOF—ACTION FOR DEATH—MORTUARY TABLES.

1. Under a petition in an action for death from the falling of a signboard, alleging the negligence to be in the original hanging of the sign, recovery may not be had on proof that, though properly put up, it afterwards became insecure and was permitted to so remain.

2. Introduction of mortuary tables to show expectancy of life is not necessary to show proper damages from death.

Appeal from Circuit Court, Jackson County; J. H. Slover, judge.

Action by Margaret A. Haines against A. A. Pearson. Judgment for plaintiff. Defendant appeals. Reversed.

Morley & Swearingen, for appellant. L. A. Laughlin, for respondent.

ELLISON, J. A large "business sign," attached to the building in which defendant did a mercantile business on one of the principal streets in Kansas City, became detached from its fastening and fell to the street below. It struck plaintiff's husband on the head, from which injury he shortly died. She thereupon brought this action for damages, and recovered in the trial court.

The petition charges the negligence of defendant to be in the original hanging of the sign with insecure and improper fastenings, and thereafter maintaining it in such insecure condition. She was permitted to recover

on the theory that, though the sign was properly put up, it afterwards, in the course of several years, became insecure and was negligently maintained or permitted to remain in such condition. The instruction for plaintiff is so worded that it is difficult to say, with certainty, whether it meant to submit to the jury the question of the sign being originally insecurely fastened, or whether it was insecurely fastened when it fell. We take it the latter is what was meant. It reads: "That the falling of the sign raises a presumption that the same was insecurely fastened to the wall from which it fell, and that the defendant was negligent in so maintaining it; and you should find for the plaintiff, unless you should find such presumption was overcome," etc.

Defendant asked, and was refused, instructions the effect of which was to declare that the plaintiff could not recover under the petition, if there was no negligence in originally hanging the sign. We think it was error to permit plaintiff to recover for negligent acts of omission under a petition charging negligent acts of commission several years prior to the accident. It is not permissible to allege one act of negligence, and recover on a totally different negligent act. *Gurley v. R. R.*, 93 Mo. 449, 6 S. W. 218; *Bank v. Armstrong*, 62 Mo. 59; *Buffington v. R. R.*, 64 Mo. 246; *Price v. R. R.*, 72 Mo. 414; *Ely v. R. R.*, 77 Mo. 34; *Waldhler v. Ry. Co.*, 71 Mo. 514. While there was evidence tending to show that the sign was negligently hung in the first instance, there was also evidence tending to show the contrary. If the latter evidence was believed, defendant was entitled to a verdict under the petition as it now stands.

It is urged in behalf of defendant that plaintiff was necessarily compelled, in order to show proper damages resulting from her husband's death, to introduce mortuary tables to show his expectancy of life. This is a mistaken view. Such tables are proper evidence, but they are not the only evidence. A proper case may be made out without the use of such tables.

The judgment is reversed, and cause remanded. All concur.

"SQUIERS v. KANSAS CITY.

(Court of Appeals at Kansas City, Mo., June 8, 1903.)

DEFECTIVE SIDEWALKS—NOTICE—INSTRUCTIONS.

1. Error in plaintiff's instruction, that if a loose plank rendered the sidewalk "unsafe and defective," and plaintiff was injured thereby, to find for her, is cured by defendant's instruction that defendant would not be liable merely because there was a defect or imperfection in the sidewalk, unless it was such that on account of it the sidewalk was not reasonably safe for travel.

2. Whether the defect in a sidewalk, consisting of a loose board, is so obvious as to impart notice to the city, is a question for the jury.

*Rehearing denied June 22, 1903.

† See Death, vol. 15, Cent. Dig. § 94.

Appeal from Circuit Court, Jackson County; John W. Henry, Judge.

Action by Martha J. Squiers against Kansas City. Judgment for plaintiff. Defendant appeals. **Affirmed.**

R. J. Ingraham, for appellant. Anderson & Robinett and N. F. Heitman, for respondent.

BROADBUSH, J. The plaintiff seeks to recover from the defendant city damages sustained by her by reason of the defective and dangerous condition of a certain sidewalk. The evidence showed that on the 13th day of March, 1901, while plaintiff, in company with her son, was passing over a sidewalk on the east side of West Prospect Place in said city, at about 50 feet south of Twenty-Eighth street, her son stepped upon one end of a board, which caused the other end to tilt up, thereby tripping plaintiff and causing her to fall, by reason of which she was injured. She recovered judgment for the sum of \$1,000, from which defendant appealed. The contention of defendant is that the court erred in giving and refusing instructions, and that the defect in the sidewalk in question was not so obvious as to impart notice.

It is insisted that instruction No. 3 given for plaintiff is erroneous and misleading, in that it did not submit to the jury the question whether or not the defect in the sidewalk was such as to render it on that account not reasonably safe, but instead uses the words "rendered said sidewalk at such time and place unsafe and dangerous"; that the expression "unsafe and defective" is not equivalent to the proper expression "not reasonably safe"; and that because a sidewalk is unsafe and defective does not necessarily imply that it is not reasonably safe. Said instruction is as follows: "The court instructs the jury that the plaintiff is not bound to prove that any officer or agent of the defendant, Kansas City, Mo., had actual notice of the condition of the sidewalk in question. And if you find from the evidence that on the 13th day of March, 1901, there was a loose plank in the sidewalk on the east side of West Prospect Place, sometimes known as 'Jarboe Street,' at a point about 50 feet south of Twenty-Eighth street, in said city, and that the looseness, if any, of said plank at said time and place rendered said sidewalk at said time and place unsafe and defective, and that plaintiff was injured by reason of such unsafe and defective condition of said sidewalk, and that a sufficient length of time had elapsed between the time, if any, when said sidewalk became defective and the date of the injury, if any, to plaintiff, for the city by the exercise of reasonable diligence to have discovered and repaired such defect, if any, in said sidewalk, then the city was negligent in not discovering and repairing said sidewalk."

A similar instruction was considered in *Robertson v. Wabash Ry.*, 152 Mo. 382, 53 S. W. 1082. It was there held that the instruction "in effect told the jury that plaintiff was entitled to recover if the depot platform was in an unsafe condition and out of repair, in consequence of which she was injured, however slight the defect may have been, while it was only required of defendant that it keep it in a reasonably safe condition for persons using it for the purpose for which it was intended, thus imposing upon defendant a greater burden than the law requires." The mere fact that the sidewalk was unsafe for persons using it, under the ruling in the above case, did not render the defendant liable. If it was unsafe and defective to the slightest degree, the jury would have been authorized to find for the plaintiff, although it might have been reasonably so; for the defendant would not be liable for every defect in its sidewalk. But we are cited to the case of *Perrette v. Kansas City*, 162 Mo. 288, 62 S. W. 448, wherein it is contended a similar instruction was approved. The instruction in that case was different from the one here, in that the term used was "unsafe and dangerous," which is the equivalent of not being reasonably safe; for the language imports more than a mere defective condition.

But plaintiff claims that, if said instruction was defective, it was cured by those asked and given on the part of the defendant. Instructions Nos. 6 and 7 properly declare the law. In No. 7 the jury are told that the mere fact that there was a defect or imperfection in the sidewalk where plaintiff claimed to have fallen was not of itself sufficient to hold defendant liable, and that, "unless the alleged defect or imperfection was such that the sidewalk was not on that account reasonably safe for travel in the ordinary modes by persons using ordinary care and prudence, their verdict should be for the defendant." Although plaintiff's instruction was faulty, yet, if read in connection with that of the defendant, the jury would not have been misled. Defendant's instruction is explanatory, rather than contradictory, of the former. Omissions in a plaintiff's instruction may be supplied by those given for the defendant. *Gordon v. Burris*, 158 Mo. 223, 54 S. W. 546; *Fischer v. Packing Co.*, 77 Mo. App. 108.

The other objection made to this instruction is "more technical than real." We think the instructions as a whole fully and fairly presented the case to the jury. Whether the defect in the sidewalk was so obvious as to impart notice to defendant was a question of fact for the jury. There was evidence of its general bad condition, at and about the place where plaintiff was injured, sufficient to warrant the verdict.

For the reasons given, the cause is affirmed. All concur.

D. H. BALDWIN & CO. v. TUCKER.

(Court of Appeals of Kentucky. June 9, 1903.)

PRINCIPAL AND AGENT—SALES—TAKING NOTE IN NAME OF AGENT—AUTHORITY—EVIDENCE.

1. In replevin for a piano sold defendant by plaintiff's agent, who took therefor a note payable to himself, and appropriated the proceeds, it appeared that plaintiff had previously shipped four pianos to the agent in his own name, to be sold as agent, and he took a check in his own name in payment for one, and a similar check and an organ in exchange for another, and plaintiff had ratified the transactions; that one of these purchasers introduced the agent to defendant. Another representative of plaintiff afterwards told defendant that the agent had authority to sell the piano, and that plaintiff was seeking evidence to handle the agent for not returning the money. Another piano agent testified to having taken notes payable to himself, and a purchaser of an organ testified that he had settled with the agent by executing a note payable to the agent. *Held*, that a verdict for defendant would not be disturbed on appeal.

2. There was no material error in admitting the statement of the representative who was seeking evidence against the agent.

Appeal from Circuit Court, Mercer County.

"Not to be officially reported."

Replevin by D. H. Baldwin & Co. against C. D. Tucker for a piano sold defendant by plaintiff's agent, who took a note payable to himself, and appropriated the proceeds. Judgment for defendant, and plaintiff appeals. Affirmed.

Gaither & Vanarsdall, for appellant. Ben Lee Hardin, for appellee.

HOBSON, J. On the former appeal herein, the court, concluding its opinion, said: "The court erred in giving a peremptory instruction to the jury. On the facts shown in this record it should have told the jury, in the absence of any evidence to show that Sparks was authorized to sell the piano and take the note payable to himself for the purchase price, to find for appellant. There was nothing in this case to show that in the business of selling pianos by agents it was usual for them to take notes payable to themselves for the purchase money. Had such been shown, then it would appear to be an act within the scope of the agent's apparent authority." *Baldwin & Co. v. Tucker*, 65 S. W. 841. On the return of the case to the circuit court, it was tried again, and at the conclusion of the evidence on both sides the court instructed the jury as follows: "Gentlemen of the jury, by virtue of the written contract between D. H. Baldwin & Co. and J. W. Sparks the latter had no authority to sell the piano in contest to defendant Tucker and to take Tucker's note therefor payable to himself. For this reason you will find for the plaintiff, unless you believe from the evidence that it was usual, about the time of said sale, in this part of the country, for agents in the piano selling business to take notes payable to themselves, in which case you will find for the defendant." The jury again found for the defendant, and the plaintiff appeals a second time to this court.

It is conceded that the instruction of the court follows the opinion delivered on the former appeal, but it is insisted that there was no evidence to warrant the instruction. The rule in this state is that, where there is any evidence of a fact, it must be submitted to the jury. It was shown on the trial that four pianos were shipped by appellant to Sparks to sell. They were shipped to him in his own name, and to be sold by him as appellant's agent. One of these pianos he sold, taking a check in his own name for the price. Another he sold, taking a check in his own name for part of the price and an organ in exchange for the remainder. These checks he cashed in his own name. Appellants made no complaint of either of these transactions, and ratified them. After all this, Sparks was introduced by one of these purchasers to appellee, and thus made the trade with him in contest. In the written contract between Sparks and the company it was stipulated, among other things, as follows: "When a sale is made by the said Sparks, it is to be reported to D. H. Baldwin & Co. without delay, and, where a sale is not satisfactory to D. H. Baldwin & Co., he shall make it so, take up the instrument, or pay for it within thirty days from advice to him that the sale is not satisfactory." It was also shown that after the transaction with appellee Sparks went to see appellant, and a negotiation was had between them as to the settlement of his accounts, and they then sent an agent to Harrodsburg to look into the state of Sparks' affairs. This agent called on Tucker, and examined the contract made with him by Sparks, assuring him that Sparks was their agent, and had a right to sell the piano, and that they were hunting up evidence to handle him for not returning the money. It was also shown by one piano agent that he had sold and taken notes individually, and by a purchaser that he had bought an organ from another agent, who had taken a note to himself personally. The defendant offered to prove by a number of witnesses that the agents for sewing machines, reapers, mowers, and property of that sort, by custom prevalent all over the state, took notes and checks payable to themselves as agents; but the court sustained an objection to this testimony, and refused to admit it. Whether this evidence should have been admitted is not now material, as the jury found for the defendant on the evidence before them. We do not see that there was any material error in the admission of the statement of the agent sent by appellant to Harrodsburg. His statement was made in the course of his employment in discharging the business committed to him by his master, explaining why he was there, and why he wanted to see the papers which Tucker had. It tended to show that appellant at that time, which was only a few days after the sale, was looking to Sparks for redress. Taking all the facts shown by the evidence into consideration, and the inferences that

may fairly be drawn from them, we cannot say there was no evidence authorizing the submission of the case to the jury, or that the verdict is so against the evidence as to warrant us in disturbing the verdict.

Judgment affirmed.

CHAMPION ICE MFG. & COLD STORAGE CO. v. AMERICAN BONDING & TRUST CO.

(Court of Appeals of Kentucky. June 10, 1903.)

FIDELITY BOND—DEFAULT OF EMPLOYEE—CONSTRUCTION—LOSS COVERED—RAISING CHECKS—LIABILITY OF BANK—REPRESENTATIONS—WARRANTIES.

1. A bond conditioned to reimburse an employer for such pecuniary loss as he might sustain by any act of fraud or dishonesty, amounting to larceny or embezzlement, committed by a designated employee in the performance of his duties as bookkeeper, or in such other position as he might be called on to fill, covered a loss sustained by the fraudulent act of the employee in raising the amounts of checks which it was his duty to fill out, whether such duty pertained to his office as bookkeeper, or to any other capacity in his employer's service.

2. In order that liability might attach on a bond conditioned to insure an employer against larceny or embezzlement by an employee, it was not necessary for the employer to introduce such proof as would convict the employee of the crime of larceny or embezzlement as defined by the laws of the state.

3. The contract expressed in an employee's fidelity bond is a form of insurance, and any ambiguity is to be construed most strongly against the company.

4. Where it was known to the officers of a bank that plaintiff's employee was its bookkeeper and trusted agent, and that he was required to fill out and cash his employer's checks, though without authority to sign them, any change in the amount of plaintiff's checks appearing in such employee's handwriting was within the apparent scope of his authority, and payment thereof by the bank would not impose any liability on it to reimburse plaintiff for the amount thereof.

5. The fact, though conceded, that a bank was liable for a loss resulting to plaintiff through the fraudulent act of his employee in raising the amount of checks drawn on the bank, would not release such employee's surety on a fiduciary bond from liability to plaintiff.

6. Statements by an employer in an application for a fiduciary bond for one of his employees that such employee's position would be merely that of bookkeeper, and that the largest amount of cash likely to be in his custody would be but a few dollars, did not amount to warranting, under Ky. St. 1899, § 639, providing that all statements or descriptions in an application for an insurance policy shall be deemed representations, and not warranties.

7. Where a bond insured an employer against any fraudulent conduct of an employee, amounting to larceny or embezzlement, in his position as bookkeeper, or in any other position to which he might be called, representations by the employer in his application for a bond that the largest amount of money likely to be in the employee's hands would be but a few dollars could not be considered fraudulent or material, but as mere promissory representations.

Appeal from Circuit Court, Kenton County.

"To be officially reported."

Action by the Champion Ice Manufacturing & Cold Storage Company against the American Bonding & Trust Company. From a judgment for defendant, plaintiff appeals. Reversed.

J. W. Bryan and S. D. Rouse, for appellant. Frank M. Tracey, for appellee.

SETTLE, J. The appellant, Champion Ice Manufacturing & Cold Storage Company, is a corporation doing business in Covington, Ky. It had in its employ a bookkeeper, Geo. H. Weitkamp by name, of whom it required a bond of indemnity, which was furnished by the appellee, American Bonding & Trust Company, for the consideration of \$12.50 paid in cash. By the terms of this bond, appellee agreed to indemnify appellant for one year for any "loss which it might sustain by reason of any fraudulent or dishonest act upon the part of Weitkamp, amounting to larceny or embezzlement," that might occur while he continued in appellant's service as bookkeeper. It appears that Weitkamp, while in appellant's service, wrongfully converted \$94.91 of its money, and, in addition, raised five of its checks, each \$100 in amount, which he caused to be cashed at the First National Bank of Covington, and appropriated to his own use the amounts thus fraudulently realized. These frauds seem to have been committed in the following manner: The weekly pay roll of the appellant company, as prepared by one of its officers, was furnished Weitkamp, as bookkeeper, with direction to make out the checks, payable to himself, for the amounts indicated. Upon thus filling out the checks as directed, Weitkamp handed them to the proper officer of the company, who signed and returned them to him to take to the bank to be cashed. Weitkamp raised five of these checks \$100 in amount, each, had them cashed, and retained the amounts of the excess over and above the sums for which they were originally and truly issued. The checks thus fraudulently raised are supposed to have been destroyed by Weitkamp. At any rate, they have not been found or produced by appellant. The aggregate amount realized by Weitkamp, from the fraudulent alterations of the checks was \$500, and the additional sum of \$94.91 he retained out of moneys collected by him as bookkeeper of appellant, or took from its money drawer. Weitkamp, upon learning that his speculations were about to be discovered by appellant, fled to parts unknown, and has ever since remained concealed and unapprehended; and this action was instituted by appellant in the Kenton circuit court to recover of appellee, on the bond mentioned, the sum of \$594.91 fraudulently appropriated by Weitkamp in the manner stated. The appellee filed answer to the petition, denying any liability on the bond, except to the extent of \$94.91,

made up of small amounts taken by Weitkamp from the cash drawer, or collected of appellant's customers, which it tendered to appellant, and, in addition, averred, in substance, that the remainder of the sum lost to appellant is not covered by the terms of the bond, and that the First National Bank, which cashed the checks raised by Weitkamp, is the sole loser by his fraud, and must account to appellant; under the laws of banking, for the amount of his defalcation, and, further, that appellee cannot be held liable on the bond given for Weitkamp, for the reason that appellant, in order to procure the bond, made various misrepresentations as to the duties and responsibilities to be imposed upon Weitkamp, because of which alleged misrepresentations appellant is estopped from recovering on the bond. After the filing of the reply, which controverted the affirmative allegations of the answer, the case went to trial, and upon conclusion of appellant's testimony the lower court, upon appellee's motion, gave the jury a peremptory instruction to find for appellee, which they accordingly did. Judgment was thereupon entered dismissing the petition and allowing appellee its costs. Thereafter appellant entered motion and grounds for a new trial, which was refused. Of the judgment dismissing its petition and refusing the new trial, appellant now complains, and asks a reversal at the hands of this court.

The appellee company is engaged in the business of furnishing bonds to secure the honesty and fidelity of fiduciaries and employes, and the one sued on in this case provides, among other things, that appellee "does hereby agree that it will within three months after receipt of proof, satisfactory to its officers and subject to the conditions hereinafter expressed, reimburse the employer [appellant], to an amount not in excess of the penalty of this bond [\$2,500], for such pecuniary loss as the employer shall have sustained of money, securities, or other personal property belonging to the employer, or for which the employer is responsible, by any act of fraud or dishonesty amounting to larceny or embezzlement committed by the employe during the continuance of this bond, in the performance of the duties of said office, or position, or such other position as he may be subsequently appointed to, or called upon to fill by the employer in said service." The bond further provided that, in case of discovery of default or loss, the appellant should give immediate notice to appellee, etc. There can be no question but that the covenants of the bond cover such a loss as was sustained by the appellant. Its only purpose was to insure against loss that might result to appellant from the fraud or dishonesty of Weitkamp, amounting to larceny or embezzlement, whether the loss was that of money, securities, or other personal property belonging to appellant, or for which it might be

made responsible; and the indemnity thus afforded by the bond not only applies to any act of fraud or dishonesty which Weitkamp may have committed in the performance of his duties as bookkeeper, but also to such as he may have committed in any other position in appellant's employment to which he may have been appointed, or called upon to fill. It is not material, therefore, whether the fraudulent and dishonest acts of Weitkamp which caused loss to appellant were committed by the making of false entries in its books, by the raising of its checks, or by abstracting money from its money drawer; nor is it material whether he was at the time acting as bookkeeper, or in some other capacity in appellant's service. In either or in any of these events, appellee, under the terms of the bond, would be, and is, liable for the loss which he occasioned.

There can be no doubt, under the evidence in this case, but that Weitkamp was authorized by appellant, and that it was a part of his duty, to receive money due it from its customers, and to draw money from the bank in which appellant's account was kept; and it was also his duty to account to appellant for the moneys thus received. His failure to do so was dishonest and fraudulent, and, in fact, constituted an act of embezzlement; and, for the loss resulting to his employer thereby, appellee's liability is fixed by the terms of the bond.

It was not necessary, in order to fix the liability of appellee upon the bond, that appellant should produce, in support of any claim that it might have arising thereunder, such proof as would convict Weitkamp of the crime of larceny or embezzlement as defined by the laws of Kentucky. Such a narrow construction of the provisions of the contract is not required by the law, and was never contemplated by the parties to it. While larceny is a common-law crime, yet in this state it is to a great extent statutory. Embezzlement is purely a statutory crime, but the terms "larceny" and "embezzlement," in the bond or policy sued on, are used as generic terms to indicate the dishonest and fraudulent breach of any duty or obligation upon the part of an employe to pay over to his employer, or account to him for, any money, securities, or other personal property, the title to which is in the employer, that may in any manner come into the possession of the employe.

It will be observed that the bond in this case is a printed one—prepared, doubtless, by a skilled attorney in appellee's employ. The contract expressed therein is but a form of insurance, and the law of insurance is that, in the construction of policies, if there be any ambiguity in them, it must be construed most strongly against the insurance company. In *American Surety Company v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977, Mr. Justice Harlan admirably states this rule as follows: "If, looking at all its

provisions, the bond is fairly and reasonably susceptible of two constructions, one favorable to the bank, and the other favorable to the surety company, the former, if consistent with the objects for which the bond was given, must be adopted; and this for the reason that the instrument which the court is invited to interpret was drawn by the attorneys, officers, or agents of the surety company. This is a well-established rule in the law of insurance. *First National Bank v. Hartford Fire Insurance Company*, 95 U. S. 673 [24 L. Ed. 568]. * * * As said by Lord St. Leonards in *Anderson v. Fitzgerald*, 4 H. L. Cas. 483: 'It [a life policy] is, of course, prepared by the company; and if, therefore, there should be any ambiguity in it, it must be taken, according to law, most strongly against the person who prepared it.' There is no sound reason why this rule should not be applied in this case. The object of the bond in suit was to indemnify or insure the bank against loss arising from any act of fraud or dishonesty on the part of O'Brien in connection with his duties as cashier, or with the duties to which, in the employer's service, he might be subsequently appointed. That object should not be defeated by any narrow interpretation of its provisions, nor by adopting a construction favorable to the company, if there be another construction equally admissible under the terms of the instrument executed for the protection of the bank." In *Fidelity & Casualty Company v. Gate City National Bank* (Ga.) 25 S. E. 392, 33 L. R. A. 821, 54 Am. St. Rep. 440, a bond similar to the one under consideration was executed by the Fidelity & Casualty Company to indemnify the bank against loss by reason of the fraud or dishonesty of one Lewis Redwine in connection with his duties as paying teller, "or the duties to which in the employer's service he may be subsequently assigned by the employer." After the execution of the bond, Redwine was made assistant cashier, and as such became a defaulter, causing loss to the bank in a large amount. The Supreme Court of Georgia, in discussing the liability of the guaranty company on the bond, said: "One of the questions for decision is whether or not the company was surety for him in the latter capacity [that of assistant cashier]. In view of the comprehensiveness of the above-quoted language, it would be difficult to hold it was not. He was certainly appointed subsequent to the execution of the bond to the office of assistant cashier, as such had duties to perform in his employer's service, and by a violation of those duties brought loss to the master. We think the plain language of the contract covers the precise state of facts which arose, and that the company is as much bound to answer to the bank for Redwine's dishonesty in the latter capacity as in the former." Under the rule announced in the case *supra*, it is manifest that though Weitkamp, in the application made by ap-

pellant to appellee for the bond sued on, was designated as a bookkeeper in its service, and is so entitled in the bond itself, the fact that he was intrusted by his employer with the duty of making out checks, and drawing money from the bank thereon, did not relieve appellee from liability on the bond, as, at most, the additional duty was only one that was assigned him by his employer subsequent to the execution of the bond, and was allowed by the terms of the bond itself. We are not, however, prepared to concede that the appellee would not have been liable for the dishonesty of Weitkamp in causing loss to his employer by raising the checks, and appropriating the money thereby received from the bank. Even in the absence of the provision of the bond mentioned, for we incline to the opinion that the duty of making out checks, and procuring money of the bank thereon, was a service that might properly and naturally have been intrusted to a bookkeeper.

It is contended by counsel for appellee that the First National Bank of Covington is liable to appellant for the sum embezzled by Weitkamp, and that it therefore has no cause of action upon the bond executed by appellee. We do not so understand the law. It is true that the relation of a bank and its depositor is that of debtor and creditor, and it is likewise true that a bank must know the signature of a depositor who draws a check upon it. We may, for the purposes of this case, even admit the rule to be that a bank, in paying a forged or altered check, does so at its peril, and at its own loss; but we think the facts of this case present an exception to this rule. It was known to the bank's officers that Weitkamp was the bookkeeper and trusted agent of appellant, and that he was required to fill up and cash its checks, though without authority to sign them in his own name or that of his employer. In the course of their business relations with the appellant, its officers and agents, the bank officers must be presumed to have become acquainted with their handwriting, and that of Weitkamp; and therefore any change of the amount of a check from appellant, appearing in the handwriting of Weitkamp, would have excited neither alarm nor suspicion in their minds, as such alteration or change would have been within the apparent scope of Weitkamp's authority; and the payment by the bank of any check altered by him, under such circumstances, would not impose any liability on the bank to reimburse appellant for the amount thereof. It is unnecessary, therefore, to determine what the liability of the bank to appellant would have been under other circumstances. But even though the bank were liable to appellant for the amount the checks were raised, that fact would not, in our opinion, exonerate appellee from liability. The purpose of the bond was to furnish indemnity to appellant from loss resulting from the fraud or dishonesty of Weit-

kamp. The position of appellee was not only that of an insurer, but in some sort that of a surety as well, and in both these capacities its liability is primary and direct. It would be restricting the law of both insurance and suretyship to an absurd degree to say that appellee cannot be held liable until after appellant, having exhausted every other remedy, or prosecuted to insolvency any others who might be liable, is still not reimbursed. In other words, appellee's liability does not depend upon whether appellant might collect the stolen \$500 from some one else. Having a right of action against the defaulter, Weitkamp, appellant has also a right of action against the guarantor of his honesty.

It is also contended for appellee that as appellant, in answer to certain written questions propounded to it by appellee before the execution of the bond, in substance represented that Weitkamp's position in its service would only be that of a bookkeeper, and that the largest amount of cash likely to be in his custody as its bookkeeper would be only a few dollars in the cash drawer, or for daily deposit, this representation amounts to a warranty, and, being false, had the effect to relieve appellee from liability on the bond. The cause of action declared on is not, in our opinion, affected by the representation in question. It was not a warranty, or so intended. Section 639, Ky. St. 1899, provides that, "all statements or descriptions in an application for a policy of insurance shall be deemed representations and not warranties; nor shall any misrepresentations, unless material or fraudulent, prevent a recovery on the policy." Viewed in the light of this statute, and of the well-known rule of elementary law that contracts of insurance are to be construed more favorably to the insured than the insurer, the answers contained in the application were not warranties; and, by the terms of the bond itself, it is apparent that they were neither fraudulent nor material. There is no averment in the answer that the bond of indemnity would not have been executed if the answers contained in the application had shown that Weitkamp would have been permitted to draw money from the banks on checks for the weekly pay roll, nor does the answer allege that appellee was in any way misled or deceived by appellant's answers to its written questions. They were, indeed, mere promissory representations, which, in the language of Mr. Joyce on Insurance (paragraph 190), are to be treated as "mere declarations of an unexecuted intention, and a failure to comply with such declarations is not fatal to a recovery upon a contract not induced by it."

Being of the opinion that the lower court erred in giving the peremptory instruction, as well as in the matter of refusing appellee a new trial, the judgment is reversed, and cause remanded, with directions to the lower

court to set aside the verdict and judgment, and grant appellant a new trial, not inconsistent with the opinion herein.

REED v. ILLINOIS CENT. R. CO.

(Court of Appeals of Kentucky. June 18, 1903.)

CONTRACTS—FURNISHING RAILROAD WITH PILING—CONSTRUCTION—TIME OF PERFORMANCE—BREACH—MEASURE OF DAMAGES.

1. A contract to furnish a railroad company with piling during the year 1901 stipulated that it was to be delivered pursuant to orders from time to time, "but it is understood and agreed that at least five hundred pieces of piling shall be ready for delivery to us on or before June 1st, 1901, and the balance * * * on or before August 1st, 1901." The railroad company, in a letter inviting the proposition, stated that the greater portion was wanted during the early part of the year, and only requested a bid for the first six months; and in a second letter it was stated that the piling must be cut at once. *Held*, that the contract obligated the railroad company to order not less than 500 pieces of piling in time to enable plaintiff to deliver it on or before June 1, 1901, and did not leave it optional with the company to order at any time during the year.

2. Where a railroad company contracts for piling to be delivered on its right of way by a certain date, pursuant to orders given therefor, the measure of damages on breach of the contract by it is the difference between the actual cost to the contractor of delivering the piling and the contract price.

Appeal from Circuit Court, Crittenden County.

"Not to be officially reported."

Action by J. P. Reed against the Illinois Central Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Molloy & Utley, for appellant. Pirtle & Trabue, J. M. Dickinson, and Blue & Nunn, for appellee.

BURNAM, C. J. Appellant, J. P. Reed, brought this action against the appellee, the Illinois Central Railroad Company, for damages for an alleged violation of a contract for piling, dated February 26, 1901, the essential parts of which, in the determination of this controversy, read as follows: "You to furnish this company and we to take from you during the year 1901, square-hewed white oak piling according to our specifications. * * * The piling to be furnished and received under this contract is to be of such various lengths and such number of pieces of such respective lengths as we may require and give you orders for from time to time, such piling to be not less than fifteen feet in length nor over seventy feet in length, the aggregate number of pieces of piling to be furnished and received under this contract to be not less than five hundred pieces nor to exceed one thousand pieces of piling, all of the piling to be subject to an inspection and rejection at the point at which delivery of same is to be made, all piling to be delivered on the right of way of this

company between Princeton, Kentucky, and Henderson, Kentucky, at such points on said right of way and piled in such manner convenient for loading on cars as our inspector may direct, such delivery to be made from time to time to meet our requirements, as will be specified on orders sent to you from time to time during the current year 1901, but it is understood and agreed that at least five hundred pieces of piling shall be ready for delivery to us on or before June 1st, 1901, and the balance of the piling called for in this contract shall be ready for delivery to us on or before August 1st, 1901." The issue between the parties is as to the construction of the contract. Appellant claims that the railroad company was bound by the terms of the contract to order not less than 500 sticks of piling in time for him to fill the order for delivery by the 1st day of June, and that, if it elected to order the balance of the piling contracted for, the contract required that the order should be made therefor by the railway company in time to have permitted the appellant to have gotten it out and ready for delivery before the 1st of August. Appellee, on the other hand, insists that whilst, under the terms of the contract, it had the right to require appellant to deliver 500 pieces before the 1st day of June, 1901, and the balance of 1,000 pieces on or before the 1st day of August, 1901, if it so elected it could disregard these periods of delivery, and order the piling at any time during the year 1901 when it saw fit, provided it did not order more than 500 pieces before the 1st day of June, nor more than 1,000 pieces before the 1st day of August. It is conceded that appellee ordered and plaintiff delivered 211 pieces of piling before the 1st day of June, and that on the 30th day of September, 1901, it made an order on the plaintiff for 289 pieces of piling, the balance of the 500 pieces, and that this order called for piling running from 35 to 60 feet long. The testimony conduces to show that, immediately after the execution of the contract, the appellant, Reed, bought trees, and collected teams, men, and machinery, with the view of complying with his contract with appellee; that after the 1st day of August, having despaired of receiving any additional orders, he discharged his men and disposed of the greater part of his teams, and that subsequently thereto, on the 30th day of September, the appellee mailed to him an order, which reached him in the early part of October, for 289 pieces of the very longest lengths provided for by the contract; that appellant made a profit of $4\frac{1}{2}$ cents per lineal foot upon the piling ordered and delivered, and testified that he could realize at least this profit upon the 289 sticks, which completed the minimum number under the contract, if the railroad company had furnished him the order and specifications at any time prior to the 1st day of June or the 1st day of August, but that it would have been impos-

sible for him to comply with the orders for the remaining 289 pieces which reached him in October during the year 1901, even if he had held his men and teams together.

Upon the trial the special judge instructed the jury as follows:

"(1) The court says to the jury that, by the terms of the contract filed with the plaintiff's petition, it was the duty of the defendant to make requisition for a minimum of 500 sticks of piling within the dimensions of fifteen to sixty feet in length, and within the other dimensions stated in the contract, for delivery along the right of way of its line of road from Princeton, Ky., to Henderson, Ky., during the year 1901, at such times as defendant might order same, and the plaintiff was required to make and deliver as many as five hundred pieces of said piling on or before June 1, 1901, if ordered, and not more than 1,000 pieces on or before August 1, 1901, if ordered by the defendant; and, if the jury believe from the evidence that the defendant did make requisition for the minimum number of five hundred pieces of piling during the current year 1901, then the law is for the defendant, and they will so find, unless they further believe from the evidence as stated in instruction No. 2.

"(2) The court says to the jury that, although they may find from the evidence that the defendant did make requisition of the plaintiff during the current year 1901 for the minimum number of five hundred sticks of piling of the dimensions named, still, if they believe from the evidence that the requisition for any part of said 500 sticks was made so late in the year as to render it physically impossible for the plaintiff to fulfill said requisition, then the law is for the plaintiff, and they will find for him the damages he may have sustained, fixing same according to instructions Nos. 3 and 4."

By the express terms of the contract, the railroad company obligated itself to order not less than 500 pieces of piling, which should be ready for delivery to it by the appellant on or before the 1st day of June, 1901. It was impossible for the appellant to comply with this stipulation of the contract without a previous order from the railroad company, specifying the length and sizes of this piling, and by necessary implication the contract imposed upon the railroad company the duty to order these pieces early enough to have enabled appellant to perform his part of the contract. To say that appellant was bound to have 500 pieces of piling ready for delivery on or before the 1st day of June, 1901, and at the same time to say that the railroad company was under no obligation to have given an order specifying the length and sizes of the piling as required by the contract, would be to render it impossible of execution by appellant. We think it was the plain purpose of the parties that the railroad company should make its order, specifying the length of at least 500 pieces of piling,

in time to have enabled the appellant to comply with his contract for delivery on or before the 1st day of June, 1901; and that this was the construction placed upon the contract by the parties previous to and at the date of its execution is clearly shown by appellee's letters, which are copied into the bill of evidence. In its first letter to appellant, dated December 19th, inviting him to make a proposition for furnishing the piling, it notifies him that it would want the greater portion of the piling delivered during the early part of the year, and only requested him to bid upon piling for the first six months of the year 1901. In its second letter, dated February 2d, it tells him that he must cut the piling at once, while the sap is down. Of course, it would have been impossible for appellant to do this without a previous order, as the length of the piling was to vary from 15 to 70 feet. In our opinion, the railroad company was bound under its contract to order not less than 500 pieces of piling in time to have enabled the appellant to have delivered it on or before the 1st day of June; and the jury should have been instructed on this theory; instead of upon that that the railroad company had the right to have ordered this piling at any time during the year 1901.

The trial court properly defined the measure of appellant's damage as the difference between actual cost to him of delivering the piling contracted for on the right of way of the company, and the contract price he was to receive therefor; but, for the errors pointed out in instructions 1 and 2, the judgment is reversed and the cause remanded for proceedings consistent herewith.

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LOWERY v. CITY OF LEXINGTON.

(Court of Appeals of Kentucky. June 18, 1903.)

MUNICIPAL CORPORATIONS—DELEGATED POWERS—DELEGATION TO AGENTS—OFFICES—CREATION BY ORDINANCE.

1. Under the Constitution and its charter, the city of Lexington has no power to create any office or officers other than those provided for therein.

2. An ordinance of a city providing for the construction of a sewer system, and appointing certain persons to superintend its construction, employ a sanitary engineer, advertise for and receive bids, fixing such restrictions and limitations as they might determine, not being required to report to the council any bids which, in their judgment, the city should not accept, was an invalid delegation of powers delegated to the council by Ky. St. 1898, § 3058, giving to the city council of that city the power and authority, by ordinance, to establish, erect, and maintain sewers.

Appeal from Circuit Court, Fayette County.
"To be officially reported."

Action by C. B. Lowery against the city of Lexington. From a judgment for defendant, plaintiff appeals. Affirmed.

Breckinridge & Shelby, for appellant. W. S. Bronston, for appellee.

NUNN, J. This action was instituted by C. B. Lowery, appellant, to test the validity of Ordinance No. 1372, passed by the city council of Lexington, Ky. The ordinance was to authorize and provide for the construction of a system of sewers in the city of Lexington; and to order an election to determine the question of issuing \$150,000 of bonds of the city for that purpose. The city demurred to the petition of appellant, the court sustained the demurrer, and adjudged that the ordinance was invalid and void. To test that question is the object of this appeal.

The first section of the ordinance authorizes sewers to be constructed in accordance with plans drawn by Col. George E. Waring, with such changes, alterations, extensions, and additions as might be determined upon in the mode and manner thereafter set out and provided. The second section provided the manner of issuing the bonds, and the terms thereof. The other sections, down to the seventh, provided the manner of holding the election and determining the result thereof. The seventh section is as follows: "George S. Shanklin, L. G. Cox, R. P. Stoll, J. R. Barr, Judge Matt Walton and Gus Straus are hereby employed by the city of Lexington to superintend and supervise the construction of the sanitary sewer system of said city, as provided for in this ordinance. And the general council is hereby authorized to pay to said named persons as wages a sum not to exceed \$800.00 each." Section 8 authorized the employment of a capable, competent sanitary engineer, who was authorized, under the superintendence of the persons named in section 7, to superintend all work, examine all materials, contracts, and purchases made under this ordinance, and, under the direction of the persons named, to superintend the construction of the sewer, disposal field, tanks, buildings, machinery, or appliances to be constructed under the ordinance. Section 9 authorized the persons named in section 7 to advertise for bids for the construction of the system, and to fix such restrictions and limitations therein as they might determine, and receive the bids, and to open and compare same, and to report to the general council the names of the lowest and best bidders, and to prepare all necessary contracts, specifications, and plans. If, in the judgment of the persons named in section 7, the bids received by them were too high, or for any reason were not such bids as the city should accept, they were authorized to reject all bids and advertise for new bids, without reporting to the general council their action. Section 9 closes as follows: "It being distinctly understood and provided in this ordinance that said persons are not required to report to the general council any bids which, in the judgment of said persons, the general council ought not to accept, or any

1. See Municipal Corporations, vol. 36, Cent. Dig. § 764.

contracts which the said persons do not believe the city ought to enter into." Section 10 provided that no money should be paid to any contractor under any contract entered into by virtue of this ordinance until the work had been examined and approved by the engineer employed under this ordinance, and a certificate issued to such contractor by the engineer, and the same was approved by the persons named in section 7, and when the certificate was thus issued and approved the same should become binding upon the city, and should be paid out of the proceeds of the sale of the bonds. Section 11 of the ordinance closes as follows: "If any part of this ordinance is declared illegal by any court of competent jurisdiction, then no bonds are to be issued under this ordinance, and this ordinance is to be considered as invalid and void."

Appellee's counsel contends that the ordinance is void because it creates new offices and officers, and names the persons to fill them, which he claims is in violation of the Constitution and the city charter. Appellant's counsel, on the other hand, contend that the ordinance does not create any office or officer, and that the persons named in the ordinance were not appointed as officers, but only as agents of the city to superintend the construction of the sewerage system provided for therein. We are of the opinion that the ordinance is void in either event. If they are to be regarded as officers, then it is void because the city had no power, under the Constitution and charter, to create any office or officers other than those provided for therein. See the case of *Lowry v. City of Lexington*, 68 S. W. 1109. If it was intended by the ordinance to make them simply agents, then it is void because they supplant the city council in the matters provided for in the ordinance. The General Assembly, by section 3058 of the Kentucky Statutes of 1890, delegated to the city council of the city of Lexington the power and authority, by ordinance, to establish, erect, and maintain sewers; and it had no power by ordinance to delegate this power to others, and relieve itself of responsibility. We do not mean to be understood to say that the city council should perform the manual labor, or be present in a body or individually to superintend the construction of the sewer; but it should retain the power and control, and remain supreme in the matter of the approval of the plans and specifications, material to be used, prices to be paid for same, the acceptance or rejection of bids for the work, and the approval or rejection of the work when completed, the issue of the bonds, the payment of the money on contracts, and other like duties and powers. The council had no right or power to delegate such duties and powers to others, and relieve itself from the labor and responsibility thereof. Dillon, in his work on *Municipal Corporations*, vol. 1 (3d Ed.) § 90, uses this language: "The principle is a plain one

that the public powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others." In the same work (volume 2, § 779) this language is found: "We have already had occasion to refer to the principle that public powers conferred upon a municipality, to be exercised by its council when and in such manner as it shall judge best, are incapable of delegation. The principle extends to the authority conferred upon a municipal corporation to levy and collect taxes, or to determine upon the necessity and character of local improvements." To the same effect is the case of *Hydes v. Joyea*, 4 Bush, 464, 96 Am. Dec. 311.

We are clearly of the opinion that the ordinance is void. Wherefore the judgment of the lower court is affirmed.

NELSON, MORRIS & CO. v. E. REHKOPF & SONS.

(Court of Appeals of Kentucky. June 17, 1903.)

PROCESS—SERVICE—NONRESIDENT CORPORATION—RESIDENT AGENT—RETURN OF SERVICE—SUFFICIENCY.

1. Under Civ. Code Prac. § 51, subsec. 6, providing that in actions against an association or joint-stock company, the members of which reside in another state, engaged in business in this state, the summons may be served on the manager, agent, or person in charge of such business in the county where the business is carried on, etc., the return of service on the agent of a foreign corporation need not show all the facts set out in the statute, but is sufficient if they are shown by the record.

2. Civ. Code Prac. § 51, subsec. 6, authorizes the service of summons in an action against a nonresident corporation on the agent or manager of such corporation in this state. A company dealing in hides wired to a broker living in this state their prices, and he sold certain hides as the representative of the corporation, forwarding the order to the corporation, which accepted it and filed it, the order being subject to their approval. *Held*, that the broker was the agent of the corporation, within the statute.

Appeal from Circuit Court, McCracken County.

"Not to be officially reported."

Action by E. Rehkopf & Sons against Nelson, Morris & Co. From a judgment for plaintiffs, defendants appeal. Affirmed.

W. M. Reed, for appellants. Bloomfield & Crice, for appellees.

HOBSON, J. On August 11, 1899, E. K. Rehkopf & Sons filed their petition ordinary in the McCracken circuit court against Nelson, Morris & Co., praying a personal judgment for \$213.28 on account of certain hides sold them by the defendants. It was alleged in the petition that the defendants were incorporated and nonresident of Kentucky, and that the transaction sued on was had through Bransford Clark, of Paducah, Ky., who was their agent. A summons was issued on the petition, which was returned as follows: "Executed August 11, 1899, on Nelson, Mor-

ris & Co. by delivering to their agent Bransford Clark a copy of the within summons. A. H. Rogers, S. M. C., by Gus Rogers, D. S." No defense having been made to the action, the court entered a personal judgment against the defendants on September 6, 1899. The plaintiffs, their execution having been returned "No property found," instituted this action on October 4, 1901, and took out an attachment, which was levied on a fund belonging to the defendant amounting to \$181. They then answered, and made their answer a cross-petition, charging that Bransford Clark was not their agent, and that the judgment entered in the former action was void. The plaintiffs then amended their petition, and set out all the facts constituting their cause of action in the original suit. The defendants not having answered the amendment, but ignoring it, the case was submitted, and the court entered a judgment subjecting the fund to the payment of the debt, and refusing to set aside the former personal judgment.

The original action was brought under subsection 6 of section 51 of the Civil Code of Practice: "In actions against an individual residing in another state, or a partnership, association, or joint stock company, the members of which reside in another state, engaged in business in this state, the summons may be served on the manager, or agent of, or person in charge of, such business in this state, in the county where the business is carried on, or in the county where the cause of action occurred."

In *Carpenter v. Laswell* (Ky.) 63 S. W. 609, it was held that a personal judgment may properly be rendered on a service of process under this provision. Although the return of the sheriff alone did not show the facts required by the statute, the return, in connection with the petition, seems sufficient. The sheriff is not required to know and to show by his return all the facts set out in the statute. If these facts are shown by the record, it is sufficient. The suit was pending in a court of general jurisdiction. The only question being whether the summons was properly served on the defendant, the court may look to the whole record to ascertain that fact. This brings us to what seems to be the real question in the case. Were the defendants engaged in business in this state, and was Clark the manager or agent of, or person in charge of, such business in this state, within the meaning of the statute? It is shown by the evidence heard on the trial that Nelson, Morris & Co. wired to Bransford Clark, who was a broker at Paducah, Ky., their prices on hides, and he, with these quotations of prices, sold the hides in controversy to appellees in Paducah, as the representative of appellants, forwarding appellees' order to appellants, who accepted it and filled it, the order being subject to their approval. The business was done in Kentucky. It was done by Bransford Clark as the agent

of appellants. As to this transaction with appellees, Bransford Clark, by whatever name he may designate his business, was in fact the agent of appellants. The business was carried on in Paducah, and the cause of action sued on arose out of this transaction. As to this transaction, appellants were engaged in business in this state, and Bransford Clark was their agent in charge of the business within the meaning of the statute. The court, therefore, properly sustained the attachment, and subjected the fund in court to the debt.

Judgment affirmed.

ISON et al. v. CORNETT.

(Court of Appeals of Kentucky. June 17, 1903.)

INFANTS—CONVEYANCES—DISAFFIRMANCE
—CONDITIONS—RECONVEYANCE OF
PROPERTY RECEIVED.

1. A purchaser of land from a grantor who had, during infancy, made a prior conveyance thereof to another, was not precluded from acquiring a good title by reason of his knowledge of such prior conveyance.

2. One who has purchased land from an infant, and given in part consideration therefor other land, which the infant has also sold, cannot demand of such infant a disaffirmance of the latter sale as a condition of disaffirming the sale to him.

3. A stepfather, standing to his stepdaughter in loco parentis, traded to her, when she was 17 years of age, for property belonging to her, property and money amounting in all to \$550. When the daughter became of age, she elected to disaffirm her conveyance, and sold the property to another for \$1,100, her father having in the meantime cut \$200 worth of timber therefrom. Held, that the father could recover the land which he had conveyed, so far as it or its representative was still retained by the daughter, and would be charged with the value of the timber which he had cut, and the reasonable rental value of the land while in his possession.

Appeal from Circuit Court, Harlan County.

"To be officially reported."

Action by R. N. Cornett against William Ison and others. From a judgment for plaintiff, defendants appeal. Affirmed.

N. B. Hays, J. G. & J. S. Forester, and J. H. Hazelrigg, for appellants. T. L. Edelen and W. F. Hall, for appellee.

HOBSON, J. John M. Creech died about 20 years ago, leaving a widow and two children, who were both then infants. He owned four tracts of land. Some time after his death the widow intermarried with William Ison, and after this the daughter Pasha married George Ison. In the year 1886, when she was 17 years of age, she and her husband swapped her interest in the four tracts of land owned by her father to her stepfather, William Ison, for a tract of land in Letcher county owned by him, he paying her \$50 in addition in the trade. This trade was proposed by her and her husband, and

seems to have been much canvassed before it was made. The tract of land which William Ison swapped to her was of the value of \$500, so that she got in the trade \$550 for her patrimony. He knew that she was only 17 years of age, and took from her an affidavit that she would make him a deed after she became of age. Before deeds were made under this trade, she and her husband swapped the William Ison tract to Elijah Ison for a tract owned by him, and by agreement William Ison made a deed to Elijah Ison for his tract. Elijah Ison conveyed his tract to her, and she conveyed her interest in her father's land to William Ison. She and her husband settled on the tract of land conveyed to her by Elijah Ison, and subsequently, while she was still an infant, conveyed one-half of it to Joseph Holcomb, and made a deed to him for it. After all this, on July 1, 1891, she became of age. The deed which she had made to William Ison for her land had not been recorded, and R. N. Cornett proposed to her husband to pay him \$1,100 for it. William Ison heard of this, and on the day that she was of age went to see her, asking her to make him a deed the next day. The next morning he went to see Cornett, telling him of his purchase of the land and requesting him to drop the trade, and offered him \$100 to do this. Cornett said he did not want his money for nothing, and Ison told him if he bought the land he would buy a lawsuit. That day Cornett took to her house a deputy clerk, with a deed he had prepared for her to sign. Joseph Holcomb's wife was there with his deed for the purpose of getting that reacknowledged. The proof is conflicting as to which deed was signed first, but from all the evidence we conclude that it was in substance one transaction, and that both deeds should be treated as executed at the same time. Both were on the table together, and the proof leaves the mind in doubt as to which was acknowledged and delivered first. Cornett got his deed and paid the money, and Holcomb's wife got his. Both were properly acknowledged. William Ison was in possession of the land at the time. Cornett paid \$1,100 for the land, \$800 of it being paid in a stock of goods. Holcomb paid nothing for the acknowledgment of his deed. Pasha Ison and her husband were then living on the remainder of the tract conveyed to her by Elijah Ison, outside of the part conveyed by them to Holcomb, and continued to reside there. Before she became of age, William Ison had cut off the land she conveyed to him timber of the value of something over \$200 and received the money for it. What she had received for the land conveyed to Holcomb is not shown. Cornett then filed this suit against William Ison to quiet his title to the land. William Ison answered, making his answer a counterclaim, and praying that his title be quieted. The case was submitted to the chancellor, who

entered judgment in favor of Cornett, and William Ison appeals.

The proof leaves no sort of doubt that Cornett bought with full knowledge of the previous sale to William Ison and of his claim to the land. It also leaves no sort of doubt that Cornett paid for the land \$1,100 in money and property. Each of them earnestly maintains that the other has no equity in his case. The stepfather evidently knowingly made a hard trade with his stepdaughter when an infant; but the husband urged the trade, and there was no fraud in it. Cornett bought with full notice of the prior claim of William Ison; also of the reacknowledgment of the deed to Holcomb, and that he was buying a lawsuit.

The deed of an infant conveying real estate, when any valuable consideration passes to him, is not void, but voidable only, and may be confirmed after his arrival at age by the reacknowledgment of the deed or conduct showing an election to stand by it. *Hoffert v. Miller*, 86 Ky. 572, 6 S. W. 447, and cases cited. After arriving at age he may disaffirm a contract made during infancy for the sale of real property, either executed or executory, by merely making another conveyance of the same property to a third person, and it is unnecessary for him to refund to the first person the consideration received in order to render the second conveyance valid. *Vallandingham v. Johnson*, 85 Ky. 289, 3 S. W. 173. The purchaser holding under a deed made by an infant cannot rely upon the champerty statute as against the second purchaser, as his holding is not adverse to the infant. *Moore v. Baker*, 92 Ky. 518, 18 S. W. 363. To same effect, see *Freeman's note to Craig v. Van Bebber*, 18 Am. St. Rep. 657, 703, 16 Am. & Eng. Ency. of Law, 288-293. The fact that Cornett had notice of the claim of Ison did not render his purchase void, for, as has been well said, the privilege of an infant to disaffirm his contract might be of little value to him if he were permitted to dispose of the property previously conveyed, to such persons only as had no notice of the prior conveyance. *Jackson v. Burchin*, 14 Johns. 124; *Clamorgan v. Lane*, 9 Mo. 446. It has also been held that if an infant conveys his land, and on attaining his majority ratifies his conveyance, and then conveys to another person for a valuable consideration, the first grantee not being in possession, the second grantee, having notice of the deed made in infancy, but no notice of the ratification, is entitled to hold the land. *Black v. Hills*, 36 Ill. 376, 87 Am. Dec. 224. The rule is thus well stated in 16 Am. & Eng. Ency. of Law, p. 287: "The right of an infant to avoid his contract is one conferred by law for his protection against his own improvidence and the designs of others; and, though its exercise is not infrequently the occasion of injury to those who have in good faith dealt with him, this is a con-

sequence which they might have avoided by declining to enter into the contract. It is the policy of the law to discourage adults from contracting with infants, and the former cannot complain if, as a consequence of their violation of this rule of conduct, they are injured by the exercise of the right with which the law has purposely invested the latter, nor charge that the infant, in exercising the right, is guilty of fraud."

Here Cornett had notice of all the facts, and bought with full knowledge of the situation; Ison, the prior purchaser, being in actual possession. But the infant had sold the land to Holcomb before her majority, and, as appears from the proof, had nothing at that time except the little place on which she resided. She was under no obligation to disaffirm her deed made to Holcomb. That deed was not void. It was only voidable. If she did not disaffirm it, it stood good. Ison, when she disaffirmed the deed made to him, could not demand of her, as a condition of that disaffirmance, that she should also disaffirm the deed made to Holcomb. Her acknowledgment, therefore, of the deed made to Holcomb after she became of age, deprived Ison of no legal right. She was under at least a moral obligation to Holcomb after she had disposed of the consideration received from him for the land conveyed to him. Her reacknowledgment of the deed put it out of her power thereafter to disaffirm it. But the same effect would have followed if she had remained silent and taken no action for the statutory period. Ison was in no worse condition after she reacknowledged that deed and disaffirmed his than he would have been if she had disaffirmed his without taking any action as to the Holcomb matter. He would have no claim on the Holcomb land if she had not reacknowledged Holcomb's deed and simply allowed the matter to remain as it was. If she had sold the land to Holcomb after becoming of age a different question would be presented; but when she reacknowledged the deed to him she simply elected not to disaffirm it, as she had the legal right to do, and, no right of Ison being prejudiced thereby, he cannot complain. As it is the policy of the law to discourage persons from buying the property of infants, and also its policy to encourage persons to buy their property at full value after they become of age without fear of losses by reasons of contracts made during infancy, the interests of this class of persons require that bona fide purchases of their property for value after they have arrived at age should be upheld; for otherwise their property might be sacrificed, as in this case, by a sale at half its value during infancy, and after they arrived at age no one would be willing to buy from them and pay the value of the property.

Pasha Ison is not a party to this suit, and we cannot, therefore, determine her rights.

But on the facts as presented the real equity of the case is not difficult to see. The disability of infancy is allowed by law as a shield, not as a sword. The infant may disaffirm his contract on becoming of age, and if, during his infancy, he has spent the consideration received, this is nothing more than the law expects of him; but if he still has the consideration, or its representative in money or property, he must, on disaffirming his contract, make restitution to the extent of the consideration still in his hands. Thus, if he gives his note for the price of personal property, and pleads infancy to the note, the title to the property reverts in the vendor, and he may recover it in an action in trover. The same principles apply in the case of real estate. *Kitchen v. Lee*, 11 Paige, 107, 42 Am. Dec. 101; *Henry v. Root*, 33 N. Y. 526; *Carr v. Clough*, 59 Am. Dec. 845; 16 Am. & Eng. Ency. of Law, 203; *Manning v. Johnson*, 62 Am. Dec. 732; *Brantley v. Wolf*, 60 Miss. 433. William Ison was the girl's stepfather. She was small when her own father died, and had grown up in his home. He stood to her in loco parentis. In this situation, when she was 17 years of age, he traded her out of her patrimony for \$550, and this land, after he had cut over \$200 worth of timber from it, sold for \$1,100 about four years later; thus showing that the land in its original condition would have been worth over \$1,300. The law will not enforce in his favor a contract made with her by him, by which more than half her property was taken from her. The rule is that ratification, to be binding on the infant, must be voluntary—the act of a free mind, and not done under misapprehension. *Note to Craig v. Van Bebber*, 18 Am. St. Rep. 705. There was no intention on her part to ratify the deed to William Ison. Cornett paid the full value of the property, and a loss should not be thrown upon him. Still she cannot use her infancy as a sword, and the chancellor, on a proper application, can do justice between her and William Ison to the extent that she still retains the land that she got from him or its representative, charging him with what he has received from the timber cut off her land, and the reasonable rent while in his possession. Judgment affirmed.

NORTHINGTON v. REID.

(Court of Appeals of Kentucky. June 17, 1903.)

JUDGMENTS—COLLATERAL ATTACK—VALIDITY—PRESUMPTIONS.

1. In a suit on notes representing the purchase price of land of a decedent sold by his widow with land of her own, the widow and the infant children of the decedent were joined as parties. The guardian ad litem of the children claimed the land, and, on the hearing, judgment was rendered that they recover it from the maker of the note. The latter made no objection to the suit because the infants had not been properly served, or because the guard-

ian ad litem had not been properly appointed or had no authority to plead therein; and it did not appear in that suit that the infants had a statutory guardian, or were under 14 years of age. The maker of the note subsequently filed a suit against a third person, claiming under the infants, to recover the land, alleging that he was the owner. Held that, he having joined issue on the pleading filed by the guardian ad litem in the suit on the notes, and a trial having been had on the merits, he could not question the judgment on the ground that the infants were not properly before the court.

2. Where a judgment of a court of general jurisdiction is attacked collaterally, every presumption is indulged in favor of its integrity; and, if no process appears, proper service will be presumed.

Appeal from Circuit Court, Ballard County.
"Not to be officially reported."

Action by N. O. Northington against Isham Reid to recover certain land. From a judgment dismissing the petition, plaintiff appeals. Affirmed.

W. H. Witty and Geo. W. Reeves, for appellant. B. S. Bailey, for appellee.

HOBSON, J. J. S. Hudson purchased of Isham Reid 2 acres of ground, and executed to Reid a note for \$115 as part of the price. His wife, Alice Hudson, owned 100 acres of ground adjoining the 2 acres. He subsequently died, leaving his wife and two infant children surviving him. After his death the wife entered into a contract with N. O. Northington by which she sold him the farm of 102 acres, and he executed to her his notes for the price. She sold one of these notes to D. P. Newman, who brought suit on it against Northington. The widow and infant children of J. S. Hudson were also made parties to this suit, and Northington in the meantime had taken up the \$115 note executed by Hudson to Reid. In this suit the infants, by their guardian ad litem, filed an answer claiming the 2 acres of ground as their property, and pleading limitation to the \$115 note. Issues were made, and the case progressed to a final hearing on August 24, 1896, and it was then adjudged by the court that the two infant children recover of the defendant, Northington, the 2 acres of land referred to; and a judgment was given them, in addition, for the sum of \$45 on account of rent while in his possession, over and above the amount of the note referred to. From this judgment an appeal was prosecuted, which was dismissed by this court. Thereafter the guardian of the infants filed a suit in the circuit court of the county, and on that petition the 2 acres of ground were sold, and purchased by Guy Murphy, who transferred his bid to Isham Reid, who paid for the land. After all this, Northington filed the suit before us against Reid to recover the land, alleging that he was the owner of it, and entitled to possession. Reid pleaded in bar of the action the proceedings in the former suit; and, the

court having sustained this plea and dismissed the petition, Northington appeals.

He insists that the judgment rendered against him in favor of the infants in the former action is void for the reason that the judgment was based on a cross-petition filed by B. S. Bailey as guardian ad litem of the infants, who were under 14 years of age; and it is insisted that the appointment of Bailey was void, no service of summons, as provided by the Code, having been made on the infants, and that the guardian ad litem had no authority to file the pleading. The summons, as shown by the transcript, was returned executed on June 30, 1893, on A. E. Hudson, Carrie Hudson, and Mary Hudson. Their father was dead, and the infants being under 14 years of age, under section 52 of the Code the summons should have been served on their guardian, if they had one, and, if none, on their mother. They had, as is now shown, a statutory guardian, and therefore the summons should have been served on him. The guardian ad litem was appointed, and filed answer for the infants. The defendant, Northington, joined issue with him, and the case was tried out on the merits. He made his answer a cross-petition against the infants, although, so far as appears, no summons was issued on it. It is unnecessary for us to determine whether the judgment in contest would be held valid in a direct proceeding to set it aside, instituted in proper time by some person entitled to maintain it. It is attacked here collaterally. It was rendered in a court of general jurisdiction, and, when a judgment of a court of general jurisdiction is attacked collaterally, every presumption is made in favor of its integrity. If no summons or process appears, it will ordinarily be presumed that there was a proper service, and the fact that an insufficient service appears will not rebut the presumption. In Freeman on Judgments, § 124, it is said: "Nothing shall be intended to be out of the jurisdiction of a superior court but that which expressly appears to be so. Hence, though the existence of any jurisdictional fact may not be affirmed upon the record, it will be presumed upon a collateral attack that the court, if of general jurisdiction, has acted correctly and with due authority, and its judgment will be as valid as though every fact necessary to jurisdiction affirmatively appears." See, also, Jones v. Edwards, 78 Ky. 6; Newcomb v. Newcomb, 13 Bush, 554, 26 Am. Rep. 222. As shown by the transcript before us, appellant, Northington, made no objection in the suit in which the judgment was rendered on the ground that the infants had not been properly served with process, or that the guardian ad litem was not properly appointed, or had no authority to plead the matters set up by him. There was no showing in that suit that the infants had a statutory guardian or were under 14 years of

† 2. See Judgment, vol. 30, Cent. Dig. §§ 333, 334.

age, so far as the record shows. Appellant, waiving all of these matters, joined issue upon the pleading filed by the guardian ad litem, and a trial was had on the merits after full preparation. He thus undertook to win that case on the facts, and, having elected to try on the merits, it must certainly be presumed now, in a collateral proceeding, as against him, that the court had jurisdiction. Having undertaken to get a judgment in his favor on the case as then presented to the court, and having lost, he cannot, in a collateral proceeding, be allowed to question that judgment on the alleged ground that the infants with whom he was litigating were not properly before the court. Judgment affirmed.

LESLIE COUNTY et al. v. WOOTON et al.
(Court of Appeals of Kentucky. June 9, 1903.)

**MUNICIPAL CORPORATIONS—HIGHWAYS—
BRIDGES—COUNTY ROADS—DUTY TO
REPAIR—MANDAMUS.**

1. A city of the sixth class, having no streets or sidewalks, was intersected by a couple of county roads, on one of which, within the city limits, was a bridge constructed partly by subscription and partly by the county, but maintained by the county. *Held*, that the bridge was a part of the county road, and it was the duty of the fiscal court, and not of the city, to replace it on its destruction.

2. Under Ky. St. 1899, § 1840, authorizing the fiscal court "to erect and keep in repair bridges and other structures," and section 4345, empowering the county judge to erect or repair bridges in cases of emergency, but requiring that, in case an expenditure of more than a certain amount was required, he should call together the fiscal court, "and it shall be their duty to make immediate provision for the emergency," mandamus would lie to compel the fiscal court to erect a bridge on a county road on its destruction, the matter being one of plain duty.

Appeal from Circuit Court, Leslie County.
"To be officially reported."

Mandamus by E. M. Wooton and others against Leslie county and others. From a judgment awarding the writ, defendants appeal. Affirmed.

John L. Dixon and H. C. Eversole, for appellants. J. M. Bicknell and Jas. H. Jeffries, for appellees.

BARKER, J. The appellees, who are citizens and taxpayers of Leslie county, Ky., instituted this action in the Leslie circuit court, in their own behalf, and in behalf and for the benefit of all the other residents and citizens of the county, to obtain a judgment awarding them a writ of mandamus against the appellants, Leslie county and the members of the fiscal court thereof, to compel them to repair a bridge constituting a part of one of the public highways of the county. The facts are these: The city of Hyden, the county seat of Leslie county, is a city of the sixth class, and contains about 300 inhabit-

ants. It is situated at or near the point where Rockhouse creek empties into Middle Fork of Kentucky river. The city lies on both sides of Middle Fork and of Rockhouse creek. It has no streets or sidewalks, but there are two county roads running through its corporate limits, intersecting each other. One of these roads, running from north to south, crossed Middle Fork, within the limits of Hyden, by means of a bridge. This bridge, which was built some years ago, partly by private subscription and partly by a donation from the fiscal court, was, prior to the institution of this action, swept away by high water; thus depriving the citizens of the county and the traveling public of a safe and convenient mode of crossing the river, and making the highway at this point practically useless. The attention of the members of the fiscal court was called to the destruction of the bridge and the necessity of its being rebuilt, but they refused to take any steps towards remedying the difficulty, and declined even to entertain a proposition so to do, assuming the position that it was the duty of the city of Hyden to rebuild the destroyed bridge; and the question whether it is the duty of the fiscal court, or the authorities of the city of Hyden, to rebuild the bridge, is the principal issue in this case.

For the appellants it is contended, first, that the charter of cities of the sixth class puts all the highways and bridges within their corporate limits under the exclusive charge and control of the municipalities; and, second, that mandamus will not lie against the fiscal court to require them to act in a matter such as is involved in this litigation.

A question precisely similar to the one here involved arose in the case of Trustees of Elizabethtown v. Hardin County Court (MS. opinion filed Feb. 9, 1877). In that case, a bridge, which was within the corporate limits of Elizabethtown, and which constituted a part of one of the county roads running into the municipality, had become out of repair, and the trustees of the city instituted an action against the county court of Hardin county to compel them to repair the structure. The lower court dismissed the bill. Upon appeal this court said: "Regarding the county court as controlling the road, like any other public highway in the county, it is still certain from the admitted facts that this bridge is indispensable for public use, or at least made necessary by the wants of the public. It is on the principal thoroughfare traveled by one portion of the inhabitants of the county in going to and returning from the county seat and the railroad depot. It is a bridge constructed on a highway, seventy feet long and essentially a county bridge. The county court is required by statute to erect such structures on its public ways when required for public use. The citizens of the town are taxed to aid in building all such bridges erected in the county, and,

when called on by the tax gatherer, must contribute in the same proportion with the citizens living outside the town limits. The citizens of the town bear the burden in common with the citizens of the county. If this town was an independent municipality, having no burdens to bear in the way of taxation, in common with the people of the county, for county improvements, then it might be well argued that the town should make all the improvements within its limits. While the town must keep its streets and alleys in repair, it cannot be said that such a structure as this is to be regarded as a part of the street, for the purpose of compelling its population to rebuild or repair it. It is within the county as well as the town limits, and is that character of improvement required to be made by the county court when the necessities of the public demand it." In the case at bar, the evidence shows the incapacity of the city of Hyden to meet the emergency with which it is confronted. It also shows that it has never taken charge of the county road, of which the bridge in question constituted a part, or done any work thereon. On the contrary, it appears that the fiscal court has heretofore ordered all the work which has been done in keeping this road in repair, and for this purpose has appointed overseers year after year. Under the authority above cited, we have reached the conclusion that the bridge constitutes a part of the county road, and that it is the duty of the fiscal court to rebuild it.

We come now to a discussion of the question as to whether or not mandamus is the proper remedy for the enforcement of this duty. Section 1840 of the Kentucky Statutes of 1899 is as follows: "The fiscal court shall have jurisdiction to appropriate county funds authorized by law to be appropriated; to erect and keep in repair the necessary public buildings, secure sufficient jail, and a comfortable and convenient place for holding court at the county seat; to erect and keep in repair bridges and other structures, and superintend the same. * * *" Section 4345 provides: "In cases of emergency, the county judge may have any bridge [kept up by the county] repaired, or a new one built; but he shall make no contract for such work or for any work on any bridge exceeding five hundred dollars, without first calling together the fiscal court and laying the matter before them; and it shall be their duty, in such cases, to make immediate provision for the emergency." Assuming that the bridge in question was part of the county road, as we think the evidence establishes, it was clearly the duty of the fiscal court to provide for the emergency arising from its destruction. The case of *Commonwealth v. Boone County Court*, 82 Ky. 632, involved a question similar in principle to the one at bar. In that case a mandamus was sought to compel the levy court of Boone county to build a new bridge. The court met pursuant to the order of the cir-

cuit court, and decided that the bridge was not necessary. Upon appeal this court held that the question of building the bridge was one reposed in the discretion of the county levy court, and that this discretion could not be controlled by mandamus. The difference between the case cited and the one at bar lies in the matter of discretion. As to the new bridge, the law conferred upon the county levy court a discretion, but as to the repair of an old bridge the language of the statute is peremptory. The opinion in the case cited fully recognized the right of the circuit court to control the inferior tribunal in a matter involving, not a discretion, but a plain duty. In the opinion it is said: "If an inferior tribunal has a discretion, and proceeds to exercise it, then its discretion should not be controlled by mandamus; but if the subordinate public agent, whether it is vested with both judicial and ministerial functions, or only with the former, refuses to act in any way, or entertain a question as to which it has a discretion, and which the law has enjoined upon its consideration, then obedience to the law should be enforced by mandamus, and the agent compelled to act, if there is no other legal remedy; but in such a case its discretion or judgment must be left free to act, and cannot be controlled in a particular direction. The performance of a plain, positive duty may be compelled by mandamus; but, where there is a discretion as to the result that may be arrived at, it cannot be controlled." In the case of *Montgomery County v. Menefee County Court*, 93 Ky. 33, 18 S. W. 1021, it was held that a writ of mandamus would issue against the members of the county court to compel the levying of a tax which ought to have been levied, and that the levying of the tax was a plain ministerial duty. In the case of the *County Court of Warren v. Daniel*, 2 Bibb, 573, it is said: "It [mandamus] is a proper remedy to compel an inferior court to adjudicate upon a subject within their jurisdiction, where they neglect or refuse to do so; but, where they have adjudicated, the mandamus will not lie for the purpose of revising or correcting their discretion." In the case of *Anderson County Court v. Stone & Son*, 18 B. Mon. 848, which involved the right to require the county levy court to levy a tax and pay for a bridge built under their order, the court said: "The first question to be considered is whether the circuit court has jurisdiction to award a mandamus in a case like the present. It is contended on the part of the appellant that the law on this subject has been changed by the Code of Practice, and that now, under operation of section 526 of the Code, such a writ can only issue against an executive or ministerial officer, and not against an inferior judicial tribunal. It must be recollected, however, that the members of the county court, in contracting for the building of bridges, and in laying a levy to pay for the work, are acting ministerially, and not

in a judicial capacity, and are therefore expressly embraced by the provisions of the Code. Consequently the jurisdiction of the circuit court to hear the application and to award the writ, if it were authorized by the testimony was unquestionable." In the case of *Hammar v. City of Covington*, 8 Metc. 494, an action had been instituted for a mandatory injunction against the municipality, to require it to repair the public highways alleged to have been allowed to fall into ruin and decay. The court held that it was the duty of the municipality to keep the streets and highways in repair, and that the relief sought should have been granted. Section 4345 requires, in the case of an emergency like the one involved here, that the county judge shall call together the fiscal court, and lay the matter before them, and then it shall be their duty to make immediate provision for the emergency. Here the bridge had been swept away by a flood tide, and the use of the highway rendered both unsafe and inconvenient. The matter had been properly brought to the attention of the fiscal court, and they had refused to perform their plain duty in the premises, as pointed out by the statute.

The circuit judge, upon the facts shown, properly awarded a writ of mandamus. Wherefore the judgment is affirmed.

THOMPSON'S EX'R v. BROWN et al.
(Court of Appeals of Kentucky. June 17, 1903.)

WILLS—CHARITABLE BEQUEST—BENEFICIARIES—CERTAINTY.

1. A will devising testator's property to her executor, to be by him distributed "to the poor in his discretion," is sufficiently definite, under Ky. St. 1899, § 317, requiring that gifts for such a purpose shall point out the purpose of the charity, and the beneficiaries thereof, with reasonable certainty.

Appeal from Circuit Court, Marion County.
"To be officially reported."

Suit between Elizabeth Thompson's executor and William Brown and others. From the judgment, the executor appeals. Reversed.

See 70 S. W. 674.

Thompson & Spalding, for appellant. H. P. Cooper, for appellees.

BURNAM, C. J. The eleventh clause of the will of Elizabeth Thompson, who died in September, 1897, reads as follows: "I will and direct that my house and lot in Raywick, Ky., be sold at such time and on such terms as my executor may deem best, and I will that the proceeds together with whatever other estate I may have after the payment of the aforesaid bequest and funeral expenses shall be collected by my executor, and by him distributed to the poor in his discretion."

The only question for decision upon this appeal is whether the gift in this clause is sufficiently definite to be enforceable under section 317 of the Kentucky Statutes of 1899, which requires that such gifts shall point out with reasonable certainty the purpose of the charity and the beneficiaries thereof. Very different rules from those that are applied in establishing and administering private trusts will be applied in order to give effect to the intention of a donor to establish a public charity. In discussing this question, Perry on Trusts, § 687, uses this language: "If in a gift for private benefit the cestui que trust are so uncertain that they cannot be identified, or cannot come into court and claim the benefit conferred upon them, the gift will fail. But if the gift is made for a public, charitable purpose, it is immaterial that the trustee is uncertain or incapable of taking, or that the objects of the charity are uncertain and indefinite. Indeed, it is said that vagueness is in some respects essential to a good gift for a public charity, and that a public charity begins where uncertainty in the recipient begins." The general doctrine upon the question of charitable bequests is that the beneficiaries should be designated as a class only, leaving the number and individuals to be determined by the trustees who administer it. Devises for the poor have always been favorite modes of dispensing charity by benevolent persons, and trusts created for this purpose have been generally upheld by the courts. In *Moore's Heirs v. Moore's Devisees*, 34 Ky. 354, 29 Am. Dec. 417, it was decided: "When an ascertainable object is designated by the donor in general and collectible terms, as the poor of a given county or parish, or when a person is appointed by him to select a described portion or kind or number from a designated class, the chancellor, sitting as judge in equity, will interpose on the ground of trust." In the case of *Curling's Adm'rs v. Curling's Heirs*, 8 Dana, 38, 33 Am. Dec. 475, James Curling left the residue of his estate for the use and benefit of a public seminary, not designating where it was to be located. The circuit judge held the devise void for uncertainty, but, upon appeal to this court, Judge Robertson, delivering the opinion of the court, said: "The testatrix, by designating a general object of charity (a public seminary), must be understood as intending either a seminary, or the seminary of his county, or any seminary which his executor or a court of equity, in the exercise of a sound discretion, should select as best adapted to effect the object of charity. Upon either of these hypotheses, the testator's purpose, as declared and circumscribed by himself, may be fulfilled by applying the fund to a specific object, without any hazard of perverting his bounty in a manner not contemplated by him and authorized by his will. Therefore, according to principles established as perfectly judicial, we are of the opinion that the

¶ 1. See *Charities*, vol. 2, Cent. Dig. §§ 45, 47.

device created a charitable trust, which may be executed according to law, and without violating the will of the testator or making a will for him; and therefore we conclude that the circuit court ought to have decreed the appropriation of the profits of the devise to the use of the Trigg Seminary, and appointed a trustee to execute the trust." In the very recent case of *Spalding v. St. Joseph's Industrial School*, 54 S. W. 206, Judge Du Relle uses this language: "All the Kentucky cases have sustained the charitable uses therein considered because the court held that a charitable object was indicated, or a class of charitable objects designated from which choice was authorized to be made. In some of them there is room for difference of opinion as to the certainty of the objects of the charitable uses sustained, but the courts have always held that they were certain, either by being designated by the donor, or one of a class designated by him from which choice was authorized to be made." In *Bedford v. Bedford's Adm'r*, 35 S. W. 926, the devise was to the state of Kentucky in trust for the benefit of the state, the profits therefrom to be appropriated annually forever towards the education of the children of the state—particularly the poor and most unintelligent. The devise in this case was sustained as sufficiently definite. The court said: "Trusts must be for the benefit of an indefinite number of persons, for, if the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity, and which distinguishes it from a mere private trust." There has been considerable diversity in the decisions of the courts of the various states of the Union as to the extent they will go in upholding an indefinite trust. In some states—particularly Maryland, Virginia, Michigan, New York, and Wisconsin—it has been held that courts of equity have no greater jurisdiction to enforce public than private trusts. On the other hand, in Kentucky, Maine, Massachusetts, Missouri, Pennsylvania, and many other states where the principles of 43 Eliz. c. 4, are accepted, they have gone to the farthest limit in this regard. In this state 16 decisions have been reported upon this question of charitable uses, beginning with the case of *Glass and Bonta v. Read*, 2 Dana, 170, in which charitable bequests have been uniformly upheld. But it is insisted that the amendment to section 317 of the Kentucky Statutes passed by the General Assembly in 1893, which is in these words, "If the grant, devise, gift, appointment or assignment, shall have pointed out with reasonable certainty the purposes of the charity and the beneficiaries thereof," etc., was intended by the lawmaking department of the government to change the rule which has heretofore prevailed in this state. The words of the amendment are the same as those used in several opinions sustaining bequests to various charities, and it would be

more consistent with reason and common sense to believe that the Legislature simply intended to crystallize into the statute law the doctrine which has been so often announced by this court, and which has been accepted with approval by the profession, the General Assembly, the public at large, and by most eminent text-writers. The gift in this case is to the poor as a class, and the testatrix has appointed her executor to select from this class the persons who are to receive the benefit of the charity. In our opinion, the judgment of the trial court is in conflict with what has become the settled legislative policy in this state with respect to public charities; and *Spalding v. St. Joseph's Industrial School*, 54 S. W. 206, relied on to support the judgment of the trial court, is not in conflict with the other cases, and the devise in this case should be upheld.

For reasons indicated, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

HUSSEY v. SARGENT et al.

(Court of Appeals of Kentucky. June 16, 1903.)

WILLS—CONSTRUCTION—VALIDITY—CONFLICT OF LAWS—TESTATOR'S DOMICILE—RULE AGAINST PERPETUITIES—EXECUTOR—ACCOUNTING—JURISDICTION.

1. A testator, after making special bequests, bequeathed to his wife two-fifths of the income of the remainder during her life, to his son two-fifths thereof, and from the remaining one-fifth he directed that his executors should pay his sister \$500 annually for her life, and that the balance of such one-fifth should be "allowed to accumulate for the benefit of" grandchildren, and directed that "such accumulation and such income" should be "equally divided and paid to and distributed among" the grandchildren when a designated grandchild should arrive at the age of 35 years, or would have been 35 had she lived. The testator made no further disposition of this one-fifth. Held to bequeath to the grandchildren, not only the income of this one-fifth, but also the principal thereof.

2. The validity of a will disposing of personal property only is determined by the law of the testator's domicile.

3. Under the laws of New Hampshire, the domicile of a testator disposing of personalty only, the provision in his will directing that a certain portion of his estate shall be allowed to accumulate for the benefit of his grandchildren, and that such accumulation and income shall be equally divided among them when a designated grandchild, 2 years old at the date of testator's death, arrived at the age of 35 years, does not violate the rule against perpetuities, but the direction for accumulation will be enforced for a period of 21 years after the testator's death, and then the amount accumulated will be distributed among the grandchildren.

4. Where an executor appointed in New Hampshire is domiciled in Kentucky and is in possession of the testator's property, none of which is in New Hampshire, the courts of Kentucky may require him to account to the persons entitled to the estate.

Appeal from Circuit Court, Jefferson County, Chancery Division No. 1.

"To be officially reported."

Suit for the construction of the will of Daniel P. Hussey, brought by Frederick D. Hussey against George W. Sargent and others, in which the guardian ad litem of Emily D. Hussey and others, infants, prayed that plaintiff, as executor and trustee, be required to account for the shares due the infants. From the judgment construing the will, and directing plaintiff, as executor and trustee, to account, plaintiff and the guardian ad litem both appeal. Affirmed on plaintiff's appeal, and the appeal of the guardian ad litem dismissed.

St. John Boyle and L. R. Yeaman, for appellants. Jas. Quarles and W. O. Harris, for appellees.

BURNAM, C. J. The appellant, Frederick D. Hussey, brought this suit against the appellees, George W. Sargent, Ezekiel H. Sargent, Webster P. Hussey, Emily P. Hussey, Sr., Fannie R. Hussey, Emily P. Hussey, Jr., Catherine P. Hussey, Mabel W. Hussey, Dorothy Hussey, and Sarah L. Hussey, for the purpose of obtaining a construction of certain clauses in the will of his father, Daniel P. Hussey, who died on the 25th of July, 1883, at his domicile in the county of Hillsborough, in the state of New Hampshire, and whose will, subsequent to his death, was duly admitted to probate in the probate office of that county. He alleges that Daniel P. Hussey's widow, the defendant Emily P. Hussey, Sr., accepted the provision of his will; that he was his only child and heir at law; that at the time of the death of Daniel P. Hussey he was married to Mary W. Hussey, and at that time had only one child, the defendant Emily Hussey, Jr., who was then 2 years old; that, after the probate of the will of Daniel P. Hussey, the defendants Catherine, Mabel, and Dorothy, children of plaintiff, were born; that, after the birth of Dorothy, his first wife, Mary W. Hussey, died, and he subsequently intermarried with the defendant Fannie R. Hussey, but that he had no children by her. He further alleges that shortly after the death of his father, Daniel P. Hussey, he removed from the state of New Hampshire to the city of Louisville, in the state of Kentucky, with his mother and family, where they have since resided; that the debts and specific legacies of Daniel P. Hussey have all been paid, except one to a public library in the city of Nashua, which is not yet due; that the estate of Daniel P. Hussey consisted entirely of personal property, which came into the hands of the plaintiff as trustee and executor, and that he has since collected and received the entire income of the estate, and that no part of it is within the state of New Hampshire; that he was born on the 9th of August, 1857. All of the defendants, except Emily P. Hussey, Sr., and the infant children of the plaintiff, are alleged to be nonresidents, and are proceeded against as such by warning order; and it is alleged that the infant defend-

ants have no statutory guardian, and the petition asks that a guardian ad litem be appointed to defend for them.

The special questions which we are asked to determine upon this appeal are: First, whether the principal of the one-fifth of the estate, the income of which was directed to be accumulated for the benefit of the children of plaintiff in the sixth clause of the will, has been disposed of by the will, or whether, as to this fund, testator died intestate. Second, whether the provisions requiring that the balance of the income upon the one-fifth of testator's estate, which is directed to be distributed among the children when Emily P. Hussey, Jr., daughter of Frederick D. Hussey, arrives at the age of 35 years, if then living, or at that date when she would have been 35 years of age had she lived, being then deceased, is void as in contravention of the law against perpetuities. Third, whether or not the bequest, contained in section 8, of the remainder of two-fifths of said estate, the income of which is now payable to testator's wife during life, is a good and valid bequest in whole or in part, and, if invalid, whether such portion of the estate is or will become vested in the plaintiff or his heirs by inheritance. Fourth, whether or not the provision that the income of any portion of the said remainder be allowed to accumulate is or is not void as against the rule against perpetuities, and, if invalid, whether or not the same is or will become vested in the plaintiff or his heirs by inheritance.

In the joint and separate answer of the infant defendants Emily P. Hussey, Jr., Catherine P. Hussey, Mabel W. Hussey, and Dorothy Hussey, filed by their guardian ad litem, it is claimed that the trusts for accumulation in favor of his wards provided for in the sixth and eighth clauses of his will are valid and enforceable, and that it was the intention of the testator, Daniel P. Hussey, that these defendants or their children, should any of them die, leaving children, before the date of distribution, should under section 8 of his will receive the principal as well as the accumulated income provided for in that section. He also alleges that his infant wards were intended by testator to be the residuary legatees of any portion of the estate not otherwise disposed of in his will, and makes his answer a counterclaim against the plaintiff for the purpose of having the rights of the infants ascertained, and requiring the plaintiff as executor and trustee to account for their shares when so ascertained. The court below held that the provisions of section 6 and 8 of the will, providing for the accumulation and distribution of the income of Frederick D. Hussey's children at the end of 33 years, at which time Emily would become 35 years old, if living, were valid and enforceable, as was also the bequest of the principal, and adjudged that the plaintiff, Frederick D. Hussey, as trustee

and executor, should file a full and complete account showing the annual income from the trust estate from the death of Daniel P. Hussey, and the sums paid by him to Jane M. Littlefield, prior to her death, under the provisions of the sixth clause of the will. To which the plaintiff excepted. The lower court declined to make any adjudication on the question as to whether or not the children of Frederick D. Hussey were entitled to take as residuary legatees that portion of the estate of Daniel P. Hussey not specifically devised by his will. To which the guardian ad litem excepted, and both the plaintiff and the guardian ad litem have appealed.

It is contended in behalf of Frederick D. Hussey: First, that the provisions contained in sections 6 and 8 of the will, for the accumulation of specific portions of the income for the benefit of his children, to be paid to them when his daughter Emily P. Hussey, Jr., reaches the age of 35, or, if she should not live that long, at such date had she lived, are void, because in contravention of the law against perpetuities, and that, being void, he, as heir at law, inherits the fund; second, that the testator has failed to dispose of the principal from which this income is derived, and that therefore, as heir at law, he is entitled to it as intestate property. On behalf of the children it is contended by their guardian ad litem that appellant is wrong on both propositions.

In the first, second, third, fourth, and fifth clauses of the will, testator makes certain special bequests about which there is no controversy. We copy the remaining clauses of the will, although only the sixth and eighth are directly involved in this litigation. They are as follows:

"Sixth. After deducting and payment of the legacies before named, I give and bequeath to my beloved wife two-fifths of the income of the remainder during her natural life, and to my said son, Frederick D., I give and bequeath a like sum to-wit: Two fifths of the income of said remainder; and from the remaining one fifth of said income I direct my executors to pay to my sister Jane M. Littlefield an annual sum of Five Hundred Dollars to commence at my decease and payable semiannually, and to be continued and payable during her natural life; the balance of said one-fifth of said income shall be allowed to accumulate for the benefit of the children of my said son or their heirs, such accumulation and such income to be equally divided and paid to and distributed among said children when Emily P. Hussey daughter of Frederick D. Hussey arrives at the age of thirty-five years if then living, or at that date when she would have been thirty-five years of age had she lived being then deceased.

"Seventh. [He gives, at the death of his wife, \$50,000 to the city of Nashua to establish a public library.]

"Eighth. If my said son shall survive my wife, he shall receive at her decease the sum of one hundred thousand dollars from my estate and shall continue to receive two-fifths of the income of the remainder, and any remainder income heretofore received by my said wife, shall, after deducting such sums as to my said executors may seem reasonable and fitting for the support of the children of my said son, be allowed to accumulate for the benefit of said children conditioned as payments and distribution as in the sixth clause of the will.

"Ninth. Should my said son die before my said wife leaving no more than two children I give and bequeath to my sister Jane M. Littlefield, my brother's widow Sarah S. Hussey, and to my said half brothers Ezekiel H. and George W. Sargent, if living, the further sum of Fifteen Hundred Dollars, to each and all of such one surviving.

"Tenth. In case of the death of my said son before the death of my wife leaving no children, I give and bequeath to my wife and her heirs one half part of the whole of the remainder of my estate; and the rest and remainder of said estate shall be divided into equal shares between those surviving of the following, to wit:—the widow of my son, my said sister, Jane M. Littlefield, my brother's widow Sarah S. Hussey, and said half-brothers Ezekiel H. and George W. Sargent.

"Eleventh. If from any cause my wife should be dissatisfied with the foregoing provisions of this will relative to her share, and should elect to receive such share or distributive part as the statutes provide, waiving the provisions herein set forth, and in lieu of the same, then I order and direct that my said son shall receive one half of the income of the remainder of said estate instead of two-fifths as set forth in section sixth. And I further order and direct that my said son shall receive on his arriving at the age of forty years the principal sum of which he shall have received the income as provided in the preceding sections.

"Twelfth. I hereby constitute and appoint Webster P. Hussey of said Nashua, and my said son Frederick D. Hussey, executors of this my last will and testament, hereby revoking any and all former wills by me made, and I hereby authorize and empower my said executors to sell or exchange my estate when same shall be deemed best and advisable and for the interest of said estate by my said executors, but no such change shall be made in said estate except sanctioned by both of said executors; further directing that no bonds are or shall be required of them as such executors. I also direct that all necessary expenses shall be paid to said executors incurred in the execution of the provision of this will, but that said son shall receive no further compensation for his services in the same. But I direct that said Webster P. Hussey shall receive in addition to such necessary expenses a sum not exceeding at any

time (besides expenses) the sum of five hundred dollars per annum, and at no time shall said sum so received exceed two per cent of the income of said property then in care and trust of said Executors, and when such percentage on the income as aforesaid would be less than Five Hundred Dollars then, he shall receive and be allowed such sum as would be two per cent on said income, and such sums so allowed to Webster P. Hussey shall be in full settlement and compensation for his services while acting and serving as such Executor.

"In witness whereof I have hereto set my hand and seal this twenty first day of June 1883, and interlineations in section seven and eight were made before signing.

"Daniel P. Hussey.

"Signed, sealed, published and declared * * * said Daniel Hussey as and for his * * * and testament in the presence of us, who at his request and in his presence and in the presence of each other have subscribed our names as witnesses thereto.

"Chas. W. Holtt.

"Ira Gustine.

"Mark G. Wilson."

That wills must be sustained, and the intention of the testator given effect by courts whenever it can be done without violating established rules of law or some public policy, is a truism so often repeated that it has become trite. But it expresses a rule which is applicable to the construction of every will when its validity or that of any part of it may be called in question. And when one undertakes to make a will it will be presumed that his purpose is to dispose of his entire estate, and does not intend to die intestate or become intestate after death. And courts are never disposed to put such construction upon a will as would be likely to lead to intestacy, and this inclination is most strong when it is a residue of personalty which is the subject of the bequest. See *Maberley v. Strode*, 3 Vesey, 456; *Whitcomb v. Rodman*, 28 L. R. A. 149, note: "And if the reading of the whole will produces a conviction that testator must necessarily have intended an interest to be given, and which is not bequeathed by express and formal words, the court must supply the defect by implication. See *Phelps v. Phelps*, 143 Mass. 570, [10 N. E. 452]." So far as we are able to discover there is nothing in any clause of this will which indicates an intention on the part of the testator that any part of his estate should under any circumstances be treated as intestate. After providing for the payment of certain specific bequests, he divides the entire remainder of his estate into five equal parts, and specifically disposes of each of these parts. In the sixth clause of his will he gives the income on two-fifths of this remainder to his son, the appellant, without restriction. In the eleventh clause, he provides that when he arrives at the age of 40 he shall receive the principal of this

two-fifths, and, as appellant has passed the age of 40 years, no question can rise as to this two-fifths remainder. He then gives the income on two of the other fifths of his estate to his wife for life, and in the eighth clause of his will provides that if his son should outlive his mother he shall receive therefrom \$100,000 in addition to the two-fifths already devised to him; and testator then provides in clause 8 that his executors may deduct such sums as may seem reasonable to them from the income of the remainder of this two-fifths of his estate, on which his wife during her life had drawn the income, for the support of his grandchildren, and that any remainder of income from this two-fifths shall be allowed to accumulate for the benefit of the grandchildren, conditioned as to payment and distribution as in the sixth clause of his will. In the ninth clause he provides for an additional bequest to his brothers and sisters of \$1,500 in the event his son shall die before his wife, leaving only two children. In the tenth clause he provides for the distribution of his estate in case his son dies before his wife, leaving no children, and in the eleventh clause he provides for the contingency of his wife renouncing the provision made for her in the will and claiming dower.

We will not consider the disposition made by testator in the sixth clause of the will of the remaining one-fifth of his estate. Out of the income of this one-fifth, testator directs that his executors shall pay his sister, Jane M. Littlefield, annually during her life, \$500, and that the balance of the income on this one-fifth shall be allowed to accumulate for the benefit of his grandchildren or their heirs, and that such accumulations and income should be paid to them when his granddaughter Emily was 35 years of age, or would have been had she lived. It must be conceded that, in order to sustain the bequest of the principal of this one-fifth interest of the estate, we must believe that testator intended and has attempted to make such a bequest. It is clear from the entire will that testator intended that the bulk of the estate, after the death of his widow, should go for the benefit of his son and his grandchildren, and that, distrusting the improvidence of youth, he postponed the time when both his son and his grandchildren could take possession of the principal of his estate devised to them, until they had acquired the discretion which is the usual accompaniment of more mature years. The provisions in the will for the benefit of the wife and son of the testator are clear, definite, and explicit. There is not the slightest intimation that testator intended that either of them should take by inheritance as well as by bequest. And we think it is equally clear that he intended that his grandchildren should take the entire accumulations of the one-fifth of his estate devised in the sixth clause of his will, subject, however, to the annuity in favor of his sister, Mrs. Jane M. Littlefield, during her life. It

is contended for appellant that the words "accumulations" and "income" are synonymous, and both refer to the premium or interest which may be realized upon the principal of this one-fifth of testator's estate, and neither has any reference to the principal of the one-fifth. It must be conceded that in its ordinary use the word "accumulations" is used in this sense, but in law it has a more definite and technical meaning. Black, in his *Law Dictionary*, defines its legal meaning as follows: "When an executor or other trustee masses the rents, dividends, or other income which he receives, treats it as capital, invests it, makes a new capital of the income derived therefrom, invests that, and so on, he is said to accumulate the fund. And the capital and accrued income thus procured constitute accumulations." We are satisfied that the testator used the word "accumulations" in this sense. He plainly intended that this particular fund should grow; that the surplus income, after payment of the annuity of \$500 to his sister, should be added to the principal, and become a part of the capital from year to year; and that in this way a fund should be accumulated from the capital and accrued income for the benefit of his grandchildren. There is another well-settled rule of construction that would give the principal of this one-fifth to the grandchildren. The testator nowhere provides that it shall go to any one else, or fall into the residue of his estate, and where the interest of a fund is bequeathed to a legatee or in trust to him, without any limitation as to the continuance, the principal will be regarded as bequeathed also. See *Craft v. Snook's Ex'rs*, 13 N. J. Eq. 121, 78 Am. Dec. 94; *Gulick's Ex'rs v. Gulick*, 25 N. J. Eq. 324; *Wainright v. Wainright*, 3 Ves. Jr. 558; *Hale v. Beck*, 2 Eden, 229. We are therefore of the opinion that testator's grandchildren took not only the income, but also the principal, of the one-fifth of the estate.

We will now proceed to the consideration of appellant's second contention, that the provision directing the accumulation of income and its distribution to the grandchildren when Emily should arrive at the age of 35 years, or would have reached that age if living, violates the rule against perpetuities. Mr. Perry, in his work on *Trusts* (5th Ed., vol. 1, § 381), says that: "In determining whether a particular devise is contrary to the rule against perpetuities, the inquiry is not whether the contingency upon which the estate is to vest actually occurs within the time limited by the rule, but whether it is possible that the event may not happen within the time. If it is possible that the event upon which the executory devise, or shifting or springing use, is to vest in some person, may not happen within the time, the executory estate is void, although in fact the event actually happens within the time." Underhill on the *Law of Wills* (vol. 2, §§ 883, 886) is to the same effect. And this view was

adopted by this court in *Stevens v. Stevens*, 54 S. W. 835; *Coleman v. Coleman*, 65 S. W. 832. Undoubtedly this provision of the will under our statute against perpetuities would be held void, but this being the will of a testator who died domiciled in New Hampshire, which disposes alone of personality, it must be construed according to the law of New Hampshire. On this point, Judge Story, in his work on *Conflict of Laws* (section 465), says: "It is now a well-settled principle in the English law that a will of personal property, regularly made according to the law of the testator's domicile, is sufficient to pass such property in every other country in which it is situated." Page on *Wills*, § 35, says: "Where a bequest of personality creates a trust, its validity is primarily to be determined by the law of the domicile of the testator, not the law of the place where the property is situated." On the same subject, Mr. Wharton, in his *Conflict of Laws* (section 570), says: "By the English common law, as held both in England and the United States, testamentary capacity as to personality is governed by the law of the domicile of the testator at the time of his death." And this rule has been followed by this court in numerous decisions. See *Chapline v. Moore*, 23 Ky. 175; *Fletcher's Adm'r v. Sanders*, 37 Ky. 345, 32 Am. Dec. 96; *Townes v. Durbin*, 60 Ky. 355, 77 Am. Dec. 176; *Dannell v. Dannell's Adm'r*, 67 Ky. 57. Indeed, we do not understand that this proposition of law is controverted by appellant. It therefore remains to be determined whether the bequest at the time it took effect was in conflict with the law of New Hampshire, the domicile of testator.

It appears from the evidence that there is no statutory provision in New Hampshire against perpetuities, and that the common-law rule prevails there, except in so far as it has been modified by the decisions of the Supreme Court of that state. The common-law rule required that every interest disposed of by will should vest within a life or lives in being at the creation of the estate, and 21 years and 10 months thereafter. See *Blackstone's Com.* 174; 2 *Minor's Institutes*, 376, 377. And it is clear that, tested by the restrictions of the common law, the devise in this clause to testator's grandchildren is void because it postpones the enjoyment of the income for a period of 33 years, which is longer than the time allowed by the common-law rule. But the Supreme Court of New Hampshire, in 1891, in their decision in *Edgerly v. Barker*, 68 N. H. 434, 31 Atl. 900, which is also reported in 28 L. R. A. 323, modified that rule of the common law as to perpetuities in a very important particular. In that case the testator devised the remainder of his estate to trustees, who were to pay fixed sums to the testator's two children for life, with remainder of the estate over to testator's grandchildren, born and unborn, and to be paid to them when the youngest

should arrive at 40 years of age, and upon their giving bond to the children of the testator for the payment of the support provided for them in the will. At common law this restriction in the vesting of the estate would have rendered the devise void, but the court sustained it by modifying the provision so as to make the gift take effect when the youngest child reached the age of 21 years instead of 40, upon the theory that the controlling idea of the testator was that his grandchildren should have the remainder of his estate, and that the postponement of this devise until the youngest child was 40 years old was secondary and subordinate, and that the court would not permit the plain intent of the testator that his grandchildren should have the estate to be defeated by the provision that it should not take effect until the youngest was 40 years old. The edition of the *Lawyers' Reports Annotated*, in a note appended to this case, says: "The application of the *cy pres* doctrine to a gift which is not charitable, so as to save it substantially, when the time of distribution fixed by the will is unlawfully remote, is somewhat unusual, but the opinion in the above case presents much authority for the essential principle involved." And, whether the decision in that case be sound or not, it is conceded to be the law of New Hampshire, under which the validity of the devise in this case must be determined.

It is very earnestly insisted for the appellant that the difference between this case and the *Edgerly* Case is so marked as to except it from the rule announced in the *Edgerly* Case. The basis of this contention is that in the *Edgerly* Case the beneficiaries were known, and the limitation was only as to the time when the estate should pass, whilst in this case the persons who are to take cannot be known until his grandchild Emily should arrive at the age of 35, or would arrive at that age provided she is alive. And in support of this contention appellants have taken the deposition of a distinguished lawyer and citizen of New Hampshire, who, in answer to a request by appellant to point out the distinctions between this case and the *Edgerly* Case, said: "In the *Barker* Case, as the bequest would not take effect until all of the grandchildren were born and the youngest became 21, the same persons would receive the property as would have taken it at the end of 40 years. No change of the beneficiaries could have been made by the court's action, whilst in the *Hussey* case the vesting of the estate at the end of 21 years instead of 33 years would cut off any grandchildren born during the 12-year period, a change of the beneficiaries would have been made by the court's action, and the testator's primary purpose altered." Upon cross-examination, the witness was asked this question: "Mr. Senator, I think it appears from the report of the *Barker* Case that at the date that case was decided by the Supreme Court, or at

least at the time when testator died, the testator's son was 35 years old and the son's wife was 32 years old, and they were approximately at these respective ages at the time the case was decided. Assuming that to be true, suppose that a child was born to that couple after the decision of the Supreme Court of New Hampshire in the *Barker* Case; in your opinion, would that child share with other grandchildren in testator's estate, or would he or she be cut off? Answer. I think they should be cut off, because the estate could not vest until 21 years after his birth, and such a limitation after life not in being or gestation when testator died would be void. What the court meant as to unborn children not then in gestation, I cannot discover. As a matter of fact, I suppose there were none." Question 17. "Then in the *Barker* Case there was a possibility of a grandchild being born who could not share in the testator's estate; that is a fact, is it not? Answer. Yes, if that was the purpose of the court in that case. Possibly the court intended that all of the unborn children should be reckoned and the property vested at the end of 21 years from the birth of the youngest child, whenever born. If so, this would tend to impeach the soundness of the decision in *Edgerly v. Barker*, but would not alter the fact that there was no possibility of change in the beneficiaries by cutting the limitation from 40 years to 21 years. Question 18. Has the decision in *Edgerly v. Barker* been overruled or modified? Answer. Not that I am aware of."

It seems quite plain that in *Edgerly v. Barker* the court put the period of distribution at the time when the youngest child then living became 21 years of age, so that there was a possibility in that case that other children might be born after that time who would be excluded. So, after all, it seems to us that it is impossible to distinguish on principle this case from that, and that, following the doctrine laid down in that case, the chancellor properly decided that the provision of the will directing the accumulation of the income was valid and enforceable for a period of 21 years after testator's death, and should be carried out by the trustee, and that two-fifths of the income, to be accumulated under the eighth clause of the will after the death of testator's widow, stands upon the same footing as the one-fifth directed to be accumulated under the sixth clause of the will, with the exception that the support for the children is to be deducted from the income derived from this interest, and that both funds go to the grandchildren in 21 years after the probate of the will of Daniel P. Hussey.

The third ground relied on for a reversal is that the chancellor erred in requiring an accounting in this action by the executor and trustee, as he qualified as such in the state of New Hampshire and received the estate by virtue thereof, and appellant has cited nu-

merous authorities to support his contention that an executor cannot be sued out of the jurisdiction of his appointment for a failure to carry out the trust imposed upon him. But the law on this question has long been settled against his contention in this state by numerous adjudications of this court. In the early case of *Dorsey's Executor v. Dorsey's Adm'r*, 28 Ky. 280, 22 Am. Dec. 33, it was held that a distributee of a decedent might enforce distribution, in the courts of this state, of assets received by the administrator appointed in Maryland, if found in this state. This was followed by *Atchison's Heirs v. Lindsey*, 45 Ky. 86, 43 Am. Dec. 153, in which the administrator and infant heirs of John Atchison sought to recover of James Lindsey, who administered upon the estate of decedent in South Carolina, certain assets received by him in that state. The contention was made in that case that, as Lindsey was appointed administrator in South Carolina and received the assets sued for there, he could not be held responsible in the tribunals of this state for the surplus remaining in his hands at the suit of a local administrator and infant heirs of decedent. In response to this contention, after referring to *Dorsey's Executor v. Dorsey's Adm'r*, the court said: "Upon express authority of this case, and upon our own sense of what is required by convenience and justice, and of the comity due sovereignty and laws of South Carolina, we are of the opinion that the mere fact that Lindsey was appointed administrator in that state, and received there the assets for which he is now charged, does not of itself exempt him from all liability to be sued in tribunals of this state for a claim growing out of his having thus received assets, to the proceeds of which the complainants or some of them are entitled. Whether any decree should finally be rendered against him on this account may depend upon the facts disclosed in his answer, and upon the proof; but we think he was bound to answer." The question was again before this court in *Manion's Adm'r v. Tittsworth*, 57 Ky. 597, and in a well-considered opinion by Judge Simpson it was decided "that it was settled doctrine in this state that the administrator or executor who is appointed or who qualified in another state, and there receives assets in his hands, may be sued in the tribunals of this state by persons entitled to such assets, if he shall have removed to and settled in this state." The question was again before the court in *Keiningham v. Keiningham's Ex'r* (Ky.) 71 S. W. 497, and the doctrine was reaffirmed. Appellant avers that his domicile is in this state, that the property disposed of by the sixth and eighth clauses of the will of testator are in his possession and under his control, and that no part of it is within the state of New Hampshire. It is manifest that the New Hampshire courts could not enforce any decree for a settlement of appellant's accounts unless he voluntarily came within

their jurisdiction, and that, under the decisions quoted supra, the courts of Kentucky have jurisdiction both of him and the property received by him under the will of testator for the purpose of requiring an accounting at his hands. We therefore conclude that the court did not err in so adjudging. In our opinion the trial court properly declined to pass upon the question raised by the guardian ad litem as to who were intended by testator to be the residuary legatees of any portion of his estate not otherwise disposed of by his will.

For reasons indicated, the judgment upon the original appeal is affirmed, and the cross-appeal prayed by the guardian ad litem dismissed, and the cause remanded for proceedings not inconsistent with this opinion.

BOARD OF COUNCILMEN OF CITY OF FRANKFORT v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 16, 1903.)

MUNICIPAL CORPORATIONS—NUISANCES —LIABILITY.

1. A city is not liable for permitting a nuisance to exist on private property within its limits.

Appeal from Circuit Court, Franklin County.

"Not to be officially reported."

Proceedings by the commonwealth against the board of councilmen of the city of Frankfort. From a judgment for plaintiff, defendant appeals. Reversed.

Ira Julian, for appellant. Clifton J. Pratt and M. R. Todd, for the Commonwealth.

NUNN, J. It appears from the statutes governing cities of the third class, Frankfort being in this class, that such cities are subject to be sued and prosecuted under the provisions of their charter which were in existence prior to the enactment of this statute. That the charter of the city of Frankfort required, in the proceedings against the city by which it was sought to be made liable, that the proceedings be instituted against the board of councilmen as a body and not against the members of the board personally. From this record it appears the city of Frankfort is sought to be made liable for permitting a nuisance to exist on private property. The question as to the liability of cities in such cases was considered by this court in the prosecution of *City of Georgetown v. Commonwealth*, 73 S. W. 1011.

In that case the court decided that the city was not liable. The principles governing that case and this are the same.

For the reasons therein given the judgment in this case cannot be sustained, and it is therefore reversed, and the cause remanded for further proceedings consistent herewith.

¶ 1. See *Municipal Corporations*, vol. 28, Cent. Dig. § 1552.

KICE v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. June 16, 1903.)

APPEAL—RECORD—BILL OF EXCEPTIONS.

1. Where the bill of exceptions has been stricken from the record, the only question presented is the sufficiency of the pleadings to support the judgment.

Appeal from Circuit Court, Jefferson County, First Common Pleas Division.

"Not to be officially reported."

Action by M. S. Kice against Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Gardner & Moxley, for appellant. Edward W. Hines and Helm, Bruce & Helm, for appellee.

NUNN, J. The appellant brought this action against appellee for an alleged breach of contract in failing to transport a fine and valuable mare for him from Beards Station, on its road, to Lexington, Ky., and, by reason of its failure to comply with its contract in the time and manner of the shipment of the animal, her death was the result. Her value was fixed at \$500. The appellee, by answer, traversed the allegations of the petition. A trial was had, which resulted in favor of the appellee.

As appears from the record, the bill of exceptions was, upon motion of appellee, stricken from the record by order of this court made on the 19th of February, 1903. This being true, the only question presented is as to the sufficiency of the pleadings to support the judgment. There is no room for contending that appellant was entitled to a judgment upon the pleadings, and his counsel make no such contention.

It follows, therefore, that the judgment of the lower court must be affirmed.

CINCINNATI, N. O. & T. P. RY. CO. et al. v. COOK'S ADM'R.

(Court of Appeals of Kentucky. June 17, 1903.)

SERVANT—INJURIES—PLEADINGS—ISSUES RAISED.

1. A petition averred that plaintiff's intestate, as brakeman, was engaged in defendant's yard in uncoupling its cars, and that its servant caught and crushed intestate's body between the cars of the train, through the negligence of defendant's servant, so injuring intestate that he died a few minutes thereafter, and that when so caught and crushed intestate was engaged in the discharge of his duties as brakeman. The answer denied that defendant or its servant caught or crushed intestate's body in the cars of its train, or so injured him that he died a few minutes thereafter, or that, when so caught or crushed, intestate was engaged in the discharge of his duties as a brakeman. *Held*, the denial was as broad as the petition and placed in issue whether intestate was in the discharge of his duties at the time he was killed.

"Not to be officially reported."

On petition for rehearing. Overruled.

For former opinion, see 73 S. W. 765. See, also, 67 S. W. 383.

BARKER, J. We have re-examined the pleadings and evidence in this case, in response to the requirements of the petition for a rehearing, and are convinced that the statement of the evidence contained in the opinion is correct. Appellee is in error as to the facts admitted by the pleadings. On the subject as to where the intestate, Edward Cook, was, and what he was doing, at the time of his death, the petition contains the following allegation: "Plaintiff avers that on the — day of —, 1901, his intestate, Edward Cook, as brakeman and switchman for the defendant company, was engaged in said yard in uncoupling and giving attention to the defendant's cars for said defendant, * * * and the defendant Fred Milligan caught and crushed said Cook's body between the cars of said train, by and through the gross negligence and carelessness of said Milligan as engineer of said defendant company in the management, movement, and operation of its said engine and train, * * * so injuring him that he died within a few minutes thereafter; and when so caught and crushed said Cook was engaged in discharging his duties as said brakeman to said company." The third paragraph of the defendant company's answer contains the following denial: "It denies that it, or the defendant Fred Milligan, caught or crushed said Cook's body in the cars of said train, * * * or that it thereby so injured him that he died in a few minutes thereafter, or when so caught or crushed said Cook was engaged in the discharge of his duties as said brakeman for said company." This denial in the answer, so far as the question as to what Cook was doing at the time he was killed, is as broad as the allegation of the petition, and placed in issue the fact as to whether or not Cook was between the cars engaged in the company's business at the time he was killed. The testimony of the witnesses does not show that Cook was between the cars in the discharge of his duties as brakeman when he was crushed, or that the engineer, Milligan, knew he was between the cars at all.

The petition is overruled.

MILLER v. FARMERS' BANK OF KENTUCKY.

(Court of Appeals of Kentucky. June 17, 1903.)

CHAMPERTOUS CONVEYANCE OF LAND—JUDGMENT—COLLATERAL ATTACK—PRESUMPTIONS—SUIT TO POSSESS LAND—PARTIES.

1. A conveyance of land after a final and un-reversible judgment for its recovery has been rendered in favor of the grantor, though no writ of possession in his favor has been sued out, is not champertous.

2. Where a judgment is assailed collaterally only, jurisdiction is presumed, though no service of process is shown.

3. One having a lien on land for the purchase money may maintain a suit for the possession thereof, though he has conveyed it to a third person.

Appeal from Circuit Court, Breathitt County.

"Not to be officially reported."

Suit by the Farmers' Bank of Kentucky, for the use of Sam Jett, against M. W. Miller. Judgment for plaintiff, and defendant appeals. Affirmed.

J. B. Marcum, for appellant. J. J. C. Bach, Jno. E. Patrick, Kelly Kash, and Jno. W. Rodman, for appellee.

HOBSON, J. In the year 1876, M. W. Puckett recovered judgment in the Breathitt circuit court against Wesley Edwards enforcing a lien for purchase money on a tract of 100 acres of land. The land was sold on February 19, 1877, and M. W. Miller became the purchaser, executing bond with surety. He failed to pay the bond, and Puckett took out an execution on it, which was levied on the land by the sheriff. After proper proceedings the land was sold, and Puckett became the purchaser. On July 3, 1878, Puckett filed suit against Miller to recover the land. This action was consolidated with the former action then pending of Puckett against Edwards, and on July 5, 1889, a judgment was entered in the consolidated actions in favor of Puckett, and awarding him a writ of possession for the land, the court holding that no conveyance was necessary, as the legal title was already in him. Puckett allowed Miller, who was his nephew, to remain on the land, and while he was thus in possession, the writ of possession in favor of Puckett not having been sued out or executed, Puckett sold to John Meagher, and on March 19, 1896, in a suit of M. W. Puckett against John Meagher, the land was included in a large boundary conveyed by order of the court by commissioner's deed to the Farmers' Bank, who sold and conveyed it to Sam Jett. Jett refused to pay the bank for the 100 acres held by Miller, and thereupon it filed this petition in equity praying that Miller be dispossessed of the land and for writ of possession therefor. The court on final hearing adjudged the bank the relief sought, and Miller appeals.

It is insisted for appellant that Miller's possession was adverse, and therefore the deed to the bank was champertous; also, that the judgment against Miller in favor of Puckett is void, as he was not before the court, and that the bank, having sold to Jett, is not the real party in interest, and cannot maintain an action.

In *Swagger v. Crutchfield*, 72 Ky. 411, it was held that the champerty act did not embrace a case where the vendor had already

litigated the title with the occupant, and had obtained a judgment in his favor which was irreversible. Besides, the proof heard on the trial is not sufficient to establish an adverse holding by Miller after the judgment in favor of Puckett against him for the land. As that judgment is not directly attacked, and is only assailed now collaterally, it is presumed that the court had jurisdiction, although no service of process is shown. *Freeman on Judgments*, § 124; *Jones v. Edwards*, 78 Ky. 6. The bank has a lien on the land for its purchase money, and therefore has an equitable interest in it. It was necessary for it to get Miller out of possession to protect its interest, and, although it had conveyed the land to Jett, it might maintain an action in equity for the protection of its rights.

On the whole case the judgment in favor of appellee seems clearly in accordance with justice and right. It is therefore affirmed.

HOFFMAN et al. v. MANN.

(Court of Appeals of Kentucky. June 10, 1903.)

FORCIBLE ENTRY AND DETAINER—AMENDMENT OF WRIT.

1. Under Code Prac. § 134, authorizing an amendment at any time in furtherance of justice of a pleading or proceeding, not materially changing the cause of action or defense, a writ of forcible entry, issued by a justice of the peace, may be amended to allege that plaintiff at the time of the entry was in peaceable possession; and this, after filing of a traverse and appeal to the circuit court.

Appeal from Circuit Court, Kenton County.

"Not to be officially reported."

Proceeding by Melissa Mann against Robert Hoffman and others. Judgment for plaintiff, and defendants appeal. Affirmed.

D. A. Glenn, for appellants. Hall & McLean, for appellee.

NUNN, J. The appellee in March, 1902, caused a justice to issue a writ of forcible entry against appellants. The jury in the justice's court found, by their inquest, that appellants were guilty of the forcible entry complained of. Appellants filed, within three days, a traverse, and the justice stayed all further proceedings on the inquisition, and delivered to the clerk's office of the circuit court of that county the whole of the papers and proceedings with reference thereto. In the circuit court the traversee joined issue on the traverse. The appellants, in the circuit court, moved to dismiss the writ because it was failed to be stated therein that appellee, at the time of the forcible entry complained of, was in the peaceable possession of the real estate therein described. During the pendency of this motion the appellee filed an amendment curing this defect, to all of which appellants objected and excepted, and this is the main ground presented by appellants for a reversal of this case.

On the trial in the circuit court the jury, under proper instructions, found that the inquisition in the justice's court was true, and that the appellants were guilty of the forcible entry complained of.

The defect in the warrant before amended in the circuit court was fatal. See cases of *Taylor & Speed v. Monohan*, 71 Ky. 239; *Powers, etc., v. Sutherland*, 62 Ky. 152; and *Burbage v. Squires*, 60 Ky. 79. In the last case the court, in effect, said that the same case should be tried anew, and that no new case should be tried, and that the claim sued for could not by amendment be increased in amount beyond the jurisdiction of the inferior court. In the case in 71 Ky. 239, the same defect existed in the writ as existed in this case, but no amendment was offered or allowed at any time, and the Court of Appeals determined that the warrant was fatally defective. In the case in 62 Ky. 152, this court used this language: "Nor did the court err in refusing to allow the filing of the 'amended petition and warrant,' as it is styled. Without deciding whether a warrant in forcible entry and detainer is amendable at all—especially after a traverse to the circuit court—we deem it sufficient to say that the amendment offered was not only defective in failing to show that the relation of landlord and tenant existed between the parties, but it presented an entirely new case by introducing a number of new parties plaintiff. This cannot be allowed."

In this case we see that the court refrained from saying whether or not an amendment in proper form was allowable. Section 134 of the Code of Practice, so far as applicable to this case, is as follows: "The court may at any time in furtherance of justice, and on such terms as may be proper, cause or permit a pleading or proceeding to be amended * * * or a mistake in any respect or by inserting other allegations material to the case. * * * And if a proceeding taken by a party fail to conform in any respect to the provisions of this Code, the court may permit an amendment of such proceeding so as to make it conformable thereto. * * * The court must in every stage of an action, disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

The court in the case of *Allen v. Brown*, 4 Metc. 344, in discussing this section of the Code, used this language: "It is clear that the plaintiff in this case may be allowed to amend on proper terms, if that section applies to proceedings by attachment on affidavit. * * * It speaks of proceedings, and not of their character and form, and it authorizes the amendment of 'any pleading or proceeding' in certain respects or 'in any other respect.' As the affidavit forms part of the proceeding, and as the section authorizes the amendment of any proceeding 'by cor-

recting a mistake in the name of a party, or a mistake in any other respect,' it is difficult to escape the conclusion that the section was intended to apply to a defective affidavit."

The proceeding by writ of forcible entry is one authorized by the Code of Practice, and certainly section 134 of the Code, the same as section 161 of the old Code, authorizes the amendment of such a proceeding within the limitations as prescribed in that section, to wit, that it does not materially change the cause of action or defense. This view is sustained by this court in the case of *Bailey v. Kelley* (Ky.) 38 S. W. 139. In that case the court said: "It would be, we think, exceedingly technical to say that this warrant could not be amended to make it conform to the form laid down and required by the Code of Practice."

The only question remaining is whether it can be amended after the traverse and in the circuit court. We understand the rule to be that the same action must be tried anew, but no new action can be tried; that any amendment changing the cause of action could not be permitted on the appeal. The amendment in the case did not change the cause of action or make any new action to be tried. It only perfected the action or proceeding, and made certain her proceeding defectively stated.

The case of *Puff v. Huchter*, 78 Ky. 146, was where Huchter made and filed his affidavit for an attachment on a claim for \$59, without filing a petition or any other memorandum or statement of his cause of action. In the justice's court his action was dismissed on account of these defects. He appealed to the circuit court. In the circuit court Puff moved to dismiss the action on the ground that no petition had been filed in the justice's court; but the motion was overruled, and the plaintiff was allowed, over the objection of the defendant, to file what was styled an "amended petition." This court, in discussing that case, used this language: "The common pleas judge seems to have regarded the affidavit as intended for a petition, and on that idea to have allowed an amendment to be filed. The affidavit did not contain all that was necessary to be alleged in the petition, and was insufficient to authorize a judgment. But its defects were in matter of form rather than of substance, and, in view of the rule that proceedings in justices' courts are to be construed with great liberality (*Long v. Ray*, 1 Dana, 430), and that appeals from their judgments are to be tried de novo, we think there was no error in overruling the motion to dismiss, or in allowing the plaintiff to set forth his demand in a formal pleading." To the same effect is the case of *Forsythe v. Huey* (decided by this court on the fourth day of the present month) 74 S. W. 1088, in which case a writ of forcible entry was permitted to be amended after traverse by the circuit court.

Perceiving no error prejudicial to the rights of appellants, the judgment of the lower court is therefore affirmed.

RANKIN v. McFARLANE CARRIAGE CO.

(Court of Appeals of Kentucky. June 10, 1903.)

CHattel Mortgages—Failure to Record—Subsequent Mortgagee—Agency—Apparent Scope of Authority.

1. Certain carriages were shipped by a wholesaler to a retailer under a contract providing that the title to the goods or the proceeds of the sale should remain the property of the wholesaler and subject to his order until all the conditions of the contract were complied with, including payment in full for the goods. This contract was not recorded. Ky. St. § 496, provides that no debt or mortgage conveying title to personalty shall be valid against a purchaser without notice until acknowledged and proved according to law and lodged for record. *Held*, that the contract was a mortgage within the statute, so that one who subsequently advanced money to the mortgagor to pay the freight on the carriages, taking a mortgage on the carriages as security, was entitled to priority over the wholesaler.

2. If the contract were regarded as making the retailer merely the agent of the wholesaler, nevertheless the borrowing of money to pay the freight was within the apparent scope of his authority, and the mortgage given to secure such borrowed money was a valid lien on the property as against the wholesaler.

Appeal from Circuit Court, Anderson County.

"Not to be officially reported."

Action by J. W. Rankin against Clay Brown, to which the McFarlane Carriage Company became a party by petition. From a judgment for the carriage company, plaintiff appeals. Reversed.

Ira Julian and L. W. McKee, for appellant.
F. R. Feland, for appellee.

BURNAM, C. J. In January, 1901, the appellee, the McFarlane Carriage Company, shipped some twenty odd vehicles, including the five in controversy, to Clay Brown, who was engaged in the business of buying and selling buggies, carriages, surreys, and other vehicles in his own name, at Lawrenceburg, Ky., under a contract that provided: "That the title to and ownership of all goods shipped under this contract, or the proceeds of the sale thereof, should be and remain the property of the McFarlane Carriage Co., and subject to their order at any time they may deem themselves unsecured, and until all the conditions of this contract are complied with, including the final payment in full in money for all said goods. But nothing in this contract is to serve as a release from making payment in full as herein agreed. * * *

Notes taken by the McFarlane Carriage Co., under this contract, are not accepted by this company as payment, but merely as evidence of liability and of the amount due." Brown further stipulated that he was to pay for each vehicle shipped at invoice price in cash, less 3 per cent. discount as soon as sold, and

to keep the vehicles fully insured for the benefit of the McFarlane Company. This instrument was not recorded. And on the 18th of May, 1901, Brown, representing himself to be the owner of these vehicles, executed a chattel mortgage on five of them to appellant, as security for the loan of \$326.59, which was borrowed for the purpose of paying freight on the shipment to the railroad company. On the 27th of May, 1902, the appellant, Rankin, brought this suit for an enforcement of his lien against Brown, and also alleged that the defendant had sold two of the mortgaged vehicles, but had failed to account for the money received thereon, and that, unless prevented, the whole would be disposed of, and asked for a specific attachment against the mortgaged property. The McFarlane Carriage Company, on their own petition, were made a party to this proceeding, and filed an answer and cross-petition, in which they set up the contract of sale with Brown, and alleged that he owed them \$385.50 for the vehicles mortgaged to appellant, and they asked the court to adjudge them a superior lien to the mortgage made by Brown to the appellant.

The uncontradicted testimony shows that the entire lot of vehicles shipped by appellee to Brown were held by the railroad company for \$326.59, for freight thereon; and that when Brown, the consignee and ostensible owner thereof, applied to appellant for a loan of sufficient money to pay the bill, he had the records of the county court clerk's office examined for liens against the property, but failed to find any. It is also uncontradicted that Brown was doing business in his own name, and that appellant had no notice of its contract with appellee or the alleged agency. Under this state of fact the chancellor, upon final submission, adjudged that the McFarlane Company were the owners of the five vehicles mortgaged to appellant, and directed their sale, and that the proceeds should be paid to appellee, and plaintiff has appealed.

Section 496 of the Kentucky Statutes provides: "No debt or deed of trust, or mortgage conveying the legal or equitable title to real or personal estate, shall be valid against a purchaser for valuable consideration without notice thereof, or against creditors, until such deed shall be acknowledged and proved according to law and lodged for record." This court has uniformly held that pocket mortgages similar to that relied on by the McFarlane Company were inferior to the lien acquired by a mortgagee who gave credit on the faith of the property without notice of such liens. This question was exhaustively considered in *Wicks v. McConnell*, 102 Ky. 434, 43 S. W. 205, and all previous cases cited and discussed, and in that case the court said: "While we adhere to the decision and reasoning in the *Baldwin Case*, we are not inclined to push the doctrine further than we are required by the language of that opinion in support of secret liens as against

creditors whose debts were created or may be reasonably supposed to have been created upon the faith of the property being, so far as they could by any possibility discover, unincumbered. If this be not the construction, then the statute is entirely nugatory." The principle in this case brings it clearly within the rule laid down in *Wicks v. McConnell*, and we think the chancellor erred in adjudging appellee's lien superior to the mortgage of appellant. But even if it be conceded that Brown was only an agent, and that appellant knew the conditions of the contract under which he received the vehicles, still he might have legally been presumed to have been authorized to borrow sufficient money to pay the charges of the railroad company for the transportation of the vehicles, as, without this being done, he could not get possession of them at all. Such a transaction is certainly within the scope of an agent's apparent authority.

For reasons indicated, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

WARING et al. v. BERTRAM et al.

(Court of Appeals of Kentucky. June 16, 1903.)

SCHOOL DISTRICTS—CREATION—PETITION—ALTERATION AFTER APPROVAL—EFFECT—INJUNCTION TO ENJOIN SCHOOL TAX—ATTACK ON JUDGMENT OF COUNTY COURT.

1. Ky. St. 1899, § 4464, relative to the establishment of graded common school districts, provides that the proposition to establish such districts shall be approved in writing on the petition to the county judge, by a majority of the trustees in the common school districts included wholly or partly within the proposed graded school district. *Held*, that an alteration in the petition, after its approval by the trustees of one district, by which its recital that the school building was to be erected at some central place to be selected by the county superintendent was changed so as to specify a particular location not near the center, was fatal to the validity of the proceedings.

2. Civ. Code, § 285, provides that a judgment can only be enjoined in the court rendering it. *Held*, that a suit in the circuit court to enjoin the collection of a graded school district tax was not violative of the statute as an attack on the judgment of the county court decreeing an election on the proposition for levying the tax.

Appeal from Circuit Court, Lewis County.
"Not to be officially reported."

Suit by John F. Waring and others against M. Bertram and others. Judgment for defendants, and plaintiffs appeal. Reversed.

Samuel J. Pugh, E. L. Worthington, and W. H. Wadsworth, for appellants. W. O. Halbert and Thos. R. Phister, for appellees.

BURNAM, C. J. At the February term, 1902, of the Lewis county court, a judgment was entered upon the petition of voters of the third and fourth common school districts of Lewis county, looking to the establishment of a graded common school district, in which the site of the school building was de-

scribed as follows: "Situated on the corner of a tract of land owned by T. S. Clark and George W. Stamper, jointly, in the village of Garrison, or Stone City, bounded as follows: On the east by the county road running from Garrison to the county road leading to Vanceburg, on the south by the land of Mrs. Thomas Underwood, and on the west and north by other lands of Clark and Stamper, containing one acre." The judgment also provides that an election should be held on the 31st of March, 1902, for the purpose of taking the sense of the legal white voters residing in the boundary of the district upon the proposition to levy an ad valorem tax of 50 cents on each \$100 of all the taxable property situated within the district subject to taxation for state and county purposes, owned by white people and corporation within the district, and a poll tax of \$1 on each white male inhabitant of the district over 21 years of age, for the purpose of maintaining a graded school in the district, and for the purchase of a site and erecting suitable buildings thereon for the school. It also directed that six persons should be elected as trustees for the graded school district, and in all other respects conformed to the provisions of section 4464 of the Kentucky Statutes of 1899. By virtue of this judgment of the county court, an election was subsequently held in the proposed graded school district on the 31st of March, 1902, which resulted in a majority of the votes being cast in favor of the school, and at this election the appellees Cornet, Howard, Carver, Keyser, Beckett, and Glenn were elected trustees. Glenn declined to act, and the appellee Fultz was appointed in his place. The five trustees qualified, and appointed a collector to collect the tax. Thereupon appellants instituted this suit to enjoin the collection, upon the ground that the written petition of voters, which was the basis for the judgment of the county court establishing the graded school district and calling the election, was a forgery to this extent, that, when the document was signed and approved in writing by D. A. Cornet, J. W. Cotton, and G. B. Sanders, trustees of Common School District No. 4, and by Thomas Howard and M. Bertram, trustees of Common School District No. 3, the petition did not set out or describe the site on which the proposed school building was to be erected, but simply recited that it was to be erected at some central place in the common school district to be selected by the county superintendent; and that, after it had been signed by the trustees of Common School District No. 4, it was changed and altered in this respect without the knowledge or consent of the signers, so as to fix the site of the common school building in the town of Garrison on the Ohio river, and not in the center of the district, and that it was also changed in other important particulars. The defendants filed both special and general demurrers to the

petition. The special demurrer was sustained, and plaintiffs' petition dismissed, and they have appealed to this court.

Section 4464 of the Kentucky Statutes of 1890 provides the only way in which a graded common school district can be established, and that section contains this proviso: "That the proposition to establish any graded common school district and school, as provided for in this section, is approved in writing on the petition to the county judge, by a majority of the trustees in the common school districts included wholly or partly within the boundary of said proposed graded common school district." The provision of the statute requiring the approval of a majority of the trustees of any common school district included wholly or partly within the boundary of the proposed graded common school district is a condition precedent. Without their approval, the county court has no jurisdiction to enter a judgment calling for an election to take the sense of the voters as to the establishment of the district and the voting of a tax to erect and maintain a building. The demurrer admits the truth of the averment of the petition that the petition of voters was fraudulently altered after it was signed, without the knowledge or consent of a majority of the trustees of Common School District No. 4, one of the districts included in the graded school district. The alteration was material and important, and invalidated the petition. The presentation of a valid petition was a jurisdictional requirement for the entry of the judgment. There was nothing, therefore, before the court on which to rest the judgment calling the election, and it was consequently void.

It is contended for appellees that this proceeding cannot be maintained in the circuit court, as it is in effect an attempt to enjoin the operation of a judgment rendered by the county court, and is therefore prohibited by section 285 of the Civil Code. We cannot sanction this contention. The judgment of the county court was simply that an election should be held, and the election has been held; every requirement of that judgment has been complied with. This is a proceeding to enjoin the collection of an illegal tax, which grows out of the judgment of the county court, but no attempt is made to interfere with the execution of the judgment itself. It is in conformity with numerous similar proceedings which were instituted in the circuit court to enjoin the collection of taxes levied for school purposes under elections held in conformity with judgments of the county court, and of which this court has taken appellate jurisdiction. See *Williamstown Graded Free School District v. Webb*, 89 Ky. 272, 12 S. W. 298; *Doores, etc., v. Varnon*, 94 Ky. 507, 22 S. W. 852; *Webb, etc., v. Smith*, 99 Ky. 11, 34 S. W. 704; and *Mullins, etc., v. Andrews, etc.* (Ky.) 45 S. W. 231.

For reasons indicated, the judgment is reversed, and cause remanded with directions to overrule the general and special demurrers.

SHEPHERD et al. v. GAMBILL et al.

(Court of Appeals of Kentucky. June 16, 1908.)

SCHOOL TRUSTEE—APPOINTMENT TO VACANCY—EFFECT OF APPOINTMENT OF SUCCESSOR—SCHOOL MEETING—NOTICE—RIGHT TO PAY AS TEACHER.

1. An appointment to fill a vacancy in the office of school trustee which will arise because of failure to hold a prior election, being made before the vacancy arises, is void.

2. Though the statute provides that one shall hold office till his successor is elected or appointed and qualified, the appointment of his successor, after his term has expired, suspends his powers, so that he cannot exercise the functions of the office till his successor qualifies the next day.

3. Notice of a meeting of school trustees to hire a teacher is not sufficient, not being given till the morning of the meeting of some of the trustees, and stating that the meeting would be at 6 o'clock in the morning, without stating the day.

4. Neither teacher should be paid out of the school fund, the one who taught not having a valid contract, and the one who was elected not having taught, having been enjoined at suit of the other; but the remedy of the one enjoined is on the injunction bond.

Appeal from Circuit Court, Breathitt County.

"Not to be officially reported."

Suit by Charles Gambill and others against Green Shepherd and another. Judgment for plaintiffs. Defendant Shepherd appeals. Reversed.

J. J. O. Bach, Jno. E. Patrick, and Kelley Kash, for appellant. Pollard & Redwine and G. W. Fleenor, for appellees.

O'REAR, J. This litigation presents a deplorable state of affairs affecting the well-being of Common School District No. 13 in Breathitt county. The suit is brought by appellee Charles Gambill, who claims to have been employed by the trustees of the district to teach its school for the year ending June 30, 1903, against the appellant, Green Shepherd, who claimed to have been also employed by the trustees to teach the school for the same year. The superintendent of schools for the county was joined as a defendant, and an injunction sought and obtained against appellant Shepherd's continuing to teach the school, and against the superintendent's paying him any of the public fund appropriated to pay the teacher in that district. Appellee was employed by Asberry Spicer, who is conceded to be a trustee, and Lewis Turner, who claimed to be a trustee, while appellant was employed by Sam Callahan, also conceded to be a trustee, and Sam Spicer, who likewise claimed to be a trustee. Thus the right of the case is attempted to be made to turn upon, as well as to decide, which one of the two, Lewis Turner or Sam Spicer, was the

legal incumbent of the office on July 1, 1902, when appellee's contract was made.

It is admitted that Lewis Turner had been elected trustee in 1898, for the three-year term ending June 30, 1902. The records of the superintendent's office appear to be in some confusion. The former superintendent, whose term expired January 5, 1902, attempted on January 2, 1902, to appoint Lewis Turner to fill the vacancy in his office which would occur on July 1, 1902, because the regular election had not been held in October previous, as required by statute. After the induction of the present superintendent into the office, Turner applied to him to have the oath of office administered. The superintendent, under a mistake as to the facts, administered the oath. On July 1st he learned that Turner's term really expired at midnight on June 30th, the day before, and thereupon appointed Sam Spicer to fill the vacancy in the office. Spicer did not qualify, however, till the next day. About 6 o'clock in the morning on July 1, 1902 (the first day of the school year under the statute when a valid contract can be made with a person as teacher), Asberry Spicer and Lewis Turner met at the schoolhouse, and sent word to Callahan to join them, to make a contract to employ the teacher for the year. Callahan failed to attend, and the other two and appellee signed the contract. A few days later Sam Spicer and Callahan, after having given notice to Asberry Spicer, the other trustee, met and employed appellant to teach the school. In the meantime, after the reputed employment of appellee, the schoolhouse was burned at night, said to be the work of an incendiary. It is claimed by appellee that his contract was binding upon the district because Lewis Turner's reappointment January 2, 1902, and his subsequent qualification, continued him in office for the full term after July 1, 1902, or in any event that he, under the statute, continued to hold his office "until his successor was elected or appointed, and qualified," and that, as he did not qualify until July 2d, Turner's incumbency of the office was legal, and his official acts binding upon the board of trustees and the public.

This suit was begun August 4, and the injunction procured from the circuit judge August 20, 1902. Then the county superintendent, at the instance of Sam Callahan, began proceedings to remove Turner from office because he had in 1899 been guilty of flagrant violations of his duties by selling the contract to teach to the highest bidder. The superintendent testifies, as well as certifies, that he found Turner guilty under the evidence before him, and removed him from office by an order dated August 21, 1902. The superintendent has recognized Sam Spicer as the trustee in lieu of Turner since July 2, 1902, except the trial above referred to showed that at that time he recognized Turner as being in office; though it seems that that action was taken to avoid the decision of the

circuit court that Turner was the legal trustee.

Our conclusion is that the appointment of Turner in January, 1902, was void. There was no vacancy then to fill. An appointment cannot be made to fill a vacancy till one occurs. For the same reason the subsequently attempted qualification of Turner was a nullity. His term of office expired June 30, 1902. The act of the superintendent in appointing his successor on July 1st suspended Turner's official term, if Spicer accepted and qualified; and to do that he should have been allowed a reasonable time. One day for that purpose was not unreasonable. At any rate, Turner's term had expired. The act of the superintendent in appointing another to the vacancy was equivalent to removing Turner. The expression that the outgoing trustee should hold his office till his successor was appointed and qualified could not mean that one removed from office could nevertheless continue to exercise its functions until his successor qualified. *Terry v. Hargis* (Ky.) 74 S. W. 271.

The contract with appellee was invalid for another reason: The notice to Callahan does not purport to have been given till the morning of July 1st. The paper is shown by appellee's witness to have been returned to the trustee who is friendly to his contest. It was not produced on the trial. The only witness who undertook to state its contents was Sam Callahan, who testifies that it stated that the meeting was to be the next morning—"8 o'clock in the morning"; at least he understood it to mean, and it was susceptible of the construction that it meant, the following morning, or, if not, then any morning. It was not sufficient notice for the meeting July 1st. *Scott v. Pendley* (Ky.) 71 S. W. 647. Appellee seeks to break the force of Callahan's testimony by showing that Callahan shot at him and attempted to assassinate him during this controversy. Callahan admits the shooting, but claims that appellee was trying to shoot him with a 32-caliber rifle.

During this controversy appellee has attempted to teach the public school under the void contract with Turner and Asberry Spicer and the order of injunction in this case. Appellant has continued to teach a few children in the same neighborhood, but disclaims that he was attempting, after the order of injunction, to teach the common school in that district. The court is of opinion that the judgment requiring the county superintendent to pay the public fund appropriated to this district to appellee was error. Nor would it have been right to have adjudged it to appellant, because he did not teach the school. His remedy is upon the injunction bond, as is that of the county superintendent, if anything has been paid to appellee under his contract and the judgment of the court. In any event, the district, which has suffered enough from this mismanaged affair, in-

volved, if the evidence is to be believed, bribery, incompetency, attempted homicide, house burning, and all manner of shameless wire-pulling by ambitious partisans, should not lose the money allotted to it, no lawful common school having been taught within the district for the year.

The judgment is reversed, and the cause remanded with directions to dissolve the injunction and to dismiss the petition.

BOARD OF TRUSTEES OF PUBLIC LIBRARY OF CITY OF COVINGTON v. BOARD OF EDUCATION OF CITY OF COVINGTON.

(Court of Appeals of Kentucky. June 17, 1903.)

PAYMENT—UNCONSTITUTIONAL LAW—RECOVERY.

1. Money paid to the board of trustees of public library of a city pursuant to Ky. St. 1899, § 3210, authorizing the payment to such board of a certain per cent. of the taxes levied for school purposes, before the statute was declared in conflict with Const. § 180, may be recovered back by the board of education of such city.

Appeal from Circuit Court, Kenton County.

"Not to be officially reported."

Agreed case between the board of education of the city of Covington and the board of trustees of the public library of said city to determine whether the amount paid to the board of trustees should be repaid to the board of education. Judgment for the board of education, and the board of trustees appeals. Affirmed.

H. C. Theissen, for appellant. W. A. Byrne, for appellee.

HOBSON, J. By section 3210, Ky. St. 1899, provision is made for a public library in cities of the second class, and by the act of March 15, 1898 (Laws 1898, p. 158, c. 63, § 4), the section was amended, and, among other things, the following provision was inserted: "In aid of the establishment and maintenance of such library, there is hereby appropriated and the general council shall annually direct to be paid over to said library board three per centum of the net amount of taxes levied annually in the city for school purposes, and one-half of the net amount of all fines and costs collected in the police court." In Board of Education of the City of Covington v. Board of Trustees of Public Library (Ky.) 68 S. W. 10, this provision of the act was held in violation of section 180 of the Constitution, providing that no tax levied and collected for one purpose shall ever be devoted to another purpose. Concluding its opinion, the court said: "It is not a case of using a part of the school tax for what is undoubtedly a school purpose and a part of the school system—as the kindergarten and the high school—but the

appropriation of a part of the tax levied and collected for school purposes to an object which, however laudable it may be, is not of the school, and should be otherwise and specifically provided for." Before that decision was rendered, the city treasurer had paid over to the trustees of the library out of the taxes levied for school purposes for the year 1900 \$1,792.82, and out of the taxes levied for the year 1901 \$1,734.98. Thereupon an agreed case was filed by the board of education against the board of trustees of the public library to determine whether the amount so paid should be repaid. The circuit court entered judgment in favor of the board of education, and the trustees of the library have appealed.

It is argued for the appellant that the money was paid voluntarily, under a clear provision of the statute, and, having been used by the trustees of the library, they should not now be forced to pay back that which was received in good faith, after expenditures have been made by them upon the faith of the payment. The rule in this state is that, where money is paid without consideration, under a clear mistake of law or fact, which should not in good conscience be retained, it may be recovered. *McMurtry v. Kentucky Central Railroad*, 84 Ky. 462, 1 S. W. 815; *Bruner v. Stanton*, 102 Ky. 459, 43 S. W. 411, and cases cited. The act under which the money was paid, being unconstitutional, was void. The legal status of the parties is the same as if the act had not been passed, for, so far as it authorized a diversion of the taxes levied for school purposes to another purpose, it was a nullity. The situation, therefore, is that money collected for school purposes has been paid out of the public treasury without warrant of law, and in violation of the provision of the Constitution. The treasurer was without authority to make the payment. The trustees of the library were without authority to receive it. While they acted in good faith, their legal situation is, simply, that they have in possession money levied for school purposes, which cannot be legally used for any other purpose. If they are allowed to keep the money, proper effect will not be given to the provision of the Constitution. The rule is fundamental that he who obtains public funds without right must return them.

Judgment affirmed.

HUTSELL v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 10, 1903.)

HOMICIDE—EVIDENCE—ADMISSIBILITY—INSTRUCTIONS—CONTINUANCE—ABSENT WITNESS.

1. In a prosecution for a homicide committed at a picnic, it was proper to receive evidence that defendant was intoxicated; that shortly before the homicide occurred he fired his pistol, and afterwards walked across the dancing pavilion, which was filled with people, with the pistol in his hand; that as he did so he made

insulting and threatening remarks, the evidence indicating a desire on his part for trouble.

2. Failure to define "feloniously" in a prosecution for homicide was not error, though the court did define "willful" and "willfully," "malice" and "malice aforethought."

3. Use of the expression "good faith believe" in an instruction on self-defense was not misleading.

4. An application for a second continuance beyond the term of a prosecution for homicide, on account of an absent witness, was properly denied where defendant in his affidavit did not show any effort to obtain the witness or his deposition, though he had stated in a former affidavit that he had been able to locate the witness in Indiana, and had been granted a 10-day continuance on that account, especially where the record showed that defendant had had five months to prepare his defense, and where there were many eyewitnesses of the homicide who testified at the trial.

Appeal from Circuit Court, Pendleton County.

"Not to be officially reported."

Howard Hutsell was convicted of manslaughter, and appeals. Affirmed.

Clare, Dickerson & Clayton and B. F. Menefee, for appellant. McKenzie R. Todd and Clifton J. Pratt, for the Commonwealth.

NUNN, J. On the 26th of July, 1902, the appellant shot and killed one David Barton with a pistol at the house of James McMillan, in Pendleton county, Ky., and at the October term, 1902, of the Pendleton circuit court the appellant was indicted by the grand jury for the willful murder of Barton. Upon the return of the indictment by the grand jury, the court fixed a day in that term for the trial, and on that day, when the case was called for trial, the appellant filed his affidavit asking for a continuance until the next term of the court, asking for further time for the preparation of his defense, and also stating that he could prove, by absent witnesses, facts material to his defense. The court granted the continuance, and set the trial for a day in the following January term. On that day the appellant again announced not ready for trial, on account of the absence of one Leslie Gowers and other witnesses named in his affidavit. He alleged that he could prove by Gowers, if present, that he was at the scene of the killing and saw it, and that Barton was advancing on appellant rapidly with an uplifted hand, with something in his hand, and that Barton made a stroke at appellant at or about the time appellant fired the first shot. That he learned for the first time what he could prove by this witness about two or three weeks before the date of the affidavit, and that he learned then that he was in the state of either Ohio or Indiana. That he learned on that morning that he was in the state of Indiana. The court refused the application of appellant for a continuance until the next term of court, but set the case for trial at a day 10 days later in the term. On that day the appellant filed another affidavit for a continuance, on the grounds of the absence of the witness Gowers and other wit-

nesses named in the affidavit. The court overruled this application for a continuance, a trial was entered into, the evidence was heard, and the jury returned a verdict finding him guilty of manslaughter, and fixed his punishment at confinement in the penitentiary for 18 years. The court overruled appellant's motion for a new trial, and granted him an appeal to this court.

The facts of the killing, as appear from the record, are in substance as follows: On that day James McMillan gave a dancing picnic in his yard at which there was an attendance of about 75 persons. There was a pavilion of sufficient size to accommodate three dancing sets at one time. About 20 feet from it in a southerly direction was a booth, at which confectionery, etc., was sold. The yard was inclosed by a fence, a barn making a part of the fence on the east. Appellant went from near Flingsville, in Grant county, to this picnic, a distance of about seven miles, and reached there about dusk. To some extent he participated in the dance, and after a few hours became partially intoxicated. That he fired his pistol in the yard, which he claimed was an accident. Then, with his pistol in his hand, he walked across the dancing pavilion, which was at that time filled with ladies and gentlemen. As he walked across the pavilion he made offensive remarks, such as, "I live in Grant county, and all the rakes live in Pendleton," and "I am not afraid of white stockings and white gloves"; and, when some one told him to stop talking that way and go with him, he said, "I don't have to; no one can stop me, and I won't go anywhere with any d—n son of a ——" and said that that picnic would be long remembered by others as well as himself. David Barton, the man he killed, approached him and said to him that he was his friend, and for him to come go with him and get a drink of lemonade, and he answered him, that he would not go any place with any d—n son of a ——. About that time the appellant started toward the front gate; some one in the crowd made some noise, and appellant thought it was in derision of him, and turned and made some remark; he started again, and a similar noise was made, and he stopped and turned again and commenced waving his hat, and Barton started in his direction. Some of the witnesses stated that Barton walked leisurely, and some rapidly, but all, both for the commonwealth and for the appellant, who testified on that point, state that he was walking with his hands by his side, without anything in them, and that appellant began to back away with his hand behind his hip; that about the time Barton got within from three to eight feet—the witnesses varying—the appellant fired a shot at him, which it seems missed him, and they suddenly ran together and clinched, it appearing that Barton was trying to get hold of the pistol. While clinched, and going round and round in the direction of the fence, the appellant fired two more

shots. They fell, the appellant backwards, and Barton on him. Barton rolled off of him upon the ground, dead. Appellant was severely wounded in the back. He was put under arrest, and put in the smokehouse during the remainder of the night. There were two physicians present, who dressed the wound of appellant on the next morning. They found a wound under the left shoulder blade; the skin was grained about three inches in length and one-half inch in width; there was an open wound for about two inches, and below both there was a cross tear. That they probed the wound between the skin and the muscles, and they gave it as their opinion that the wound was made by something blunt, and not by a knife. They were shown the place where the appellant and deceased fell, and the blood upon the ground indicated that it was the place. They stated that they found some broken glass and two stubs from cherry sprouts, which appeared to have been cut slanting with an ax, the larger one about the size of the finger, five or six inches long, and the other one much shorter and smaller, and within about two inches of the larger one. The appellant pleaded self-defense, and when put upon the stand denied all the improper conduct testified to against him, and stated that Barton and two others were approaching him in a menacing manner, and that he believed that he was in danger of losing his life, when he fired one shot and missed. Then Barton grabbed him and cut him, when he fired two shots and killed him. The evidence further shows that the deceased was about 62 years of age at the time he was killed.

The appellant contends that the court erred to his prejudice in allowing evidence, over his objection, to go to the jury, in that it permitted evidence of his intoxicated condition, the exhibition of his pistol, of his firing it, and the insulting and threatening remarks made by appellant from 10 to 30 minutes prior to the killing. That this was no part of the *res gestæ*, and had a tendency to prejudice the minds of the jury against him and his defense. We are of the opinion that the court did not err in this. He exposed his pistol on the pavilion in the presence of the crowd of ladies and gentlemen, using oaths. He showed a desire to start trouble. He was armed, prepared for it, and appeared to be inviting an attack from some one of those present. His actions and words for some time before the homicide indicated a mind filled with general malice, and a purpose to injure or kill some one. The case of *Whittaker v. Commonwealth* (Ky.) 17 S. W. 358, was one in which the error complained of was very similar to the one before us. In that case the court said: "The evidence of these threats and this conduct was not competent as part of the subsequent *res gestæ*; they were not a part of the bloody transaction; but it was competent as showing general

malice and a purpose to injure or kill some one, and the deceased became the victim."

The court, in its instructions, defined "willful" and "willfully"; "malice" and "malice aforethought." The appellant does not complain of the definitions of these terms as given by the court, but complains that the court erred in failing to define "feloniously," and claims that it was prejudicial error to define those terms without also defining this one. This was not error. The definitions given by the court could not have had any influence on the jury's understanding of the term "feloniously," or their conception of its meaning.

The appellant complains that the court erred in the use of the expression "good faith believe," and "had reasonable grounds to believe," in its instruction on self-defense. The criticism on the words "good faith" is not well taken. By the expression "good faith believe" the court evidently meant, and the jury could not have understood otherwise than that it meant, real or actual belief, and not pretended or assumed belief by appellant.

The appellant further contends that the court erred in refusing to grant him a continuance on account of the absence of Leslie Gowers. All the other witnesses named in his affidavit were present at the trial before the evidence was completed. The appellant in his last affidavit for a continuance did not state any fact showing any effort on his part to obtain the presence of Gowers. He had stated in his former affidavit that he had been able to locate Gowers in the state of Indiana. The court then continued the case for 10 days, and neither the affidavit nor the record discloses any effort upon the part of appellant to obtain the presence of the witness, nor any attempt to take his deposition, which under ordinary circumstances might have been obtained within the 10 days. And, in addition, the record shows that he had over 5 months in which to prepare his defense.

We are of the opinion that he did not show proper diligence; and in addition to this, there were many eyewitnesses to the killing. The commonwealth introduced 8 or 10, and the defense about the same number, and from all these eyewitnesses we feel that the jury were enabled to arrive at a just conclusion as to all the circumstances and facts connected with and surrounding the killing.

Perceiving no error prejudicial to the rights of the appellant, the judgment of the lower court is affirmed.

McVAW v. SHELBY et al.

(Court of Appeals of Kentucky. June 18, 1903.)

MINORS — APPOINTMENT OF GUARDIAN — ACTION FOR SALE OF REAL ESTATE — ABATEMENT — TITLE OF PURCHASER.

1. Under Ky. St. 1899, § 2022, providing that, if the minor is 14 years of age, he may nomi-

inate his own guardian, but, if the minor resides out of the state, the court may appoint a guardian of its own selection, the court may, on the application of minors who live out of the state and are over 14 years old, appoint a guardian of their choice.

2. An action by a guardian for sale of the minors' real estate does not abate by his resignation and failure of his successor to file an amended petition and cause an order to be made reciting the facts and substituting him as plaintiff; but it is enough to prevent the judgment of sale being void, and to give good title to the purchaser, that there are filed in the action copies of the proceedings as to resignation and appointment, and that the court makes an order reciting these facts, and approving the new guardian's bond.

Appeal from Circuit Court, Jefferson County, Chancery Division.

"Not to be officially reported."

Action by the guardian of Evelyn Shelby and another against Albert Shelby for sale of their real estate. From a judgment overruling exceptions of A. McVaw, the purchaser at the sale, to the report of sale, he appeals. Affirmed.

E. L. McDermott, for appellant. W. S. Pryor and Pryor & Sapinsky, for appellees.

NUNN, J. Reginald Shelby and his wife died in Jefferson county, Ky., prior to the year 1900, and left three, and only three, children—Evelyn, Alice M., and Albert Shelby—all of them being under 21, but over 14, years of age. M. C. Marshall, their uncle, was appointed by the Jefferson county court their guardian. These children were the owners of a house and lot in the city of Louisville, and these children, Evelyn and Alice M. Shelby, by their guardian, filed a petition in the Jefferson circuit court, chancery division, against Albert Shelby, for the sale of the property, alleging that it was a vested estate jointly owned by them, and was in their possession, and that it could not be divided without materially impairing its value, and for other reasons alleged that it would be to their interest to have it sold. These children resided with their uncle, M. C. Marshall. Soon after the institution of this action, he moved from the state of Kentucky, and took up his residence in the city of Dallas, Tex. He took the children there, and they resided there with him. Shortly thereafter he returned temporarily, and settled his accounts, and resigned as such guardian. Thereupon the court, on the written request of the infants, appointed the Louisville Trust Company as their guardian, and it executed bond as such guardian, and, by its proper official, took the oath required by law. Immediately thereafter it filed a copy of the proceedings in the county court, showing the resignation of Marshall and his settlement, and the order appointing the trust company, as exhibits in this action. Thereupon the following order was made in this action: "Came the Louisville Trust Co., by counsel, and filed herein a duly attested copy of the order of the Jefferson county court

of February 23, 1901, accepting the resignation of M. C. Marshall as guardian of the infant plaintiffs, Evelyn Shelby and Alice Maud Shelby, and of the infant defendant, Albert Shelby, and showing the appointment and qualification of the Louisville Trust Co. as guardian of the three infants just named. And came the Louisville Trust Co. as such guardian, and produced in court its bond, with its capital stock as surety, and the bond, being examined and approved by the judge, is ordered to be certified by the clerk of this court to the clerk of the Jefferson county court for record." Thereupon the court adjudged the sale of the house and lot described in the petition. The commissioner sold the same, and the appellant, A. McVaw, became the purchaser at the price of \$4,875. The appellant filed exceptions to the report of sale, claiming that sale was void for the following reasons: First, that the resignation of M. C. Marshall as guardian of the infant plaintiffs and defendant abated that action, and that same was not revived by his successor within the time required by law; second, that the order of the Jefferson county court appointing the Louisville Trust Company guardian of the infants was void; third, that at the time of the submission of this action for judgment it was a "stale case."

As to the third proposition, it is agreed by counsel for both appellant and appellees that it has no merit in it, and cannot avail the appellant.

As to the second exception, we are of the opinion that the order appointing the Louisville Trust Company as such guardian was not void. Section 2022 of the Kentucky Statutes of 1899 authorizes the county court to appoint guardians for infants who reside out of the state, even though the infants are over 14 years of age, and who may not have nominated their guardian; that court having jurisdiction to make the appointment in the county in which the infants' real estate may be situated; but, if no real estate, then in the county in which the infant may have personal estate.

As to the first exception, wherein the appellant claims that the action was abated by reason of the resignation of Marshall as guardian and the failure of the trust company to file an amended petition setting up its appointment and causing an order to be made reciting these facts and substituting it as plaintiff in lieu of Marshall, we are of the opinion that the action did not abate; and, while this would have been the better practice, yet the filing by it of the copy of the proceedings named, the execution of the bond required by the Code, and the order of the court with reference to these matters, made the Louisville Trust Company a party to the action. At most, this irregularity would only make this proceeding erroneous, and not void, and, the judgment not being void, the purchaser takes a good title. In

the case of *Bailey v. Fanning Orphan School*, 14 S. W. 908, the court said: "If the judgment is not void, but simply erroneous, in consequence of the alleged defects, the purchaser takes a title to the land, notwithstanding judgment may be reversed on account of these defects. But the judgment is not void in consequence of such defects. The judgment cures them, at least so far as the appellant [purchaser] is concerned." There are several cases to the same effect decided by this court.

We are of the opinion that the appellant obtained a good title by the purchase of the land herein, and the judgment of the lower court is therefore affirmed.

CITY OF MADISONVILLE v. PEMBERTON'S ADM'R.

(Court of Appeals of Kentucky. June 17, 1903.)

MUNICIPALITIES—DEFECTIVE STREET—SUFFICIENT OPENING—NOTICE—CONTRIBUTORY NEGLIGENCE—CAUSE OF DEATH—QUESTIONS FOR THE JURY—AMENDMENT OF PLEADINGS.

1. Where a city has graded one of its public highways, and put in a curbing, and permitted citizens to make a cinder sidewalk, which is constantly used by them, there is a sufficient opening or taking charge of the highway to render the city liable for a defect in the sidewalk, though it has not been improved by official action.

2. If a defect in a sidewalk has existed for such a length of time that the city, in the exercise of proper care, should have known of it, notice will be presumed.

3. Where a hole in the sidewalk has remained for several months, having been originally occasioned by the negligent act of the city's agent in undermining the curbing, the question of notice to the city of the defect is for the jury.

4. The use of a sidewalk known to be defective is not contributory negligence as a matter of law, the question being for the jury.

5. In an action for death from an injury occasioned by defective sidewalk, the question as to the actual cause of death is one of fact for the jury.

6. Allowing amendments to pleadings is a matter of discretion, with which the appellate court will not interfere.

Appeal from Circuit Court, Hopkins County.

"Not to be officially reported."

Action by H. R. Pemberton's administrator against the city of Madisonville. Judgment for plaintiff, and defendant appeals. Affirmed.

Jerrold A. Jonson, Polk Laffoon, J. Fletcher Dempsey, E. D. Morrow, and Wm. Worthington, for appellant. Gordon & Gordon & Cox and J. F. Gordon, for appellee.

BARKER, J. On the 12th day of February, 1900, H. R. Pemberton, while walking along the sidewalk of Lawrence street, in Madisonville, Ky., stepped into a hole, and was thrown down, his side striking the edge of the curbing, inflicting an injury, from the

effects of which, it is claimed, he died in the following August. W. J. Cox, having been appointed administrator of his estate, instituted this action in the Hopkins circuit court to recover of the city of Madisonville damages for the injury inflicted upon his decedent.

It is alleged in the petition that Lawrence street is one of the public highways of the city of Madisonville; that the defect in the sidewalk by means of which Pemberton was injured was known to appellant, or could have been known to it by the exercise of ordinary diligence, it having existed a sufficient length of time to put the municipality on notice. The answer put in issue the facts as to whether or not Lawrence street was a highway of the city, the negligence of the municipality in regard to the defect in the paving, that the injury complained of caused the death of appellee's decedent, and charged affirmatively that the accident was caused by the contributory negligence of appellee's decedent. The reply, as amended, controverted the affirmative allegations of the answer, and thus the issues were made up.

The material facts, as shown by the evidence, are as follows: On the evening of the 12th of February, 1900, at the hour of half past 7 o'clock, appellee's decedent, in company with his son, was walking along the sidewalk on Lawrence street, when he stepped into a hole about a foot and a half long, and from 15 to 18 inches in depth, which threw him down, striking his side against the edge of the curbing. He was extricated and helped to his feet by his son, and went on his journey, evidently thinking that he was not seriously injured, although he complained at the time of being hurt. On the following morning a considerable swelling or knot appeared on his side where the injury was inflicted, and he seems never to have been able to work at his business, except in a most desultory manner, up to his death. The sidewalk in which the defect causing the injury existed was not made by the city, but the carriageway of Lawrence street had been graded under an order of the municipality, and the curbing placed along its edge, thus separating the street proper from the sidewalk. The walkway was then made by the citizens filling in between the property line and the curbing with cinders or ashes. The hole by means of which the decedent was injured seems to have been caused by the cinders being washed out under the curbing into the street, owing, it is claimed, to the wrongful or negligent act of one of the city's employes, who, while engaged in some work for the city in the street, had undermined the curbing, thus taking away the support of the cinders which constituted the walkway, and, as a result of hard rain, the cinders had been washed under the curbing and out into the street, thus creating the hole by means

† 4. See *Municipal Corporations*, vol. 36, Cent. Dig. §§ 1677, 1755.

of which decedent was injured. Upon a trial of the case the jury returned a verdict in favor of appellee, awarding damages against the city in the sum of \$3,000. The motion for a new trial having been overruled, the appellant has brought the case here for review.

The evidence clearly established that Lawrence street was one of the highways of the city of Madisonville, and while it had not, by official action, improved the sidewalk, it had graded the street, put in the curbing between the highway and the carriageway, and permitted the citizens to make a sidewalk of cinders, which was constantly used by them; and this, in our opinion, is a sufficient opening or taking charge of the highway in question to require the city to keep the sidewalk free from dangerous obstructions or excavations. The case of *City of Louisville v. Brewer's Adm'r*, 72 S. W. 9, involved a question similar in principle to that at bar. Rawling street had been taken into the city of Louisville by a change of the boundary line of the municipality, under proceedings authorized by law. Prior to the annexation of the boundary in question, Rawling street was a county road. A number of houses had been built along and fronting this highway, and a cinder path had been placed along the edge of the road for the use of pedestrians, and three or four posts, one of which was the cause of the accident complained of, had been erected along the outside edge of the cinder path for the purpose of preventing wagons or other vehicles from being driven on or over it. The path was about four or five feet wide, and the post which occasioned the injury stood nearly in the middle of it, about one and a half feet further than the others. It was about two and a half feet high and six or eight inches square, and the top had been split to a sharp point. After this portion of the county road was taken into the city by annexation, it was continued and used as a public thoroughfare, and property fronting thereon assessed for taxation by the municipality. The plaintiff in the case cited, while walking along the cinder path at night, stumbled over the post in the path, inflicting wounds of which he died the next day. In that case, as in this, it was insisted that, in order to authorize a recovery, it was necessary for the plaintiff to establish the fact that the street in question had been formally accepted and improved by the city. This court, in their opinion, reviewing the authorities at length, held that under the facts as stated the corporation was liable; that it was its duty to keep the cinder path reasonably free from obstructions endangering the safety of pedestrians while using it. Undoubtedly the general rule is that a municipality charged with the duty of maintaining highways must keep its streets and sidewalks in a reasonably safe condition for the use of the travelling public. Nor is it

necessary, to charge the corporation with negligence, that it should have actual knowledge of the defect causing the injury. If the defect in the highway has existed for such a length of time as, by the exercise of proper care and diligence, the municipality ought to have obtained knowledge of it, notice will be presumed. The question of whether or not the obstruction or defect has remained in the highway sufficient time to place the municipality upon notice is a question of fact for the jury to determine. In the present instance the hole in the sidewalk had remained there for several months, having been caused, as before said, by the negligent act of one of the city's agents in undermining the curbing, thus permitting the hole to wash in the sidewalk.

The evidence showed that appellee's decedent, in a general way, knew of the existence of the hole into which he fell; but we do not think that this general knowledge, of itself, made him guilty of contributory negligence in using the sidewalk. This question also arose in the case above cited, and it was held, on authority of the case of *City of Maysville v. Guilfoyle*, 62 S. W. 493, that, although the decedent knew of the existence of the obstruction which caused his death, yet, inasmuch as he seemed momentarily to have forgotten it, the question as to whether or not he was guilty of contributory negligence was for the jury to determine. In the case of *City of Maysville v. Guilfoyle* the plaintiff knew of the existence of the defect which caused the injury. The court held: "It cannot fairly be said, as a matter of law, that appellee was guilty of contributory negligence by forgetting for the time the existence of the defect." In the *Modern Law of Municipal Corporations* (section 1292) it is said: "The fact that plaintiff had knowledge of the dangerous condition of a street will not prevent his recovery if he used reasonable diligence to prevent injury. Hence traveling on a sidewalk known to be out of repair is not negligence of itself. It may be evidence of negligence to use a street in a dangerous condition, but it is not negligence as a matter of law. The use of a street with knowledge of its unsafe condition is not contributory negligence where care is used proportionate to the known danger." Again, in section 1294 it is said: "Although a person is thoroughly familiar with the dangerous condition of a sidewalk by reason of its frequent use, yet if, through forgetfulness, he walks into a hole in such walk, and is thereby injured, it is not contributory negligence." The question of whether or not the use of the sidewalk by appellee's decedent was or was not contributory negligence under the circumstances was peculiarly within the province of the jury to determine, as was likewise the question of whether or not his death resulted from the injury complained of. There was a good deal of tes-

timony tending to show that his death resulted from other causes than the injury received by his fall, but the determining of that question was for the jury.

The trial court did not err in permitting the filing of the amended reply. It is true, it came late, but the admission of amendments is a matter which addresses itself to the sound discretion of the court, and with the exercise of this discretion we will not interfere.

Appellant complains of the instructions given, and the refusal of the court to give instructions asked by it; but a careful consideration convinces us that the court fairly presented the legal questions growing out of the facts of this case to the jury.

Perceiving no error in the record, the judgment is affirmed.

COMMONWEALTH v. FERIEL.

(Court of Appeals of Kentucky. June 16, 1903.)

CRIMINAL LAW—MISCELLANEOUS OFFENSES—RIGHT OF APPEAL.

1. An appeal will not lie from a conviction or acquittal of violating Ky. St. 1899, § 4335, prescribing a penalty of from \$5 to \$50 for the destruction of or injury to a public road, since section 4336, securing to both the state and defendant the right of appeal for violations of the act, limits such right to cases in which a party is fined more than \$50.

Appeal from Circuit Court, Marion County.
"Not to be officially reported."

W. D. Ferial was acquitted in the county court of willfully obstructing a public road, and the commonwealth appealed to the circuit court, and again appeals from a judgment of that court dismissing the appeal. Affirmed.

H. W. Rives, Clifton J. Pratt, and M. R. Todd, for the Commonwealth.

SETTLE, J. The appellee, W. D. Ferial, was arrested under a warrant charging him with the offense of willfully obstructing a public road in Marion county. Upon the trial before the county judge and a jury he was acquitted upon a peremptory instruction. The case was then appealed to the circuit court by the commonwealth, and upon motion by the appellee it was dismissed by that court, and from that judgment this appeal was prosecuted.

The only question presented by the record is whether the appeal by the commonwealth to the circuit court should have been entertained by that court. The warrant charged appellee with an offense under section 4335, c. 110, Ky. St. 1899, which provides that "any person who shall willfully obstruct, injure, or destroy, any of said public roads * * * shall be fined for each offense not less than \$5.00, nor more than \$50.00." Section 4336 provides that: "In all prosecutions under this act the party shall be entitled to trial by jury. In all cases, when the party is

fined more than \$50.00, an appeal shall lie to the circuit court. Either commonwealth or defendant may prosecute the appeal; the appeal to be taken as now provided by law." It will be observed that an appeal to the circuit court is permitted by the section supra only when the person accused is fined more than \$50. In that event the appeal may be taken either by the commonwealth or defendant. The appellee was not fined in this case at all, and could not have been fined more than \$50, if he had been found guilty, as the maximum fine named in section 4335, under which he was accused and tried, is only \$50. It would seem to follow, therefore, that the appeal did not lie to the circuit court; consequently that court did not err in dismissing the appeal. The right of appeal can exist only when allowed by statute, and section 4336 confers the only right of appeal in prosecutions resulting under section 4335 of the statute supra. In such a case, therefore, as that of appellee's, section 4336 must control, regardless of any other provision of the law that may confer the right of appeal as to other offenses. This view of the case makes it unnecessary for us to consider other questions urged in the brief of counsel.

Wherefore the judgment is affirmed.

HINKLE v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 16, 1903.)

INTOXICATING LIQUORS—INDICTMENT—SUFFICIENCY.

1. An indictment charging the illegal sale of intoxicating liquors by having in possession and control a house and inclosure where such liquors were furnished and obtained in violation of law, does not state an offense, because of the failure to allege guilty knowledge or personal participation in the selling.

Appeal from Circuit Court, Knox County.
"Not to be officially reported."

Isaac Hinkle was convicted of illegally selling intoxicating liquors, and appeals. Reversed.

B. B. Golden, for appellant. Clifton J. Pratt and M. R. Todd, for the Commonwealth.

O'REAR, J. Appellant was indicted under an act approved May 7, 1886, entitled "An act to prohibit the sale of spirituous, vinous, or malt liquors, or intoxicating beverages, * * * within five miles of Union College in Knox County." 2 Laws 1885-86, p. 494, c. 995. The indictment specifically charged in apt language the commission of the offense, but it needlessly undertook to say how the selling was done, wherein it averred that it was "by having in his [defendant's] possession and control a house and inclosure where spirituous liquors were at the time furnished and obtained in violation and evasion of law, the said Hardison [witness] obtaining same in said house and inclosure," etc. The circuit court overruled

a demurrer to this indictment. The evidence disclosed more of guilty knowledge and conduct than is charged in the indictment, and enough to have justified the submission of the case to the jury, and to have supported the verdict, if the indictment had been such as to have warranted its submission to the jury. Merely being in the legal possession and control of the house and inclosure where spirituous liquors were sold or furnished without guilty knowledge of the fact, or without personally participating in it, is not enough to sustain the charge attempted to be set up by the indictment.

The judgment is reversed, and cause remanded, with directions to award appellant a new trial, and to sustain the demurrer to the indictment, and for further proceedings not inconsistent herewith.

LITER v. FISHBACK.

(Court of Appeals of Kentucky. June 10, 1903.)

INFANTS—SALE OF LAND—VALIDITY OF PROCEEDINGS—REMAINDER INTERESTS—REINVESTMENT OF PROCEEDS—POWER OF EQUITY.

1. The powers of courts of equity to sell and reinvest infants' real estate are not inherent, but statutory.

2. It is an indispensable requisite to the validity of proceedings under Civ. Code, § 491, which provides that the owner of a particular estate may institute proceedings for the sale of real estate belonging to infants in remainder, that the provision of the statute as to reinvestment of the entire proceeds be followed.

3. Civ. Code, § 490, which provides that a vested estate in real property jointly owned by two or more persons may be sold by order of a court of equity in an action brought by either of them, though the plaintiff or defendant be an infant, if the estate be in possession, and the property cannot be divided, only applies where the estate is in the possession of all the joint owners, and has no application where it is sought to sell land in which one person has a life estate and another the remainder, the life tenant alone having possession.

Appeal from Circuit Court, Jefferson County, Chancery Division.

"Not to be officially reported."

Action by C. L. Fishback against W. W. Liter. Judgment for plaintiff, and defendant appeals. Affirmed.

Lane & Harrison, for appellant. E. L. McDonald, John M. Scott, and Chas. Bowser, for appellee.

BURNAM, C. J. The appellee, Claude L. Fishback, who was plaintiff in the court below, instituted this suit against the appellant, W. W. Liter, for the possession of a tract of 15.6 acres of land lying in Jefferson county. He alleges, in substance, that on the 11th day of October, 1888, his father and statutory guardian, Edward P. Fishback, brought a suit against him in the Louisville law and equity court when he was an infant, in which he alleged that he was the owner as tenant by the curtesy of a life estate in the land, and that plaintiff was the owner of

the remainder in fee; that he sought to have the property sold, and out of the proceeds the value of his life estate paid to him, and the remainder reinvested in other real estate for plaintiff; that a judgment was rendered in this proceeding on the 18th of March, 1890, decreeing a sale thereof, and under which judgment the marshal of the court sold the property to William B. Mann at the price of \$520, which was confirmed, and that thereafter a deed conveying the property was made to Mann in consideration of the purchase price; that subsequently, on the 11th day of January, 1896, Mann and wife conveyed the property to the defendant, Liter, who was in possession thereof. The defendant, in his answer, alleged that the suit of Edward P. Fishback against plaintiff, in which the decree for the sale of the land was entered, was brought pursuant to the provisions of section 491 of the Code for a reinvestment of the proceeds in other real estate; and that the Louisville law and equity court had jurisdiction of the subject-matter of the suit and persons of the plaintiff and defendants prior to the rendition of the judgment; and that its judgment had never been vacated, set aside, modified, or appealed from, and is in full force and effect; and pleaded the judgment in that case and the proceedings had thereunder as a bar to plaintiff's cause of action. The plaintiff, in his reply, denies that the Louisville law and equity court, in the action of Edward P. Fishback v. C. L. Fishback, had jurisdiction for a sale of the property for purposes of reinvesting the proceeds in other real estate, and denies that he ever received the benefit of the purchase price paid into court in that action, or any part thereof, or that he now keeps and retains same. In the second paragraph of his reply he denies that the judgment of sale was made in pursuance of section 491 of the Civil Code, but that it purported to be rendered in pursuance of section 490 of the Code, as it ordered a sale of the property because it was indivisible, and that the proceeds might be divided between Edward P. Fishback and the plaintiff. He alleges that the court had no jurisdiction to render the judgment, and that it was void, and charges that no reinvestment was ever made of the proceeds, but that his father and guardian was permitted to withdraw the entire purchase money from the court, and appropriate it to his own use; that both Edward P. Fishback and John Hawkins, the security on the bond which was given by Fishback as guardian, had both died many years ago, insolvent. The case was submitted on the pleadings, and the chancellor held that the judgment under which plaintiff's lot was sold was void, and that no title passed, and directed that a writ of possession should issue therefor in favor of the plaintiff, and the defendant has appealed.

The question for decision is, did the Louisville law and equity court have jurisdiction

to decree a sale of the infant's real estate under the allegations of the petition? The law is well settled in this state that the powers of courts of equity to sell and reinvest infants' real estate are not inherent, but statutory. See *Fall City Real Estate, etc., v. Van Kirk*, 71 Ky. 459; *Paul v. Paul*, 66 Ky. 484; *Bridgeford v. Beck*, 74 Ky. 540; *Walker v. Smyser*, 80 Ky. 620; *Henning v. Harrison*, 76 Ky. 725; *Swearingen v. Abbott* (Ky.) 35 S. W. 925; *Hicks v. Jackson* (Ky.) 68 S. W. 419. In *Ogden v. Stevens* (Ky.) 33 S. W. 932, the court, through Judge Pryor, said: "This court has frequently held, and particularly in the late case of *Kinslow v. Grove* (Ky.) 32 S. W. 933, that the jurisdiction of the chancellor to sell infants' real estate is derived solely from the Code or statutes, and any other mode is void, and passes no title." In *Isert v. Davis* (Ky.) 32 S. W. 294, the court, in considering the question of the sale of an infant's real estate, said: "The statutes regulating proceedings of this kind are clear and explicit. They are designed for the protection of the class of persons who are unable to protect themselves, and, unless rigidly adhered to by the courts, the persons who are the peculiar objects of the chancellor's care will constantly be made the victims of injustice and wrong." And the question was considered at length in *Elliott v. Fowler* (Ky.) 65 S. W. 849. Section 489 provides that a vested estate of an infant may be sold, first, to pay the debt of an ancestor; second, for the payment of the infant's debt or liability; third, for the maintenance and education of the ward; fourth, for the reinvestment of the proceeds. The sale was clearly not made under this section of the Code. Section 491 provides that the owner of a particular estate may institute proceedings for the sale of real estate belonging to infants in remainder, or the remainderman may sue the life tenant in the same way, provided the entire proceeds are held for reinvestment in other real estate. There is no pretense that the provisions of this statute as to the reinvestment of the entire proceeds were followed, as was held in *Dineen v. Hall* (Ky.) 65 S. W. 445, 66 S. W. 392, to be an indispensable requisite. Section 490 of the Code provides that: "A vested estate in real property jointly owned by two or more persons may be sold by order of a court of equity in an action brought by either of them, though the plaintiff or defendant be an infant, if the estate be in possession, and the property cannot be divided without materially impairing its value or the value of the plaintiff's interest therein." Sales can only be ordered under this section when the estate is jointly held, and in possession of all the joint owners, and it has no application where the life tenant has the sole possession, as in the case at bar. This section was considered in *Malone v. Conn*, 95 Ky. 93, 23 S. W. 677.

It is apparent from the pleadings that the sole purpose of the suit instituted by E. P.

Fishback in October, 1888, was to procure a sale of the land in which he held a life estate for the purpose of reducing his interest to cash. This the court had no jurisdiction to decree (see *Dineen v. Hall* [Ky.] 65 S. W. 445, 66 S. W. 392), and the judgment directing it was void, as against the rights of the infant remainderman.

Judgment affirmed.

LOUISVILLE & N. R. CO. v. HARROD.

(Court of Appeals of Kentucky. June 10, 1903.)

NEGLIGENCE—INSTRUCTIONS—DUTY TO GIVE—PREJUDICIAL ERROR.

1. Where, in an action for injuries sustained by reason of a defective derrick, the evidence for both plaintiff and defendant showed that the derrick was out of repair and defective, and had been in such condition for a long time prior to the injury, errors in the instructions in assuming that defendant had negligently permitted the derrick to remain out of repair were not prejudicial.

2. Under Civ. Code Prac. § 817, providing that either party to a civil cause may ask written instructions on points of law, which shall be given or refused by the court before the commencement of the argument to the jury, it is not error for the court, in a civil action, to fail to instruct on a point of law involved, where no instruction is requested; but, if a party requests an instruction thereon which is refused because of defects, in form or substance, the court must give a proper instruction.

Appeal from Circuit Court, Franklin County.

"To be officially reported."

Action by Robert E. Harrod against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Ira Jullian and Edward W. Hines, for appellant. J. A. Scott and W. C. Marshall, for appellee.

NUNN, J. The appellee filed this action in the Franklin circuit court, among other things alleging, in substance, that while he was engaged in delivering a load of tobacco to the appellant, a common carrier for hire, at its depot in Frankfort, Ky., and while lifting the hoghead from the wagon by means of a derrick, he was struck upon the face and chin with the handle thereof, which cut through his lower lip and chin, knocked out several of his teeth, cut his tongue, greatly disfiguring him, destroying his speech, and otherwise permanently injuring him, and that his injuries were the result of the defective, unsafe, and dangerous condition of the derrick, which was known to appellant, or could have been known to it by the exercise of ordinary care, in time to have prevented the injury, but was unknown to appellee, and could not have been known to him by the exercise of ordinary care. The appellant, by its answer, traversed the allegations of the petition, and alleged that appellee's in-

juries were received as the result of his own contributory negligence. This affirmative matter was traversed by the appellee. A trial was had, which resulted in a verdict and judgment in favor of appellee for the sum of \$1,000. The appellant's motion for a new trial was overruled by the court, and the case is here on appeal.

The only grounds urged for a reversal are alleged erroneous instructions given by the court, and the failure by the court to give the instruction offered by it on contributory negligence.

The appellant contends that the instructions given by the court might well have been construed by the jury as assuming that appellant had negligently permitted the derrick to be and remain out of repair. Even if the contention of appellant is correct, it was not an error prejudicial to the appellant, for the reason that the evidence both for appellant and for appellee showed that the derrick was out of repair and defective at the time of the injury, and had been in such condition for a long period of time prior thereto.

The evidence of appellee was that he was using the derrick in unloading his hogshead of tobacco, at the time of his injury, in a careful and prudent manner; that by means of the derrick he had raised the hogshead from the wagon, had turned it preparatory to lowering it to appellant's platform, and commenced lowering it. The chain, or something about it, caught for an instant, and then suddenly gave way, and the hogshead went down with such force as to jerk the handle out of his hand and hit him in the face and injure him, as stated.

The appellant introduced one or more witnesses who stated that, some time after the appellee's injuries were received, the appellee, in relating how he received his injuries, stated that he was lowering the hogshead, and he thought it had reached the platform when it had not, and he turned the handle loose, and then it hit him in the face. The appellee denied this, and said he did not make such statements, nor did he receive his injuries under such circumstances.

The court did not give any instruction on contributory negligence on the part of appellee. The appellant offered one, which the court properly refused, because, as drawn, it did not contain the law of contributory negligence. The court should, however, have given an instruction on contributory negligence; and, under the evidence, it was error prejudicial to the appellant in failing to do so. That part of section 317 of the Civil Code of Practice which is applicable to the question before us reads as follows: "Either party may ask written instructions to the jury on points of law, which shall be given or refused by the court before the commencement of the argument to the jury." It appears from this record that the court, on its own motion, gave such instructions as were

given to the jury. According to the opinion of this court in the case of *Clark v. Baker*, 7 J. J. Marsh. 197 (giving it a strict construction), the lower court did not err in failing to give an instruction on contributory negligence after it had refused the improper one offered by appellant. But it appears from later decisions of this court that the opinion in the case *supra* has been to some extent modified. See the case of *Swope v. Schafer*, 4 S. W. 300. In that case counsel for appellants contended, as the lower court assumed the province of instructing the jury unasked, it should have given the whole law of the case, suited to every state of fact upon which the jury might have properly found a verdict for either party. The court, in discussing this question, said: "This rule has never been applied to the trial of civil cases to the extent stated by counsel. For though the court may, in such case, instruct the jury without being moved so to do, it is not bound to instruct. *Clark v. Baker*, 7 J. J. Marsh. 197. Nevertheless it seems to us that if the court does, on its own motion, instruct in a civil case, it should not direct the jury unconditionally to find against a party upon a given hypothesis, when there may be another alike supported by the evidence, but withheld from the consideration of the jury, upon which they might find in favor of such party." The rule upon this question now is that, where a party in a civil case fails to offer an instruction upon a point of law involved in the case, it is not error in the court to fail to instruct on that point; but if a party offers an instruction upon some point of law involved, which is refused by the court because of defect in form or substance, then it is the duty of the court to prepare, or have prepared, and give, a proper instruction on that point.

For these reasons, the case is reversed, and the cause remanded to the lower court for further proceedings consistent herewith.

NEW YORK LIFE INS. CO. v. WARREN DEPOSIT BANK.

(Court of Appeals of Kentucky. June 16,
1903.)

INSURANCE—FORFEITURES—PREMIUM NOTES —NONPAYMENT—OFFER TO RETURN—ESTOP- PEL—PAID-UP POLICY—ACTIONS—LACHES.

1. Where an insurance company made no attempt to collect a premium note after its maturity, which provided that, in case the note was not paid, all claims to further insurance, which full payment in cash of the premium would have secured, should be forfeited to the company, except as otherwise provided in the policy, the fact that the company did not offer to return the note at its maturity to the maker did not estop it from relying on the forfeiture provided therein.

2. Where an action was not brought to obtain a paid-up policy in accordance with the terms of a policy which was forfeited for nonpayment of premiums, within five years after forfeiture, the right to such paid-up policy was barred by laches.

Appeal from Circuit Court, Warren County.
 "Not to be officially reported."

Action by the Warren Deposit Bank against the New York Life Insurance Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Humphrey, Burnett & Humphrey and Mitchell & Du Bose, for appellant. J. M. Galloway, Jno. B. Rodes, and W. B. Gaines, for appellee.

NUNN, J. On December 9, 1899, appellant issued to E. A. Porter a policy of insurance for \$5,000 on the ordinary life plan. Soon after the issue and delivery of the policy, it was assigned and put in pledge to the Warren Deposit Bank as security for a debt owing by E. A. Porter to the bank. The premiums were paid annually until December 9, 1896. The total annual premium was \$232.50. On December 9, 1896, when the succeeding year's premium became due, by an agreement between the insured and appellant, the former was permitted to pay \$58.38 in cash, and to execute and deliver his promissory note for \$175.12, payable June 9, 1896. At the maturity of that note he was unable to pay all of it, and, by an agreement with the company, he was permitted to pay \$43.78; leaving a balance due of \$131.34, including interest to that date. Thereupon he executed and delivered to the company his note for that sum, due September 9, 1896. No part of that note was ever paid. The note is as follows: "Pol. 339,686. New York, June 9th, 1896. Three months after date I promise to pay to the order of the New York Life Insurance Company, \$131.34 at the office of the company, 346 Broadway, New York. Value received. This note is given in part payment of the premium due December 9th, 1896, on the above policy, with the understanding that all claims to further insurance and all benefits whatever which full payment in cash of said premium would have secured shall become immediately void and be forfeited to the New York Life Insurance Company, if this note is not paid at maturity except as otherwise provided in the policy itself. [Signed] E. A. Porter." From September 9, 1896, to October 22, 1901, neither said Porter, nor his assignee, the bank, nor any one for him, made any demand of appellant for a paid-up policy, which privilege was specially provided for in the policy.

This court, in the case of *The Washington Life Ins. Co. v. Miles*, 66 S. W. 740, fixed five years as a reasonable time in which an action might be brought for a paid-up policy, and after that time such action could not be maintained. Also, in the case of *The Equitable Assurance Society of the United States v. Warren Deposit Bank* (decided by this court at the present term, on the 10th of June, 1903) 75 S. W. 275, the court again sustained and approved the limit therein stated.

It is contended by appellees that the ex-

ecution and delivery of the note copied above, constituted satisfaction of the premium until the next regular premium was due, December 9, 1896, and that the condition in the note, to wit, "the policy * * * shall become immediately void and be forfeited to the New York Life Insurance Company if this note is not paid at maturity," cannot avail appellant, for the reason that it did not return, or offer to deliver or return, the note, at its maturity, to the maker. There is no pretense that after the maturity of this last note, on September 9, 1896, appellant, through any agent or representative, attempted to collect same, or that any demand for payment was made. It remained silent and inactive in the matter. By such conduct it did not waive its right to claim and demand a forfeiture on September 9, 1896, as expressed in the note referred to. See *Union Central Life Ins. Co. v. Duvall*, 46 S. W. 518; *Moreland v. Same*, 46 S. W. 516; *Manhattan Life Ins. Co. v. Myers*, 59 S. W. 30; *Same v. Savage's Adm'r*, 63 S. W. 278; and other cases recently decided by this court. It appearing that more than five years had elapsed from the maturity of this last premium note to the institution of this action, therefore the special judge, in sustaining the demurrer to appellant's answer pleading laches, was in error.

The judgment is reversed, and cause remanded, with directions to overrule the demurrer, and for further proceedings consistent herewith.

SETTLE, J., not sitting.

SENN v. LOUISVILLE MALTING CO.

(Court of Appeals of Kentucky. June 16, 1903.)

DEED—ASSUMPTION OF INDEBTEDNESS—RIGHT OF CREDITOR—FRAUDULENT CONVEYANCE—RECONVEYANCE—SUFFICIENCY OF EVIDENCE.

1. Evidence in an action by the creditor of a grantor partnership against the grantee, on the theory that the latter had assumed partnership debts, examined, and held to show such assumption, notwithstanding the subsequent alteration of the deed, and also to show that the grantee was the continuous owner, notwithstanding the grantors' apparent title; that having been originally conferred on them by the grantee in fraud of his creditors.

Appeal from Circuit Court, Jefferson County; Common Pleas Division.

"Not to be officially reported."

Action by the Louisville Malting Company against Martin Senn. Judgment for plaintiff, and defendant appeals. Affirmed.

Lane & Harrison, for appellant. J. J. McHenry and E. W. Sprague, for appellee.

NUNN, J. On the 4th day of August, 1898, Wegenast & Berger, sons-in-law of appellant, conveyed to him a brewing plant in the city of Louisville, together with all the wagons, carts, horses, and mules used in conducting the business of the firm, and all notes

and accounts due the firm, in consideration that appellant surrender to them a note of \$5,000 which he held against them as the purchase price of the brewery (appellant had previously sold the brewery to them), and also that appellant would pay certain notes to one Walters, which were a lien on the brewery, and pay all the debts created by them in the conduct of the business of the brewery. Appellee, by counsel, about the 22d of September, 1898, addressed a letter to appellant, referring to the stipulations of this deed of record, and demanded of him payment of the balance of their claim, of \$300, which was created for hops sold Wegenast & Berger, and used by them in this brewery. Appellant did not respond to this letter, but went to his attorney with Wegenast & Berger, and claimed that in drafting the deed a mistake had been made—that he had not agreed or assumed to pay the debts which Wegenast & Berger had created in the brewing business—and caused the attorney to prepare another deed, correcting or changing the first one by stating that Senn, appellant, did not assume and was not to pay the debts referred to. They, however, failed to correct the deed, wherein it stated that appellant was to take and become the owner of all the notes and accounts due the firm of Wegenast & Berger, created in the business. Appellee then brought this action against the appellant upon its account, alleging that he had assumed to pay it. Appellant answered, denying that he had assumed to pay it, except in the manner stated. The action was transferred to the equity docket and tried, and the lower court adjudged that appellant should pay the debt, and he has appealed from that judgment.

The record discloses these facts in addition to those stated: That appellant had purchased from one Walters this brewery plant, and owed Walters a balance of the purchase price of over \$7,000, and that appellant was about to be sued by Walters for libel or slander, and, as claimed by him, to prevent the property from becoming involved with liens, he sold it to his sons-in-law, Wegenast & Berger, and conveyed to them the plant, together with all wagons, carts, horses, mules, notes, and accounts contracted in the business, in consideration that Wegenast & Berger should pay him \$5,000, and assume the payment of the \$7,000 due Walters, purchase money, and to pay all notes and accounts due by appellant, contracted in running the brewery. The title remained in Wegenast & Berger for about one year, and then (August 4, 1898) the property was reconveyed to appellant for the consideration stated, and thus remained until September 23d, when the change or correction stated was made. Appellant and Berger both testify that their agreement was that the property should be reconveyed to appellant on the same terms as when he conveyed to them, and each made this statement more than once in their depositions. But

when asked directly and pointedly whether it was a part of their agreement that appellant should assume and pay the debts of the partnership, they expressly denied that such was the trade, and that appellant did not assume or agree to pay the debts of the firm, or any part thereof, except he did agree to pay the debt due to Walters. Wegenast died before the proof was taken. It is also shown by the record that the Walters debt had been reduced to the amount of \$3,000, and that Wegenast & Berger did not pay anything thereon. Therefore appellant must have paid \$1,000 on this claim after his sons-in-law assumed to pay this claim.

From all the facts and circumstances admitted and proven, we cannot say that the lower court erred in adjudging that appellant should pay appellee's debt. The proof, as appears from the record, conduces to show that the cause of the change in the deed was brought about by the presentation of appellee's claim for payment, and also that the brewery plant was all the time really the property of appellant, and the contemplated action for libel or slander was the sole cause of the transfer.

Wherefore the judgment of the lower court is affirmed.

COMMONWEALTH v. COLLIER.

(Court of Appeals of Kentucky. June 16, 1903.)

INJURING HIGHWAYS—INDICTMENT.

1. An indictment alleging that defendant suffered and permitted a water gap to be erected and maintained on premises in his possession and under his control, and to remain in such condition as to force the water over a turnpike, making it dangerous to travelers, is defective, in failing to allege that he erected or directed the erection of the water gap, or, with knowledge of its erection, suffered and permitted it to remain.

Appeal from Circuit Court, Lincoln County.
"Not to be officially reported."

Demurrer to an indictment against Dave Collier was sustained, and the commonwealth appeals. Affirmed.

Clifton J. Pratt and M. R. Todd, for the Commonwealth.

NUNN, J. The appellee was indicted in the Lincoln circuit court, and charged, in substance, as follows: That he did unlawfully suffer and permit a water gap to be erected and maintained on premises in his possession and under his control, and to remain in such condition as to force the water over a turnpike road, and wash away the gravel and metal thereon, and make great holes and puddles in the road, and to remain in such condition for at least a period of 60 days prior to the indictment, and, by reason of forcing the water back over the road, made it dangerous and almost impassable for vehicles, horses, and persons, and made it dangerous to the lives of divers good citizens who passed and repassed over the road, etc.

The indictment is well drawn, and charges an offense, except that it is failed to be alleged that appellee erected the water gap, or directed the erection thereof, or that he, with the knowledge of its erection, suffered and permitted it to remain. For these reasons, the lower court was right in sustaining the demurrer to the indictment.

Judgment affirmed.

McINERNEY, Sheriff, v. HUELEFELD.
(Court of Appeals of Kentucky. June 11, 1903.)

COUNTIES—DIVISION INTO JUSTICE DISTRICTS—UNFAIR APPORTIONMENT—EFFECT—TAXATION—ENJOINING LEVY—NECESSITY FOR LEVY—RESOLUTION OF FISCAL COURT—DESCRIBING PURPOSES OF LEVY—MUNICIPAL CORPORATIONS—SEPARATION FROM COUNTY—ACTS OF LEGISLATURE—REPEAL.

1. The fact that the commissioners appointed to divide a county into justice districts only allotted to a city in the county two magistrates, while five were allotted to the county outside of the city, notwithstanding that the city greatly exceeded the rest of the county in both wealth and population, was not ground for enjoining, at the suit of a private citizen resident in the city, a tax, levied by the fiscal court of the county, which is composed of the county judge and magistrates, where no exception was taken to the confirmation of the report of the commissioners, nor any attempt made to procure a reapportionment four years later, as authorized by Ky. St. 1899, § 1082.

2. So long as municipal governments make levies of taxes within the limits prescribed by the Constitution, courts of equity will not inquire into the necessity of the levy at the suit of an individual taxpayer.

3. The resolution of the fiscal court of a county levying a tax of 38 cents on the \$100, which recited that it was apportioned as follows: "Three cents for the purpose of creating a sinking fund with which to purchase a poor farm and erect suitable building thereon, ten cents for the maintenance and repair of the public roads and bridges of the county, and twenty-five cents to defray the general county expenses"—specified the purposes of the levy with sufficient distinctness.

4. There is nothing in the various special acts relating to the city of Covington to indicate an intention to separate the city from the county of Kenton for governmental purposes.

5. The various special acts relating to the city of Covington were repealed by the general act of October, 1892, which was passed in conformity with the mandate of the Constitution requiring uniformity and prohibiting special legislation.

Appeal from Circuit Court, Kenton County.

"To be officially reported."

Action by H. B. Huelefeld against M. D. McInerney, sheriff. Judgment for plaintiff. Defendant appeals. Reversed.

Frank M. Tracy and Herbert Jackson, for appellant. Francis J. Hanlon, W. S. Pryor, and A. G. Simrall, for appellee.

BURNAM, C. J. This action was instituted by the appellee, H. B. Huelefeld, a citizen and taxpayer of the city of Covington, against the appellant, M. D. McInerney, sheriff of Kenton county, to enjoin the col-

lection of a tax of thirty-eight cents on each \$100 of property in the county, which was levied by the fiscal court of Kenton county, composed of the county judge and seven magistrates, five of whom reside outside of the city of Covington, and two within the city limits, at the regular meeting of the fiscal court for that purpose in April, 1902, upon three grounds:

First, because the commissioners appointed pursuant to section 1079 of the Kentucky Statutes of 1899, to divide the county into justices' districts, only allotted to the city two magistrates, while five were allotted to the county outside of the city, notwithstanding the fact that the city greatly exceeded the rest of the county both in wealth and population. It appears from the record that in 1892 the county judge of Kenton county appointed three commissioners to divide the county into magisterial districts, and that they performed this duty in strict conformity with the provisions of section 1080 of the Kentucky Statutes of 1899, and that no exceptions were made to the division as made by them, and their report was regularly confirmed by the judgment of the Kenton county court at its January term, 1893, and so far as this record shows this apportionment has never been called in question in any way. If, as contended, this apportionment of the county into magisterial districts was unjust to the city of Covington, they could have filed exceptions to the confirmation of the report, and, in addition to this remedy, section 1082 of the Statutes provides that the county may be reapportioned into justices' districts at any term of the court in the same way four years after the first apportionment. As the city of Covington has not complained of this apportionment in the manner pointed out by the statute, a court of equity cannot regard it as a sound contention at the suit of an individual citizen to enjoin the collection of the tax assessed against him.

The next ground complained of is that the levy made by the fiscal court is in excess of the requirement of the county, and was not itemized in the manner required by law. Section 1839 of the Statutes, which was passed in conformity with the requirements of section 157 of the Constitution, provides: "The fiscal courts shall have jurisdiction to levy each year for county purposes an ad valorem tax on all property subject to taxation within the county, whether belonging to natural persons or corporations, companies or associations, not to exceed fifty cents on each \$100.00 in value thereof as assessed for state purposes." The tax complained of in this action is only for 38 cents on each \$100 in value of taxable property in the county, and is therefore clearly within the limit. The law is well settled that, so long as municipal governments make levies of taxes within the limits prescribed by the Constitution, courts of equity will not undertake to inquire into the necessity of the levy at the

hands of an individual taxpayer. See *Mayfield Woolen Mills, etc., v. City of Mayfield*, 61 S. W. 43, where the question was recently and thoroughly considered by this court, and the conclusion there reached is supported by the overwhelming weight of authority on the question. See *High on Injunctions* (2d Ed.) § 544; *Cooley on Taxation* (2d Ed.) p. 372. Nor does the record sustain this contention of appellee as to the alleged excessive levy. And it does not bear out appellee's contention that the fiscal court did not specify with sufficient distinctness the purpose for which the levy was made. The resolution of the fiscal court on this point recites that 38 cents was apportioned as follows: 3 cents for the purpose of creating a sinking fund with which to purchase a poor farm and erect suitable building thereon, 10 cents for the maintenance and repair of the public roads and bridges of the county, and 25 cents to defray the general county expenses. The language of the resolution is in substantial compliance with the provisions of the state revenue act, which provides that an annual tax of 50 cents on each \$100 of value on all property shall be levied for the following purposes: "Twenty-two and one-half cents for the ordinary expenses of the government; twenty-two cents for the schools; five cents for the sinking fund; and one half of one cent for the A. & M. College." In our opinion, the levy was sufficiently definite.

The third and most important ground upon which appellee assails the levy is that the city of Covington is by law separated from the balance of the county of Kenton for governmental purposes, and that in consequence thereof the fiscal court of the county had no legal power or authority to levy a tax for county purposes upon the property of citizens living within the city of Covington; and incidentally to this contention it is insisted by appellee that the decision rendered by this court in the case of *Richardson v. Boske, Sheriff, etc.*, 64 S. W. 919, should be overruled. In that case *Richardson*, a citizen of Kenton county, residing outside of the corporate limits of the city of Covington, sought to enjoin *Boske*, the then sheriff, from collecting a tax which the magistrates of the county residing outside of Covington, assuming to be the fiscal court of the county, had levied on property located in the county outside of the city of Covington for the year 1899, for county purposes, on the ground that the magistrates residing in the city of Covington did not act as members of the fiscal court, which made the levy, and that the tax was therefore levied by an illegally constituted fiscal court. The sheriff resisted the granting of the injunction upon the ground that the city of Covington was separated from the residue of the county for governmental purposes, and was therefore not liable for any part of the tax sought to be enjoined, and that the magistrates residing within the city limits did not constitute any part of the

fiscal court, and to support this contention relied upon certain special acts of the General Assembly running through a series of years, which exempted the citizens of Covington from any charge for maintaining the public roads of the county outside the city, and for other expenses for the maintenance and improvement of the county outside of the city, and are the identical acts relied on to support the contention of appellee in this proceeding. In that case it was not necessary for the court to decide whether the separation of the city of Covington from the residue of the county for governmental purpose actually existed by virtue of these acts or not, but the court did decide that in so far as they were inconsistent with or repugnant to the act of October, 1892, which is embraced in sections 1833 to 1851, inclusive, of the statutes, which define and prescribe the duties of fiscal courts, they were repealed by the concluding section of that act, and that the fiscal court consisted of the county judge and seven magistrates, and that as such they had the jurisdiction to appropriate county funds for all the purposes defined in section 1840 of the Kentucky Statutes of 1899, and to levy a sufficient tax, within the statutory limit, upon all the property within the entire county, whether located inside or outside of the city of Covington, for this purpose. The decision in the case of *Richardson v. Boske, Sheriff*, has been referred to and approved by this court in quite a number of cases which have since been decided. See *Campbell County v. Newport & Cincinnati Bridge Co.*, 66 S. W. 526; *City of Covington v. Highlands District*, 68 S. W. 669; *Commonwealth v. Porter*, 68 S. W. 621; and *Johnson v. Boske*, 66 S. W. 400. And that case followed the rule which had been previously announced in *Campbell County v. Commissioners, etc.* (Ky.) 42 S. W. 111, and *Joyes v. Jefferson Fiscal Court* (Ky.) 51 S. W. 435. And we still adhere to the law as therein announced. In addition we will say that there is nothing in these various special acts which sustain the contention that the General Assembly intended thereby to separate the city of Covington from the county of Kenton for governmental purposes. They are in no sense contracts between the city and state. The General Assembly always had the power to repeal them when they saw fit, and did so by the general act of October, 1892, which was passed in conformity with the mandate of the Constitution requiring uniformity and prohibiting special legislation. The city of Covington maintains its separate municipal government like every other city in the commonwealth, and in addition thereto permits the use of its city courthouse by the circuit court while it is holding its session within the city. But there is nothing to support the contention of a separation between the city and county for governmental purposes. On the contrary, the county government is administered by county officers, who are

elected by the entire county, and whose jurisdiction extends over the entire county, including the city of Covington.

The General Assembly has plenary power to create counties; and it cannot be doubted that, if they had intended to establish a separate county government in the city of Covington, they would have done so in a clear, explicit, and unequivocal act passed for that purpose. In our opinion, the contention rests upon no substantial basis and cannot be maintained.

For reasons indicated, the judgment is reversed and cause remanded, with instructions to dissolve the injunction granted by the circuit judge, and for an order dismissing plaintiff's petition, with costs, and for such other proceedings as may be necessary to carry out the views indicated in this opinion.

HENDERSON COUNTY v. HENDERSON BRIDGE CO.

(Court of Appeals of Kentucky. June 19, 1903.)

JUDGMENT—ENJOINING COLLECTION OF TAXES BY SHERIFF—CONCLUSIVENESS AGAINST COUNTY.

1. Ky. St. 1899, § 4129, makes the sheriff collector of all taxes, unless otherwise provided. Sections 4148, 4151, 4184, point out the mode of collection by levy on land, etc. Section 4131 provides that, when the office of sheriff is vacant, the county court may appoint a collector of taxes. Const. § 144, provides that each county shall have a fiscal court, and Ky. St. 1899, § 1834, provides that the corporate powers of the county shall be exercised by the fiscal courts. Section 1840 gives the court control of the fiscal affairs of the county, and provides that it shall have jurisdiction of all matters relating to the levying of taxes, etc. *Held*, that as, under the statutes, the sheriff of a county, so far as his powers affect taxation, is merely a tax collector, a default judgment against him in suit by a taxpayer to enjoin the collection of taxes, in which the county is not a party, is not binding on the county in a subsequent action by it to collect the taxes.

Appeal from Circuit Court, Henderson County.

"To be officially reported."

Action by the county of Henderson against the Henderson Bridge Company. From a decree dismissing the action, complainant appeals. Reversed.

Montgomery Merritt and N. Powell Taylor, for appellant. Helm, Bruce & Helm, for appellee.

HOBSON, J. The county of Henderson instituted suit against the Henderson Bridge Company to recover certain taxes alleged to be due for the years 1893, 1894, 1895, and 1896. The bridge company resisted judgment on the ground that every item of the taxes sued for had been adjudged illegal in suits brought by it against the sheriff of Henderson county, final judgment having been entered in each of these suits perpetually enjoining the collection of the taxes. The

plaintiff demurred to the plea of *res judicata*. The court overruled the demurrer, and, the plaintiff declining to plead further, the action was dismissed. The only question to be determined on the appeal is whether the judgments rendered in the former actions by the bridge company against the sheriff bind the county, although it was not a party to those suits. In those cases the bridge company alleged that Henderson county had levied no tax for the years named, that its property had not been assessed for taxation, and that the sheriff had not been authorized to collect the tax. The sheriff did not answer the petition, and judgment by default was entered to the effect that the plaintiff did not owe the tax, perpetually enjoining the sheriff from collecting it. Appellee relies on the principle that a judgment against the legal representatives of a county is conclusive against it and all its citizens. The rule is thus stated in *Freeman on Judgments*, § 178: "The position of a county or municipal corporation towards its citizens and taxpayers is, upon principle, analogous to that of a trustee towards his cestui que trust, when they are numerous, and the management and control of their interests are by the terms of the trust committed to his care. A judgment against a county or its legal representatives in a matter of general interest to all its citizens is binding upon the latter, though they are not parties to the suit." To same effect is *Black on Judgments*, § 584. The principle stated in these sections is that a judgment against a county or its legal representatives in a matter of general interest to all the people of the county is binding not only on the official representatives of the county, but on all its citizens, though not made party defendant by name; otherwise there would be no end to litigation. But no question arises in this case between any of the citizens of Henderson county and appellee. The only question is whether the county is bound by default judgments in favor of appellee in actions between it and the sheriff, to which the county was not a party. The question how far a municipality may be bound by a judgment against one of its subordinate officers is not touched upon in either of these sections. In the latter part of section 178 of *Freeman on Judgments*, it is said: "Though its officer is a nominal party to a suit, and the municipality is not joined with it, a judgment is conclusive for or against it, if it was the real party in interest, and as such prosecuted or defended the action." The rule that one who prosecutes or defends an action in the name of another is bound by the judgment, though not nominally a party to it, is of general application, and has been recognized by this court. *Schmidt v. L. & L. Railroad Co.*, 99 Ky. 143, 35 S. W. 135, 36 S. W. 168. But this rule does not apply here, as no defense was made to the action against the sheriff. The judgment against the municipality binds its citizens, because it is their

legal representative; but can it be said that the county is bound by the default judgment against the sheriff for this reason? A judgment binds only parties and privies. The heir is bound by a judgment against his ancestor; the distributee by a judgment against the administrator; but, unless there is some privity, one person is never bound by a judgment against another. The ground upon which a municipality is held bound by a judgment against certain of its officers is that these are its legal representatives, who are by law authorized to speak for it and control its affairs; but this cannot apply to subordinate municipal agencies having no power to speak for the municipality or control its action. In none of the adjudged cases has the municipality been held bound by a default judgment against any of its officers, except those who had charge of its affairs as its chief managing agents. Thus, in *Lyman v. Faris*, 53 Iowa, 498, 5 N. W. 621, the validity of a tax having been determined in an action against the board of supervisors, who were the managing agents of the county, it was held that an action to enjoin the collection of the tax could not be maintained by a taxpayer, as the supervisors represented all the taxpayers of the county in the defense which they had made to the former action on the same ground. To the same effect are *State ex rel. Wilson v. Rainey*, 74 Mo. 229; *Harmon v. Auditor*, 123 Ill. 122, 13 N. E. 161, 5 Am. St. Rep. 502. In *Gallaher v. Mounts-ville*, 34 W. Va. 730, 12 S. E. 859, 26 Am. St. Rep. 942, certain taxpayers, suing for themselves and all other taxpayers of the county, sought an injunction against the delivery of certain bonds, which was refused. Then other taxpayers, who were not named as parties in the first suit, brought a similar suit, suing for themselves and all other taxpayers. The first action was held a bar to the second. See, to same effect, *McCann v. Louisville* (Ky.) 63 S. W. 446. Were the rule otherwise in this class of cases, there could be no end to litigation until every taxpayer in the county had brought his individual suit. In *Sauls v. Freeman*, 24 Fla. 200, 4 South. 525, 12 Am. St. Rep. 190, the county commissioners were sought to be enjoined from moving the county records in a proceeding instituted by certain taxpayers. There had previously been a mandamus awarded against the commissioners to remove the records, and this judgment was held to bar the second suit; but the commissioners were empowered by law to remove the records and were, therefore, the representatives of the people of the county in this matter. *State ex rel. Brown v. C. & L. Railroad Company*, 13 S. C. 290, rests on the same ground. None of these cases involved a judgment against an inferior ministerial officer who was not by law intrusted with the disposition of the matters in controversy. In no case cited or decided, so far as we can find, has an inferior officer been allowed to accomplish indirectly

by means of a judgment against him what he could not do directly. In all the cases where the judgment against the officer was held a bar, his official act without the judgment would have bound the municipality. The question, then, to be determined, is, has the sheriff in the collection of taxes such power, under our statute, as to make him the legal representative of the county so that a judgment against him will bind the county?

By section 4129, Ky. St. 1899, "the sheriff by virtue of his office shall be collector of all state, county and district taxes, unless the payment thereof is, by law, specially directed to be made to some other officer." This statute confers upon him only power to collect the taxes. The mode of collection is pointed out in sections 4148, 4151, 4184, Id., by distraint, levy on land, or attachment. By section 4131, if the office of sheriff is vacant, the county court may appoint a collector of taxes. The powers of the sheriff are the same as those of the tax collector. By section 144 of the Constitution each county shall have a fiscal court, composed of the county judge and justices of the peace; or a county may have three commissioners, who, together with the county judge, shall constitute the fiscal court. Pursuant to this provision of the Constitution is section 1834, Ky. St. 1899: "Unless otherwise provided by law, the corporate powers of the several counties of this state shall be exercised by the fiscal courts thereof respectively." Also section 1840: "The fiscal court shall have jurisdiction * * * to regulate and control the fiscal affairs and property of the county, * * * and to execute all of its orders consistent with the law and within its jurisdiction, and shall have jurisdiction of all such other matters relating to the levying of taxes as is by any special act now conferred on the county court or court of levy and claims." By section 1883 the officer who may collect the state revenue in each county shall also collect the county levy. It will thus be seen that the entire control of the fiscal affairs of the county is vested in the fiscal court, of which the sheriff is not a member, and that his sole power in the matter of taxes is limited to that of a tax collector. The powers of a tax collector and the limitations upon his authority are thus well stated in *Cooley on Taxation*: "The authority of a collector of taxes to collect is his warrant. The duplicate is but a memorandum of the amount he is to collect from the parties therein named respectively. Without a warrant, the collector becomes a trespasser as soon as he intermeddles with the property of the taxpayer." Page 292. "It is not the business of the collector to question the fairness or propriety of any tax which has been committed to him for collection. If the assessment is excessive, the party assessed must make the objection, and not the collector. His duty is to collect the

list committed to him, and he cannot excuse himself for any failure to exhaust his authority in collecting on the pretense that the person taxed should have been assessed otherwise than he was." Page 500. "In general, any mere ministerial officer to whom process is issued, which proceeds from an officer, or board, or other body having authority to issue process of that nature, which process is legal in form, and contains nothing on its face to notify or apprise him that it is issued without authority, will be protected in serving it, even though in fact it was issued without authority of law. This is a rule not only essential to the protection of such officers, but absolutely required also for the due dispatch of public business." Page 559. The tax collector, therefore, in the collection of his tax warrants, stands substantially as the sheriff in executing a *fi. fa.* or other final process which is delivered to him. In acting under such a writ the officer is protected if the writ is valid on its face. He is not the agent of the plaintiff. The sale made by him is the act of the law, and the plaintiff in the writ is in no way bound by the acts of the officer if he leaves the law to take its course without directing the officer in the discharge of his duties. Freeman on Executions, § 273; Rorer on Judicial Sales, § 46. The sheriff, in the collection of his revenues, is a ministerial officer, charged with a specific duty, which is to collect the money on the tax bills, and pay it over to the person entitled to receive it. He is without power to dispose of the fund, or to release the taxpayer from liability, or to reduce the amount to be paid by him, or to do anything involving the fiscal interests of the county. He has no authority to represent the county in any litigation. He cannot employ counsel for it, or subpoena witnesses on its behalf, or do any act at its expense, however necessary, in the litigation for the protection of its rights. In the collection of the public dues, he is simply the agent of the law, performing duties imposed on him by the law. The county is not responsible for his acts out of court unless it directs or controls them; and the same rule must apply to his acts in court; for he cannot accomplish by nonaction in court what he could not accomplish by direct action out of court. The law does not impose on the sheriff the burden of defending suits against the county. The expense of such litigation might be far beyond his means. When the rights of the county are to be determined, it should be sued, so that it may control the defense, pay the expenses, and take such steps as its interests may require. There are other officers charged with certain duties ministerial in character in connection with the collection of taxes that must be regarded as the representatives of the county if the sheriff can be so regarded. Thus it is the duty of the assessor to assess the taxpayers. But it

would not be maintained that a default judgment suffered by an assessor enjoining him from assessing the property of a taxpayer would bar the state or the municipality from proceeding under section 4241, Ky. St. 1899, to have the omitted property assessed. It is the duty of the county clerk to copy the tax list, and deliver the copy to the sheriff for him to collect on. If a taxpayer were to enjoin the county clerk by a default judgment from copying his list and delivering it to the assessor, this judgment would not conclude the commonwealth or the county, or prevent it from collecting its taxes.

None of the tax cases decided by this court touch the question. It is true, suits to test the validity of taxes have been brought in the name of the sheriff, and, where the litigation has been conducted by the state or municipality in the name of the officer, it is bound by the judgment; but the interests of the municipalities of the state, as well as sound legal principles, require that they should be made parties defendant to actions against the tax collector, where the purpose of the action is to prevent them from collecting their revenues; for the power to tax involves the power to exist, and their usefulness might be crippled or destroyed if the collection of taxes levied for their support could be defeated by judgments in actions over which they had no control. A county may be sued. Section 51 of the Civil Code of Practice provides: "In an action against a county the summons must be served on the presiding judge of the county court, or, if he be absent from the county, upon its attorney." In *People v. Squire*, 110 N. Y. 666, 18 N. E. 362, the plaintiff had obtained a mandamus against the commissioner of public works, and relied on that judgment as *res adjudicata* between him and the city. The court, deeming the matter free of doubt, simply said: "The city of New York is not a party to the litigation, and is not bound by any judgment heretofore entered in this proceeding." In the subsequent case of *Peck v. State*, 137 N. Y. 372, 33 N. E. 317, 33 Am. St. Rep. 738, the court, approving this case, said: "In *People v. Squire*, 110 N. Y. 666 [18 N. E. 362], we held that a judgment in a mandamus proceeding against the commissioner of public works for the city of New York did not bind the city for the reason that it was not a party to the litigation." In *Gillmore v. Fox*, 10 Kan. 509, a suit was brought against the county clerk and county treasurer to enjoin the collection of certain assessments made by the city of Emporia, without making it a party. It was held that the city was the real party in interest, and was a necessary party to the action. The court said: "If the city cannot collect these special assessments, it must resort to general taxation to raise the amount. But, before it can be properly determined that the city cannot collect these special assessments, the

city must have its day in court." The same principle was followed in *Voss v. Union School District*, 18 Kan. 467, where a suit to enjoin a collection of taxes was brought against the treasurer and sheriff. The court said: "Said treasurer and sheriff were merely nominal parties, and the school district was the real party in interest." To the same effect are *Knopf v. Chicago Real Estate Board*, 173 Ill. 196, 50 N. E. 658, *Heinroth v. Kochersperger*, 173 Ill. 205, 50 N. E. 171, and *Bradley v. Gilbert*, 155 Ill. 154, 39 N. E. 593. In the last case an effort was made to enjoin the action of the county board as to dieting prisoners without making the county of Cook defendant. The court said: "Whatever may be said as to the right or policy of county boards to adopt the method of fixing the amount to be paid for dieting prisoners shown by this bill to have been pursued in Cook county, before that method can be judicially pronounced contrary to law and void the alleged offender must be given its day in court." See, also, *Beach on Injunction*, 373; *Carpenter v. Grisham*, 59 Mo. 251; *Samis v. King*, 40 Conn. 312; *Lefferts v. Board of Supervisors*, 21 Wis. 688; 10 Ency. of Pleading and Practice, 913, 914; *Attala County v. Niles*, 58 Miss. 48.

The other questions made in the case seem to be settled in *Henderson Bridge Co. v. Negley* (Ky.) 63 S. W. 989; *Louisville Bridge Co. v. Louisville* (Ky.) 65 S. W. 815; *Campbell County v. Bridge Co.* (Ky.) 66 S. W. 526.

The judgment is reversed, and cause remanded, with directions to sustain the demurrer to so much of the answer as pleads the former adjudication in bar of the action, and for further proceedings consistent herewith.

WALKER v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 18, 1903.)

INTOXICATING LIQUORS—LOCAL OPTION LAW —WHOLESALE DEALINGS—CHARACTER OF PURCHASER—INEBRIATES.

1. Ky. St. 1899, § 2557, provides that, when the local option law has been put in force in a city or district by vote, it shall be unlawful for any person to sell intoxicating liquors therein, etc. Section 2558 declares that the provisions of the local option law shall not apply to any wholesale dealer who in good faith and in the usual course of trade sells by wholesale in quantities of not less than five gallons, delivered at one time, not to be drunk on the premises. *Held*, that where a wholesale dealer sold a quantity of beer exceeding five gallons, not to be drunk on the premises, as authorized by section 2558, in a local option district, the fact that the purchaser was an inebriate, to the seller's knowledge, and intended to drink the beer at his residence, did not justify conviction under section 2557.

Appeal from Circuit Court, Graves County.
"Not to be officially reported."

West Walker was convicted of illegally selling intoxicating liquors, and he appeals. Reversed.

J. D. Atchison, B. C. Seay, and Saml. Crossland, for appellant. H. J. Moorman, C. J. Pratt, and M. R. Todd, for the Commonwealth.

SETTLE, J. The appellant, West Walker, was indicted and tried in the Graves circuit court for the offense of selling, loaning, and bartering spirituous, vinous, and malt liquors, to wit, whisky, brandy, wine, gin, ale, and beer, by retail, without a license so to do, to J. F. Sanderson, within the corporate limits of the city of Mayfield, in which city local option was then in force. The trial resulted in his conviction, the jury finding him guilty of the charge fixed his punishment at a fine of \$75, and, a new trial having been refused him by the lower court, he prosecutes this appeal.

But one witness was introduced by the Commonwealth, J. F. Sanderson, to whom the alleged sale was made, and the appellant testified in his own behalf. It was proved upon the trial that the F. W. Cook Brewing Company, a corporation of Evansville, Ind., was engaged in wholesaling beer by the keg and case in the city of Mayfield, Ky., and that it had a license to so sell both from the city of Mayfield and the county court of Graves county. It was also in proof that the appellant, West Walker, was the duly appointed and acting agent of the F. W. Cook Brewing Company in the city of Mayfield at the time he made the sale for which he was indicted. It was conceded upon the trial that the local option law was in force in the city of Mayfield at the time of the sale, and the proof indisputably showed that the quantity sold to Sanderson by appellant was as much or more than five gallons, that it was delivered at one time, and that it was not sold to be drunk, nor was it drunk, upon the premises where sold, but was immediately sent to the residence of the purchaser.

The indictment against appellant was found under section 2557 of the Kentucky Statutes of 1899, as amended by act of March 11, 1902. Acts 1902, p. 41, c. 14, § 2558, in so far as applicable to this case, is as follows: "The provisions of this act shall not apply to any manufacturer or wholesale dealer who in good faith and in the usual course of trade sells by the wholesale in quantities of not less than five gallons delivered at one time, and not to be drunk on the premises."

The appellant concedes that the sale of the beer was made to Sanderson, but contends that it was a sale by wholesale, made in good faith and in the usual course of trade, and that it was not drunk upon the premises. Upon the other hand, it is contended for appellee that the sale was not made in good faith, because the purchaser was a known inebriate, and that at the time of the purchase he communicated to the appellant his intention of drinking the beer at his residence, it being in proof that the purchaser so

informed appellant at the time of his purchase of the beer.

We think it was improper for the court to have admitted the evidence of the inebriety of the witness, and the knowledge of appellant of that fact. We infer that in permitting proof of this fact the court proceeded upon the idea that if the purchaser of the beer bought it for his own use, and he was an inebriate, a sale under these circumstances amounted to an invasion of the law. If this view of the law were to obtain, then a wholesale dealer of beer could only lawfully sell to one licensed to sell the same by retail. The section of the statute, *supra*, does not limit the right of the wholesale dealer to sell only to those who are licensed to engage in the retail trade. For selling to an inebriate spirituous, vinous, or malt liquors, whether by wholesale or retail, the appellant might have been indicted and punished under another statute which declares such a sale to be an offense, and provides an adequate punishment therefor; but we do not think, because he might have been punished under the last statute for the sale made in this instance to Sanderson, that that fact made him guilty under the indictment in this case, and, if not, it necessarily follows that the evidence admitted by the court as to the inebriety of Sanderson was incompetent. Under the evidence in this case it appeared that all the conditions required by section 2558 of a wholesale dealer existed: First, that the beer was sold by a wholesale dealer; second, that it was sold in good faith and in the usual course of trade; third, that the quantity was not less than five gallons; fourth, that it was delivered at one time; fifth, that it was not drunk, nor was it to be drunk, on the premises.

Upon the state of facts here presented we are of opinion that but one instruction was proper, namely, a peremptory instruction to the jury to find for the defendant; wherefore the judgment is reversed, and the cause remanded with directions to the lower court to grant appellant a new trial, and for further proceedings not inconsistent with this opinion.

LOUISVILLE TOBACCO WAREHOUSE CO. v. GIST et al.

(Court of Appeals of Kentucky. June 18,
1903.)

NOTES—PAROL TRANSFER—ACTIONS—PARTIES
—COUNTERCLAIM—TRANSFER OF PLAINTIFF—
APPEAL—APPEARANCE — REVERSAL — NEW
TRIAL.

1. Where one to whom a note had been transferred by parol was a surety or guarantor thereon, the payee was not a necessary party to an action thereon.

2. Where an action on a note which had been transferred to a surety or guarantor was brought in the name of the payee by mistake, and defendant answered by way of counterclaim against such payee, and on a motion alleging the mistake the court dismissed the petition, without prejudice, but permitted defendant

to take judgment on the counterclaim for plaintiff's failure to plead to the same, from which plaintiff appealed on the ground that the court had no jurisdiction of the plaintiff, plaintiff's appeal constituted an appearance, and the judgment would be reversed, and a new trial granted on the counterclaim.

Appeal from Circuit Court, Henry County.
"Not to be officially reported."

Action by the Louisville Tobacco Warehouse Company against G. W. Gist and others. From a judgment in favor of defendants on a counterclaim, plaintiff appeals. Reversed.

Humphrey, Burnett & Humphrey, for appellant. W. B. Moody and W. O. Jackson, for appellees.

NUNN, J. On September 10, 1896, the appellees, G. W. Gist, Luther Corbin, E. C. Ferguson, and Shelby Ferguson, executed their joint note to the Louisville Tobacco Warehouse Company for \$90, due in one day. Said note is as follows: "\$90.00. New Castle, Ky., Sept. 10th, 1896: One day after date we promise to pay to the order of the Louisville Tobacco Warehouse Company, Ninety Dollars, with interest at eight per cent. per annum from date until paid, negotiable and payable at the Citizens National Bank in Louisville, Ky. In consideration of said money which is advanced to us on our present crop of tobacco, and in consideration of the Louisville Tobacco Warehouse Company agreeing and undertaking to furnish warehouse facilities for selling said crop of tobacco, when ready for shipping, we agree and bind ourselves to ship to it at the Green River Warehouse, Louisville, Ky., all our crop of tobacco, and in the event we do not ship it, said tobacco, as herein agreed, we agree to pay it full warehouse fees, both buying and selling, same as it would have received had it sold it, and in order to secure the full payment of said note with all interest thereon, and the fees as herein provided, we have and do hereby convey and mortgage to the Louisville Tobacco Warehouse Company all our crop of tobacco, about 10 hogsheads raised during the year 1896, which is now in barn on farm of about — acres of land owned by George W. Gist and in the county of Henry and state of Kentucky. G. W. Gist. Luther Corbin. E. C. Ferguson. Shelby Ferguson. Witness, N. C. Shouse." This note has indorsed upon it the following guaranty: "I hereby guarantee the payment of this note and waive demand, protest and notice. [Signed] J. W. Shouse & Bro." And also indorsed upon it is the following credit: "\$34.72 paid April 7th, 1897." It appears from the affidavits of N. C. Shouse and attorneys John D. Carroll and J. R. Fears that said note was given to Mr. Carroll for collection; that he turned the note over to Mr. Fears, directing him to bring suit thereon; that on August 12, 1901, Fears, as attorney, brought suit thereon in the name of the Louis-

ville Tobacco Warehouse Company against the payors of the note. The defendants answered, making their answer a counterclaim against the plaintiff. At the next term of the court, and without filing reply, the plaintiff filed the affidavit of its president, and also the affidavit of N. C. Shouse, J. D. Carroll, and J. R. Fears, in substance stating that the warehouse company was not the owner of the note sued on at the time of the institution of the action; that prior to that time N. C. Shouse, who was bound for the payment thereof, paid to the plaintiff the amount of the balance thereof, and at the institution of the action he was the sole owner of the note; that by mistake and oversight of counsel the action had been brought in the name of the appellant. The court sustained appellant's motion, and dismissed the petition without prejudice. The appellant failing to plead to the counterclaim of appellees, a trial was had thereon before a jury, and it returned a verdict in favor of appellees for the sum of \$365.25.

The issue on this appeal is whether the tobacco warehouse company was before the court on the counterclaim of the appellees. The appellees contend, under the authority of *Gill v. Johnson's Adm'r's*, 1 Metc. 649, and *Perry v. Seitz*, 2 Duv. 122, that the payee of a note who has transferred it by parol, is a necessary party to an action thereon. This is a correct principle, but this rule does not apply where the transferee is a surety or a guarantor. The proof is very vague upon this question, and it is not stated that N. C. Shouse was a member of the firm of J. W. Shouse & Bro., the guarantors of the note. The affidavits filed on the motion state that N. C. Shouse was the beneficial owner of the note, but do not state under what circumstances he became the owner thereof, nor how much he paid for it. This question being in doubt, and as the action on the note was dismissed by the lower court, it is immaterial now whether N. C. Shouse was a member of the firm of J. W. Shouse & Bro. or not, as on the return of this cause the appellant will be a party and before the court on the counterclaim of appellees, and will be permitted to plead and litigate this claim with appellees. See *Stovall v. Stovall's Adm'r* (Ky.) 39 S. W. 416; *C. O. & S. W. R. R. Co. v. Heath's Adm'r*, 87 Ky. 660, 9 S. W. 832, and the cases therein cited. In *C. O. & S. W. R. R. Co. v. Heath's Adm'r*, 87 Ky. 660, 9 S. W. 832, the judgment was reversed, and cause remanded, with directions to grant appellant a new trial, and the court said: "As the appellant is in court by the appeal, no other service is required, this court having repeatedly held that an appeal from a void judgment for the want of process placed the appellant in court on the return of the case for all the purposes of a trial."

For these reasons the case is reversed, and the cause remanded for further proceedings consistent with this opinion.

TAYLOR v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 18, 1903.)

CORPORATIONS — DIVIDENDS — FRAUDULENT DECLARATION — OFFICERS — RECEIPT OF DIVIDENDS — EMBEZZLEMENT — STATUTES — CONSTRUCTION — PENALTY — INDICTMENT — DUPLICITY — EVIDENCE — MOTIVE — INSTRUCTIONS.

1. Where an investment company's by-laws provided that a surplus fund, consisting of 5 per cent. of the weekly collections or dues, should be used or invested as the directors might elect for the best interest of the company, and an expense fund, consisting of 10 per cent. of the weekly collections and dues and transfer fees, should be used for current and such other expenses as the directors might direct, such by-laws did not authorize the directors of the corporation, while insolvent, to distribute dividends from such funds as against creditors of the corporation.

2. Under Cr. Code, § 128, providing that if an offense involves the commission of an injury to person or property or the taking of property, and be described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the person injured or as to the owner of the property is immaterial, an indictment charging that defendant, as president of a certain corporation, by virtue of his office received and took certain moneys or property of the company, and of divers persons unknown who had intrusted the same to the keeping of the company, and did then and there feloniously, and with intent to willfully injure and defraud such company and such persons, embezzle and convert the money to his own use, was not demurrable as charging two offenses, one the embezzlement of money of the corporation, and the other the embezzlement of money of such other persons.

3. Under Ky. St. 1899, § 1202, providing that if any officer of a corporation shall embezzle or convert funds of the corporation, or funds placed in his care as an officer, he shall be fined, etc., an indictment of the president of a corporation, charging that certain money came into his hands by virtue of his position, and that he converted the same fraudulently, etc., was sufficient.

4. In a prosecution of the president of an insolvent corporation for embezzlement of its funds, committed by the voting and receiving of unearned dividends from the corporation's assets, it was no defense that such dividends were voted, and the payment thereof concurred in, by all the stockholders, on the ground that they were the owners of the corporation's assets, such assets being owned by the corporation as a separate entity distinct from the stockholders.

5. In a prosecution of the president of an insolvent corporation for the embezzlement of its funds in the receipt of dividends voted with his consent from the corporation's assets while it was insolvent, a conviction could be maintained only on proof of knowledge that the corporation had no funds legally applicable to dividends when such dividend was declared and paid, and that such declaration and payment was with the fraudulent purpose of converting the corporation assets to the use of the officers and stockholders.

6. In a prosecution of the president of an insolvent corporation for embezzlement in receiving dividends declared during insolvency, evidence of the corporation's insolvency, together with evidence that other dividends had been declared and received about the same time, including a transfer of the corporation's assets to another company and its actual condition at the time of the transfer, was admissible to show the motive of the directors in declaring the dividend which was the basis of the charge.

7. Where, in a prosecution of the president of an insolvent corporation for receiving dividends alleged to have been fraudulently declared, it appeared that the business of the corporation in itself was incapable of being successfully carried on, and evidence of other dividends declared from its assets was admitted on the issue of motive, the court should have limited such evidence solely to that issue by an instruction.

8. Where, in a prosecution of an officer of an insolvent corporation for embezzlement in declaring and receiving dividends from certain funds not applicable to dividends as against creditors, evidence that other like companies had been accustomed to divide the proceeds of such funds among their stockholders was immaterial.

9. In a prosecution of the president of an insolvent corporation for embezzlement in the declaration and receipt of dividends from certain funds of the corporation, evidence that defendant and his co-directors believed and were advised by counsel that they were authorized to declare and receive dividends from such funds was admissible.

10. Ky. St. 1899, § 548, making directors liable for all debts of a corporation on payment of a dividend while the corporation is insolvent or which would make it insolvent, and section 530, providing a fine against directors who violate any of the provisions of the chapter relating to corporations, merely relate to acts of omission or misfeasance, and do not apply to the embezzlement of corporate assets by the fraudulent declaration of a dividend while the company is insolvent, with intent to convert the corporation's assets to the use of the stockholders, prohibited by section 1202.

11. In a prosecution of the president of an insolvent corporation for embezzlement in the declaration and receipt of a dividend, failure of the court to submit to the jury the issue of the fraudulent actions of defendant's co-directors in declaring and paying such dividends was error.

12. In a prosecution of the president of an insolvent corporation for embezzlement in the declaration and receipt of dividends alleged to have been appropriated by him fraudulently and without right, failure of the court to define the limitations of the term "right" and the meaning of "fraudulent" was error.

13. In the prosecution of the president of an insolvent corporation for embezzlement in fraudulently declaring and receiving dividends, the court should have charged that fraudulent conversion of such dividends was the deceitful, intentional appropriation of the corporation's property without right or a belief of right, and a fraudulent intent was the intent to effect such appropriation.

Appeal from Circuit Court, Fayette County.

"To be officially reported."

A. P. Taylor was convicted of embezzlement, and he appeals. Reversed.

Hobbs & Farmer, C. J. Bronston, and Morton, Darnall & Wilson, for appellant. C. J. Pratt, and M. R. Todd, for the Commonwealth.

O'REAR, J. Appellant prosecutes this appeal from a verdict and judgment convicting and sentencing him under a charge of embezzlement. He and four others, in May, 1900, organized, as incorporators, the Industrial Mutual Investment Company. Its authorized capital stock was \$5,000, of which each one of the incorporators subscribed \$1,000. They

then paid in on their several subscriptions the sum of \$50 each, executing their notes to the company for the balance. Whether they ever actually paid any of this balance is not perfectly clear, although they claim that they did. The object of the corporation, as stated in the articles, was as follows: "The nature of the business and the object and purposes proposed to be transacted, promoted and carried out by said corporation, shall be the issuing and selling with the right to redeem: Certificates of Membership in the Corporation, subject to the terms, conditions, restrictions and limitations named in said certificates of said corporation. The conditions, terms, restrictions and limitations shall be named in each certificate of membership, and shall be constituted and become a part thereof. Also the buying or selling of real estate and personal property, bonds, stocks and securities of all kinds, and the investment of accumulations and the surplus in real estate, stocks, bonds and other securities."

It may be here stated that the corporation never in fact did any other business, so far as the record shows, than issuing the membership certificates alluded to.

These certificates of membership were sold to the public. Exactly what relation the holders then bore to the corporation does not seem to have been clearly understood by the incorporators or the dealers. The incorporators insist most earnestly, and back their contention by the opinion of counsel procured before they embarked in the enterprise, that the certificate holders were in no sense members of the corporation, and were not entitled in any event to share in its profits or net accumulations. By a statement contained in the charter, limiting the corporation's indebtedness to \$5,000, it is indicated that they were not regarded as creditors either. It may be as well to say now that their relation was that of creditors of the corporation. The contract represented by the "membership certificate" was as follows:

"Certificate of Membership.

"The Industrial Mutual Deposit Company.

"Lexington, Kentucky.

"These Presents Witnesseth, that _____ of _____, State of _____, has filed an application, which is a part of this contract, and has paid the Industrial Mutual Deposit Company, of Lexington, Ky., (a corporation) the sum of _____ Dollars, it being for one week's installments on _____ coupons numbered serially from _____ which coupons are a part hereof.

"Now, in consideration of said payment and the further agreement of the holder thereof, on or before of each Monday of each week, from the date of the issuance of these coupons, to pay at the office of the Company, or to some duly authorized agent thereof, five cents upon each redeemed coupon made a part hereof, as said before, and

so on, continuing until all of said coupons shall be redeemed by said company.

"The said Industrial Mutual Deposit Company promises and agrees to pay to said _____ or to his or her heirs, personal representatives, or assigns upon the redemption of each of said coupons, one dollar and sixty cents (\$1.60) on every dollar (\$1.00) paid to keep same in force to the date of redemption less ten cents (10c) on each coupon when redeemed.

"The terms and conditions printed on the back hereof, and in the application for same are made a part of this certificate as fully as if recited over the signatures hereto affixed.

"In Testimony Whereof, The Industrial Mutual Deposit Company has caused these presents to be executed by its President and Secretary, and its corporate seal to be affixed, in the City of Lexington, Kentucky, this the July 23, 1900.

"A. P. Taylor, President.

"[Seal.] Frank Gilmore, Secretary.

"(Conditions.)

"(1) If any installment of weekly dues be not paid on Monday of any week, then the coupon upon which default is made shall be marked void for that week, and shall not be entitled to participate in the Redemption fund for said week; and if such default continues for four consecutive weeks, then this contract shall become void, and of no effect, and the holder thereof shall forfeit all money paid on same to the Company.

"(2) The coupons hereto attached shall not be eligible for Redemption until eight weekly installments of dues shall have been paid thereon.

"The Company reserves the right to redeem said coupons, or any of them, at any time in the manner provided for by the By-Laws of said Company, and upon the payment of the amount hereinbefore promised, and binds itself to redeem all coupons, within one hundred and four weeks upon which one hundred and four weekly payments have been made.

"(3) The weekly collections on dues are divided into eight funds namely:

"(a) General Redemption Fund,—which consists of 20 per cent. of weekly collections on dues, and is used to redeem coupons that are eight or more weeks old, and are in force by a fixed mathematical rule, numeral apart system, which is determined each week by the number and value of each eligible coupon in force; and by the amount of money in said fund.

"(b) Mortuary Fund, which consists, of 10 per cent. of the weekly collections on dues and is used to pay off death claims. If there are no death claims any week, this Fund is added to the General Redemption Fund and is used for the same purpose.

"(c) Special Redemption Fund, which consists of 10 per cent. of collections on weekly dues, and is used to redeem every tenth

eligible coupon in force each weekly Redemption.

"(d) Grand Special Redemption Fund, which consists of 15 per cent. of the collections on weekly dues, and shall be used to redeem the oldest coupon in force on the Register consecutively.

"(e) Cash Surrender Fund, which consists of ten per cent. of the weekly collections on dues, and is used the 30th week and each week thereafter, to pay cash surrender claims. If there are no such claims at the 30th week or thereafter, this fund shall be added to the Grand Special Redemption Fund, and shall be used for the same purpose. Up to thirty weeks this fund shall be added to the Grand Special Redemption Fund and every other week thereafter unless there be a cash surrender claim. Thus increasing the Grand Special Redemption fund to 25 per cent. of weekly collections on dues, said increased fund to be used as above set forth.

"(f) Reserve Fund, which shall consist of 20 per cent. of the weekly collections on dues, and income derived from the investment of said fund and such other sums as the Board of Directors may add, and shall be used to guarantee the payment of all matured obligations of the company by reason of the issuance of certificates.

"At no time shall the reserve exceed by 20 per cent. the entire amount paid in on unredeemed coupons.

"When amount at any time shall exceed said sum it shall be passed to the General Redemption Fund.

"(g) Surplus Fund, which shall consist of five per cent. of the weekly collections on dues, and shall be used or invested as the Directors may elect for the best interest of said company.

"(h) Expense Fund, shall consist of ten per cent. of the weekly collections on dues and of the transfer fees, and shall be used for the current expenses of the company, and for such other purposes as the Directors may direct.

"(4) All coupons are numbered consecutively.

"(5) Death Options. In the event of the death of the holder of this certificate, his or her heirs or personal representatives may accept the following options to-wit: (First) accept in cash all money paid in on unredeemed Coupons less ten per cent. on each Coupon.

"(2nd) May continue this contract, for the benefit of decedent's estate. The payment of death claims shall be from the Mortuary Fund and are to be paid in the order of their applications for same.

"(6) Borrowing option: After 24 or more weekly dues have been paid the holder may borrow all the money in the reserve fund that has been placed there from the weekly dues by said holder. Said loan to be applied to the payment of dues on said coupons, and said coupons shall be assigned to the

Trustees of Reserve fund as collateral for said loan. Said loan shall bear six per cent. interest per annum and shall be paid out of the first maturing coupons.

"(7) Surrender Cash Options: After 30 or more weekly dues have been paid, the holder may surrender this contract and receive in cash ninety per cent. of all money paid in on unredeemed coupons hereto attached. Cash Surrender option to be paid out of cash surrender fund in the order of application for same.

"(8) Application for any option:—offered in this contract to be effective must be made in writing within two weeks after the last weekly dues were paid otherwise the Company will not be bound by them, nor will it be bound to extend any of these options until after two weeks from the date of application.

"(9) These Coupons, are only transferable on the books of the Company, and for such transfer one half cent will be charged on each coupon.

"(10) All Remittances, for credit on coupons are sent at the risk of the sender or holder thereof.

"No receipt for dues is official, nor will any be accepted, unless signed by an authorized agent.

"(11) The Company, will be bound by only such statements as are contained in this contract.

"No agent, General or Special, of this Company has any right to vary or change in any way any part of this contract.

"(12) The holder by acceptance hereof, admits he has read and understands this contract.

"The above contract with its conditions as recited above is hereby made and becomes a part of the By-Laws of this corporation.

"(Form of Coupon.)

"Coupon No. —.

"The Industrial Mutual Deposit Company, Agrees to redeem this Coupon, according to the conditions named in the contract of which this is a part.

"A. P. Taylor, President.

"Frank Gilmore, Secretary."

The "numeral apart" system referred to in the contract was this: A certain per cent., say 1 one per cent., of the coupons in force, was taken as a basis of distribution. If 1 per cent. of the coupons in force when a distribution occurred was, for example, 50, then every fiftieth coupon that was eight weeks old, or older, would be redeemed at the rate of \$1.50 net, without regard to what sum had been paid on it, except that at least eight payments must have been made. This redemption was made from the "reserve fund" provided in the contract, so far as the money on hand to the credit of those funds would permit. These redemptions occurred weekly.

It is perfectly patent that the scheme attempted was impossible of execution hon-

estly, so as to perform all the contracts. The most charitable view to take of it is that it was a species of lottery. It took the money paid in by new "members" in one week to "redeem" the coupons sold to others more than eight weeks before. If the theory of appellant and his associates be adopted, that the 10 per cent. of each certificate sold should go into an "expense fund," and 5 per cent. into a "surplus fund," neither of which could in any event be enjoyed by or divided among the holders of the certificates, then it was mathematically certain that, out of the remaining 85 per cent. of all the money paid in, the corporation could not in two years pay back, to those who paid it in, 150 per cent., as it had no other resources or income. If the articles of incorporation had contemplated only the character of business above alluded to, we would have some doubt whether it would have become a corporation in fact, as we are not prepared to say that persons may avail themselves of corporate powers to do an illegal business, even to the extent of becoming a de facto corporation. So far as the manifest purposes of this corporation are concerned, they do not appear to have been illegal. That the directors subsequently adopted a method that made their transactions violative of law cannot affect the fact that the corporation's existence was lawful. If their contracts were void because mutually engaged in by the parties with the understanding on both sides that the corporation was conducting a lottery scheme alone, then it may be doubtful if the policy holders would have any claim upon the courts to enforce their contracts against the corporation as liabilities. Such understanding, however, was not shown nor attempted to be shown in this case. So far as this record discloses, the purchasers of the coupons were innocent of such knowledge or connivance. Many features of the contract may have been possible of performance, and without legal objection. It was the duty of the corporation to have employed and distributed the funds received by it for the sale of membership certificates so as not to have broken the law, and so as to have complied with the undertakings to holders as nearly as possible, by honest and legal methods of dealing. If they could not do that, it was then their duty to refund the money received, with its interest.

As to how the "surplus" and "expense fund" provided for in these contracts were liable to distribution by the corporation becomes a material inquiry in this case. The provisions of the contract—which are identical with the by-laws of the company on that subject—are repeated here for convenience: "(g) Surplus fund, which shall consist of five per cent. of the weekly collections on dues, and shall be used or invested as the Directors may elect for the best interest of the company. (h) Expense fund, shall consist of ten per cent. of the weekly collec-

tions on dues and of the transfer fees and shall be used for the current expenses of the company, and for such other expenses as the directors may direct." It is the argument on behalf of appellant that these two funds were, by the express terms of the contract, set apart to the uses of the corporation proper, as distinct from certificate holders, and that it was contemplated by the contracts that the corporation might do with these funds what it pleased; that in no event or contingency were the certificate holders entitled to share in their distribution. In our opinion, nothing in the language employed, when it is fairly interpreted by its commonly understood meaning, exempts this corporation from its statutory and common-law liability as such to its creditors. That liability is first to pay to its creditors their demands in full, or to provide therefor, before the stockholders are entitled to distribute anything among themselves as dividends, or otherwise than in legitimate expenses actually incurred in the business. If the corporation is solvent when it pays dividends to stockholders, and their payment does not impair its capital and resources set apart to pay its debts, then the discretion of its directors in declaring and paying the dividends will not be questioned. The corporation in this case had not the right, if it was in fact insolvent, to distribute about 20 per cent. of its assets among its stockholders as dividends, when all of its assets would not pay its liabilities.

The board of directors of the corporation met on May 14, 1901, and declared a dividend of \$2,500 (\$500 to each stockholder) payable to themselves; they did the same on June 27, 1901, and repeated it August 5, 1901. On November 4, 1901, they, by resolution, appropriated to each of themselves \$500 "on account," and on December 30, 1901, appropriated \$300 more to each of themselves "on account." In March, 1902, the affairs of the company were placed in the hands of a receiver, as an insolvent. The grand jury of Fayette county indicted appellant, who was president of the board of directors, on the count of fraudulently converting and embezzling \$500 of the funds of the corporation. This \$500 was the part of the dividend declared March 14, 1901, that was paid to appellant as one of the five stockholders. The descriptive part of the indictment is in these words: "That the said A. P. Taylor on the third day of May, 1902, in the county aforesaid was the president and a director of a corporation known as the Industrial Mutual Deposit Company, a corporation duly incorporated under the laws of the State of Kentucky, and being such President and Director of said corporation, did then and there, by virtue of his said office and employment and while he was so employed and acting as such President and Director aforesaid, receive and take into his possession United States Bank notes, currency and silver coin,

commonly known as money, of the value of \$500.00, the property of said company and of divers persons whose names are unknown to the Grand Jury, who had intrusted such money into the custody and keeping of said company, and to the said Taylor as an officer thereof, did then and there unlawfully and willfully and feloniously and with intent to willfully injure and defraud the said company and the said persons, embezzle the said money and convert the same to his own use, and that too at a time different from that mentioned in indictments Nos. 1 and 2 and 4, against the peace, etc." The indictment was under section 1202, Ky. St. 1899, as follows: "If any officer, agent, clerk or servant of any bank or corporation shall embezzle, or fraudulently convert to his own use or the use of another, bullion, money, bank notes, or any effects or property, belonging to such bank or corporation, or other corporation or any person, which shall have come to his possession or been placed in his care or under his management as such officer, agent, clerk or servant, he and the person to whose use the same was fraudulently converted, if he assented thereto, shall be confined in the penitentiary not less than one nor more than ten years." A demurrer to the indictment was interposed, because it is claimed it charges two offenses: One, in that appellant embezzled the money of the corporation; and the other, that he embezzled the money of various persons, other than the corporation, and unknown to the grand jury.

We are of opinion that but one offense was charged, that is, the taking of a certain \$500 in one fund and at one time. Its ownership was not material, further than that it must be charged and shown to have belonged either to the corporation of which appellant was an officer or agent, or to some person who had intrusted its possession to that corporation. Section 128, Cr. Code, appears to us to control this question. It reads: "If an offense involves the commission of, or an attempt to commit an injury to person or property, or the taking of property, and be described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the person injured or attempted to be injured, or as to the owner of the property taken or injured or attempted to be injured, is not material." This court has uniformly held that where the act within this section is particularly and sufficiently described, so that it may be identified as the one which the accused is called upon to answer, whether the owner of the property taken or injured is correctly named is immaterial. *McBride v. Com.*, 13 Bush, 337; *Johnson v. Com.*, 87 Ky. 189, 7 S. W. 927; *Olive v. Com.*, 5 Bush, 376; *Hennessy v. Com.*, 88 Ky. 301, 11 S. W. 13. Under the section of the statute quoted, the distinguishing features of the crime of embezzlement are that the official should have come into possession of the property converted by reason of the

confidence and trust reposed in him by virtue of his position, and that he should have converted such property fraudulently: in other words, it is to punish fraudulent breaches of trust when committed by such persons. The indictment contains all necessary averments showing the commission of this offense, and the demurrer was properly overruled.

The learned circuit judge, in the exercise of extreme caution, restricted the evidence to rather narrow bounds, as affecting both the prosecution and the defense. Without noticing each feature of it in detail, we will state the principles which, in our opinion, should control the investigation. The argument is presented for appellant that in view of the fact that all the stockholders and directors of the corporation (there being but five of them) concurred in the act of declaring the dividends and in the wrongful appropriation of the money, if it was wrongfully done, a peremptory instruction in behalf of appellant should have been given to the jury. This argument is predicated upon the theory that the corporation is in fact, and after all, merely the aggregation of its stockholders; that the stockholders are the actual, or at least the beneficial, owners of its assets; and that it is impossible in law for one to steal his own property. The argument denies the existence of the corporation as a separate legal entity. In a somewhat different form, but no less persuasive in its logical application, this argument has been variously made before. For example, it was once held that a corporation, being an intangible, soulless, fictitious creation, a mere legal and commercial convenience, could not be guilty of negligence, or, indeed, of any tort. Especially was it held that it could not commit willful wrongs involving moral turpitude, such as libel and the like, because it could not have the malicious intent, the wicked mind, whose presence was an essential ingredient to the offense. *Thompson, Corp.* §§ 6275-6321, 6299, and cases there collated. It was once argued, and in conformity held, that neither could a corporation be guilty of infractions of the statutes and criminal laws, for the same reasons. In all these cases it was argued that the wrongful act was *ultra vires*, and that only the agent or servant perpetrating it could be held responsible. *Com. v. Swift, etc., T. P. Co.*, 2 Va. Cas. 362; *Thompson, Corp.* 6418; *Lord Holt*, in 12 Mod. 559, *Anon.*; *Wharton's Crim. Law*, § 91. Except as to such crimes as treason, and others involving personal immorality, these theories have long been exploded. In recent times the use of corporate qualities has become so extensive that it would be impossible to continue business under existing methods on any other basis than to treat the corporation, concerning the title of its property, and its liabilities and its rights, as a person. Modern legislation, as well as almost universal usage, so regard it.

In legal contemplation, the title to the property of a corporation is in fact in it, without regard to who are its members, or how numerous or how few they may be. It cannot divest itself of this title, except by its governing body or authorized agents, acting officially, in some manner permitted by its organic law, or by such acts of theirs on its behalf as would constitute an estoppel as against a natural person. Nor is it true, either in theory or in fact, that a corporation is composed solely of its stockholders. This creature of the law, endowed with the qualities in law of a natural person to a certain extent, is charged as such with the duty to hold, and ultimately to dispose of, the property which it may take, to certain ends only, viz., (1) the payment of the debts and other obligations incurred by it, and (2) to the distribution of the balance among those who hold its stock, as a corporate liability, in the proportion fixed by law. The corporation, so long as it holds property, cannot escape doing either of these things, except by the consent of all who are affected thereby. True, a great variety of acts and dealings, within the scope of its lawful powers, it may do, that in fact may be inimical to the interests mentioned. These *intra vires* acts—matters of judgment and discretion of the governing body of the corporation—are generally beyond the concern of the courts. Three persons may form a corporation, and may consequently own all the stock. Beyond a certain limit they are not liable for its debts, which may largely exceed that limit. The corporation alone, then, is liable. If it be true that the stockholders may without criminality convert all its assets to their own use, those dealing with it on the faith of its property might be irretrievably injured. To prevent just this thing, in part, the Legislature has enacted section 1202 of the statutes against embezzlement by the officers and agents of corporations. It recognizes the title of the property to be in the corporation. It presupposes the power of the corporate officers to manage and control their property in any manner they see fit, except that they may not fraudulently convert it to their own use or the use of another. It was to preserve the property to the ends required by law that was in contemplation. If the corporation owed nothing, then a division of its assets among all its stockholders, by their action, would not and could not be fraudulent as to any person, for it would amount simply to a voluntary liquidation and dissolution of the corporation. That is one of the things it has the right to do after payment of its debts. We conclude that the motion for peremptory instruction was properly overruled.

The inquiry in this case, therefore, should have been, first, to learn whether the corporation had assets on May 14, 1901, which might be lawfully used in paying dividends; that

is, a surplus in fact, whether or not in name. If it had, then the motive of the directors in this case in paying the dividend is immaterial. If it had not, the question of motive becomes important and controlling. If the directors believed they had the right to pay the dividend, or if they paid it in utter ignorance of their legal right, but without any fraudulent motive against others interested in the assets of the corporation, they cannot be guilty of the crime charged. On the other hand, if they at the time knew that there were not funds belonging to the corporation which could legally be used in paying the dividend, and passed the resolution declaring it, and paid it with the fraudulent purpose of converting to their own use the money of the corporation, using the form of declaring the dividend as a blind to cover their speculations, then they are guilty under the statute. *McKnight v. U. S.*, 115 Fed. 972, 54 C. C. A. 358.

We find a case very like the one at bar, in principle, in *Reeves v. State* (Ala.) 11 South. 158. There, as here, the official came into possession and control of the fund converted, by virtue of his office, and the trust reposed in him by reason of it. Reeves and the other officers of the corporation, under the guise of a legal act, committed a fraud by which they misappropriated the funds of the corporation. We quote from that opinion: "But we do not question that the statute may be violated by fraudulent transactions under the guise of loans, made with full knowledge of the managing officers or agents of the bank. The distinction is between the making of mere irregular, unsafe, or reckless loans of the bank's money, which would amount to maladministration only, and pretended loans, made in bad faith, for personal advantage, and with fraudulent intent, the pretended borrower being an officer, agent, clerk, or servant, having control and custody of money of the bank by virtue of his office or employment, which control and custody is shared by those making the pretended fraudulent loan, and who participate in the fraudulent purpose of the pretended borrower; and in cases which assume this phase it may become essential that the evidence should be permitted to take such range as to show the relationship existing between such managing officers, their management of the funds of the bank with respect to each other, the transactions they had had or permitted with each other, involving the use of the bank's money, outside of and beyond the usual course of dealing of the bank, similar to or connected with the loan which is brought in question by the indictment, and illustrative of the real purpose and intent with which the latter was made. A transaction such as is herein above referred to would not be a loan in any sense of the law; it would be a fraud; and such fraud may be accompanied by facts and circumstances which would constitute it embezzlement, or a fraudulent conversion to the

use of the accused, within the meaning of this statute."

To determine whether the company was solvent on May 14, 1901, proof of its resources and assets, their solvency and security, should have been allowed, as well as of the course and nature of its business and the extent of its liabilities. In this connection, proof of the declaration and payment of the other dividends and sums to the directors and stockholders about the same time, including the transfer to the Germanis Company, when the Industrial Mutual Deposit Company sold out to it, and the actual condition of the company at these dates, should have been allowed, as showing or tending to show the motive of the directors, including appellant, in declaring the dividend May 14, 1901. All the transactions of the stockholders to which appellant was a party, in the way of buying coupons in the names of various syndicates, and borrowing the money of the corporation for that purpose on the security of the coupons, should have been allowed for the same purpose. The jury should be charged, though, as to the purpose of the evidence of other dividends declared, and other transactions permitted to be proved which went solely to the question of motive. This is especially necessary in this case, lest the jury should be allowed to believe that they were trying the accused for engaging in a very questionable enterprise, in which he and his associates appear to have been treated with peculiar partiality, and for the result of its being wrecked to the damage of their patrons; a result that in all likelihood would have happened finally anyhow, if they had attempted to carry out the plan adopted, however fairly.

As appellant could not have alone voted and declared the dividends in question, and therefore could not by such vote or act have taken or converted the money charged, it is essential, to constitute his guilt, that all directors, or at least a majority of them voting in the affirmative, including appellant, if he voted or participated in the act, must have acted in declaring and paying the dividend, and appellant also in receiving it, with the knowledge that their act was illegal, that there were no such funds belonging to the corporation subject to that purpose, and that they each acted with the fraudulent purpose of converting to their own use, and to the use of each other respectively, the money of the corporation. For if the directors other than the appellant, through an honest belief in their right to do so, voted the dividend, although it could not have legally been done, the act was merely maladministration; it was not criminal; and, as the act of voting the dividend was the one by which that money was set apart to the stockholders, the knowledge or purpose of appellant in receiving it cannot alone make him guilty. *United States v. Britton*, 108 U. S. 193, 2 Sup. Ct.

326, 27 L. Ed. 701; Id., 108 U. S. 199, 2 Sup. Ct. 531, 27 L. Ed. 698; U. S. v. Harper (C. C.) 33 Fed. 471; U. S. v. Youtsey (C. C.) 91 Fed. 870. It is equally true that if the directors voting the dividend, other than appellant, did so with the guilty knowledge and purpose of committing a fraud upon the corporation, and of converting to themselves its assets, yet if appellant actually believed he had the right to receive it and appropriate it, and acted without fraud, he would not be guilty.

Appellant offered to prove, by officers of other investment companies doing business at Lexington, that they had construed similar provisions in their charters as giving the "surplus" and "expense" funds absolutely to the stockholders. This evidence was offered to prove a custom, it is said, as justifying appellant's like belief and construction. The trial judge, we think properly, refused to permit the testimony. As a matter of law, we decide that the company had not the right to appropriate these funds to themselves if the company was insolvent, or if such appropriation made it so. The belief or conduct of other people could not affect the matter. Appellant's belief and that of his co-directors, in acting in this case, was relevant, and was properly admitted. It was likewise proper that they should have been permitted to state the foundation of their belief—whether it was based upon advice of counsel, or their experience in other similar concerns, or whatever it may have been.

It is insisted for appellant that the Legislature has by statute, by sections 548, 550, Ky. St. 1899, fixed the whole responsibility of directors for wrongfully declaring dividends, and that they cannot be otherwise punished for that act. Section 548, Ky. St. 1899, makes the directors of a corporation liable for all its debts if they should pay any dividend to stockholders while it is insolvent, or that would make it insolvent. This is a civil liability only, and does not affect their responsibility for criminal acts. Section 550, Ky. St. 1899, provides a penalty, by way of fine, against directors who violate any of the provisions of the chapter on corporations. This section deals with those acts which are merely negligent, principally acts of omission or nonfeasance; the failure to comply with certain features of the law, the observance of which it was believed tended to the surer protection of those interested in or dealing with the corporation, whether stockholders or creditors. It was not intended by this section to reduce the felonious act of embezzlement by the officers of a corporation to a mere misdemeanor. Besides, this prosecution is not for wrongfully declaring dividends when the condition of the company did not justify it, but it is for embezzlement committed under the guise of declaring a dividend.

The instructions to the jury did not submit the question of the fraudulent action of ap-

pellant's co-directors in declaring and paying the dividend. That was error, as is pointed out above.

The instructions permitted a conviction if appellant appropriated the money of the corporation "without right and fraudulently." The court failed to define to the jury what were the limitations of this "right" and the meaning of "fraudulent," thus making the jury judges of the law as well as of the facts. This was error. The jury should have been instructed that the directors had the right to declare the dividend in the event that the assets of the company remaining were sufficient to pay its liabilities, including those to the holders of outstanding membership certificates; that the directors had the right to reimburse themselves from the "expense fund" any sums actually advanced or paid out of their own money by them on behalf of the company to procure or extend its business; but the declaration and payment of dividends, or the payment of alleged expenses otherwise, were without right in fact and in law.

In defining "fraudulent conversion" and "fraudulent intent," as used in the instructions, the court should have told the jury that "In this case by fraudulent conversion is meant the deceitful, intentional appropriation of the property of the corporation, without right or without a belief of right as defined in these instructions; and a fraudulent intent is the intent to effect such appropriation."

The instructions, in all other particulars, in our opinion, fairly present the law of the case.

The judgment is reversed, and cause remanded, with directions to set aside the judgment and verdict, and to award appellant a new trial under proceedings not inconsistent herewith.

GREEN COUNTY v. SHORTELL.

(Court of Appeals of Kentucky. June 17, 1903.)

MUNICIPAL CORPORATIONS—BOND ISSUE—SUBSCRIPTION TO RAILROADS—CONDITIONS OF ISSUANCE—NOTICE TO PURCHASERS—RECORDS—DUTY TO SEARCH—NONCOMPLIANCE—ESTOPPEL—PAYMENT OF INTEREST.

1. Where bonds issued by a county in subscription to railroad stock contained no recitals as to the authority of the officers issuing them, or as to the performance of preliminaries requisite to their issuance, there was no estoppel on the county to plead a noncompliance with such conditions, and that they were issued without authority of law.

2. Where the charter of a railroad (1 Sess. Acts 1869, p. 463, c. 1578) vested in the company power to construct a road through certain counties, and, in exception to the general law of the state, empowered any of such counties to subscribe to stock, issuing bonds therefor, on such conditions as it might deem fit, and a county did issue bonds on specified conditions to be performed by the railroad, which were not printed on the bonds, but appeared on the orders of record in the county court, a pur-

chaser of such bonds was charged with notice of the conditions upon which they were to be issued, a noncompliance with which would be available as a defense to a suit by him on the bonds.

3. In pursuance of legislative authority, a railroad company filed in the county court a request that there be submitted to the qualified voters the question as to whether the county should subscribe for capital stock of the company, issuing its bonds therefor, upon the condition that the company should construct its road through the county, and within one mile of a certain town, and also upon the further condition that the bonds should not be issued, or the county pay any part of either principal or interest, until it should be exonerated from payment of a subscription to the stock of a certain other road. The issue was ordered at an election held for that purpose, and all the orders made in pursuance thereof were conditioned as stated. *Held* that, properly construed, the exoneration was a condition precedent, after which the bonds could be issued, but would not be binding in the event of a failure on the part of the railroad to comply with the other condition.

4. An order of the county court directing the clerk to make a subscription to certain railroad stock on behalf of the county, and on the terms specified in the order submitting the question to a vote, was a direction to the clerk to do a merely ministerial act, vested in him no discretion, and was not an invalid delegation of the power vested in the county court to make the subscription.

5. Where by its charter a railroad company was to be built entirely across the state, and, by the terms of the subscription to stock of the road by a certain county through which it passed, bonds were issued, conditioned on the road's being constructed through the county, a subsequent construction by a successor of such road of $4\frac{1}{2}$ miles of railroad in the county was not a substantial compliance with the conditions of the bond issue.

6. Payment of interest on bonds by a county for some years does not estop it to show their invalidity.

Appeal from Circuit Court, Green County.
"To be officially reported."

Action by J. D. Shortell against Green county. From a judgment for plaintiff, defendant appeals. Reversed.

Ernest McPherson, Jno. W. Lewis, and D. T. Towles, for appellant. George W. Jolly, for appellee.

HOBSON, J. The Cumberland & Ohio Railroad Company was incorporated by an act approved February 24, 1869 (1 Sess. Acts, 1869, p. 463, c. 1578). It was vested with power to construct and operate a railroad from the Ohio river, through the counties of Henry, Shelby, Washington, Nelson, Marion, Taylor, Green, Barren, and Allen, to a point on the boundary line between the states of Kentucky and Tennessee, "to be selected by the president and directors, about due north from the town of Murfreesboro, Tennessee, with a view of connecting with the southern systems of railways converging at Nashville, Tennessee." See Charter, § 12 (1 Sess. Acts 1869, p. 468, c. 1578). Any city, town, or county, through which the

proposed road should pass, was authorized to subscribe stock in the railroad company in any amount it desired, and to issue bonds therefor, payable to bearer, with coupons attached, bearing interest not exceeding 6 per cent. payable in the city of New York at not more than 30 years from date; but, before any such subscription should be valid, the question of making it should be submitted to the qualified voters of the municipality, and a majority of the qualified voters voting at the election should be in favor of the subscription. *Id.* p. 471, c. 1578, § 15. The charter authorized subscriptions to be made upon such conditions as might be deemed fit. In construing it in *Shelby County Court v. Cumberland & Ohio Railroad Co.*, 71 Ky. 209, this court said: "The president and directors of the railroad company are not only expressly vested by the twelfth section of the act of 1869, *supra*, 'with all the powers and rights necessary to the construction' of the road, but the sixteenth section provides that the company 'shall have all the powers and privileges conferred' on the 'Louisville & Nashville Railroad Company by the laws of Kentucky for constructing and operating their said road not herein specified and granted, and not in conflict with the term of this charter'; and, by section 22 of the charter of the Louisville & Nashville Railroad Company, the county courts of counties through which that road passes are expressly authorized to submit to the voters of their counties propositions for subscribing for stock in that corporation, 'if by them deemed expedient, in such manner as they may direct and prescribe.' And by the sixth section of an act to amend the same charter, approved January 17, 1856 (1 Acts 1855-56, p. 184, c. 20), counties, towns, cities, and other corporations are authorized, in express terms, to subscribe for stock in that road, 'with such terms and time of payment, conditions annexed, and kind of payment that may be set forth in the subscription.'"

At its June term, 1869, the following request was filed in the Green county court: "We, the undersigned commissioners of the Cumberland & Ohio Railroad Company, hereby request that the county court of Green county submit to a vote of the qualified voters of said county the question whether said county shall subscribe, for and on behalf of said county, and in pursuance of the provisions of the charter of said railroad company, two hundred and fifty thousand dollars to the capital stock of said company, payable in the bonds of said county, having twenty years to run, and bearing six per cent. interest from date, upon the conditions that said company shall locate and construct said railroad through Green county, and within one mile of the town of Greensburg, in the said county, and shall expend the amount so subscribed within the limits of Green county, and also upon the

¶ 6. See Counties, vol. 13, Cent. Dig. § 283; Municipal Corporations, vol. 36, Cent. Dig. § 1950.

further condition that said bonds shall not be issued, or said county pay any part of either principal or interest on said amount subscribed as aforesaid, until said county of Green shall be fully and completely exonerated from the payment of the capital stock subscribed by the county court of said county, for and on behalf of said county, to the Elizabethtown and Tennessee Railroad Company." The county court thereupon made the following order: "Whereas, the commissioners of the Cumberland & Ohio Railroad Company, by virtue of the authority delegated to them by the charter of said company, have requested the county court of Green county to order an election in said county of Green, and submit to the qualified voters of said county the question whether said county court shall subscribe, for and on behalf of said county, two hundred and fifty thousand dollars to the capital stock of the Cumberland & Ohio Railroad Company, having twenty years to run, and bearing six per cent. interest from date, and payable in the bonds of said county, upon conditions that said company shall locate and construct said railroad through the county of Green, and within one mile of the town of Greensburg, in said county, and shall expend the amount so subscribed within the limits of Green county, and also upon the further condition that said bonds shall not be issued, or said county pay any part of the principal or interest on said amount subscribed to said Cumberland & Ohio Railroad Company, until said county of Green is fully and completely exonerated from the payment of the capital stock voted by said county, and authorized to be subscribed by said Green county court to the Elizabethtown & Tennessee Railroad, or any part of the interest thereon. It is therefore ordered by the court that an election by the qualified voters of Green county, at the several voting places in said county, be held and conducted by the several officers, as prescribed by law, holding elections, on the 3d day of July, 1869, to vote on the question as to whether or not the said county court of Green county shall, for and on behalf of said county, subscribe two hundred and fifty thousand dollars to the capital stock of the said Cumberland & Ohio Railroad, conditioned and to be paid as above stated." The election was held, resulting in a vote in favor of the subscription, and at its June term, 1870, the county court entered the following order: "Whereas, in pursuance of an order of this court made on the 17th day of June, 1869, an election was held in said county of Green on the 3d day of July, 1869, at the several precincts in said county, and it appearing that a majority of the qualified voters at said election decided that the county of Green should subscribe for two hundred and fifty thousand dollars of the capital stock of the Cumberland & Ohio Railroad Company: Now, it further appearing

that said election was held in conformity with the law, and in accordance with the provisions of the charter of the company, now, therefore, I, Thomas R. Barnett, the presiding judge of the Green county court, by virtue of the authority in me vested by law, and to carry out the wishes of said voters, do hereby subscribe for two hundred and fifty thousand dollars of the capital stock of the Cumberland & Ohio Railroad Company, for and on behalf of the said county of Green, which subscription is to be paid in the bonds of said county as prescribed in said order of submission, and this subscription is made with the condition set out in the order of this court ordering said election, and now on record in the office of this county." At its October term, 1871, this further order was made: "On motion of E. H. Hobson, director of the Cumberland & Ohio Railroad, it is ordered that Z. F. Smith, president of the Cumberland & Ohio Railroad, be, and he is hereby, authorized to have printed for the county of Green the bonds, to the amount of two hundred and fifty thousand dollars, the amount of subscription of Green county to said railroad, in the following denominations, to wit (the same to be conditioned as specified in the order submitting the vote of the said county): 125 bonds at \$1,000, \$125,000; 200 bonds at \$500, \$100,000; 250 bonds at \$100, \$25,000." At the January term, 1872, bonds to the amount of \$1,300 were ordered to be issued, and at the February term \$5,000 more. At the April term, 1872, the following order was entered: "Application was this day made to the presiding judge of the county court of Green county by the president and board of directors of the Cumberland & Ohio Railroad Company to issue the balance of the bonds of said county, to the amount of the subscription of said county of Green, to the said Cumberland & Ohio Railroad Company; and, the court being sufficiently advised, it is ordered by the court that the balance of the said bonds be, and they are hereby, ordered to be issued, to be signed by the judge of said county court of Green county, and countersigned by the clerk of said court, as required by the charter of said company." Under this order the bonds here in controversy were issued. They read as follows: "United States of America. County of Green, State of Kentucky. For the Cumberland and Ohio Railroad. Twenty years after date, the county of Green, in the state of Kentucky, will pay to the holder of this bond the sum of — with interest thereon at the rate of six per cent. per annum, payable semiannually upon presentation of the proper coupons hereto attached, principal and interest, being payable at the Bank of America, in the city of New York. In testimony whereof, the judge of the said county of Green has hereunto set his hand and affixed the seal of said county, on the 1st day of April,

A. D. 1871, and caused the same to be attested by the county clerk, who has also signed the coupons hereto attached."

Appellee, James D. Shortell, is the holder of six of these bonds, each for the sum of \$1,000, and of one bond for \$500. He filed this suit against the county of Green to recover on the past-due coupons. The county pleaded in defense of the suit the conditions above set out. On the former appeal a demurrer was sustained to the answer on the ground that it did not state the facts relied on sufficiently to raise the question aimed to be presented. See *Shortell v. Green County*, 59 S. W. 522, 63 S. W. 979. On the return of the case to the circuit court the answer was amended so as to set out all the facts above stated, and it was pleaded that the conditions upon which the subscription was made had not been complied with; that the Cumberland & Ohio Railroad failed to erect or construct a line of railroad through Green county, or within one mile of the town of Greensburg; that there is no railroad now, and never was any railroad, running through Green county; that no part of the amount subscribed was ever spent in Green county in the construction of any railroad therein, and that the county was not exonerated from the payment of the capital stock voted by it to the Elizabethtown & Tennessee Railroad; that the conditions prescribed in the subscription were all disregarded and never fulfilled; and that the bonds were issued without authority of law, in violation of the rights of the taxpayers of Green county. The court sustained a demurrer to the answer, and the defendant appeals.

It is conceded that the appellee is a bona fide purchaser of the bonds, without notice of the defense now set up by the county, and the question to be determined is whether, notwithstanding this, the defense relied on is good against him. In determining this question an important distinction is made by the authorities between those bonds which contain recitals certifying that the preliminary requisites for the issue of municipal bonds have all been complied with, and bonds containing no such recitals. Thus in *Citizens' Savings Association v. Perry County*, 156 U. S. 701, 15 Sup. Ct. 550, 39 L. Ed. 585, the United States Supreme Court said: "But it is urged that, the bonds having been executed and issued by those whose duty it was to execute and issue them whenever that could be rightfully done, the county is estopped to plead their invalidity as between it and the bona fide purchaser for value. This argument would have force if the material circumstances bringing the bonds within the authority given by law were recited in them. In such a case, according to the settled doctrine of this court, the county would be estopped to deny the truth of the recital as against bona fide holders for value. But this court in *Buchanan v. Litchfield*, 102 U. S. 278 [26 L. Ed. 139], upon full consideration,

held that the mere fact that the bonds were issued without any recital of the circumstances bringing them within the power granted was not of itself conclusive proof, in favor of a bona fide holder, that the circumstances existed which authorized them to be issued." See, to same effect, *Town of Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579; *School District v. Stone*, 106 U. S. 183, 1 Sup. Ct. 84, 27 L. Ed. 90; *Carroll County v. Smith*, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517; *Hopper v. Town of Covington*, 118 U. S. 148, 6 Sup. Ct. 1025, 30 L. Ed. 190. This doctrine was recently reaffirmed in the case of *Provident Life & Trust Co. v. Mercer County*, 170 U. S. 593, 18 Sup. Ct. 788, 42 L. Ed. 1156. The bonds in question containing no recitals as to the authority of the officers issuing them, or as to the performance of the preliminaries requisite to their issuance, there is no estoppel on the county to plead the truth of these matters. Municipal corporations are simply agents of the state for local purposes, and possess merely such powers as are expressly given, or may be properly implied because essential to effectuate what is expressly granted. 1 *Dillon on Municipal Corporations*, § 189; *Ottawa v. Carey*, 108 U. S. 110, 2 Sup. Ct. 361, 27 L. Ed. 669. The officers of a municipality have only such powers as are conferred upon them by law, and all persons dealing with them are required to take notice of the extent of their authority, because all persons are required to take notice of the laws of the land. *Mayor of Baltimore v. Reynolds (Md.)* 83 Am. Dec. 535; *Marsh v. Fulton County*, 10 Wall. 688, 19 L. Ed. 1040. When the bonds of Green county were offered upon the market, every person buying them was put upon notice that the counties of this state had no authority to issue bonds of this character by the general laws of the state, and that the bonds in question were not binding on the county unless issued by special legislative authority. It was therefore incumbent upon all before buying these bonds to learn by what authority they were issued. It was shown by the bonds that they were issued "for the Cumberland and Ohio Railroad." They were made payable to the holder. When the purchaser looked to the charter of the Cumberland & Ohio Railroad, he was informed by it that the county court could only issue the bonds of the county after the question of making the subscription had been submitted to the qualified voters, and a majority of them had voted in favor of the subscription. He was also informed that the county might make a subscription on such conditions as it saw fit. There being nothing on the face of the bonds to advise him on these matters, it was incumbent on him, before buying paper which was invalid in the absence of express authority in the officials, to look to the record, and see under what circumstances these bonds had come into existence. When he looked to the record of the Green county court, which, under the act, he was bound to know

would set forth the facts, he was apprised that the subscription was made upon the conditions that the company would locate and construct its railroad through Green county, and within one mile of the town of Greensburg, and would expend the amount so subscribed within the limits of Green county, and also upon the further condition that the bonds should not be issued, or the county pay any part of either principal or interest, until it was fully exonerated from the subscription to the Elizabethtown & Tennessee Railroad Company. He was also notified that, in the order of the court under which the vote was taken, it was expressly submitted whether the county would subscribe \$250,000 to the capital stock of the Cumberland & Ohio Railroad, "conditioned and to be paid as above stated," and that in the order making the subscription it was stipulated, "This subscription is made with the condition set out in the order of this court ordering said election and now on record in the office of this county." He was further notified that, in the order directing the bonds to be printed, it was provided, "the same to be conditioned as specified in the order submitting the vote of the said county." These orders of the county court were the authority under which the bonds were issued, and the only authority which the officers issuing them had. They plainly disclosed the fact not only that the subscription was conditional, but that it was "to be paid as above stated," and that the bonds were "to be conditioned as specified in the order submitting the vote." The county officials had no authority to issue a bond not conditioned as specified in the order submitting the vote, for the subscription was expressly conditioned, and only to be paid on condition. If the county officials had followed the order of the county court, and issued bonds conditioned as specified in the order submitting the vote, the bonds, on their face, would have informed every purchaser of the conditions on which they were voted. But when the county officials neglected to do this, and issued instead a naked promise to pay, without any recital of the authority under which it was issued, the purchaser was put upon inquiry as to their authority, and their want of authority is as available against him as the facts pleaded would have been, had they followed their authority, and conditioned the bonds as specified in the order submitting the vote. In executing the bonds in their present form, the county officials may have supposed that the rights of the county were sufficiently protected by the orders entered in the county court. The rule on the subject is thus stated in *Hainer on Municipal Securities*, § 413: "Where bonds purporting to have been issued by a municipality contain no recitals of an election, or of proceedings and orders of the municipality, but are mere naked promises to pay, every purchaser and holder of the securities is

chargeable with notice of whatever appears upon the face of the records. If in such case it appears upon the face of the records that the commissioners had no authority to issue the bonds, the municipality could avail itself of that want of authority as a defense to an action even by a bona fide holder. When the laws or constitutional provisions relating to the issuance of county bonds point to the county records as evidence of facts required to authorize their issuance, such records, and not the recitals in the bonds, must be looked to by all persons proposing to deal in them." In *Lewis v. Bourbon County Com'rs*, 12 Kan. 216, the court, by Brewer, J., said: "Every one dealing with the commissioners or purchasing such securities must take notice of the law under which they act. * * * That these bonds are negotiable paper does not alter the case. The law merchant does not make the act of an agent proof of his authority." In *Veeder v. Town of Lima*, 19 Wis. 287, the court, by Chief Justice Dixon, said, after referring to similar statutory provisions as in the act referred to: "These provisions mark very clearly to my mind the intention of the Legislature that all persons negotiating for the bonds, whether directly with the supervisor or with third parties, must look to the records, and govern themselves accordingly. They are public records, open at all times to inspection; or, if in any cases it is inconvenient or impracticable, transcripts can be had at a trifling expense." In *Cooley on Constitutional Limitations*, in a note to side page 217, after collecting many authorities as to the effect of recitals in such bonds, and quoting at length from *Gould v. Town of Sterling*, 23 N. Y. 464, which is to the effect that the municipality is not bound by recitals in bonds, if unauthorized, the distinguished author says: "It is, of course, impossible to reconcile these authorities, but the doctrine in the case of *Gould v. Town of Sterling* appears to us to be sound, and that, wherever a want of power exists, a purchaser of the security is chargeable with notice of it, if the defect is disclosed by the corporate records, or, as in that case, by other records, where the power is required to be shown."

It is insisted, however, for appellee, that, by the terms of the subscription, it was made upon the condition that the bonds should not be issued, or the county pay any part of either the principal or interest of the amount subscribed, until the county was exonerated from the payment of its subscription to the Elizabethtown & Tennessee Railroad. It is urged that this part of the condition was made precedent to the issuing of the bonds, but that the rest of the condition, to the effect that the company should locate and construct its road through Green county, or within one mile of Greensburg, and expend the amount subscribed in Green county, was not made a condition precedent to the issue of the bonds, and therefore only an

obligation was imposed upon the railroad company, for the performance of which the county only looked to it. It is also insisted that it is shown by the record that the subscription to the Elizabethtown & Tennessee Railroad was void. We cannot concur in either of these conclusions. The meaning of the contract, taken as a whole, is that the subscription is upon the condition that the company shall locate and construct its railroad through Green county, and within one mile of Greensburg, and expend the amount subscribed in the limits of Green county; and the further condition is added that the bonds are not to be issued, or anything paid on account of the subscription, until the county is exonerated from its former subscription to the Elizabethtown & Tennessee Railroad. In other words, the bonds are not to be issued until this release is made, and after the release is made the bonds may be issued, but they are to be subject to the condition that the company should locate and construct its road as above set out. The railroad authorities, in applying to the county court for a vote on this subject, intended by their petition for the people of the county to understand that, before any liability was created, the old subscription to the Elizabethtown & Tennessee Railroad was to be out of the way entirely, and that after this was done the promise of the county to pay was to be conditioned on the location and construction of the road through Green county, and within one mile of the town of Greensburg. In construing the contract, the court must bear in mind that it was a proposition submitted by the railroad company to be voted on by the people of Green county, and that construction must be adopted which was clearly contemplated by the parties at the time. The railroad company intended the people to understand, and the people understood, from the paper when they voted on the subscription, that they were to get a railroad through the county, and that, if they did not get it, their subscriptions, being "conditioned and to be paid as above stated," would not be binding upon the county. That this was the understanding of the parties is conclusively shown by the order of the county court, made on the motion of the railroad company, directing the bonds to be printed, "the same to be conditioned as specified in the order submitting the vote of the said county." As to the matter of the subscription to the Elizabethtown & Tennessee Railroad, the record shows the following order of the county court, made on May 20, 1868: "This day T. R. Barnett, presiding judge, and D. T. Towles, clerk, of the Green county court, produced their certificate in words and figures as follows, viz.: 'We, T. R. Barnett, presiding judge, and D. T. Towles, clerk, of the Green county court, duly authorized to compare the pollbooks of Green county, certify that at an election

held in said county at the various voting places in said county on the 16th day of May, 1868, on the question whether the county court of Green county shall, for and on behalf of said county, subscribe for 3,000 shares of the capital stock of the Elizabethtown & Tennessee Railroad Company, to be paid for in the bonds of said county, payable in twenty years, and bearing six per cent interest, payable semiannually in the city of New York, with interest coupons attached thereto, and that 586 votes were cast for said subscription, and 204 against said subscription. May 20th, 1868. T. R. Barnett. D. T. Towles.' It is therefore ordered by the court that the said vote be and is now entered of record as follows, to wit: 586 votes were cast for said subscription, and 204 votes were cast against said subscription, showing that there is a majority for said subscription of 382 votes. It is now, therefore, ordered that the clerk of this court, for and on behalf of the county of Green, make said subscription on the terms specified in the order submitting the question to a vote as aforesaid."

It is insisted that the order is void because the county court, instead of making the subscription, delegated this duty to its clerk; and *Mercer County Court v. Kentucky River Navigation Company*, 71 Ky. 300, is relied on. But in that case the order of the county court appointing the commissioner to make the subscription contained these words: "But said commissioner is directed not to subscribe said stock, or any part thereof, until said company shall, by proper orders entered on the books, agree that no part of their subscription shall be mortgaged under the provisions of the tenth section of the act of the Kentucky Legislature incorporating said company, nor shall the county of Mercer be in any manner bound for the subscription herein decreed to be made until said company has accepted it upon the conditions herein set forth." It was held that the power, of the county court to make the subscription, being conferred by law, must be exercised by it, and that it could not confer upon a commissioner the power to determine important questions submitted for its determination. The ground of the decision was that there was no subscription unless certain things were done, and the commissioner was to determine whether these things were done, and thus, by the exercise of his discretion, determine whether the subscription should be made, whereas the law had vested this discretion alone in the county court. But the case before us is wholly different. No discretion is conferred upon the county clerk. He is simply directed absolutely to do a clerical act. County courts cannot conveniently sign subscription papers or documents of this kind, and for convenience such bodies usually act by a commissioner or agent in the discharge of the mere clerical duty of signing

the papers. Such a course of doing the business has been often sustained. 23 Am. & Eng. Ency. of Law (2d Ed.) 365, 366; Miller v. New York, 109 U. S. 385, 3 Sup. Ct. 228, 27 L. Ed. 971; Birdsall v. Clark (N. Y.) 29 Am. Rep. 105; Burrill v. Nahant Bank (Mass.) 35 Am. Dec. 395; Dillon on Municipal Corporations, § 60. As the case is here only on demurrer, the question is not presented whether the subscription was in fact made.

Again, it is urged that 4½ miles of railroad have been built in Green county by a successor of the Cumberland & Ohio Railroad Company, and this is relied on as a compliance with the condition of the contract, under the case of Providence Trust Co. v. Mercer County, 170 U. S. 602, 18 Sup. Ct. 788, 42 L. Ed. 1156; but that case rests on the peculiar facts there shown, it being held, in effect, that the contract was substantially complied with. That is not the case here. There has been no substantial compliance with the contract. The road was to be built from the Ohio River to the Tennessee line, and the subscription was made on the condition that it was to be paid when the road was constructed through Green county. It has never been constructed through Green county, nor does its construction in any manner approximate a fulfillment of the conditions. To hold that there has been a compliance with the terms of the contract would be to give no effect to the natural meaning of the language used. People's Ferry Co. v. Balch, 74 Mass. 303; Memphis, etc., Railway v. Thompson, 24 Kan. 170.

The fact that the county paid the interest on the bonds for a few years does not estop it to show their invalidity. Marsh v. Fulton County, 10 Wall. 676, 19 L. Ed. 1040; Norton v. Shelby County, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178; District Tp. of Doon v. Cummins, 142 U. S. 366, 12 Sup. Ct. 220, 35 L. Ed. 1044; Mercer County v. Providence Life & Trust Co., 72 Fed. 623, 19 C. C. A. 58; Graves v. Saline Co., 161 U. S. 373, 16 Sup. Ct. 526, 40 L. Ed. 732.

We therefore conclude that, upon the facts shown, the county of Green is not liable upon the bonds sued on, and that the court should have overruled the demurrer to the answer. As the case was submitted both on a demurrer and a motion for judgment notwithstanding the answer, we will not now direct a judgment to be entered for the defendant. As the bonds in contest contain no recitals, no opinion is intimated on the conflict of authority referred to by Judge Cooley as to whether municipal officers issuing bonds without authority can estop the municipality by reciting in the bonds that they have such authority.

Judgment reversed and cause remanded for further proceedings not inconsistent herewith.

SETTLE, J., declined to sit in the case.

75 S.W.—17

STUART v. HARMON.

(Court of Appeals of Kentucky. June 20, 1903.)

"Not to be officially reported."

Modification of opinion. For former opinion, see 72 S. W. 365.

PER CURIAM. The opinion is modified to the extent of leaving open the question whether or not Harmon should be charged with the proceeds of the sale to those claiming under the Swan patent.

NEW YORK LIFE INS. CO. v. JOHNSON'S ADM'R.

(Court of Appeals of Kentucky. June 20, 1903.)

"To be officially reported."

Modification of opinion. For former opinion, see 72 S. W. 762.

PER CURIAM. As no objection seems to have been made to the introduction of the memorandum book, so much of the opinion as relates to the right to introduce the same as evidence is withdrawn, and the question will remain an open one, without this court being committed to any view of it.

EDWARDS v. LOGAN.

(Court of Appeals of Kentucky. June 20, 1903.)

"To be officially reported."

Modification of opinion. For original opinion, see 70 S. W. 852.

O'REAR, J. The very earnest petition for a rehearing has induced a careful re-examination of the record, and that by other judges than the one who wrote the opinion. As the result, the court concludes to adhere to the former opinion. However, there are two matters, unimportant as affecting the result, or any conclusion of law announced, that we desire to correct. We do not, and did not, intend, by anything said in the opinion respecting the action of the two commissioners who canvassed the returns, to intimate that they were actuated by other than perfectly honest motives, or that their count of the ballots was not absolutely fair. The order appointing the commissioners recites that "this order is made without prejudice to the rights of either party." This the court construed into being a formal exception, though it appears the order was indorsed "O. K." by one of the parties and by the attorney of the other. It is said this operated as a consent to the order, and perhaps it did.

Lewis Hill and George Parsley were held by the lower court to be illegal voters. But their votes were not deducted, because there

was not sufficient evidence in the opinion of the trial judge as to how they voted to authorize it. Hill, we held to be an illegal voter, but as to Parsley we did not decide whether or not he was a legal voter. We concluded, also, that there was not sufficient evidence as to how they voted to warrant the deduction of their votes from those of either candidate. It is due to the trial judge to say that the result of his finding respecting these two votes is sustained; but, as neither he nor this court rejected those votes, the result is not affected.

The petition for rehearing is overruled.

SETTLE, J., not sitting.

McNULTY et al. v. TOOPF et al.
(Court of Appeals of Kentucky. June 20, 1903.)

MUNICIPAL CORPORATIONS—ORDINANCES—VALIDITY—TITLE—SUFFICIENCY—ADOPTION—RECORDS—POLICE POWERS—INTOXICATING LIQUORS—CLOSING SALOONS—PENALTIES—ACTION—PLEADING.

1. An ordinance entitled an ordinance prohibiting the dispensing of spirituous liquors during certain hours, closing saloons, coffee houses, and like places of business during such period, and requiring the removal of obstructions to the interior view from saloons, coffee houses, or like places of business, is not repugnant to Ky. St. § 3059, providing that no ordinance shall embrace more than one subject which shall be expressed in the title.

2. Under Ky. St. § 3058, conferring power on certain cities to regulate the selling or giving away of spirituous liquors by any person within the city other than those duly licensed, and to pass such ordinances as may be expedient in maintaining the peace, good government, health, and welfare of the city, an ordinance prohibiting the dispensing of spirituous liquors between certain hours of the night, requiring the closing of saloons, and the removal of obstructions from the interior view of saloons, is authorized.

3. A provision in the ordinance prohibiting druggists from dispensing spirituous liquors between certain hours of the night is invalid, a druggist not being permitted to dispense liquors at any time as a drink.

4. The ordinance, in prohibiting wholesale liquor dealers from dispensing liquors during certain hours, is invalid.

5. An ordinance, in declaring that the entrance or exit of any person from any saloon during the hours specified that same should be closed should be prima facie evidence of its violation is invalid, as an attempt to legislate on the weight and effect of evidence.

6. Where the invalid provisions of an ordinance can be eliminated without affecting the remainder, it will not be invalid in toto.

7. In an action for the penalty for violating an ordinance requiring the closing of saloons, an answer controverting the validity of the ordinance because it had not been published as required by Ky. St. § 3045, may be filed, and the question of fact investigated.

8. Under Ky. St. § 3063, providing that the general council shall cause all ordinances passed by them to be fairly recorded in the journal of proceedings, an answer in an action for the penalty for violating an ordinance averring that the ordinance was not recorded in the

journal on the days it passed the respective houses is insufficient, as it does not aver that the proceedings of the board were not recorded at all.

Appeal from Circuit Court, McCracken County.

"To be officially reported."

Action by F. P. Toopf and others against James McNulty and others. From a judgment in favor of defendants, plaintiffs appeal. Reversed.

Thos. E. Moss, for appellants. Read & Berry, for appellees.

O'REAR, J. This proceeding and appeal involves the validity of the following ordinance, passed by the general council of the city of Paducah, a city of the second class:

"An ordinance prohibiting the selling, dispensing or giving away of any spirituous, vinous or malt liquors, between the hours of 10:30 o'clock p. m. and 5 o'clock a. m. closing saloons, coffee houses and like places of business during said hours; providing for the removal of obstructions to an interior view from the exterior and front of any building occupied by a saloon, coffee house or like business or calling, on certain days and certain hours, and prescribing penalties for violation of its provisions.

"Be it ordained by the General Council of the City of Paducah, Ky.

"Section 1. That it shall be unlawful for any saloon, coffee house or other place where spirituous, vinous or malt liquors are sold by the drink in the city of Paducah, to sell, offer for sale or give away either or any of said liquors between the hours of 10:30 p. m. and 5 o'clock a. m.

"Sec. 2. That each and every saloon, coffee house or other place where spirituous, vinous or malt liquors are sold by the drink in the city of Paducah, shall be tightly closed, front side and rear at 10:30 o'clock p. m. and the same shall not be reopened until 5 o'clock a. m. the succeeding morning, and the entrance to or exit from any saloon, coffee house, or other place where spirituous, vinous or malt liquors are sold by the drink in the city of Paducah by any person or persons during the time herein specified that same shall be closed, shall be held as prima facie evidence of a violation of this section.

"Sec. 3. That whereas the police of the city are deterred by the regulations governing the police department from entering the saloons, each and every saloon, coffee house or other place where spirituous, vinous or malt liquors are sold by the drink in the city of Paducah, shall in the front doors and front partitions of same, hold all blinds open all screens, remove stained glass or frosted windows, and remove boxes or merchandise, and any other matter or thing which may obstruct the view of the interior of such place from the front thereof on all

¶ 6. See Municipal Corporations, vol. 36, Cent. Dig. § 243.

days now fixed by the state law that these places shall be closed, and between the hours of 10:30 p. m. and 5 o'clock a. m. as provided for closed hours in the preceding section.

"Sec. 4. That it shall be unlawful for any druggist, grocery-man, wholesale liquor dealer, or other person, to dispense, sell or give away any spirituous, vinous or malt liquors between the hours of 10:30 o'clock p. m. and 5 o'clock a. m.

"Sec. 5. That for the violation of any of the provisions of any of the foregoing sections, the offender, upon conviction of the first offense, shall be fined any amount not less than ten dollars (\$10.00) nor more than fifteen dollars (\$15.00), upon the conviction of the second offense, the offender shall be fined in any amount not less than fifty dollars (\$50.00) nor more than sixty dollars (\$60.00), upon conviction of the third offense, the offender shall be fined in any amount not less than seventy-five dollars (\$75.00) nor more than one hundred dollars (\$100.00) and in addition thereto the license to sell spirituous, vinous, or malt liquors, in the city of Paducah, issued to such offending person, or firm, shall be forfeited.

"Sec. 6. That all ordinances, or parts of ordinances, conflicting with any of the provisions of this ordinance, are to the extent of such confliction, hereby repealed, and this ordinance shall take effect from and after its passage and approval.

"Adopted by the Council Nov. 17th, 1902.

"Chas. Reed, Prest.

"Adopted by the Board of Aldermen, Dec. 4th, 1902. Chas. Q. C. Leigh, Prest.

"Approved Dec. 19th, 1902.

"D. A. Yeiser, Mayor."

The first objection to the ordinance is, it is claimed, that its title embraces more than one subject, and is therefore repugnant to section 3059 of the Statutes, namely: "No ordinance shall embrace more than one subject, and that shall be expressed in the title." The court is of the opinion that the fact that the subject-matter is detailed in the title more minutely than is necessary does not invalidate the ordinance. *Allen v. Hall*, 14 Bush, 85. What this title really means, and the sum of it is, that the ordinance is one "to further regulate the sale of spirituous, vinous, and malt liquors in the city of Paducah." The main objection to the provisions of this ordinance is, it is argued, that it is an improper exercise of the police power of the state. Among the powers conferred upon the municipalities of cities of the second class is that (subsection 10, § 3058, Ky. St.): "To restrain, regulate and prohibit the selling or giving away of any spirituous, vinous or malt liquors, by any person within the city other than those duly licensed; to forbid and punish the selling or giving away of any spirituous, vinous or malt liquor to any woman, minor, or habitual drunkard." Subsec-

tion 23, § 3058: "To impose, enforce and collect fines, forfeitures and penalties for the breach of any provision of this act or any ordinance. * * * Subsection 25, § 3058: "To pass all such ordinances, not inconsistent with the provisions of this act, or the laws of the state, as may be expedient in maintaining the peace, good government, health and welfare of the city, its trade, commerce and manufactures, and to enforce same by fines and penalties; and any enumeration of subjects and matters herein to be regulated shall not be construed as a limitation upon this general power." The state has a right to determine what employments or business shall be permitted, and to forbid those which are deemed prejudicial to the public good. Under this right it forbids the keeping of gambling houses; and other places where games of chance or skill are played for money, the keeping for sale of indecent books and pictures, and the keeping of houses of prostitution and the resort thereto, and in some states the sale of intoxicating drinks as a beverage. These several kinds of business have a tendency which is injurious and demoralizing; and this tendency is recognized even in states where they are not forbidden, and they are subjected to regulations with a view to reducing their evils to a minimum." *Coley's Constitutional Limitations*, 743. Under this general power of the state to regulate the traffic in such articles and such employments as are deemed to be deleterious to the public peace, welfare, or morals, there has been delegated expressly to the municipality, of which Paducah is one of the class, the power to likewise regulate the same within its borders. The keeping open of saloons and resorts where intoxicating liquors are sold as a beverage, or where tipping is indulged between the hours of 10:30 at night and 5 o'clock in the morning, is a matter that may be regulated by the municipality under the grant of the police power above conferred upon it by the state. Nor is it an unreasonable regulation, or beyond the fair exercise of this power, for the municipality to require not only that these places should be closed between the hours mentioned, but that at such times as they are by the laws of the state or the ordinances of the municipality required to be closed the operators shall in the front door and front partitions of their business houses have all blinds, upon all screens, remove stained glass or frosted windows, and remove such obstacles as may obstruct the view of the interior from the front thereof. Under a statute conferring substantially the same powers upon cities of the fourth class regarding the restraining and punishing of vagrants and prostitutes and whore-mongers, it was held by this court (*Duan v. Com.*, 105 Ky. 834, 40 S. W. 813, 43 L. R. A. 701, 88 Am. St. Rep. 344) that it was a fair exercise of the police power to prohibit prostitutes from being found on the streets be-

tween the hours of 7 o'clock p. m. and 4 o'clock a. m., except in instances of reasonable necessity.

Concerning the inhibition of a druggist dispensing spirituous, vinous, or malt liquors between the hours of 10:30 p. m. and 5 o'clock a. m., we are of opinion that the ordinance is invalid. The druggist is not permitted to dispense or sell spirituous, vinous, or malt liquors at any time by the drink or as a beverage. It must be disposed of only as a medicine, and generally upon prescription. It may be important, and, indeed, necessary, that this right of the druggist to lawfully dispose of this ware at any time of the day or night should be unrestricted by such interference. Nor is it a reasonable exercise of the police power of the state to prohibit wholesalers of liquors from moving or disposing of their wares at wholesale, not to be drunk on the premises or adjacent premises, at any hour that may best suit the convenience of the parties.

We are also of the opinion that, while the state might, by statute, make the fact that persons during the time when the keeping open of saloons and such places is prohibited are seen to enter or leave them prima facie evidence of the violation of the act (*Piqua v. Zimmerlin*, 35 Ohio St. 507), we are unable to find where the state has delegated to the municipality the right to legislate upon the question of evidence, and of its weight and effect before the courts. The provision in the ordinance making such fact prima facie evidence of the violation of the act is invalid. In other respects, except the three specifically mentioned, the court is of opinion that the ordinance is not violative of any term of the Constitution or statute law of this state. As the objectionable features may be eliminated without affecting the remainder of the ordinance, it will not be held invalid in other respects because of their presence.

Appellants McNulty and Graham, saloon keepers, tendered and offered to file an answer controverting the validity of the ordinance upon the ground that it had not been published as required by section 3045, Ky. St., which requires such publication before an ordinance shall be in force. If the publication has not been made in fact as required by the statute, then the ordinance would not be enforced. The answer should have been permitted to be filed, and the question of fact that it presented investigated. However, there is no limitation as to when the ordinance should be published. We are of opinion that it would become effective from the time that it was or shall be published as provided in that section.

A further complaint is made in the answer of McNulty and Graham that the ordinance "was never recorded into the journal of the proceedings of the board of council of date November 17, 1902, or November 3, 1902, nor was it recorded in the journal of proceedings of the board of aldermen on November 20,

1902, or December 4, 1902." Those were the dates at which the ordinance had its first and second readings, respectively, and was put upon its passage in the two houses of the city council. Section 3045, Ky. St., also provides "each board shall keep a correct journal of its proceedings," and section 3063: "The general council shall cause all ordinances, resolutions and by-laws passed by them to be fairly recorded in the journal of proceedings. After the adjournment of any session of either house, all of the original ordinances and all resolutions which may have become laws thereat shall be filed with the auditor, who shall record the same in well-bound books provided for the purpose by the city: provided, that no ordinance shall be recorded until it shall have become a law." The averment of the answer upon this subject is merely that the ordinance was not recorded in the journal on the days at which it is said to have been passed by the respective houses of the council. It is not averred that the proceedings of the board were not recorded upon the journals of the two bodies at all. We are of opinion that, if the proceedings were enrolled upon the journals, and thereafter approved by the bodies whose action they represented, and signed by their respective presiding officers, the requirements of the section would have been complied with.

The judgment is reversed, and this cause remanded, with directions for proceedings consistent herewith.

STEPHENSON'S ADM'R v. ILLINOIS
CENT. R. CO. et al.

NICHOLS v. SAME.

(Court of Appeals of Kentucky. June 20, 1903.)

REMOVAL OF CAUSES—DIVERSE CITIZENSHIP
—RIGHT TO REMOVE—REMOVAL—WAIVER
—COMMENCING NEW SUIT.

1. Where, in a suit in a state court, the petition alleges that one of defendants is a resident of the state, and other defendants fail to traverse such allegation, it is error to allow them to file petitions for removal to the federal court, and accept their bonds thereon.

2. Where a state court erroneously permitted certain defendants to file petitions for removal, and approved bonds given thereon, and such defendants took a transcript to the federal court, and plaintiffs appeared there, and moved to have the cause remanded, and subsequently on their motion the cause was dismissed without prejudice, plaintiffs, by their conduct, lost their right to have the state court's action corrected.

3. Under such circumstances plaintiffs had the right to bring another action for the same cause.

Appeals from Circuit Court, McCracken County.

"Not to be officially reported."

Action by Lucy Stephenson's administrator against the Illinois Central Railroad Company and others, and action by Annie Nichols against the same defendants. From a judgment in each action overruling a motion to set aside an order approving bonds on peti-

tion for removal to federal court, plaintiffs appeal. Dismissed.

Taylor, Gilbert & Lucas, for appellants. Wheeler & Hughes, J. M. Dickerson, and Pirtle & Trabue, for appellees.

NUNN, J. The questions involved in these cases on this appeal being the same, we dispose of them together. Appellants, in November, 1902, instituted actions in the McCracken circuit court against appellees, charging, in substance, that by reason of the negligence of appellees in the management, running, and operation of a train of cars it ran over and killed Lucy Stephenson and maimed Annie Nichols. Appellee Illinois Central Railroad Company at the first term of the court filed a petition and bond asking a transfer of the action to the United States court for the Western District of Kentucky, alleging that it was a corporation organized and existing under the laws of Illinois, and that its office was in Chicago; and alleged "that the controversy was wholly between citizens of different states, and could fully be determined without the presence in the action of its codefendants, A. T. Cole and Robert Bean." Robert Bean filed a like petition and bond, claiming that at the date of filing the petitions of plaintiffs he was and had been since a resident of the state of Mississippi, and also asked a transfer. The court allowed their petitions and bonds to be filed, and made an order approving them. Appellants then moved the court to set aside the orders of approval. The court overruled their motions, to which they excepted, and prayed an appeal, which was granted. The petitions of appellants charged that the defendants Robert Bean and A. T. Cole were engineer and conductor, respectively, of the train of cars which killed Lucy Stephenson and maimed Annie Nichols, and that they both saw the peril of appellants in sufficient time to have stopped the train and saved them from injury, but negligently failed to do so; and also alleged that defendants Cole and Bean were then and at the time of filing their actions residents of the county of McCracken and state of Kentucky. The appellee company and Bean did not traverse the petitions of appellants as to the residence of defendant A. T. Cole. For these reasons the court erred in allowing the petitions to be filed, and accepting their bonds. See cases of *Winston's Adm'r v. I. C. Railroad Co.* (Ky.) 65 S. W. 13, 55 L. R. A. 603, and *C. & O. Railroad Co. v. Dixon's Adm'r* (Ky.) 50 S. W. 252. But appellants, by their actions since that error was committed by the lower court, have lost their right to have same corrected. The appellees took a transcript of the record, and filed it in the United States court at Paducah, and appellants appeared in that court, and made a motion to have the cases remanded to the state court, which motion was overruled. Then appellee filed its

answer, and the appellants controverted it of record. On their motion the actions were dismissed without prejudice. The appellants, by their conduct, recognized the fact that these cases were transferred, and dismissed them. Consequently they have no actions pending now in either court. But under the authority of *Adams Express Co. v. Schofield* (Ky.) 64 S. W. 903, they have the right to bring other actions for the same negligence, if not barred by lapse of time.

For these reasons the motions of appellees to dismiss these appeals are sustained.

GARTH'S GUARDIAN v. TAYLOR et al.
(Court of Appeals of Kentucky. June 20, 1903.)

"Not to be officially reported."

Modification of opinion. For former opinion, see 72 S. W. 777.

PER CURIAM. It is not necessary, for a decision of this case, to determine whether the order of the county court was void or voidable, as in either event it was properly set aside. So much of the opinion as holds it void is withdrawn, and no opinion is expressed as to whether the order was void or voidable.

The petition for rehearing is overruled.

COMMONWEALTH v. McGOVERN et al.
(Court of Appeals of Kentucky. June 20, 1903.)

PRIZE-FIGHTING—EQUAL DIVISION OF REWARD—USE OF GLOVES—EFFECT—EQUITY—POWER TO ENJOIN.

1. Evidence examined, and held to show that a fight advertised to take place between certain persons would, if permitted, constitute a prize-fight.

2. The fact that the reward is to be equally divided between the combatants in a prize-fight does not legalize the transaction.

3. The use of gloves by combatants in a prize-fight will not make the contest any less a violation of the statute.

4. Ky. St. 1899, § 1289, which provides that it shall be the duty of "all judges of courts, * * * on being informed * * * that such a fight [prize-fight] is about to take place, * * * to suppress and prevent the same, and * * * in order to suppress or prevent the same they shall exercise all the powers vested in them for the prevention of crimes," authorizes a court of equity, in a suit by the commonwealth, to enjoin one from permitting the holding of a prize fight on his premises, on the ground that such a use of his property will constitute a public nuisance, though it cannot grant an injunction against the principals in the contemplated prize-fight, nor those connected with them as managers, trainers, etc., because the process of the criminal courts is adequate to prevent the fight by the arrest and prosecution of the parties concerned.

Paynter, Barker, and Nunn, JJ., dissenting.

Appeal from Circuit Court, Jefferson County, Chancery Division.

"To be officially reported."

Suit by the commonwealth against Terry McGovern and others. From a judgment

dismissing the petition, the commonwealth appeals. Reversed.

Clifton J. Pratt, Bennett H. Young, H. L. Stone, David W. Fairleigh, and Helm Bruce, for the Commonwealth. Dodd & Dodd, Kohn, Baird & Spindle, O'Neal & O'Neal, and Forcht & Field, for appellees.

SETTLE, J. This equitable action was instituted in the Jefferson circuit court, common pleas division, by the appellant, the commonwealth of Kentucky, on relation of the Attorney General, against the appellees, Terry McGovern and others, to prevent the holding of a prize-fight advertised to take place on the 22d day of September, 1902, in the Auditorium, a large theater situated in the city of Louisville. Terry McGovern and Young Corbett were to be the combatants, and their managers and the owner of the Auditorium were made parties to the action.

It is averred in the petition, in substance, that the prize-fight was to be given under the auspices of the Southern Athletic Club of which the appellee Robert Gray is the sole stockholder and manager; that the Auditorium has a seating capacity of 4,000, and that the prices of tickets for admission into that building to witness the prize-fight vary from \$5 to \$20 a seat; that the fight was to take place according to the Marquis of Queensbury rules, and the fighters were to receive \$10,000 between them. It is further averred that the prize-fight, if allowed to take place, would bring to the city of Louisville a great number of sporting men, disorderly persons, and criminals, and that the persons so drawn to the city would constitute a lawless, turbulent, and dangerous assembly of many thousands of people, and would produce breaches of the peace and other violations of the law, which would have a demoralizing effect upon the good order and well-being of the community, and produce a public nuisance. It is also averred that a criminal prosecution of the principals and others connected with them would not prevent the great injury that would be done to the people of the state by holding the prize-fight within its bounds, and, finally, that the commonwealth has no adequate remedy at law for the injury which would result to the public welfare, if the prize-fight were allowed to be held. Answer was filed by the appellees, traversing the allegations of the petition.

Thereafter, upon the pleadings and proof, in the form of affidavits and depositions, the judge of the court in which the action was then pending issued a temporary restraining order against appellees, and upon the day following its issue a motion was made by the appellees before one of the judges of this court to dissolve the restraining order, and that judge and five of his associates, members of this court whom he called in consultation, rendered the following opinion:

"This motion was made before the Chief

Justice, who by consent of the applicants transferred the hearing of the motion to Judge White, who invited the whole court, except Judge Paynter (absent), to hear the application with him. The majority of the court who heard the application to dissolve the injunction of Judge Field are of the opinion that the contest which has been enjoined is a prize-fight, and that it is not material whether the victor in the contest is to receive more of the reward offered than the vanquished. The court is divided equally upon the question of whether the chancellor has preventive power under the Kentucky Statutes to restrain the holding of such contest; Chief Justice Guffy and Judges White and Burnam holding in the negative, and Judges Du Relle, Hobson, and O'Rear holding the affirmative. The motion to dissolve is therefore denied."

After the foregoing action by this court, the case was submitted upon the pleadings and proof to the judge of the chancery division, No. 2, Jefferson circuit court, for trial, who rendered judgment dismissing the petition. Appellant complains of that judgment, and has brought the case by appeal to this court for review.

No one can doubt that the contest between appellees McGovern and Corbett, if it had taken place as advertised, would have been a fight. Indeed, it is clear from the evidence furnished by the record that the fight between these men was to be one of unusual endurance and extreme brutality, a very feast of blood, to be enjoyed to the full by the thousands who were expected to witness it. From the mass of testimony in regard to the bloody character of such contests found in the record we have but to mention the following:

Lambertson, the sporting editor of a Cincinnati newspaper, in describing a fight of this kind which he witnessed at the Auditorium, said it appeared to him the men were "hitting each other just as hard as they could."

Harris, the manager of McGovern, in speaking of his manner of fighting, says: "There is 'no make-believe' about it; that, when he goes into a contest of this kind, he 'goes in to win'; that he strikes 'just as hard as he can'; and that this is the way with every such contest, unless it is a 'fake.'"

Gearhart, a professor of boxing in the city of Louisville, testified that he had seen a great many contests under the Marquis of Queensbury rules, and that they are brutal; and, upon being asked if it was customary for the contestants to try to knock each other out in such contests, he said: "The contestants do generally, if they are fighting under the Marquis of Queensbury rules, endeavor to knock each other out, because, if they succeed in doing that (that is, in knocking their opponent down, so that he is unable to get on his feet in ten seconds), in that way they will get the decision. Hence, they always

endeavor to do that, if they are 'fighting on the square,' in sporting parlance." Upon being further asked if the sports would regard it a square contest if the opponents did not use their best endeavor to knock each other out, he answered: "No, that would be considered a 'fake.'"

A physician, Dr. Gossett, testified to having professionally attended a man named Handler, after his fight with Bill Harrahan at the Auditorium in November, 1901, and of his condition said: "His upper lip was cut in two places—one side clear through to the teeth, completely severed, and the other side was nearly through. His upper lip was swollen about three or four times its normal thickness, and one eye completely closed and swollen very much. Both lids were swollen about an inch in thickness, due to the extravasation of blood. He could not open one of his eyes. The other was very nearly as bad. He had a cut over one eye, about an inch and a half in length, in which we had to take three or four sutures. We took six or eight sutures in his lip. His face was very much bruised; looked like a piece of raw beef. Blood was oozing from different parts of it. * * * When I first saw him, the feeling I had was of sickening disgust."

Another witness, Mr. Lewis Humphrey, testified that he saw the fight between Ryan and West for the championship of the middle-weights of the United States, which occurred in the Auditorium in the city of Louisville on March 4, 1901. They fought with five-ounce gloves and under the Marquis of Queensbury rules. The fight was under the auspices of the Southern Athletic Club, of which the appellee Robert C. Gray was then, as now, the manager, and some of the city police were present. The fight is thus graphically described by the witness: "I saw this fight from beginning to end, being very close up to the ring, where I could very distinctly see both contestants during the whole fight. They were dressed in the manner which is universally customary with prize-fighters, being stripped to the waist. They started into the fight in the usual manner, by shaking hands in the center of the ring, and then began to fight each other with their fists, using and manifestly exerting all of their physical strength in the blows delivered against each other. It was an extremely vicious fight, and the physical punishment of each of the contestants was very great. West was the greatest sufferer. His nose was split early in the fight, so it hung in two portions. Midway in the contest he was so covered with blood that above the waist it was difficult to see the white skin. The gloves on the hands of his opponent, Ryan, became fairly soggy with blood from striking the face of West. West showed the greatest endurance, and, although at least half a dozen times it appeared as if he would faint, he remained in the ring until the close of the seventeenth round. During this time he was several

times knocked to the floor, and barely managed to rise before the count of ten. At the end of the seventeenth round he took a seat in the corner, and was in such a dazed and weakened condition that, after consultation with his seconds, the referee declared him unable to go further, and awarded the fight to Ryan. During the fight Ryan resorted to what is known as 'chopping tactics,' and cut and bruised West in innumerable places about the entire face and head; also striking him in the body, raising very perceptible bruises. Ryan was himself badly cut about the face, and one of his eyebrows split. He bled very freely, and the attention of his seconds between the rounds was almost entirely taken up with removing the blood from his face and body. A large quantity of blood covered the floor on which they were fighting, making it at several places very slippery."

The combats described by the witnesses were conducted according to the Marquis of Queensbury rules. It is admitted that the prize-fight, to prevent which the injunction in this case was sought, was to be fought under the same rules. A copy of these rules is made a part of the record in this case, and we here quote from that copy the following:

"Sixth. When the contestant has fallen to the ring floor through the medium of a blow or weakness, he must arise, unassisted, within a period of ten seconds. His opponent must meanwhile retire to his corner, and not resume fighting until the fallen man has regained his feet. Should the latter fail to recommence the battle within the specified ten seconds, the referee shall award the victory to the other contestant. When a contestant is on the floor, the count shall be made by the official timer of the club, either from an electric clock or his watch. He shall call off each second by striking the gong.

"Seventh. A contestant, on one knee, or hanging on the ropes in a helpless condition with his toes off the floor, shall be considered down, and, if struck while in that position, must be awarded the decision by the referee."

The brutal frankness of the language contained in these rules manifests, without the aid of extrinsic evidence, the character of the fighting provided for therein, and the cruelty of the punishment that may be inflicted thereunder.

The fact that the reward in this case was to be equally divided between the combatants cannot legalize the transaction. As well said by counsel for appellant, to hold that the statute against prize-fighting covers only the case where the reward is unequally divided would be to say that the statute does not prohibit the brutal and debauching public exhibition, but does prohibit a greater reward being given to one than to the other combatant. It would be absurd to place such a construction upon the purpose and object of the statute, and certainly there is nothing

in its language that warrants the conclusion that it was enacted to prevent discrimination between the victor and the vanquished. "The evil designed to be remedied by the statute is that class of brutal exhibitions, for giving which considerable sums of money were paid, and we do not think the statute can be evaded by rewarding the unsuccessful, as well as the successful, party." *State v. Purtell*, 56 Kan. 483, 43 Pac. 783.

Nor will the use of gloves by the combatants in a prize-fight make such a combat any less an offense in the eyes of the law. The Supreme Court of Louisiana in the case of *State v. Olympic Club*, 47 La. Ann. 1095, 17 South. 599, said of such a contest as the one under consideration: "The glove contests permitted in defendant's club are advertised extensively and are generally known as 'prize-fights.' The fighters are under contract with each other, with the club, and under obligations to spectators and betters, to fight to a finish; that is, usually until there is what is called a 'knock-out.' There can be no reasonable objection to boxing as generally understood. It is a manly, healthful, and vigorous training, and encouraged in some of our most respectable institutions; and interference with it by legislative power would be a great stretch of authority, bordering upon an infringement of personal liberty. And even boxing without gloves for a display of skill and for pastime, when there is no breach of the peace, and no intentional injury to the person, cannot be considered as embraced within the statute. But in a prize contest for a purse, with or without gloves, there is, despite the customary shaking of the hands and the preliminary courtesies between the combatants, an intention to do injury and to break the public peace. The contest is directly within the spirit, if not the exact definition, of an assault. In such a contest there can be no absence of an intention to do an injury, for the purpose of the contest is to subdue an opponent by knocking him senseless, or so injuring him that he cannot, within a given time, continue to fight."

A fight between McGovern and Corbett would necessarily be one of the bloodiest of its kind, for the large money reward, and the more highly prized championship at stake, would furnish every incentive to fire the courage and enlist all the physical powers of the combatants. Blood would flow, and flesh be bruised and mangled, to the delight of the multitude of spectators present, whose applause would doubtless equal that of the Roman populace for the victorious gladiator, as, standing over his prostrate foe, he awaited the turn of the Emperor's thumb that he might know whether to slay or spare his victim. But we will not consume further time upon this branch of the case; for, whatever else may be in doubt, we take it there is no escape from the conclusion that the combat between McGovern and Corbett would have

been a prize-fight, if conducted as advertised.

It now remains to be seen whether a court of equity has jurisdiction to prevent by injunction a prize-fight. Ky. St. 1899, §§ 1284-1288, inclusive, prohibit prize-fighting, make it a felony to engage in prize-fighting, a misdemeanor to aid or abet in bringing on a prize-fight, or to bet on or voluntarily witness such a fight, and also a misdemeanor for any one to permit the use of his lands for a prize-fight.

Section 1289: "It shall be the duty of all judges of courts, justices of the peace, mayors of cities, trustees of towns, and other conservators of the peace, all sheriffs, constables, marshals, and other public officers, on being informed or having reason of their own knowledge to believe that such a fight is about to take place, or that there is training or preparation in any place, within their jurisdiction, for such fight, to suppress and prevent the same, and for this purpose they shall arrest the offending parties, or have them arrested, or hold them to security for their good behavior, and also commit them to prison, if they do not give bail for their appearance at the next circuit court to answer the charge; and in order to suppress and prevent the same, they shall exercise all the powers vested in them for the prevention of crimes and misdemeanors; and any officer having such knowledge or information, who shall willfully neglect or fail to execute the duties required of him in this section, shall be fined in the sum of \$500.00, and shall forfeit his office."

We are told by Judge Story, in his excellent work on Equity Jurisprudence (volume 2, § 921): "In regard to public nuisances, the jurisdiction of courts of equity seems to be of very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. This jurisdiction is applicable, not only to public nuisances, strictly so called, but also purprestures upon public rights and property." Again, in section 924, it is said by the same author: "The ground of this jurisdiction of courts of equity in cases of purpresture, as well as of public nuisances, undoubtedly is their ability to give a more complete and perfect remedy than is attainable at law, in order to prevent irreparable mischief, and also to suppress oppressive and vexatious litigation." Continuing the discussion, the learned writer announces further that: "The courts [of equity] cannot only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest and abate those in progress, and by perpetual injunction protect the public against them in the future, whereas courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety

of the community. Though not frequently exercised, the power undoubtedly exists in courts of equity thus to protect the public against injury."

In *Pomeroy's Equity*, 3rd vol., § 1849, it is said: "A court of equity has jurisdiction to restrain existing or threatened nuisances by injunction at the suit of the Attorney General in England, and at the suit of the state or the people, or municipality, or some proper officer representing the commonwealth, in this country."

In 21 Am. & Eng. Encyc. of Law, 703, it is likewise said: "A court of equity has discretionary jurisdiction to enjoin the creation or erection of either a public or private nuisance or a purpresture. This jurisdiction is founded upon the ability of equity to prevent irreparable mischief and vexatious litigation, and to furnish a more complete remedy than can be had at law. The remedy by indictment for a public nuisance is not an adequate remedy at law, precluding the remedy by injunction; nor is the right of a private person to call upon the public authority to abate the public nuisance, after its erection, such a remedy."

In *Attorney General v. Jamaica Pond Aqueduct Corp.*, 133 Mass. 361, an injunction was granted to restrain the lowering of the waters of a pond, on the ground that it would be injurious to the public health. In concluding its opinion, the court said: "Indeed, it may be affirmed that in no well-considered case has the power of a court of equity to interfere by injunction in cases of public nuisances been denied; the only denial being that of a necessity for exercise of that jurisdiction under the circumstances of the particular case."

In *Mugler v. Kansas*, 123 U. S. 672, 8 Sup. Ct. 273, 31 L. Ed. 205, suit was brought by the state to enjoin the operation of a distillery, which was forbidden by its laws, on the ground that it was a public nuisance, injurious to the morals of the community. The court, after referring to the rule herein quoted from *Story's Equity*, adopted it without reservation. The same doctrine is adhered to in *People v. City of St. Louis*, 48 Am. Dec. 339, and *Atty. Gen. v. Railroad Cos.*, 35 Wis. 425.

We find by the foregoing authorities that the jurisdiction of courts of equity to prevent and suppress nuisances, especially such as affect the public health, morals, or safety, is of ancient date, though in Kentucky this power has been somewhat restricted in its application. While the writ of injunction may not be employed to prevent the commission of crime, as such, we see no reason why it may not be resorted to to prevent the use of real property for the holding of a prize fight. Indeed, we think the use of the injunction for this purpose is not only permissible, but required by the statute, *supra*, enacted to suppress that evil, if the means at

the command of the criminal courts are inadequate to its suppression.

We are not inclined to believe that the language of the act, *supra*, "shall exercise all the powers vested in them for the prevention of crimes and misdemeanors," confers upon any of the officers named therein new powers of any kind; but it does require of all ministerial officers of the state peculiar and extraordinary alertness, activity, and zeal in the exercise of all the powers with which they are vested in the matter of preventing and suppressing prize-fights, and any willful failure of duty on their part will subject them to a fine of \$500 and the forfeiture of office. The same provision of the statute requires that "all judges of courts," in the performance of the duties enumerated in the statute, "in order to suppress and prevent" prize-fights, shall exercise all the powers vested in them for the prevention of crimes and misdemeanors. It will be observed that the language, *supra*, not only embraces judges of courts of purely criminal jurisdiction, but also includes all judges of courts. Therefore, the command reaches judges of common-law and equity jurisdiction, and no such express command is laid by the Kentucky Statutes upon all judges with reference to any other crime or misdemeanor than prize-fighting. Under the statute, then, it is the duty of all the officers, both judicial and ministerial, named therein, to act without delay in preventing and suppressing prize-fights. They are not to wait for the fight to begin, nor for the principals and others who are to engage therein to reach the place determined upon for the fight, before taking the necessary steps to prevent the same, but should proceed at once before the fight, and upon receiving notice of the fact that it will be held, to issue proper process for the arrest of the guilty parties, put them under arrest, and require of them bonds to keep the peace, and to answer for the violation of law in the circuit court.

The question presented for the consideration of the judge of the Jefferson circuit court, when the injunction was applied for in this case, was whether or not the powers that might be invoked under the criminal jurisdiction of the courts were adequate to the suppression of the prize-fight about to come off, and, if not, what further powers might be exercised by him? As the statute required of him the exercise of all the powers of which he was possessed, and the right to employ the writ of injunction being one of those powers, it was his duty to grant it to the extent of preventing the use of the Auditorium for the holding of the prize-fight, if in the exercise of a sound discretion the facts before him justified such relief, in aid of the jurisdiction of the criminal courts in the matter of the arrest and prosecution of the guilty participants in the prize fight. In granting the injunction to the extent indicat-

ed, the chancellor would only exercise the jurisdiction that was exercised in draining the pond, and in suppressing the distillery, in the Massachusetts and Kansas cases, respectively, above cited.

In none of the cases, *supra*, was there any question of property or pecuniary right involved; nor need there be any property right involved, so far as the state is concerned, in the maintenance of the public health, morals, or safety. These are all valuable rights, though not susceptible of a pecuniary estimate, which it is the duty of the state to protect by every means at its command; and, if a court of equity has the power to enjoin the use of private property as a nuisance which is dangerous to the public health, why may it not in like manner enjoin it where it constitutes a nuisance dangerous to the public safety or morals?

Is the use of land or a building for the maintenance of prize-fighting a public nuisance? In Wood on Nuisances (3d Ed.) § 66, the author says: "A public exhibition of any kind that tends to the corruption of morals, or to a disturbance of the peace or of the general good order or welfare of society, is a public nuisance. Under this head are included all puppet shows, legerdemain, and obscene pictures, and all exhibitions, the natural tendency of which is to pander to vicious tastes, and to draw together the vicious and dissolute members of society." That a prize-fight is an exhibition of the character here described, and consequently a public nuisance, there can be no doubt; and, if so, the use of a theater for prize-fighting is such a nuisance. Therefore the Legislatures of many of the states have enacted laws for their suppression, realizing, no doubt, that the remedies afforded by the general laws were not adequate to that end; and the courts have been uniform in upholding the statutes thus enacted. Thus, in *Sullivan v. State*, 67 Miss. 352, 7 South. 276, the Supreme Court of Mississippi said: "We think, however, that the evil sought to be protected against by the statute is the debasing practice of fighting in public places, or places to which the public, or some part of it, is admitted as spectators."

Such a meeting as would have been held in the Auditorium, in Louisville, to witness the prize-fight between McGovern and Corbett, if that fight had occurred, would doubtless have attracted many of the better and law-abiding class of citizens, curious to see such a spectacle as a prize-fight; but for every such reputable citizen thus attending there would have been present a dozen gamblers, confidence men, bunco steerers, or pickpockets, gathered from all parts of the United States, men of idle, vicious, and criminal habits and practices, whose business is to prey upon the public in some form or other, and many of them would remain in the community after the combat to ply their nefarious callings. Such an assembly would

easily be led into a riot, or other unlawful disturbance of the public peace. In addition to the evils suggested, there would be the contaminating effect of such a meeting upon the youth of the city and state, which might prove of incalculable injury to their morals and future welfare. Such a gathering, too, would demand increased vigilance in the protection of the property of the city and its inhabitants, be a menace to good order, and disturb the peaceful pursuits and happiness of citizens who would be unwilling to patronize such an enterprise.

We conclude, therefore, that while a court of equity may not grant an injunction against the principals who were expected to engage in the fight in question, nor those connected with them as managers, trainers, etc., because the processes of the criminal courts and the powers of conservators of the peace in the city of Louisville are, or ought to be, adequate to the prevention of the prize-fight, by the arrest and prosecution of the parties concerned, yet it was proper for the lower court to enjoin the owner, proprietor, and managers of the Auditorium theater from permitting the holding of a prize-fight therein, and from allowing therein any future exhibitions of the same character, upon the ground that such a use of the building would constitute a public nuisance, dangerous to the public morals and safety. We think this exercise of power by the court cannot be questioned, not because any new powers were conferred upon it by the statute against prize-fighting, but because such jurisdiction exists in courts of equity, and has practically always so existed, and, further, because its exercise was required in this instance by the exigencies of the case and the express language of the statute, which commanded the court to use all the powers with which he was vested, to the end that the nuisance might be suppressed.

As already suggested, not the least of the evils connected with the holding of the prize-fight would be the presence of the immense crowds of lawless and turbulent men from all quarters. An injunction against the use of the building advertised as the place of the fight would go far toward preventing the assembling of this crowd, and thereby avert incalculable mischief, which could not well be averted by the criminal courts, or their ministerial officers, after the assembling of the audience at the place of the combat, or in the act of assembling; for, although every person who attends a prize-fight by that act violates the law, it would be impossible for the officers of the law to arrest any considerable number of them under such circumstances.

We do not regard this case as analogous to that of *Neaf v. Palmer*, 103 Ky. 496, 45 S. W. 503. In the latter case the action was brought by several property owners to enjoin the maintenance of a bawdy house upon the property of another. In passing upon

the questions involved, this court said, in part: "It is not alleged that there are offensive sights or sounds about the obnoxious premises, but only that the property is made less valuable in the vicinity, and that the moral atmosphere is tainted and pestilential. The injury is wholly consequential. It seems to us, under these circumstances, criminal courts had best be left to enforce the criminal laws. They are confessedly adequate for the purpose of suppressing such evils."

There was nothing in the case, *supra*, to indicate that the bawdy house complained of could not be suppressed by the ordinary methods appertaining to the criminal court, and, the damages resulting to the plaintiff's property from the existence of the bawdy house being wholly consequential and speculative, it would, of course, have been improper in that case to employ the writ of injunction in aid of the mere property rights of the individual. But in the case at bar the complainant is the state—the sovereign—which is seeking by a writ of injunction to prevent a great evil, affecting the people of the city of Louisville, and the entire state as well, and which threatens irreparable injury to the public morals because of its cruelty, inhumanity, and debasing associations, and danger to the public safety because of its bringing together the lawless and turbulent elements of society from all quarters. Upon such a state of facts, and with the commands of the statute directing him to employ all his powers to avert the threatened evil, it would, in our opinion, be no stretch of authority for the chancellor to employ the aid of the writ of injunction in such an emergency, to the extent, at least, of preventing the use of real property for the holding of the prize-fight. Nor do we think that the right of the chancellor to so employ the writ of injunction in this case is dependent upon the fact that a property right be involved. It may be justified upon the higher ground that the morals and safety of the public are involved, and that the public good is of the first consideration.

If the element of continuity were needed in this case to authorize the injunction, it is shown by the record to exist; for several witnesses testify to having attended contests similar to this in the Auditorium, and the advertisement of the McGovern-Corbett fight showed that it would come off at the Auditorium, and that it was one of a series of 14 of such contests, all given under the auspices of the Southern Athletic Club, and several of which had already been held, and perhaps some of them elsewhere than in the Auditorium. The evidence shows, therefore, that the use of the Auditorium had, to some extent at least, been devoted to the maintenance of prize-fights, and that its use for that purpose is to be continued. We are of the opinion, however, that continuity is not a necessary element in this case. In

Cincinnati Railroad Co. v. Commonwealth, 80 Ky. 127, the railroad was indicted for a public nuisance in leaving a hand car on a public road; and, though the proof showed that the car did not remain for more than a day, this court held that the offense "was not to be determined by the length of time the thing that worketh hurt, inconvenience, or damage to the public continues, or by the number of times it may be repeated, nor is it necessary, in order to constitute the offense, that actual injury be sustained by any person." In order to constitute a public nuisance, in the meaning of the law, it is not always necessary that the acts charged should have been habitual or periodical. Where a single act produces a continuing result, the offense may be complete, without a recurrence of the act. Thus one act upon the part of an individual in befouling a spring from which the public are accustomed to drink is a public nuisance. So is indecent exposure of one's person in a public place. Wood on Nuisances, §§ 27, 57. To constitute the offense denounced by the statute as a prize-fight, or prize-fighting, it is not necessary that a number of such combats, or that more than one combat, should take place. We think one such offense at a given place would constitute a public nuisance, and it is the province of a court of equity to prevent nuisances that are threatened, and before irreparable mischief ensues, as well as to arrest or abate those in progress, and by perpetual injunction protect the public against them in the future.

Being of the opinion that the chancellor erred in dismissing the petition, and in refusing to perpetuate the injunction, in this case, to the extent of restraining the owners and managers of the Auditorium from permitting the use of that building for the holding of the prize-fight between appellees McGovern and Corbett, the judgment is reversed, and cause remanded, with directions to set aside the order dismissing the petition, and to enter in lieu thereof the necessary decree perpetuating the injunction to the extent herein indicated.

PAYNTER, BARKER, and NUNN, JJ., dissent.

LOUISVILLE & N. R. CO. v. ROBERTS.
(Court of Appeals of Kentucky. June 20, 1903.)

APPEAL—INSTRUCTIONS—REVIEW—FAILURE TO OFFER INSTRUCTION.

1. One may, on appeal, complain of an erroneous instruction, though he has not offered one correctly presenting the law applicable.

"Not to be officially reported."

Modification of opinion. For former opinion, see 70 S. W. 834.

O'REAR, J. The opinion in this case is modified, by withdrawing it to the extent that it holds that, unless the objecting party

offers an instruction presenting correctly the law applicable to the point in question, he will not be heard on appeal to complain of an erroneous instruction given by the court on that point. In this case the court is of opinion that the inaccuracy of the instruction in question was not prejudicial to appellant. The petition for rehearing is overruled.

**OWENSBORO WATERWORKS CO. v.
CITY OF OWENSBORO et al.**

(Court of Appeals of Kentucky. June 20, 1903.)

MUNICIPAL CORPORATIONS—TAXATION—DELINQUENT TAXES—PENALTIES.

1. Under Ky. St. 1899, § 3392, giving the common council of cities of the third class authority to prescribe such penalties for dilatory payment of taxes as in their discretion may seem proper, such a city may by ordinance inflict a penalty for the nonpayment of municipal taxes to the extent of 10 per cent. on the amount due.

"Not to be officially reported."

Response to petition for rehearing. For former opinion, see 74 S. W. 685.

BARKER, J. Our attention has been called, in the petition for a rehearing, to section 3392 of the Kentucky Statutes of 1899, which authorizes the common council of cities of the third class to prescribe such penalties for the dilatory payment of taxes as, in their discretion, may be proper, and to the fact that the record shows that under the power conferred by this section of the statutes the common council of Owensboro, which is a city of the third class, have passed ordinances inflicting a penalty for the nonpayment of municipal taxes to the extent of 10 per cent. on the amount due. We see no reason why these ordinances, in so far as they are applicable to the tax bills involved in this case, should not be enforced; and the opinion is modified to the extent of directing, when the case returns to the circuit court, that the ordinances in question, in so far as they may be applicable to the tax bills involved here, shall be enforced by adding the penalty authorized by them, in addition to the 8 per cent. interest authorized by section 3400 of the Kentucky Statutes of 1899. Otherwise the petition for a rehearing is overruled.

CITY OF CARLISLE v. SECREST.

(Court of Appeals of Kentucky. June 17, 1903.)

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS—DEFECTS—INJURIES—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTIONS FOR JURY.

1. The fact that a pedestrian knows generally of the existence of a defect in a sidewalk does not make his use thereof negligence per se.

2. A pedestrian's foot slipped on the uneven surface of a sidewalk, and he fell against and

over a gateway which separated the walk from a sunken alleyway to the bottom of the alleyway and was injured. *Held*, in an action against the city, proper to exclude evidence that the gate which separated the walk from the alleyway had frequently been left open prior to the injury, it not being shown that it had been left open continuously for any specific length of time, and hence there being nothing to put the municipality on notice.

3. The gate had nothing to do with the injury, it appearing that plaintiff slipped, and the gate being merely too low to constitute an effective barrier between him and the alley.

4. A pedestrian's foot slipped on the uneven surface of a sidewalk, and he fell against and over a gateway which separated the walk from a sunken alleyway to the bottom of the alleyway and was injured. *Held*, that the question whether the city had failed to keep the walk reasonably free from defects was for the jury.

5. The question whether plaintiff was guilty of contributory negligence was for the jury, it appearing that he knew in a general way of the existence of the defect in the sidewalk, and it being dark at the time and place of the accident.

Appeal from Circuit Court, Nicholas County.

"Not to be officially reported."

Action by A. G. Secrest against the city of Carlisle. From a judgment for plaintiff, defendant appeals. Affirmed.

Wood & Ross and J. B. Ross, for appellant. Jno. I. Williamson, for appellee.

BARKER, J. On the 23d day of August, 1901, the appellee, A. G. Secrest, while walking along the sidewalk of Main street, in the city of Carlisle, slipped and fell over a gate, about two feet high, into an alleyway several feet lower than the surface of the sidewalk, receiving severe injuries in his shoulder and arm, to recover damages for which he instituted this action. The petition charges, substantially, that the sidewalk, at the point where appellee slipped and fell, by reason of the negligence of the appellant was in an unsafe and dangerous condition to pedestrians; that it was made of rough rock slabs, which had, by long usage, become very uneven, some of them slanting down towards the property-line, and having holes several inches in depth between them; that this condition of things was known to the appellant, or could have been known to it by the exercise of reasonable diligence, as the defective condition of the sidewalk had existed for a sufficient length of time to place the municipality upon notice. The answer denies the negligence of appellant, and pleads affirmatively the contributory negligence of appellee. A trial in the lower court resulted in a verdict in favor of the appellee, awarding him damages in the sum of \$500. From the judgment based upon this verdict, this appeal is prosecuted.

It appears that on the evening of August 23, 1901, about 8 o'clock, appellee was going from his home to church, in order to get his children, who were there; it was drizzling rain, and the sidewalk was wet; there were some trees along the street, which obscured

¶ 1. See Municipal Corporations, vol. 24, Cent. Dig. §§ 1677, 1755.

the pavement, at the point where the injury occurred, from the public lights; the appellant was in somewhat of a hurry because of the rain, and, just as he reached a point opposite the alleyway spoken of, his foot slipped on the uneven surface of the rocks, and he fell against and over the gateway which separated the sidewalk from the sunken alleyway, and was precipitated to the bottom of the alleyway, a distance of about 4 to 4½ feet. The evidence shows that appellee knew of the defective condition of the sidewalk in question, but momentarily forgot it. The fact that a pedestrian knows, generally, of the defect in a sidewalk, does not make his use thereof negligence per se.

In the case of *City of Louisville v. Brewer's Adm'r* (Ky.) 72 S. W. 9, a pedestrian was injured, while walking along a cinder path which formed the sidewalk of one of the streets of Louisville, by falling over a post which stood in the highway, receiving injuries from which he died the next day. The evidence shows that the decedent had known of the existence of the post prior to the accident, but had momentarily forgotten it. The court left the question of contributory negligence for the jury to determine. In the case of the *City of Maysville v. Gullfoyle* (Ky.) 62 S. W. 493, upon this subject, it was said: "It cannot be fairly said, as a matter of law, that appellee was guilty of contributory negligence by forgetting for the time the existence of the defect." In the *Modern Law on Municipal Corporations*, § 1292, the rule is thus stated: "The fact that plaintiff had knowledge of the dangerous condition of a street will not prevent his recovery if he used reasonable diligence to prevent injury; hence his traveling on a sidewalk known to be out of repair is not negligence of itself. It may be evidence of negligence to use a street in a dangerous condition, but it is not negligence as a matter of law. The use of a street with knowledge of its unsafe condition is not contributory negligence where care is used proportionate to the known danger." Again, in section 1294, it is said: "Although a person is perfectly familiar with the dangerous condition of a sidewalk by reason of its frequent use, yet if, through forgetfulness, he walks into a hole in such walk and is thereby injured, it is not contributory negligence." Dillon, in his work on *Municipal Corporations* (section 1007), says: "A person may walk or drive carefully in the darkness of the night, relying upon the belief that the corporation has performed its duty, and that the street or walk is in a safe condition. He walks, it has been said, by a faith justified by law, and, if his faith is unfounded and he suffers an injury, the party in default must respond in damages." In the *Modern Law of Municipal Corporations*, section 1304, it is said: "Where there are excavations on private lots adjacent to a sidewalk, the city must use reasonable care to protect pedestrians from falling therein."

In the case at bar, appellee endeavored to show that the gate which separated the sidewalk from the sunken alleyway had been frequently left open prior to the time of the injury complained of. This evidence was properly excluded by the court, as it was not shown that the gate had been left open continuously for any specific length of time immediately prior to the accident, and therefore there was nothing to put the municipality upon notice. We think that the gate in question had nothing to do with appellee's injury; the testimony shows that he slipped upon the sidewalk, and, losing his equilibrium, fell over the gate into the hole beyond; the gate was simply too low to constitute an effective barrier between the falling man and the alleyway.

It was the duty of the appellant to keep its sidewalk reasonably free from defects endangering the traveling public while using it, and if it failed in the performance of this duty it is responsible for the damages caused by such failure. The questions as to whether or not there was such failure upon the part of the municipality, or as to whether or not the appellee was guilty of contributory negligence in the premises, were peculiarly within the province of the jury to determine, and, as these questions were properly submitted by the court to the jury in the instructions given, the judgment is affirmed.

FIGG v. LOUISVILLE & N. R. CO.

CITY OF LOUISVILLE v. FIGG.

(Court of Appeals of Kentucky. June 17, 1903.)

MUNICIPAL CORPORATIONS—BENEFIT ASSESSMENTS—RAILROAD RIGHT OF WAY—LIABILITY FOR ASSESSMENT.

1. A strip of land appropriated to use by a railroad as a right of way, and which is a "lot," within the meaning of the statute governing street improvements, is liable to an assessment for a street improvement.

Appeals from Circuit Court, Jefferson County, Chancery Division.

"To be officially reported."

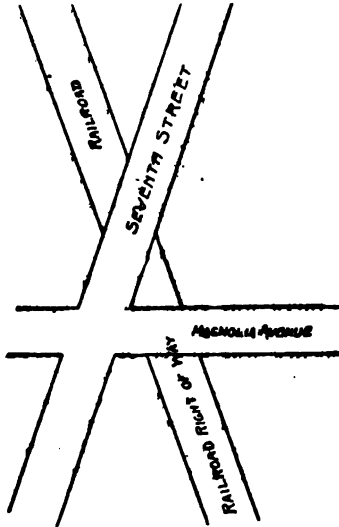
Suit by the city of Louisville against the Louisville & Nashville Railroad Company and L. R. Figg. From the judgment, said Figg and the city of Louisville separately appeal. Reversed.

Wm. Furlong and B. F. Washer, for appellant Figg. H. L. Stone, for appellant city of Louisville. Helm, Bruce & Helm, for appellee Louisville & N. R. Co.

PAYNTER, J. The main line of the Louisville & Nashville Railroad Company runs southwardly from near Tenth and Broadway streets, Louisville, Ky., to and beyond Nashville, Tenn. Its right of way is 60 feet in width. Under appropriate proceedings in the

¶ 1. See *Municipal Corporations*, vol. 36, Cent. Dig. §§ 1032, 1033, 1056.

general council, Magnolia avenue was improved by original construction, and the taxing district was properly designated. Within that district, east of Seventh street and south of Magnolia avenue, is a parcel of land 60 feet wide, used by the appellee as a roadbed, or what is commonly called the "right of way," and, as a part of it, a triangular parcel north of Magnolia avenue and east of Seventh street. The local situation is shown by the following plot:



It is insisted on behalf of the railroad company that (1) the property sought to be subjected to part of the cost of street improvement is only a right of way, and therefore cannot be charged therewith; (2) it receives no benefit from the improvement; (3) the right of way is not a lot, in the meaning of the statute governing street improvements.

It is not the intangible right to use it, but the strip of land which the railroad company appropriates for its use, and upon which it builds its roadbed, is its right of way. The railroad company has been in possession of the strip of land in question for 50 years. It is a part of a great railroad system. Its right of way is perpetual. In *Elizabethtown, Lexington & Big Sandy R. Co. v. Combs*, 10 Bush, 393, 19 Am. Rep. 67, the court held the injury resulting from the location of a railroad in such proximity to adjacent property as that smoke, soot, and fire from passing engines was thrown or blown into or upon it, entitled the owner to a single recovery, as the injury was permanent and enduring. In other words, the court regarded that the railroad had appropriated for all time to come, and the injury would be permanent. It is the very remotest possibility imaginable that the appellee would ever abandon its right of way. The court concludes that its use of its right of way will be perpetual. It is therefore practically the

owner of the land. If this strip of land was not occupied by the railroad company as a right of way, it would not be suggested that it was not subject to the special tax for street improvement. The purpose for which the lot is used cannot affect the question of its liability for the cost of street improvement. Counsel for appellee calls attention to cases of other courts holding that rights of way cannot be charged with the cost of street improvements, while, on the other hand, counsel for the appellant calls attention to cases in other courts holding that such rights of way are liable for such cost. It is not necessary to discuss this class of cases further, because this court, in *Louisville, Cincinnati & Lexington R. Co. and Louisville Railroad Transfer Co. v. Obst and Stange*, 188, opinion, Feb. 28, 1875, and *City of Louisville v. Cincinnati Southern R. Co.*, 78 Ky. 857, held that such special taxation could be imposed.

On the second question we quote from *Preston v. Rudd, etc.*, 84 Ky. 158, which reads as follows: "Such assessments are made upon the assumption that a portion of the community are specially benefited by the improvement. The principle is that the territory is benefited, that it has a common interest, and that, governed by equitable rules, it must equally bear the burden. Necessarily, individual cases of hardship will arise, but it approaches equality as nearly as it is practicable. It follows that a lot owner may be compelled to pay his proportion of the cost of an improvement, although in his particular case his property may not be benefited. This rule, however, cannot be so extended as to entirely take from the citizen his property. This would work a manifest injustice. It would be spoliation, and not taxation. Under the guise of benefit and taxation, he cannot be thus arbitrarily deprived of his property. It would be but an appropriation of it, by the exercise of arbitrary power, to public use, without compensation. * * * We do not understand that *Barfield, etc., v. Gleason, etc.*, 63 S. W. 264, changes the rule announced in *Preston v. Rudd, etc.*, and other cases of this court. Spoliation is not shown in this case. Under the statute governing street improvement, a lot is any piece of land within the territory defined by the statute or the general council, where the territory to be assessed is not bounded by principal streets. The use or nonuse, or the character of the use to which the parcel of land is put, does not determine the question whether it is or is not a lot. The strip of land used by the railroad company the day before it was appropriated by it as a right of way was a lot, in the meaning of the statutes, and to thus appropriate it cannot change its character.

The judgment is reversed for proceedings consistent with this opinion.

DIETRICH v. ROTHENBERGER et al.
(Court of Appeals of Kentucky. June 17, 1898.)

CORPORATIONS—ULTRA VIRES ACTS—LIABILITY OF DIRECTORS.

1. The directors of a corporation are not personally liable to an individual with whom they have done business, if the transaction with him is within the corporate powers, though at other times and with other persons they may have, without wasting the corporate assets, done business not authorized by the charter.

2. A corporation authorized to borrow money and give notes or other evidences of indebtedness borrowed a sum of money, and issued to the lender a paper bearing the title, "Certificate of Deposit," which certified that the lender had the sum loaned to his "credit" at the office of the corporation, and that the corporation agreed to pay the same to him, with interest at the expiration of a certain period. *Held* not to constitute the doing of a banking business by the corporation, and hence its directors were not liable to the holder of the "certificate," on the theory that the corporation had exceeded its powers.

3. If the directors of a corporation engage in a business not within its corporate powers, and, in so doing, waste or lose the corporate assets, they are personally liable.

O'Rear and Nunn, JJ., dissenting.

Appeal from Circuit Court, Jefferson County, Law and Equity Division.

"Not to be officially reported."

Action by William Dietrich against Gus F. Rothenberger and others. From a judgment sustaining a demurrer to the petition, plaintiff appeals. *Affirmed*.

Wallace & Miller, for appellant. W. Pratt Dale, for appellees.

HOBSON, J. The plaintiff, William Dietrich, deposited in the German-American Title Company the sum of \$300, for which it delivered to him the following: "No. 104. Certificate of Deposit. \$300.00 German-American Title Company. Louisville, Ky., December 9, 1895. This is to certify that William Dietrich has now to his credit at the office of this company the sum of three hundred dollars, which the German-American Title Company agrees to pay to said William Dietrich in twelve months after this date with interest at the rate of six per cent. from date until paid on return of this certificate endorsed by William Dietrich. Gus F. Rothenberger, Secretary. A. J. Speckert, President." The German-American Title Company was a corporation organized under chapter 56 of the General Statutes of Kentucky, and was not authorized to do a banking business. It became insolvent. Dietrich then filed this suit against the directors of the corporation, charging that at the time he made the deposit, and long prior thereto, it was engaged in the banking business, and, while so engaged, received his deposit, with the knowledge and authority of the defendants, as its directors. Personal judgment was prayed against them on the ground that they were engaged in a business which the corporation was not authorized to follow. The court sustained a demurrer to his petition, and he appeals.

It is immaterial, so far as the plaintiff is concerned, what business the corporation engaged in with other persons. If the transaction with him was within its corporate powers, the directors are not personally liable to him, although at other times, and with other persons, they may have done business not authorized by their charter. The plaintiff's cause of action rests on the transaction had with him. The fact that in other transactions other persons might not have reason to complain of the directors for exceeding the powers conferred upon them by law would subtract nothing from the plaintiff's right to complain, if in the transaction with him the legitimate powers of the corporation were exceeded; and if, in his transaction, these powers were not exceeded, he cannot, to make out his cause of action, show that they were exceeded in other transactions with other persons. The question presented, then, simply is whether the transaction with the plaintiff was within the powers of the corporation. The corporation was authorized to borrow money, and give notes therefor, or other evidences of indebtedness. Stripped of its form, the transaction with the plaintiff was, in effect, that he lent the corporation \$300, which it agreed to pay him in 12 months, with interest at the rate of 6 per cent. The paper not only contains a promise to pay, but sets out fully the consideration; and the fact that it is called a "certificate of deposit," instead of a "promissory note," does not affect its legal character. In the American & English Ency. of Law, vol. 5, p. 803, it is said: "A certificate of deposit drawn in the usual form seems to fulfill in every particular the definition of a promissory note, to wit, an unconditional promise in writing for the payment of a certain sum of money absolutely and at all events. It is therefore held in all the states of the Union, except Pennsylvania, that the instrument is, in substance and in legal effect, a promissory note, and governed in most respects by the same general rules." In *Citizens' National Bank v. Brown*, 45 Ohio St. 39, 11 N. E. 799, 4 Am. St. Rep. 536, where a similar paper was before the court, it was said: "The certificate was in effect a promissory note. It possessed all the requisites of a negotiable promissory note, and as such was governed by the rules and principles applicable to that class of paper. In *Howe v. Hartness*, 11 Ohio St. 449 [78 Am. Dec. 312], it was held that a certificate of deposit substantially the same as that under consideration was a negotiable promissory note. And in *Miller v. Austen*, 13 How. 218 [14 L. Ed. 119], where the amount deposited with the bank was payable only to the order of the depositor, at a future day certain, upon the return of the certificate of deposit, it was recognized as the established doctrine that a promise to deliver or to be accountable for so much money is a good bill or note; that the sum named in the certificate issued being certain

and the promise direct, every reason existed why the indorser of the paper should be held responsible to his indorsee, that could prevail in cases where the paper indorsed is in the ordinary form of a promissory note; and that, as such note, the state courts generally had treated certificates of deposit payable to order." To same effect, see *Bank of Peru v. Farnsworth*, 18 Ill. 563; *Talladega Insurance Company v. Woodward*, 44 Ala. 287; *Poorman v. Mills*, 35 Cal. 118, 95 Am. Dec. 90; *Gregg v. Union County National Bank*, 87 Ind. 238; *Bean v. Briggs*, 1 Iowa, 488, 63 Am. Dec. 464; *Hatch v. First National Bank*, 94 Me. 348, 47 Atl. 908, 80 Am. St. Rep. 401; *Tripp v. Curtenius*, 36 Mich. 494, 24 Am. Rep. 610; *Pardee v. Fish*, 60 N. Y. 265, 19 Am. Rep. 176; *Bellows Falls Bank v. Rutland County Bank*, 40 Vt. 377; *Klauber v. Biggerstaff*, 47 Wis. 555, 3 N. W. 357, 32 Am. Rep. 773, and cases cited. The distinction between such a transaction and the business of banking is plain, for any one may borrow money, and may put in such form as he pleases the evidence of his indebtedness. An express company is not a bank, although it draws and sells bills of exchange. *Wells, Fargo & Co. v. Northern Pacific Railroad Co.* (C. O.) 23 Fed. 469. Nor is a corporation a bank, which borrows money for its own use on bonds. *Barry v. Merchants' Exchange Company*, 1 Sandf. Ch. 280. In 3 *American & English Ency. of Law*, 791, it is said: "The distinction between a bank and trust company is well defined. The powers of the trust company depend upon the terms of its charter, of course, but they are not banking powers. The trust company, like the savings bank, pays interest upon deposits, but its deposits are strictly loans, not subject to check. It may not issue its own notes for circulation, nor does it buy or sell exchange in the ordinary course of its dealings. In directions that are not akin to banking, its powers are much broader, and extend outside the monetary realm into real estate transactions, trusteeships, and the conduct of property interests of all kinds. The exercise by a trust company of some of the functions of a bank does not make the company a banking institution, nor lay its officers liable to prosecutions for violating the banking laws." Banks receive deposits subject to check. They are public agencies created for the public service, and are required to serve the public. The money in this case was simply lent for 12 months. It was not subject to check. There was nothing in the transaction that might not have been done, and is not in fact done, by many individuals throughout the state. It was not the exercise by the corporation of any banking privilege, nor beyond the powers of the corporation under its charter. *Dietrich* stands simply as a creditor of the corporation who lent it money, and has no other claim upon the directors than any other creditor who lent it money or bought its paper. The action is

not based on the idea that the directors, by engaging in the banking business outside of the legitimate powers of the corporation, wasted or lost the corporate assets. If they had done this, to the extent that assets of the corporation were thus lost by them, they would be liable personally. But it is not alleged that any of the assets of the corporation were lost in the banking business. The sum of the cause of action stated is that the plaintiff lent the corporation \$300, and that it was then engaged, without authority, in the banking business. If for this the directors are liable personally to him, they are equally liable for all other transactions of the corporation within the powers conferred on it, although no part of its assets were lost by the directors in the business done outside of its corporate powers, and the creditors were in no wise prejudiced thereby.

Judgment affirmed.

BARKER, J., not sitting. **O'REAR** and **NUNN, JJ.**, dissenting.

KELLEY v. CULVER'S ADM'R.

(Court of Appeals of Kentucky. June 20, 1903.)

ADMINISTRATORS—SUIT TO SETTLE ESTATE—CLAIMS OF CREDITORS—FILING—LACHES—LIS PENDENS—SALE OF LANDS.

1. Ky. St. 1899, § 2087, provides: "When the heir or devisee shall alien, before suit is brought [on the ancestor's or testator's debt], the estate descended or devised, he shall be liable for the value thereof, with legal interest from the time of alienation, to the creditors of the decedent or testator; but the estate so aliened shall not be liable to the creditors in the hands of a bona fide purchaser for a valuable consideration, unless action is instituted within six months after the estate is devised or descended, to subject same." *Held* not intended to create a lis pendens lien on the lands descended or devised, for the payment of the ancestor's debts, for a longer period than for six months after an action might have been begun to settle the estate and subject the land.

2. Civ. Code Prac. § 432, provides: "A creditor appearing before the commissioner [to audit claims] and presenting his claim becomes thereby a party to the action [for settlement of the estate] and is concluded by the final judgment of the court allowing or rejecting his claim." *Held*, whether a creditor of the estate filing his claim was made a party to the petition in the settlement suit, or not, could not affect the validity of the lis pendens.

3. To obtain the benefits of a lis pendens, the party asserting it must have not only a suit in which relief in rem is sought against specific property sufficiently identified by the record, to which the other claimant or title holder must be a party in fact, but he must prosecute his suit with reasonable diligence.

4. Where, after the expiration of the six months mentioned in Ky. St. 1899, § 2087, one becomes a purchaser in good faith and for value, it does not matter how much he knows about who were the creditors of decedent, as nothing but a valid lis pendens can then affect the land as a lien.

5. Certain creditors of an estate were, as such, named and joined in a suit to settle the

¶ 3. See *Lis Pendens*, vol. 33, Cent. Dig. § 23.

same by the administrator thereof, and were thereby, as well as by the advertisement of the commissioner to whom reference was had to audit claims, called on to file their claims, if they desired to avail themselves of the benefit of the action. They failed to file their claims, without excuse or explanation, till after the commissioner had reported all claims ascertainable, and till after two judgments of sale of land had been rendered in the action, and the last sale to pay debts of decedent and the costs of the suit and of administration had been confirmed. Two years after they should have set up their claims, they sought to enforce them against the residue of the land sold by the heirs to an innocent purchaser for value, after deducting what was necessary to discharge the known liabilities of the estate. *Held*, that they were guilty of laches precluding their recovery.

Appeal from Circuit Court, Nelson County.
"To be officially reported."

Suit by Jacob Culver's administrator to settle the estate. From a judgment subjecting to creditors' claims certain land sold by the heirs to John S. Kelley, Kelley appeals. Reversed.

John S. Kelley and Geo. S. & John A. Fulton, for appellant. Nat W. Halstead, for appellee.

O'REAR, J. This suit was begun in 1896 by Jacob Culver's administrator to settle his estate. There was not enough personalty to pay the debts of the decedent, and his lands were described in the petition with the view to selling enough of them to pay the indebtedness. The heirs at law and certain creditors, including appellees Bowling & Greenwell, were made defendants, and had actual notice of the pendency and nature of the suit. A reference was had to the master commissioner November 14, 1896, to audit the claims against the estate. On the 29th day of May, 1897, the commissioner, who had previously publicly advertised for claimants, filed his report, showing all claims presented. There were no exceptions to this report. The court decreed a sale of enough of the land, after the allotment of a homestead to the widow, to satisfy the claims reported by the commissioner. The land was sold in August, 1897, and reported to the court at the following October term. Upon exceptions filed to the sale by certain of the heirs, it was set aside, as was the former judgment of sale, for a misprision. A resale was adjudged to pay the indebtedness allowed. That judgment was entered March, 1898. The sale was made under it May 9, 1898, and was confirmed, without exception, May 28, 1898. It was not necessary, as developed by this sale, to sell all the decedent's land to pay the indebtedness presented against the estate. On the 5th day of October, 1898, appellant bought the remainder of the land from the heirs at law, paid them the purchase money—an adequate price therefor—and took their deed of conveyance. On November 11, 1898, a claim for \$117.84 was filed in court on this action by Bowling & Greenwell. They sought to have enough of

the remaining land—that sold and conveyed to appellant by the heirs October 5, 1898—sold to satisfy their claim. Appellant resisted the application on the ground that he was an innocent purchaser for value, and without notice of Bowling & Greenwell's claim. He also pleaded their silence and delay in presenting their claim against the estate as an estoppel. The circuit court subjected the land to the payment of the claim. Bowling & Greenwell resided and did business in the county where the land lay, and in which the suit was pending. It is insisted by appellee that appellant was a *lis pendens* purchaser, and took the title of the heirs subject to the right of the creditors of their ancestor to subject his property in this action to pay his debts. Section 2087, Ky. St. 1899, is relied on. It is: "When the heir or devisee shall alien, before suit is brought, the estate descended or devised, he shall be liable for the value thereof, with legal interest from the time of alienation to the creditors of the decedent or testator; but the estate so aliened shall not be liable to the creditors in the hands of a bona fide purchaser for a valuable consideration, unless action is instituted within six months after the estate is devised or descended, to subject same." This section was not intended to create a lien upon the lands descended or devised, for the payment of the ancestor's debts, for a longer period than for six months after an action might have been begun to settle the estate and subject the land. It merely held the estate subject to the decedent's debts until a reasonable time—six months—within which a *lis pendens* lien might be created against it. As to the validity and effect of the *lis pendens* after it was begun, the section did not change the common-law rule. Whether the creditor of the estate was made a party to the petition in the settlement suit, or not, cannot affect the validity of the *lis pendens*, for the suit was brought for his benefit, in part, and by statute (section 432, Civ. Code Prac.) his merely filing his claim therein made him a party. Then the allegations of the petition favorable to his proceeding became adopted as allegations on his behalf. That he was made a party to the petition, in fact, merely brought actual notice to him, earlier than the commissioner's advertisement could, of the pendency and nature of the suit, of its privileges to him, and of the necessity of his availing himself of it if he would share in the distribution of its assets, and become entitled to all the other benefits that might flow from the *lis pendens*. His rights and his duties, as well, were those of an actual party to the suit. To obtain the benefits of a *lis pendens*, the party asserting it must have not only a suit in which a relief in rem is sought against specific property sufficiently identified by the record, to which the other claimant or title holder must be a party in fact, but he must prosecute his suit with reasonable diligence. Concerning this rule,

and the limitations just adverted to, this court, in *Clarkson v. Morgan's Devisees*, 6 B. Mon. 447, said: "It has ever been regarded as a harsh and rigorous rule in its operation upon the rights of bona fide purchasers. The rule was dictated by necessity, as indispensable to the rights of litigants, and as the means of terminating litigation about the matter in contest. But being a hard rule, and operating with great severity, in many instances, upon the rights of innocent purchasers, it should never be carried, in favor of a complainant asking its enforcement, beyond the purpose and reason of its creation. To entitle him to enforce it against bona fide purchasers, he has been held to reasonable diligence in the prosecution of his suit, and should be guilty of no palpable slips for gross irregularities in the management of the same, by which injury may accrue to the rights of others who are not parties." Also, see, *Watson v. Wilson*, 2 Dana, 406, 28 Am. Dec. 459; *Erhman v. Kendrick*, 1 Metc. 146; *Debell v. Foxworthy's Heirs*, 9 B. Mon. 228. The doctrine as announced in *Clarkson v. Morgan's Devisees*, supra, is approved by the text in *Freeman on Judgments*, § 208, and sustained by the authorities there cited. It is founded in part upon the idea that a stranger to a suit should not intermeddle with its subject-matter, except upon pain that he be bound by its conclusion; that he must take notice of its existence, and to that end he is required, at his peril, to exercise due diligence in informing himself as to its existence and nature. It would be an anomalous rule, indeed, that would require diligence of the innocent stranger, while condoning the most culpable negligence of the controlling party to the suit. The doctrine of *lis pendens* does not depend at all upon, nor is it affected by, the actual knowledge of the stranger as to the purposes of the suit, or the specific facts to be gathered from its record. He is bound, if bound at all, by the sufficiency of the record alone. So that if the suit be permitted to abate, or revivor be not had for unreasonable length of time (*Watson v. Wilson*, 2 Dana, 406), or if it is not presented with reasonable diligence, it is the same as if the suit had never been brought, so far as the doctrine under discussion is concerned.

In the case at bar, the creditors, *Bowling & Greenwell*, were named and joined in the suit as creditors, and thereby, as well as by the advertisement of the commissioner, were called upon to file their claim as creditors, if they had any, and desired to avail themselves of the benefit of the action. They, without excuse or explanation, failed to do so till after the commissioner had reported all claims ascertainable, till after two judgments of sale had been rendered in the action, till after the last sale to pay the debts of the decedent and the costs of the suit and of the administration had been confirmed, and till after the heirs had sold and conveyed

to an innocent purchaser for value the residue of the land, after deducting all that was necessary to discharge the known liabilities of the estate; and not till more than two years after they might and should have set up their claim do they attempt to assert it against this land. By their prolonged silence under circumstances ordinarily calculated to produce action, they not unreasonably produced the impression upon any one investigating the record that they were not in fact creditors, or that they elected not to avail themselves of the purposes of the suit. It is equivalent to their having said to intending purchasers from the heirs at law: "I have no claim against this land." For silence may be as potent a disclaimer, under conditions calling for action, as would be a positive declaration. "No one is permitted to keep silent when he should speak, and thereby mislead another to his injury." 2 *Herman on Estoppel*, p. 1069. The admirably clear text of 1 *Herman on Estoppel & Res Adjudicata*, § 6, thus epitomizes this branch of estoppel: "If a man has led others into the belief of a certain state of facts by conduct of culpable negligence, calculated to have that result, and they have acted on that belief to their prejudice, he shall not be heard afterwards, as against such persons, to show that state of facts did not exist. A man is not permitted to charge the consequences of his own fault on others, and complain of that which he has himself brought about."

It is very earnestly claimed that the allegations of the petition filed by the administrator brought to settle the estate were enough to put appellant upon notice as to the existence of *Bowling & Greenwell's* claim, as if his knowing of it affected him in the least. The language of the petition that is referred to is this very vague and indefinite averment: "The defendant *Mary Culver* holds a mortgage on a part of the land hereinafter described, and which was a debt against said decedent amounting to about \$450, and which is due and unpaid. And the defendants *Bowling & Greenwell* and *Dr. James Muir* and said *Mary Culver* are the only creditors of said decedent known to plaintiff." It is to be observed that the section of the statute before referred to (section 2087), affecting purchasers for value from the heir at law or devisee, does not require that the purchaser shall have been an "innocent" purchaser, or one without notice of the ancestor's indebtedness. It merely requires that he be a purchaser in good faith and for value. If, after the six months mentioned, one becomes such purchaser, it does not matter how much he knows about who were the creditors of the decedent. The only thing that can at that time affect the land as a lien is a valid *lis pendens*.

There is no question of fraud involved in this suit. Upon the facts recited, we are of the opinion that the pendency of the action

ceased to constitute a *Ms pendens* lien upon the land, by reason of Bowling & Greenwell's negligence in failing for so long to present their claim, and to prosecute it with reasonable diligence.

The judgment of the circuit court is reversed, and the cause is remanded for proceedings not inconsistent herewith.

**EQUITABLE LIFE ASSUR. SOC. OF
UNITED STATES v. WARREN
DEPOSIT BANK et al**

(Court of Appeals of Kentucky. June 10,
1903.)

**INSURANCE—LAPSED—PAID-UP POLICY—RIGHT
TO ISSUAL—LACHES IN APPLICATION.**

1. A life insurance policy, lapsed for nonpayment of premiums, entitled insured, certain payments having been made, to have issued to him in lieu thereof a new, paid-up, nonparticipating policy, on condition, however, that the lapsed policy should be surrendered, duly receipted, within six months of his default. *Held*, that although, notwithstanding the condition of the policy, insured was entitled to a reasonable time in which to demand an issual of the paid-up policy, a failure of insured to make application therefor for over five years from the date of default was laches, such as to bar his right.

Appeal from Circuit Court, Warren County.

"Not to be officially reported."

Action by the Warren Deposit Bank and another against the Equitable Life Assurance Society of the United States. From judgment for plaintiffs, defendant appeals. Reversed.

Humphrey, Burnett & Humphrey and Mitchell & Du Bose, for appellant. John M. Galloway, John B. Rodes, and W. B. Gaines, for appellees.

O'REAR, J. A life policy in appellant society, issued upon the life of E. A. Porter, and assigned by him to appellee Warren Deposit Bank, lapsed for nonpayment of premium due August 6, 1896. By reason of certain payments having been made under a provision of the contract of insurance, the assured (Porter) was entitled to have issued to him, on August 6, 1896, in lieu of the policy, a new paid-up policy, without participation in the profits, for the entire amount which the full reserve, according to the legal standard of the state of New York, would then purchase as a single premium, calculated by the legal table for single-premium policies then in use by the society. But it was provided, however, "that this policy shall be surrendered, duly receipted, within six months of the date of such default in payment of premium as mentioned above." More than five years after the policy had lapsed this action was begun by the assured and his assignee to compel the issual to them of the new paid-up policy provided for and above mentioned. Appellant pleaded the laches of appellee in making the application, as well as the statute of limitations.

In *Mutual Life Ins. Co. v. Jarboe*, 102 Ky. 80, 42 S. W. 1097, 39 L. R. A. 504, 80 Am. St. Rep. 343, it was held, in construing the terms of a policy substantially the same as the one sued on, that the insured was entitled to have the new paid-up policy issued to him, although he did not make the application within the six months named, provided the application therefor was made within a reasonable time. The cases of *Hexter v. U. S. Life Insurance Co.*, 91 Ky. 357, 15 S. W. 663, and *Northwestern Mut. Life Ins. Co. v. Barbour*, 92 Ky. 429, 17 S. W. 706, 15 L. R. A. 449, which had restricted the right of the insured to demand such policy to the contract time of six months, were expressly overruled. The Jarboe Case was followed and approved in *Manhattan Life Ins. Co. v. Patterson* (Ky.) 60 S. W. 333, 53 L. R. A. 378, and again in *Washington Life Ins. Co. v. Miles* (Ky.) 66 S. W. 740. In the last-named case the court, all concurring, after full and careful consideration of the matter, announced the rule that should be applied generally, as to the time within which the application should be made by the insured, that such time should not be longer than five years from the day when the insured might first have demanded the issual of such policy. The failure of the insured to make the demand within that time was conclusively deemed by the court to be such laches as would bar his right of action upon the policy. There is nothing in this case that should relieve appellee of the operation of this rule.

The action of the special circuit judge in sustaining the demurrer to appellant's answer, pleading the laches, was error. The judgment is reversed, and cause remanded, with directions to overrule the demurrer, and for proceedings not inconsistent herewith.

SETTLE, J., not sitting.

**DAVIS' ADM'R v. CHESAPEAKE & O. RY.
CO. et al.**

(Court of Appeals of Kentucky. June 17,
1903.)

**REMOVAL OF CAUSES—DIVERSE CITIZENSHIP
— FOREIGN CORPORATIONS—COMPLIANCE
WITH STATE LAW—EFFECT—JOINDER OF
DOMESTIC CORPORATION—JOINDER OF RES-
IDENT SERVANTS—SUFFICIENCY OF PETI-
TION—RAILROADS—CROSSING INJURIES—
PRIVATE CROSSING—TRESPASSERS—PLEAD-
INGS—CONSTRUCTION.**

1. A compliance by a foreign railroad corporation with Const. § 211, and Ky. St. 1899, § 841, the former providing that such corporations shall not be entitled to the right of eminent domain, or have power to acquire a right of way or real estate, until they shall have become bodies corporate in accordance with the laws of the commonwealth, and the latter prescribing the manner of such incorporation, does not render the corporation a citizen of the state in such sense as to deprive it of the right to remove to the federal court actions instituted against it by a citizen of the state.

2. In an action against a foreign railroad corporation, an amended petition, tendered after

the filing by defendant of a petition for removal of the cause to the federal court, making a domestic corporation, original defendant's lessor, a party, came too late to prevent the removal.

3. An allegation in a petition that plaintiff's intestate was killed "at or near" a private crossing should be construed to mean that she was killed at a place on the track other than the crossing.

4. A failure to slacken the speed of a train, or to give signals at an approach to private crossings, is not negligence.

5. In an action against a railroad for injuries at a private crossing, near a public crossing, where there was no averment that signals usually given on the approach of trains to the public crossing could have been heard at the private crossing, and the distance between the crossings was not given, but a bare statement that they were "near" together, the question of defendant's negligence in failing to give signals at the public crossing, on which plaintiff could rely, was not raised.

6. Those in charge of a train owe a trespasser on the tracks of the railroad no duty, except to use reasonable care to save him after discovering his peril, and, if injured, he cannot rely for a recovery against the railroad on alleged negligence in failing to give signals on approach to either a private or public crossing.

7. In order to prevent a removal of an action for injuries against a foreign railroad company to the federal court, by joining as defendants resident servants of the railroad in charge of the train causing the injury, the petition must state a good cause of action against the servants so joined.

Nunn, J., dissenting in part.

"To be officially reported."

On rehearing. Rehearing granted, and former opinion withdrawn.

For former opinion, see 70 S. W. 857.

PAYNTER, J. This is an action to recover damages for the loss of the life of the intestate by the alleged negligence of the Chesapeake & Ohio Railway Company. It presented its petition and asked for the removal of the case to the federal court, and the motion was sustained. Owing to our duplex system of government, perplexing and delicate questions as to the respective jurisdiction of the federal and state courts arise; and the judiciary should meet and dispose of them with fairness and in the orderly manner which should characterize the proceedings of courts of justice. It will not be our purpose to discuss the questions considered by the Supreme Court of the United States, but to state its conclusions and follow them, as that court has jurisdiction to adjudicate the question involved.

Section 1, art. 3, of the Constitution of the United States provides that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." Section 2 of the same article provides that, "the judicial power shall extend to all cases in law and equity, arising under this Constitution, * * * to controversies * * * between citizens of

different states." When a case decided by a supreme court of a state involves the question of diverse citizenship, the Supreme Court of the United States has held in many cases that it will review the judgments of those courts on the question. That court having adjudged the precise question here involved, and adversely to the view of this court, expressed in the former opinion delivered herein, we feel that the petition for a rehearing should be granted, and the opinion withdrawn, which is done.

The appellant is a citizen of Kentucky. It is substantially averred in the petition that the Chesapeake & Ohio Railway Company is a corporation organized under the laws of Virginia, and became a corporation, citizen, and resident of this state by filing in the office of the Secretary of State and in the office of the Railroad Commission, pursuant to section 211 of the Constitution and section 841 of Kentucky Statutes of 1899 copies of its articles of incorporation. The Chesapeake & Ohio Railway Company is a Virginia corporation. It complied with section 841, Ky. St. 1899, which reads as follows: "No company, association or corporation created by, or organized under, the laws or authority of any state or country other than this state, shall possess, control, maintain or operate any railway, or part thereof, in this state until, by incorporation under the laws of this state, the same shall have become a corporation, citizen and resident of this state. Any such company, association or corporation may, for the purpose of possessing, controlling, maintaining or operating a railway or part thereof in this state, become a corporation, citizen and resident of this state by being incorporated in the manner following, namely: By filing in the office of the Secretary of State, and in the office of the Railroad Commission, a copy of the charter or articles of incorporation of such company, association or corporation, authenticated by its seal and by the attestation of its president and secretary, and thereupon, and by virtue thereof, such company, association or corporation shall at once become and be a corporation, citizen and resident of this state. The Secretary of State shall issue to such corporation a certificate of such incorporation." This section of the statute was based upon section 211 of the Constitution of the state, which reads as follows: "No railroad corporation organized under the laws of any other state, or of the United States, and doing business, or proposing to do business, in this state, shall be entitled to the benefit of the right of eminent domain or have power to acquire the right of way or real estate for depot or other uses, until it shall have become a body corporate pursuant to and in accordance with the laws of this commonwealth." When the Chesapeake & Ohio Railway Company complied with the terms of this section of the statute, it at once became "a corporation, citizen and resi-

¶ 4. See Railroads, vol. 41, Cent. Dig. § 394.

dent of this state," for it is therein so provided.

But the question then arises whether it remained a citizen of the state where it was organized in the meaning of section 2, art. 3, of the Constitution of the United States. In *Bank v. Deveaux*, 5 Cranch, 86, 3 L. Ed. 38, Chief Justice Marshall said: "That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen, and consequently cannot sue or be sued in the courts of the United States, unless the rights of members in this respect can be exercised in their corporate capacity." In *Covington Drawbridge Co. v. Shepherd*, 20 How. 227, 15 L. Ed. 896, it was said: "No one, we presume, ever supposed that the artificial being, created by an act of incorporation, could be a citizen of a state in the sense in which that word is used in the Constitution of the United States." In *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207, the court said: "A corporation itself can be a citizen of no state, in the sense in which the word 'citizen' is used in the Constitution of the United States. A suit may be brought in the federal courts by or against a corporation, but in such a case it is regarded as a suit brought by or against the stockholders of the corporation; and for the purpose of jurisdiction it is conclusively presumed that all the stockholders are citizens of the state which by its laws created the corporation." At first the Supreme Court held that, in order to give federal courts jurisdiction of an action by or against corporations, it was necessary to aver citizenship of the incorporators. Subsequently it held that the individuals composing a corporation were conclusively presumed to be citizens of the state creating the corporation.

There is no averment in the petition that the individuals composing the Chesapeake & Ohio Railway Company were associated together for the purpose of organizing a corporation of the same name in this state. The corporation which they organized in another state is, by an act of the General Assembly, declared to be a citizen and corporation of Kentucky, by reason of its compliance with certain constitutional and statutory regulations. In *St. Louis R. Co. v. James*, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802, it appeared that the St. Louis Railroad Company had been incorporated by the state of Missouri, and had subsequently filed its articles of incorporation with the Secretary of State of the state of Arkansas, under a statute like the one under consideration. A citizen of Missouri sued it in Arkansas, alleging it was a citizen of Arkansas. The court held that it was not a citizen of Arkansas, and was entitled to have its case removed to the federal court. The precise question involved in this case was decided in *Walters v. Chicago R. Co.*, 186 U. S. 479, 22 Sup. Ct. 941, 47 L. Ed. —, the court holding that the case should be removed to the federal court; and as au-

thority for the decision cited *St. Louis R. Co. v. James*, and *Louisville R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081. On November 3, 1902, the same court, in *Calvert, Administrator, v. Southern Railway Co.*, 23 Sup. Ct. 844, 47 L. Ed. —, decided the same question here involved and in the *Walters* case, and ruled the same way it did in the latter case. *Southern Railway Company v. Allison*, 23 Sup. Ct. 713, 47 L. Ed. —, decided May 18, 1903, by the Supreme Court, involved precisely the same question we have under consideration. The Southern Railway Company, a Virginia corporation, accepted the provisions of the statute of North Carolina, which is similar to our statute. The question was whether it was by virtue thereof a citizen of North Carolina, and thereby lost its citizenship of Virginia, in the meaning of the federal Constitution; and the court held that it had not, and that it was entitled to have the action removed to the federal court. In that case the court reviewed the cases to which attention has been called and held them to be authority for its conclusion. The court also said it had "read with respectful consideration" the case of *Debnam v. Southern Bell Telephone Co.*, 126 N. C. 831, 36 S. E. 269, in which the Supreme Court of that state reached the same conclusion that this court reached in the opinion which has been withdrawn, but said it could not concur therewith. The *Debnam* case was cited in the withdrawn opinion as authority therefor.

After the petition for removal had been filed, the appellant tendered an amended petition, making the Maysville & Big Sandy Railroad Company, a domestic corporation and appellee's lessor, a defendant. It came too late to prevent a removal of the case. Therefore it was not within the rule of the *McCabe* case (Ky.) 66 S. W. 1054, and *Person v. Illinois Central Railroad Co.* (C. C.) 118 Fed. 342.

Before the petition for removal was filed, the plaintiff filed an amended petition, making Bracken, Lewis, and Inskip defendants, who were the conductor, engineer, and fireman, respectively, and who are alleged to have been in charge of the train when the accident happened. A recovery is sought against them, as well as the Chesapeake & Ohio Railway Company.

It is alleged that the intestate was run over and killed "at or near" a private crossing over the railroad track between her house and garden; that it was "not far" from public crossings to the east and west of her. The alleged negligent acts are that the train ran over the crossing at the rate of 50 miles per hour, which was a dangerous speed; that they failed to keep a lookout for travelers upon or at the crossing; that they failed to give signals of the approach of the train to the crossings. These are the acts of negligence averred in the petition. The averment that she was killed "at or near" the private

crossing should be construed that she was killed at a place on the track other than the crossing, because pleadings are to be construed most strongly against the pleader. A failure to slacken the speed of the train, or to give signals at the approach to private crossings, is not negligence. *Louisville & Nashville R. R. Co. v. Survant* (Ky.) 44 S. W. 88; *Johnson's Adm'r v. Louisville & Nashville R. R. Co.*, 91 Ky. 651, 20 S. W. 754. It is only where the crossing is a public one that reckless speed or the failure to give signals amounts to negligence of the railroad company. *Louisville & Nashville R. R. Co. v. Survant*, 96 Ky. 197, 27 S. W. 909. In *Louisville & Nashville R. R. Co. v. Bodine* (Ky.) 59 S. W. 742, 56 L. R. A. 506, it appeared that the party had been injured at a private crossing, and in considering the question of negligence the court said: "In this case, in view of the dangerous character of the crossing, its long use, not only by Bodine, but by the public, the fact that signals were accustomed to be given by the trains as they approached it, the speed of this train, and the fact that it was a special, imposed upon the appellant the obligation to give such warning of its approach to this crossing as exigencies of the situation demanded for the protection of human life; and, as no warning at all was given, we think the jury were warranted in concluding that proper precaution was not exercised by appellant, and that by reason of this the accident occurred."

The rule there stated does not change the general rule announced in *Johnson's Adm'r v. Louisville & Nashville R. R. Co.*, but simply recognizes an exception to it. The facts averred do not bring the case within the rule of *Louisville & Nashville R. R. Co. v. Bodine*. Neither do they bring it within the rule of the *Cahill Case*, 92 Ky. 345, 18 S. W. 2, if for no other reason than there is no averment that the signals usually given on the approach of trains to the public crossings referred to could have been heard at the private crossing; the distance between the public and private crossings not being given, so the court could infer that a signal given at the public crossing could have been heard at the private crossing. The averment that the public crossings were near the private one is not sufficient; because what in the estimate of the pleader was near might be too far for the signal to be heard at the private crossing.

From the averments the court concludes that the intestate had the right to use the private crossing. But, under the rule that a pleading must be construed most strongly against the pleader, the averment that she was killed "at or near" the crossing is equivalent to the averment that she was not killed on it, but near the crossing; hence she was a trespasser. This being true, under the well-settled rule of this court, those in charge of the train owed her no duty, except to use reasonable care to save her after discovering

her peril. As she was not on a crossing when killed, it cannot be claimed that, as to the intestate, it was negligence to fail to give signals on the approach to either the private or public crossing. In *Shackleford's Adm'r v. Louisville & Nashville R. R. Co.*, 84 Ky. 43, the court said: "Railroad trains must give the customary signals at public places or public crossings. The failure to do so is negligence; but this is required for the safety of passengers, trainmen, and the public using, and who have the right to use, the track at such public ways, and not for the purpose of protecting those who, as trespassers, may be crossing or using the track elsewhere. The instances are numberless upon every railroad of persons living along it, and having to and being in the habit of crossing the track to pass from the dwelling to the out-buildings or vice versa; and to require the companies in all such cases to signal the approach of their trains, and to presume and guard against the presence of persons upon the track, would not only be unreasonable, but detrimental to public travel."

If the plaintiff desires to join as defendants persons who are claimed to be jointly liable for the tort with the railroad company, which is a foreign corporation, and thus prevent a removal of the case to the federal court, a cause of action must be stated against the parties so joined. Our conclusion is that the amended petition did not state a cause of action against Bracken, Lewis, and Inskip.

The judgment is affirmed.

NUNN, J., dissents from so much of the opinion as recognizes that a foreign corporation is entitled to have its case removed to the federal court, after complying with section 841 of the Kentucky Statutes of 1899.

SWICE'S ADM'X v. MAYSVILLE & B. S. R. CO. et al.

(Court of Appeals of Kentucky. June 20, 1903.)

RAILROADS—LEASE OF LINES—LIABILITIES OF LESSOR—SERVANT'S INJURIES.

1. Where a railroad company, under valid legislative authority, leases its lines to another road, it is not liable as an employer for injuries caused to employes of the lessee through the lessee's negligence.

"To be officially reported."

On rehearing. Rehearing granted, judgment affirmed, and former opinion withdrawn.

For former opinion, see 70 S. W. 1117.

HOBSON, J. Appellant filed this suit against the Maysville & Big Sandy Railroad Company, a Kentucky corporation, and the Chesapeake & Ohio Railway Company, a Virginia corporation, to recover for the death of her intestate. The Chesapeake & Ohio

Railway Company filed its petition to remove the case to the Circuit Court of the United States for the Eastern District of Kentucky. The court ordered the removal, and the plaintiff appeals.

The Chesapeake & Ohio Railway Company is the lessee of the Maysville & Big Sandy Railroad Company. The intestate was a laborer in the service of the Chesapeake & Ohio Railway Company on a coal dock in a coal yard near the city of Maysville, and while walking on a narrow elevated platform, adjoining the coal dock, he fell therefrom, by reason, as alleged, of its not being sufficiently secured. The order of the circuit court removing the case rests on the idea that no cause of action was stated against the Maysville & Big Sandy Railroad Company, and the fact that it was made a defendant to the petition did not affect the right of the real defendant to a removal of the case. The lease made by the Maysville & Big Sandy Railroad Company to the Chesapeake & Ohio Railway Company, and the authority under which it was made, are set out in the case of McCabe's Adm'r v. Maysville & Big Sandy Railroad Co., 66 S. W. 1054. It was there held that the lessor company continued liable to the public for the discharge of the obligation imposed on it by law; but whether it would be liable to the servants of the lessee for injuries received by reason of its negligence was a question not decided. The cases holding that the lessor is not liable for injuries to the servants of the lessee from its negligence are referred to in the opinion, and distinguished from the case before the court. The case now presented requires a determination of this question, as Swice was in the employment of the lessee, and was injured, as alleged, by reason of its negligence.

In *Lee v. Southern Pacific Railroad Co.*, 116 Cal. 97, 47 Pac. 932, 38 L. R. A. 71, 58 Am. St. Rep. 140, the court, in passing on the question, said: "In all cases where a valid lease is found (or, as in this discussion, where it is assumed), the lessor company owes no duty whatsoever as an employer to the operatives of the lessee company. The claim of the relationship of employer and employé under such circumstances is a false claim and quantity. It does not exist. The responsibility of the lessor company, when it attaches, does not spring from this relationship, but arises from a failure of the lessor company to perform its duty to the public, of which public the employé of the operating company may be regarded as one. Thus, in those cases where the injury has resulted to an employé of the operating company by reason of the negligence of a fellow servant, or want of skill and care in the lessor company in managing the road, or in negligence in furnishing suitable appliances, these and kindred matters being entirely and exclusively within the control of the lessee company, for injury which may result the lessor

is in no way responsible." In a note to this case in 58 Am. St. Rep. 153, after a review of many cases, it is said: "As to employé of a lessee corporation, the weight of authority, whether the lease is authorized or not, is to the effect that they cannot recover for injuries received through the negligence of such lessee or its servants or agents. *Virginia, etc., Ry. Co. v. Washington*, 86 Va. 629 [10 S. E. 927, 7 L. R. A. 344]; *Hukill v. Maysville, etc., R. R. Co.* (C. C.) 72 Fed. 745. The duties which are owed by a railroad company to its servant are not duties owed to him in common with the public, but grow out of the contract of service. He assumes the relation of servant to his employer voluntarily, and out of it arises the reciprocal obligations from one to the other. It seems to us that the relation of the servant of the company operating the road to the owner is very different from his relation to his employer, and that the relation of the owner of the road to him is different from its relation to the general public. His contract is not with the company owning the road; and it may be asked, does the latter owe him the duty of a master to his servant, or guaranty that the master with whom he has voluntarily contracted will perform its obligation to him? It may be that if the injury had occurred by reason of a defect in the roadbed or track, and not by reason of a defect in the engine, the company charged with the duty of keeping up the road would be liable. But if it were true that the injury was caused entirely by another company operating the owner's roadbed, and was inflicted upon one of its own employé by reason of a defect in machinery entirely under its control, it is difficult to see upon what principle of policy or justice the lessor would be held liable merely because it owned the road. *East Line, etc., Ry. Co. v. Culbertson*, 72 Tex. 375 [10 S. W. 706, 3 L. R. A. 567], 13 Am. St. Rep. 805."

When the Legislature authorized the Maysville & Big Sandy Railroad Company to lease its road, it necessarily contemplated that the lessee should have servants to run it; for the lessee could not otherwise operate it. And to hold the lessor responsible to these servants would not be to give fair effect to the legislative action. The question is fully discussed, also, in *Virginia Midland Railroad Co. v. Washington*, 86 Va. 629, 10 S. E. 927, 7 L. R. A. 344, and in that opinion other authorities are collected. It seems to us that the distinction made is sound, and there seems to be little or no conflict of authority on the subject.

The other questions discussed were disposed of in *Davis' Adm'r v. Chesapeake & Ohio Ry. Co.* (decided at this term) 75 S. W. 275.

The former opinion herein (see *Swice's Adm'r v. Maysville & Big Sandy Railroad Co.*, 70 S. W. 1117) is withdrawn, and the judgment appealed from is affirmed.

**PEOPLE'S ELECTRIC LIGHT & POWER
CO. v. CAPITAL GAS & ELECTRIC
LIGHT CO.**

(Court of Appeals of Kentucky. June 16,
1903.)

CITIES — EXCLUSIVE FRANCHISES — GAS COMPANY — RIGHT TO FURNISH ELECTRIC LIGHT — ENLARGEMENT OF FRANCHISE.

1. Where the exclusive franchise to furnish light to a city has been granted to a gas and electric light company, and another company also claims such right, thereby casting a cloud on the title of the first company to the right claimed by it, injunction to restrain the second company from setting up such exclusive right is the proper remedy, though the first company is not in possession of the streets.

2. In an action by a gas and electric company, claiming that the exclusive franchise to light the streets had been granted to it, to restrain another company from setting up a claim to a similar exclusive right, a plea of champerty by defendant, on the ground that it had the exclusive right to furnish light at the time the plaintiff's franchise was granted, was demurrable.

3. A plea denying that the sale of the franchise to appellant was advertised, or that bids were publicly received therefor, or that the franchise was sold to appellant as the highest and best bidder, stated a good defense.

4. Where the charter of a gas company did not authorize it to furnish any other light than gas, and it had no facilities for so doing, a franchise granted by a city to such company, giving it the exclusive right to use the streets to furnish gas and "other illuminating light," was void as to "other illuminating light."

5. A city contracted to deed its gas plant and grant an exclusive franchise to furnish gas and other light to a company whose charter gave it no right to furnish any light but gas. The deed was made to an assignee of this company, and the assignee's charter provided that it should furnish gas and electric light. The deed imposed no obligation on the grantee to furnish any other light than gas. *Held*, that the deed did not give the grantee an exclusive right to furnish electric light.

6. Contracts made by the grantee with the city with reference to furnishing electric lights, which did not impose on the company any duty to furnish such light, did not give the company an exclusive right to furnish electric light.

7. Under Const. § 164, providing that, before granting any franchise for a term of years, a city shall receive bids therefor and award the same to the highest and best bidder, a city cannot enlarge a franchise already granted, except by award to the highest and best bidder.

Appeal from Circuit Court, Franklin County.

"To be officially reported."

Action by the People's Electric Light & Power Company against the Capital Gas & Electric Light Company. From the judgment both parties appeal. Affirmed.

Hazelrigg & Chenault and John W. Ray, for appellant. John W. Rodman and John B. Lindsey, for appellee.

SETTLE, J. This equitable action was instituted by the appellant, People's Electric Light & Power Company, to enjoin the appellee, Capital Gas & Electric Light Company, from interfering with its alleged exclusive right to supply the city of Frankfort,

its inhabitants, and consumers, with electricity for lighting and other purposes, as provided by its articles of incorporation and authorized by an ordinance of the city. The answer and counterclaim filed by appellee contains six paragraphs, and denies that appellant has or owns the exclusive right, or any right, to supply the city of Frankfort, or its inhabitants, with electricity for lighting, or any other purpose, or that the city council had the power, by ordinance or otherwise, to confer upon appellant any such right, and for further defense avers in substance that it and its assignor and predecessor, the Southern Gasworks Company, by purchase and deed from the city of Frankfort, acquired title to its gasworks, mains, and pipes, and to the exclusive use of its streets and alleys, for the purpose of furnishing gas and electricity for the lighting of its streets and the use of its inhabitants, which right has been confirmed by repeated subsequent contracts made between it and the city, and that this right is about to be interfered with by appellant, for which reason the answer asks an injunction against it.

Appellant filed general demurrer to the answer and counterclaim, and each paragraph thereof, which was sustained to the first, second, fourth, and fifth, and overruled as to the third and sixth, paragraphs. Thereupon an amended answer and counterclaim was filed by appellee, to which and to the several paragraphs of the original answer, as amended, appellant again filed a general demurrer, and, the case being submitted on that demurrer, it was sustained as to the first, second, fourth, and fifth paragraphs of the answer as amended, and also as to the new paragraph added by the amended answer, to all of which appellee excepted. The cause was then submitted for trial and judgment upon the pleadings and an agreed writing containing all the evidence, documentary and otherwise, upon which the parties relied in support of their respective contentions. Whereupon the special judge, expressing his views in a well considered and ably written opinion, rendered judgment to the effect that neither appellant nor appellee has the exclusive right to use the streets of the city of Frankfort for the purpose of furnishing electricity to the city or its inhabitants for lighting purposes, and enjoining each of them from asserting any such exclusive right. Appellant and appellee each excepted to the judgment and prayed an appeal to this court, and the case is now before us upon both appeals for final adjudication.

The facts presented by the pleadings and evidence are as follows: The city of Frankfort, by a written contract of May 30, 1882, made with the Southern Gasworks Company, the assignor of appellee, sold to it its gasworks, which had theretofore been constructed and was then being operated under a charter from the Legislature granted the city. By the terms of this contract it granted, or

attempted to grant, to the Southern Gasworks Company the exclusive right to the use of its streets "for the purpose of laying, repairing, and properly operating all mains, pipes, and other necessary machinery for the furnishing of all gas or other illuminating light in said city." The consideration of this sale, as recited in the contract, was the undertaking of the Southern Gasworks Company to execute to the city 40 interest-bearing bonds of \$1,000 each, payable 40 years from July 1, 1882, with the privilege reserved of paying the bonds, or any one or more of them, before maturity. The company further undertook to improve the gasworks, extend the mains, to light a certain number of street lamps at the price named in the contract, and to furnish private consumers gas at not exceeding \$2 per 1,000 cubic feet; but this maximum price was to be adjusted every five years, so as not to exceed the average price charged for gas in cities or towns of the same or a less population than Frankfort. The contract mentioned, and all rights incident and appertaining thereto, were assigned by the Southern Gasworks Company to the appellee, Capital Gas & Electric Light Company, which became incorporated by a legislative act approved April 24, 1882, and by deed of June 27, 1882, the city of Frankfort conveyed appellee, as assignee of the Southern Gasworks Company, all the property and rights which it had agreed theretofore to sell to the Southern Gasworks Company; it being recited in the deed that the appellee had already executed and delivered the 40 bonds required of the Southern Gasworks Company by its contract with the city. The appellee by the terms of the deed was to assume and carry out all the undertakings of its assignor with the city. By virtue of the rights thus acquired under the contract and deed mentioned, appellee only manufactured and furnished gas for several years for the use of the city and its inhabitants; but about January 1, 1890, it constructed an electric light plant, and began for the first time to furnish electric lights to the city and its inhabitants, though no contract was made by appellee with the city in reference to electric lighting until September 18, 1893, at which time a new or supplemental contract was made between appellee and the city, under which the electric lights were to be furnished. This contract contained the statement that it was entered into at the request of the city, and because it desired a modification of the former contract. It appears that since that time various supplemental agreements have been made between the parties from time to time for the continued lighting of the streets; but neither the contract of September 18, 1893, nor any of those of subsequent date, contain any provision or agreement requiring appellee to furnish electricity to private consumers or regulating the price thereof.

Appellee's claim of the exclusive right to the use of the streets of the city for furnish-

ing electricity to the city and its inhabitants for lighting purposes is based upon its various contracts with the city. Upon the other hand, the appellant, People's Electric Light & Power Company, contends that it has the exclusive right to the use of the streets for the furnishing of electric lights to the city and its inhabitants by virtue of the ordinances of the general council passed July 23 and August 13, 1901, and that the franchise granted it by these ordinances was duly advertised for sale, and bids therefor were received publicly, and that the franchise was thereby awarded to it as the highest bidder. It is averred by appellants that appellee is wrongfully asserting an exclusive right or franchise to supply electricity to the city and its inhabitants for lighting purposes, and is thereby casting such a cloud upon its title that it is being prevented from selling, pledging, or mortgaging its stock, or selling its bonds, whereby to raise the money with which to erect its plant, and it therefore asks that appellee be enjoined from asserting the claim of exclusive right set up by it.

We think the special judge properly sustained the appellee's general demurrer to the extent indicated in the judgment. The first paragraph of the answer interposes the defense that appellant cannot maintain the action to quiet its title to a franchise to light the city of Frankfort with electricity, as it is not in possession of the streets and alleys of the city, the use of which is necessary to the enjoyment of its franchise. The contention of appellant is that the cloud cast upon its title to the franchise is preventing it from selling, pledging, or mortgaging its stock, or selling its bonds, in consequence of which it has been unable to erect its electric plant, or to enjoy the franchise granted it by the city of Frankfort. In such a state of case, injunction is the only remedy, if, as a matter of fact, appellant owns the exclusive franchise to which it lays claim. This point seems to have been well settled in *Citizens' Gaslight Company v. Louisville Gas Company*, 81 Ky. 263.

The second paragraph contains a plea of the statute of champerty, which has no place in a case like this. Although it may have been true that, at the time of the grant of the franchise from the city of Frankfort to appellant, appellee was exercising a like franchise under claim that it was exclusive, such a claim, unless true in fact, could not prevent the city from granting a similar franchise to appellant. Upon the other hand, if appellee's franchise was exclusive, the grant of the franchise by the city to appellant was simply void.

The third paragraph of the answer, by denying that the sale of the franchise to appellant was advertised, or that bids were publicly received therefor, or that the franchise was sold to appellant as the highest and best bidder, raised an issue of fact upon which proof was necessary. Therefore

this paragraph was properly held to be good upon demurrer.

The fourth and fifth paragraphs set forth the various contracts between appellee and the city, upon which its claim to the exclusive franchise is based, and they present the contention that the grant of the franchise to appellant is void, because its effect is to impair the obligation of appellee's contract with the city. By legislative sanction the city of Frankfort was invested with the title to its streets and alleys, and all other property of the city, including its gasworks and waterworks; all being under the exclusive control of the city council. By an act, of March 28, 1872 (Laws 1871-72, p. 393, c. 899), it was provided "that the board of councilmen of the city of Frankfort be, and they are hereby, authorized to grant, bargain, sell, and convey, to rent or lease, any and all property, or any part thereof, belonging to said city of Frankfort, be the same lands, tenements, goods, chattels, or franchises, or immunities, on such terms, and for such sums, and at such times, as said board of councilmen shall deem for the best interest of said city of Frankfort."

We find in appellee's charter the following provisions: "Said company shall furnish gas light or electric light to any person on such terms as the company and such person may agree upon, and any such contract shall be obligatory and enforceable in any proper court in this commonwealth"—and, further, that the appellee company shall have authority "to put up lamp posts and electric lights, and that said gas and electric lights shall be furnished to the city at a reasonable price per light per annum, as may be agreed on." It is contended for the appellee that these provisions of its charter, considered with those of the charter of the city, conferred upon the city ample power to grant appellee the exclusive franchise asserted by it; and it is conceded by the special judge that some of the authorities cited by counsel for appellee tend strongly to support that contention, though he properly, as we think, declined to accept that view. We agree with him that the question of whether the city has the power to grant an exclusive franchise, such as is claimed by appellee in this case, is not before us for decision. In our opinion, it did not, by its several contracts with the city, obtain the exclusive franchise claimed for it, even though it be conceded that the city was authorized to grant it.

The Southern Gasworks Company, appellee's assignor, made the original contract with the city, under which appellee claims title to the franchise asserted by it. It is clear that the charter of the Southern Gasworks Company provided only for the furnishing of gaslight. It conferred no authority to use any light other than gaslight, and its contract with the city was to furnish only gaslight; indeed, it was unprepared to furnish any other. We therefore further

agree with the special judge that the contract which granted, or attempted to grant, to that company the exclusive right to the use of the streets of the city for the purpose of supplying "gas or other illuminating light" was void as to "other illuminating light."

An examination of the charter of appellee will show that it did confer power to make and supply electricity, and to accept from the city a grant of the use of its streets for that purpose; and the city having carried out its contract with the Southern Gasworks Company, by executing a deed to appellee, as its assignee, conveying to it the gasworks, and the exclusive use of the streets of the city for supplying "gas or other illuminating light," it becomes important to determine the effect of that deed. It will be borne in mind that the Southern Gasworks Company did not, in its contract with the city, undertake to erect an electric plant, or to supply electric light to the city or its inhabitants. It did, however, undertake to issue \$40,000 worth of bonds, and to improve the gasworks, extend the mains, and supply gas to the city and other consumers at agreed prices specified in the contract. The appellee, as assignee of the Southern Gasworks Company, assumed by the deed only such obligations as rested upon the latter; nothing more. Therefore it was under no duty to erect an electric plant, or to furnish electricity to the city or its inhabitants for lighting. We do not think it was the purpose of the city to confer an exclusive right upon appellee's assignor, or upon it, to furnish electricity for the city's use and that of its inhabitants, without imposing an obligation to compel it to exercise that right.

It is contended, however, by counsel for appellee, that the incorporation of such an obligation in the contract was unnecessary, as it was required by its charter to furnish electricity for lighting purposes. We are of opinion that the provision of appellee's charter that "said company shall furnish gas or electric light to any person on such terms as the company and such person may agree upon" only expressed the duty which rests upon every corporation enjoying a public franchise to serve all alike, and does not compel the exercise of the franchise. We find that, for seven years after its right to use the streets of the city for lighting purposes was secured, appellee failed to use electricity for that purpose; and this failure to exercise its electric light franchise demonstrates that it was under no obligation to do so. Furthermore, there was no time during that seven years that it could have been compelled by the city to furnish electric lights to it or its inhabitants; and yet appellee insists that it had the right to prevent any other person from doing so. We are unable to find anything in any of the contracts between the city and appellee that requires the latter to furnish electric lights for the use of the city or its inhabitants. Upon the contrary,

we find in all of them that appellee has been careful not to recognize any obligation on its part to supply electricity. There is no ground for appellee's contention that its alleged exclusive franchise was confirmed by its contract of 1893 made with the city of Frankfort. The language of that contract shows no purpose or attempt to confer upon appellee any new right; and, in view of section 164 of the present Constitution, it was without authority to enlarge appellee's rights under the first contract, except by its becoming the highest and best bidder for the additional privilege; and, besides, it is by no means certain that the city had the power to grant an exclusive franchise. In the case of *City of Newport v. Newport Light Co.*, 21 S. W. 645, this court held that an exclusive gas franchise, which had been conferred by the city upon the light company, did not confer the exclusive right to supply electricity for lighting purposes, though the contract authorized the light company to substitute electricity for gas.

We do not feel called upon to consider the contention of appellant that the grant from the city to appellee is in perpetuity, and therefore void. It was the opinion of the special judge that the grant is limited to 40 years, because the bonds issued by appellee to the city, which are secured by lien on its property and franchises, were made payable in 40 years. We are not disposed to question the correctness of this view of the law; but, as the pleadings make no issue on this question, its consideration is unnecessary. Nor is it necessary to decide that the failure of appellee to exercise its alleged exclusive franchise for several years prior to January 1, 1890, worked a forfeiture thereof, as such nonuser and consequent forfeiture are not pleaded by appellant. It is manifest that the appellant's franchise is not exclusive, as the language of the ordinance granting it will show. Upon the whole case, we have found no difficulty in reaching the conclusion that neither appellant nor appellee is entitled to the exclusive franchise claimed.

There are one or two other questions connected with the case that might be discussed, though not raised by the record; but, as we are of the opinion that we have passed upon all that are material to a proper decision of the case, they have not been considered.

For the reasons herein indicated, the judgment of the lower court is affirmed upon both the original and cross appeal.

EXCHANGE BANK OF KENTUCKY v. THOMAS et al.

(Court of Appeals of Kentucky. June 9, 1903.)

"Not to be officially reported."

Dissenting opinion. For majority opinion, see 74 S. W. 1086.

PAYNTER, J. I dissent, because I am of the opinion that the bank could have brought its suit at any time after the debt matured. If it was misled by the deposit, it was again placed in a position to extricate itself from the effect of it, because within six months it was advised, by the suit to have it so treated, that it was a preferential act. When this was done, the bank was bound to take notice of the effect of the transaction, and, if it desired to keep the statute of limitation from running, it should have brought its suit. After deducting the time which elapsed between the date of the deposit and the institution of the suit to have it adjudged a preferential act, more than seven years elapsed after the maturity of the note until the suit was brought on it. If the surety had pleaded that the deposit paid the note, the bank could have successfully shown it did not amount to a payment of it, because of the preferential character of the act. The debt was never extinguished, and was enforceable.

GARDNER et al. v. CONTINENTAL INS. CO. et al.

(Court of Appeals of Kentucky. June 19, 1903.)

MORTGAGES — FORECLOSURE — INSURANCE — PAYMENT TO MORTGAGEE — ASSIGNMENT OF MORTGAGE — PLEADING — ANTICIPATING DEFENSES — APPEAL — RECORDS — OMISSIONS.

1. Where, in a suit on a written contract, the contract shows that no cause of action exists, the court on demurrer to the petition will consider the exhibit, for, while an exhibit cannot make a pleading good, it may make it bad.

2. Where a former suit was appealed, and, on appeal in a subsequent suit, the cause is briefed with reference to the record in the former suit, which is filed in the subsequent suit, and no motion is made to strike out such record, it may be considered to supply omissions from the record in the subsequent suit.

3. In an action on a fire policy, it is matter of defense that insured has breached the condition requiring sole and unconditional ownership, and the defense need not be anticipated in the complaint.

4. Where a mortgage is assigned to an insurance company by the mortgagee, and on foreclosure it appears that the premises were insured by the company and the loss paid to the mortgagee in consideration of the assignment and in accordance with the policy, the payment of the loss extinguished the mortgage to the extent thereof, precluding a recovery thereon by the company.

5. Where a grantee assumes a mortgage indebtedness and interest, legal interest is contemplated.

Appeal from Circuit Court, Mason County.
"Not to be officially reported."

Action by the Continental Insurance Company and others against J. D. Gardner and others. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

A. E. Cole & Son, for appellants. Thos. R. Phister, E. L. Northington, and W. D. Cochran, for appellees.

HOBSON, J. This action was filed by the Continental Insurance Company against appellees J. D. Gardner, S. D. Gardner, and Mariam Gardner. It was alleged in the petition that on May 2, 1895, S. D. Gardner executed to J. D. Mayhugh his promissory note for \$1,800, due three years after date, with interest at the rate of 8 per cent. per annum until paid, and, to secure it, he and his wife, Mariam Gardner, executed to Mayhugh a mortgage on a tract of 100 acres of land on which they resided; that \$25 was paid on the note on August 25, 1897, and that nothing more had been paid; that on April 20, 1897, S. D. Gardner conveyed the land, except his homestead of \$1,000 in value, to J. D. Gardner, in consideration of his assuming the payment of the mortgage debt; that on July 15, 1899, Mayhugh, in consideration of \$1,612.50 paid him by the insurance company, assigned to it this much of the note and mortgage security. The mortgage and deed referred to were filed as part of the petition. The deed is in the usual form, but concludes with these words: "But it is expressly understood that the party of the first part does not relinquish his homestead in the land hereinbefore described, but retains the same." J. D. Mayhugh was made a defendant to the action, and filed an answer in which he stated that on June 1, 1897, the Continental Insurance Company issued to J. D. Gardner a policy of insurance, insuring him in the sum of \$1,000 on the dwelling on said land, \$500 on barn No. 1, and \$200 on barn No. 2, and, at his special instance and request, a mortgage clause was attached to the policy, making the loss payable to him as his interest might appear; that thereafter the dwelling house and barn No. 1 were burned, exceeding in value the amount of the insurance thereon; that the company refused to pay the policy, and he sued it and recovered a judgment, which was paid on July 15, 1899, amounting to \$1,612.50; and he then executed to it the assignment referred to in the petition, but on the understanding and agreement that its lien was to be inferior to his. He made his answer a cross-petition against the other defendants, and prayed judgment for his debt and the foreclosure of his mortgage. The defendant J. D. Gardner filed an answer in which he alleged that on June 1, 1897, in consideration of the sum of \$23 paid by him to it, the insurance company executed to him the insurance policy referred to, and agreed to insure him against the loss of the property by fire in an amount not exceeding the sums named; that on April 2, 1897, his father, S. D. Gardner, had executed to him a deed conveying to him the property, in consideration of his assuming the mortgage, but reserving to himself his homestead exemption, and that at the time of the execution of the policy he was the owner of the land, subject to the mortgage; that when he procured the policy and paid the premium he neglected to have

it provided in the policy that the amount of the loss, if any, should be payable to the mortgagee J. D. Mayhugh to the extent of his interest, and, being reminded of this by the mortgagee, he requested the agent of the insurance company to make an addition to the policy to the effect named, which the agent agreed to do, but, being unfamiliar with the different kinds of mortgage clauses from the fact that he had been in the business but a few weeks, the agent, by mistake, attached to the policy a mortgage clause to the effect that in the event of loss and the payment of it by the insurance company it should be subrogated to the rights of the mortgagee, and he would thereby forfeit his right to have credit on the mortgage debt for the amount of his insurance; that he did not discover the mistake, nor did the agent, the policy being in the possession of Mayhugh, and he supposing that the ordinary mortgage clause had been attached; that if he had known of the mistake he would not have accepted the instrument; that he and his father had agreed with Mayhugh to keep the property insured, and for this reason it was agreed that the ordinary mortgage clause should be attached to the policy, as he thought had been done; that the attaching of the other paper to the policy was by mistake of the agent and without his knowledge; that thereafter, in October, 1897, the buildings burned, and that he gave notice immediately of the loss, and furnished proofs within 60 days, which the company assured him was all that was necessary for him to do to entitle him to the payment of the policy. He prayed judgment reforming the paper and crediting the amount paid by the insurance company on the mortgage. Other allegations were made in an amended answer charging fraud in the transaction. The court sustained a demurrer to the answer of Gardner, and entered a judgment in favor of the insurance company and Mayhugh foreclosing the mortgage on the land.

In the answer of Gardner, the policy and the mortgage clause attached thereto are filed as part marked "Exhibit A." In copying the record, the clerk certifies that Exhibit A is not filed with the papers, and it is not included in the transcript. Appellees insist that for this cause the judgment must be affirmed, as the court must presume that the exhibit sustains the judgment. The rule is that an exhibit will not cure a defective pleading or supply averments omitted in the pleading. But it is also the rule that in a suit on a written contract, if the contract shows that no cause of action exists, the court on demurrer will consider the exhibit. In other words, while an exhibit cannot make a pleading good, it may make it bad.

But there has been a former suit between J. D. Gardner and the Continental Insurance Company on this policy, which was appealed to this court. The original policy was filed

in that action, and for that reason, perhaps, its absence in this case is accounted for. The record of that case has been filed with the record in this case. It is insisted for appellees that we cannot look to the record of that case, although placed with this record. There would be great force in this contention if presented by a motion to strike out the record before submission. If the motion had then been sustained, appellants might have supplied their record. No motion to strike out was made; the attorneys have briefed the case with the knowledge that the papers were filed with the case, and, if their objection be sustained now, the appellants would be left without remedy. Under the circumstances, appellees must be held to have waived the irregularity by not presenting the objection by motion to strike out before submission, as, the case being submitted, appellants had a right to understand it was to be tried on the record before the court.

The ground upon which the court appears to have sustained the demurrer is that, in the deed to J. D. Gardner, S. D. Gardner reserved his homestead. It was stipulated in the policy that it should be void if the interest of the insured be other than unconditional and sole ownership. This condition is one of the many exceptions contained in the policy in different clauses. It was unnecessary for the insured to anticipate a defense based on a violation of this condition. If the company relied on such defense, it must plead the violation of the condition affirmatively. 2 Wood on Insurance, § 522; Stephens on Pleading, side p. 350. When the company sets up this clause of the policy to defeat its liability upon it, the insured may reply setting up matter of waiver or estoppel, if any he has. It would be unnecessary prolixity, and tend rather to confusion, to require all these matters to be anticipated and avoided by the plaintiff in the first place. The insured alleged that he was the owner of the property, and this was sufficient to enable him to maintain the action, unless some breach of the conditions of the policy was set up by the defendant. Under the facts alleged in the answer, the payment of the loss by the insurance company to Mayhugh extinguished the mortgage to this extent, and no recovery can now be had in its favor thereon.

The judgment in favor of Mayhugh is too large. The promise to pay interest at 8 per cent., as contained in the note, so far as appears, was usurious as to the excess over 6 per cent. In the deed from S. D. Gardner to J. D. Gardner, the latter only assumes the mortgage indebtedness of \$1,800 and interest. This, in legal contemplation, includes only the debt of \$1,800, with legal interest. Judgment should therefore have been entered in favor of Mayhugh only for \$1,800, with interest at 6 per cent. from May 2, 1895, subject to a credit of \$25 paid August 25, 1897, and \$1,612.50 on July 15, 1899.

Judgment reversed, and cause remanded with directions to overrule the demurrer to the answer of J. D. Gardner, and for further proceedings consistent herewith.

LOUISVILLE BRIDGE CO. v. LOUISVILLE & N. R. CO.

PITTSBURG, C., C. & ST. L. RY. CO. v. SAME.

(Court of Appeals of Kentucky. June 20, 1903.)

INDIVISIBLE CONTRACT—SPLITTING OF CAUSE OF ACTION—OBJECTION—WAIVER—EVIDENCE—TABLES—SECONDARY EVIDENCE.

1. Two suits on the same contract were begun at nearly the same time in the same court, in both of which defendant appeared and filed demurrers, which were heard together; only one opinion being rendered in both cases. Defendant answered, and both causes proceeded for several years; defendant at no time making objection to the splitting of the cause of action. After a judgment in one suit, and some five years after the suits were begun, defendant pleaded that judgment in bar in the other suit; claiming that the cause of action had been split. *Held*, that defendant had waived its right to object to the splitting of the cause of action.

2. In a suit by a railway company to recover excessive tolls charged by defendant bridge company, the railway company had no means of knowing the amount of freight that had passed over the bridge, except by the waybills and transfer slips which it had preserved, and these were very numerous. *Held*, that a tabulated statement of the facts shown by the bills and slips was admissible in evidence on being sworn to as correct by the officer of the railway company under whose supervision the statement was prepared, and after an offer to allow the opposing party to examine the original papers.

3. The waybills and transfer slips were not objectionable as secondary evidence.

4. A plaintiff in an action on contract cannot recover where there is no data from which the amount to which he is entitled can be ascertained, though it is clear that he is entitled to recover something.

Appeal from Circuit Court, Jefferson County, Law and Equity Division.

"To be officially reported."

Action by the Louisville & Nashville Railroad Company against the Louisville Bridge Company and another. From the judgment rendered, the defendants separately appeal, and plaintiff prosecutes a cross-appeal. Affirmed.

Dodd & Dodd, Gibson, Marshall & Gibson, and Humphrey, Burnett & Humphrey, for appellants. Helm, Bruce & Helm, for appellee.

HOBSON, J. On June 5, 1872, a contract was made between the Louisville Bridge Company, the Louisville & Nashville Railroad Company, the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, and certain other railroad companies, by which the railroad companies agreed to send their traffic over the bridge, and bound themselves to pay the bridge company such rates therefor as would pay certain fixed charges, create a

sinking fund to meet an outstanding debt, and pay the stockholders a given annual dividend. This contract is set out in the opinion of this court in the case of Pittsburg, C., C. & St. L. Railway Co. v. Dodd, 72 S. W. 822. By the terms of the contract, the railroad companies using the bridge were placed on terms of absolute equality; that is, each was to pay at the same rate for traffic it did over the bridge. For convenience, the Louisville & Nashville Railroad Company did not pay its tolls directly to the bridge company, but paid them to the connecting lines north of the river, and they settled with the bridge company. After the rates had been fixed, and things had gone on for a number of years, an arrangement was made by which the bridge company did not require the roads north of the river to pay the full amount of their tolls, but at the end of each quarter the charges were rebated to them to the extent that there was a surplus over and above what was called for by the contract, and they were only required to pay to the bridge company the balance. This was without the knowledge or consent of the Louisville & Nashville Railroad Company, which continued to pay the full tolls. The rebating of the tolls began about the year 1881, and was not discovered by the Louisville & Nashville Railroad Company until some time in the year 1888, when some facts came to the knowledge of its president which led him to suspect what was going on. He wrote to the bridge company, complaining, but nothing was done, although various communications passed between the parties. Finally, in the year 1892, the Louisville & Nashville Railroad Company filed this suit against the bridge company and the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, seeking to recover of them on account of the excessive tolls charged for the years 1881 to 1891. About the same time it filed another suit to recover for the same matters for the year 1892. In the latter suit, amended pleadings were filed,* setting up a like claim for the years 1893, 1894, and 1895. Finally this case was tried, and a judgment rendered in favor of the Louisville & Nashville Railroad Company. The defendants appealed to this court, and the judgment was affirmed. See Louisville Bridge Company v. Louisville & Nashville Railroad Company, 106 Ky. 674, 51 S. W. 185. After that judgment had been rendered, the defendants filed an amended answer in the other suit, involving the years from 1881 to 1891; pleading that judgment in bar of the action. The court sustained a demurrer to the pleading. Evidence was then heard, and, the case being submitted, the court gave judgment in favor of the Louisville & Nashville Railroad Company for the years 1888, 1889, 1890, and 1891, but dismissed its claim as to the years prior to 1888. From this judgment the defendants have appealed, and the plaintiff prosecutes a cross-appeal. The matters mainly relied on for re-

versal on the original appeal are the ruling of the court on the plea in bar, and its admission of the evidence offered by the plaintiff to make out its case.

As to the plea in bar, it is earnestly maintained by the appellants that the whole claim for all the years from 1881 to 1895 was based on the same contract, and, being an entirety, the plaintiff could not split its cause of action, and sue for part of it in one suit, and for the remainder in another. Numerous authorities are cited by counsel in support of the proposition that, where an entire cause of action is split, a judgment in one case will bar a second action for the rest of the claim. The principle is sound, and has been applied very often by the courts. But it has no application where the defendant consents to the splitting of the cause of action. A party to an action is never allowed to take advantage of that which he consented to, and his consent may be shown expressly, or it may be implied from the circumstances, as in other cases. Both the actions referred to were brought in the same court, and near the same time. The defendants appeared in both actions, and, without making any objection to the cause of action being split, or the bringing of two suits, filed a general demurrer to the petitions. These demurrers were heard by the court together, but one opinion being delivered; the court treating the two actions as one. The demurrer was sustained, amended pleadings were filed, the general demurrer was filed again, and again the two actions were heard together by the court, and the demurrers were overruled; the court delivering, as before, but one opinion in the two actions. After this, without any objection to the bringing of two suits, the defendants filed answer in each, and the issues were made up, the two actions moving on together side by side; and no objection was made until the year 1897, or something like five years after the suit was brought, when, one of the actions having been tried, an amended answer was filed, pleading the judgment in that action in bar of the other. In the one action the plaintiff sought to recover for the time down to the year 1891, and in the other for the time after 1891. If objection had been made to the separation of the cause of action, the plaintiff might have dismissed one suit without prejudice, and set up the entire cause of action in the other. This would have profited the defendants nothing. It was more convenient to the parties to practice the claim for the two periods separately, for the reason that the evidence was different, and it would have been somewhat confusing to have prepared the whole matter in one suit. Besides, a very large sum of money was sued for—one half a million of dollars—and the bridge company had nothing to gain by advertising the large claim against it in one suit. When a party is put to an election, and elects what course he will follow, he cannot thereafter abandon that election to

the prejudice of the other party. When the two suits were filed and were heard together as one action on the demurrers, it was incumbent on the defendants to make objection to the form of proceeding then or not at all. Their silence then was an acquiescence in the prosecution of the two actions. One of the objects of the Code is to expedite legal proceedings by requiring objections not going to the merits of the action to be made when the occasion for them arises. All such objections are waived if not made before issue is joined on the merits. *Gunn v. Gudehus*, 15 B. Mon. 449. All objections of mere form come within this rule, which is founded upon reasonable principles, for otherwise the rules of procedure, which are intended to facilitate the administration of justice, become in the hands of the skillful practitioner the instruments for defeating justice. *Curd v. Lewis*, 1 Dana, 351; *Warren v. Glynn*, 37 N. H. 340. Under the facts as shown by the record, we conclude that the defendants acquiesced in the bringing of the two separate actions, and by their course led the plaintiff to understand that the prosecution of the two actions was consented to by them, or at least that the objection thereto was waived. After all this, it was too late, after one action had proceeded to judgment, to object in the other action to that which for three years had at least impliedly been consented to.

The objection as to the admissibility of the evidence arises in this way: The bridge company kept no record of the business done by the Louisville & Nashville Railroad Company, as it paid its tolls to the connecting lines, and they settled with the bridge company. When it became necessary to ascertain how much the tolls of the Louisville & Nashville Railroad Company amounted to, a very difficult question was presented, as no separate record of the payments of the tolls had been kept. Previous to the year 1888, the Louisville & Nashville Railroad Company had no records at all on the subject; but after the year 1888 it kept the waybills on the freight, or, where the waybill followed the goods, the transfer slip, from which the waybill was made out, was preserved. From these original papers kept by the railroad company, with much labor, it made out a detailed statement of the tolls paid by it subsequent to the year 1888. Objection is made as to the competency of these papers, on the idea that they were simply loose memoranda. This cannot be maintained. They were the original and best evidence of the transaction, and were the record kept by the railroad company to show its transactions. In cases of this sort the law does not demand impossibilities; it only demands the best evidence practicable; and no witness could carry in his mind these transactions. The only possible way to prove them is from the record kept at the time the transactions occurred. It is also objected that these original papers were not in fact produced before

the commissioner to whom the case was referred to state the account; but he reports that he examined them, and that they were not filed for the reason that they would fill up the commissioner's office, and were too numerous to be brought into court. This was all that the plaintiff could do. The defendants and their attorneys were also afforded opportunities to examine the papers. The defendants also complain that the statements of the account made out from these papers were allowed in evidence. Proof was taken by the officer of the railroad under whose supervision and oversight the work was done, and he testifies to its correctness, and that it was done under his eye; that is, that he superintended it, checked it up, and knew it to be correct. It was unnecessary to bring in all the clerks who had made out the original waybills or prepared the numerous statements. The waybills, being the records of the company of its transactions made at the time, were original evidence, and admissible without further proof, because made and kept as a record in the usual course of business. The proof by the two witnesses who testify to the correctness of the statements made up from these waybills was sufficient to make out a *prima facie* case, which was supported by the commissioner's own investigation, and his finding the statements correct in so far as he tested them; but, of course, he could not examine all the items. The papers would, perhaps, have filled the courtroom; and no good could have come from bringing them in before the judge, for no court could go through all these papers and make up a statement. If he did it, not being a practiced accountant, his work might have been worth intrinsically less than his commissioner's. Besides, the defendants took no proof. The roads north of the river had their records, and, if the proof by the plaintiff was not correct, they had it in their power to show the truth. This they made no effort to do. For the years after 1892 there was little dispute about the amount of the tolls. The result reached by the commissioner for the years from 1888 to 1891 corresponds substantially with the amount fixed for the years after 1892. The cardinal feature of the common law is its want of specific rules. It rests on a few general principles. It requires the best evidence that the case is reasonably capable of, but it requires no more. The issue in this case depended upon a statement to be made up from thousands of waybills, which, if all brought in, would have filled up the commissioner's office. The only practical way of getting at the truth was to make out a statement from these waybills. If either party doubted the accuracy of the statement when prepared, the court could afford him access to the papers, and give him opportunities to manifest the truth to him. To demand of the plaintiff more than was shown here would be to deny a recovery in cases of this character. The rule of evidence

is that no evidence shall be received where there is better evidence which may reasonably be had. It is intended to prevent fraud, but it is not intended to prevent the administration of justice, where all the evidence is produced by the party of which the case is reasonably susceptible. In *Northern Pacific Ry. Co. v. Keyes* (C. C.) 91 Fed. 47, where similar tables were introduced in evidence and objected to, the court said: "To have called each of the clerks would have added very little to the trustworthiness of the evidence. No clerk conducted any entire investigation, but various details were placed in the hands of forty or fifty different employes, and each contributed his computation to the general result. No clerk could have testified that the tables were correct, for the reason that they were not made by him; neither could any single clerk testify that the figures from which the tables were compiled were correct, for he only contributed a small fragment to the general result. The method adopted was the only practicable one for conducting the investigation. It would have been absolutely impossible for any one man to have compiled the general result without delaying the case for years. A reasonable safeguard against falsification in the preparation of such statements is furnished by placing the records from which they are compiled freely at the disposal of the adverse party. It was the duty of the companies to do this, and to give the Attorney General the fullest assistance in explaining such records, and to allow him to place the same in the hands of expert accountants, if he so desired, for the purpose of detecting error or falsification in the testimony as prepared by the companies. The record shows that this was done throughout the taking of the testimony in these cases. We must assume that the Attorney General was satisfied of the correctness of the testimony, from the fact that he declined to investigate its trustworthiness." This seems applicable to the case before us. The evidence in the case is the original record kept by the railroad company of the transactions as they occurred. The statements or tables prepared by the clerks are not, properly speaking, evidence at all. They are only exhibits of the facts shown by the evidence. If the court doubted their correctness, he should have had correct statements or tables prepared; but it was not necessary to do this when those offered were proved to be presumptively correct, and there was no showing made that they were incorrect. The court has a sound discretion in determining matters of this sort, in the interest of substantial justice, and we see no error in the admission of the matters in question.

The defendants complain that interest was allowed on the amount found due the plaintiff. In the former case above referred to, of *Louisville Bridge Company v. Louisville & Nashville Railroad Company*, 106 Ky. 674, 51 S. W. 185, it was held not only that the

defendant was liable, but that it was liable for interest from the date of the illegal exactions—at least, from the time it had information of the amount due the plaintiff. The chancellor seems to have followed this ruling. As to the cross-appeal of the appellee for the years previous to 1888, there being no record of the amount of tolls paid, we concur with the chancellor in refusing to give relief. The court will not guess at the amount of a judgment. The plaintiff must make out his case. If he cannot do it, it is his misfortune that he has no evidence. It is true, we might infer from the facts shown by the record that appellee is entitled to something for these years, yet, after all, it would be a bald guess to fix any amount. But while we are unwilling to disturb the judgment on the cross-appeal, we have no doubt from the record that at least as much was due the appellee as the chancellor entered judgment in its favor for, and that, on the whole case, appellants have no substantial ground of complaint.

As the bridge company and the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company are not adversary parties herein, their rights as between themselves are not determined.

Judgment affirmed.

LOUISVILLE & N. R. CO. v. HART COUNTY.

HART COUNTY v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. June 19, 1903.)

CORPORATIONS—INTEREST ON PAID-UP CORPORATE STOCKS—STOCK DIVIDEND—EFFECT—ESTOPPEL—CORPORATE RECORDS—PRESUMPTIONS.

1. Under 2 Acts 1850-51, p. 444, c. 505, § 5, which provides that a certain railroad "shall allow to all subscribers and holders of stock under the company, interest on the same from the time of paying for said stock" up to the time of making the first dividend, interest did not begin to run on the stock from the date on which a county subscribing therefor issued bonds in payment thereof, but from the date of the delivery of the bonds to the company, though the bonds bore date anterior to their delivery, and the purchasers thereof would be entitled to interest from their date.

2. Evidence that counties, as subscribers of stock in a railway corporation, frequently delivered their bonds in payment of stock subscriptions after the time the bonds bore date, tends to overcome the presumption that bonds issued by a particular county in payment of stock subscribed by it were delivered to the corporation the day they were dated.

3. Where there was no evidence to impeach the correctness of the record of a corporation showing the transactions between it and their stockholders, had about 50 years before, its record showing the date a subscriber paid for stock by delivering to it bonds is the best evidence as to the date when the stock was paid for.

4. Under Acts 1851-52, p. 742, c. 429, § 15, which provides that a certain railroad shall, on the date of the first dividend, and thereafter on presentation and surrender at the company's

office of tax receipts for taxes paid to defray interest on bonds given by a county in payment of corporate stock, issue to the holders of tax receipts stock for the same, and 1 Acts 1855-56, p. 188, c. 20, § 4, which declares that the holders of stock issued to such taxpayers shall be entitled to all the rights and privileges of stockholders, except that such stock shall not bear interest, a taxpayer paying taxes to defray interest on county bonds issued in payment of corporate stock is entitled to an amount of stock equal to the tax receipt, together with all cash and stock dividends declared on such stock.

5. A corporation was required to allow to all stock subscribers interest from the time of paying for the stock to the time of making the first cash dividend. In 1861 it declared a stock dividend as of April 1 following. A stock subscriber denied the right of the corporation to stop the running of interest, except by its declaring a cash dividend. At the meeting declaring this dividend, a county, as stock subscriber, was represented by a sinking-fund commissioner. At a subsequent meeting of stockholders, the county was represented by two sinking-fund commissioners, who joined with other stockholders in declaring invalid the claim of the stockholder denying the right to stop interest except by a cash dividend. Subsequently the corporation declared and paid several cash dividends on the basis that interest stopped by the payment in 1862 of the dividend declared in 1861, and the county acquiesced therein. *Held*, that the county was estopped from claiming that interest continued to the time the corporation declared the first cash dividend.

6. A transferee of corporate stock acquires the right to any interest due on the stock, though payable in stock instead of cash.

Appeal from Circuit Court, Jefferson County, Chancery Division.

"To be officially reported."

Action by Hart county against the Louisville & Nashville Railroad Company. From the judgment, both parties appeal. Affirmed on plaintiff's appeal. Reversed on defendant's appeal.

McCandless & James, for appellant. Helm, Bruce & Helm and H. W. Bruce, for appellee.

PAYNTER, J. The charter of the Louisville & Nashville Railroad Company was granted on March 5, 1850. Several amendments to it were passed by subsequent Legislatures. The company was organized by the election of directors in September, 1851. Under the charter the counties through which the proposed line of railroad was to be constructed were authorized to subscribe to the capital stock of the company. The city of Louisville was also authorized to subscribe therefor. The counties and municipalities seem to have subscribed for \$3,200,000 of it. In January, 1853, Hart county subscribed for \$100,000 of the stock, but did not pay for same when subscribed. To pay the subscription the county issued bonds aggregating \$100,000. The appellee claims that the bonds were delivered to it as follows: August 14, 1853, \$38,000; August 6, 1853, \$33,000; and September 30, 1857, \$34,000. The bonds bore dates as follows: April 1, 1853, \$33,000; April 1, 1854, \$3,000; and April 1, 1855, \$34,000. To obviate the necessity of

an elaborate statement of the facts as to the differences out of which this suit grew, they will be made to appear as far as necessary in our discussion of the questions involved. This action was filed on March 23, 1870, and the answer was not filed for many years thereafter. The action was brought in equity, and for the purpose of compelling the appellee to issue to her certificates of stock for interest which matured on her subscription to the capital stock during certain periods, for certificates of stock for taxes paid by the taxpayers of the county to meet the interest which matured on the bonds which had been issued to pay for her subscription, and also to recover certain alleged cash dividends which she claimed she was entitled to receive. For convenience, we will designate Hart county as appellant, and the Louisville & Nashville Railroad Company as appellee.

The first question that will be considered is, did interest accrue on the subscription from dates on which the appellee claims the bonds were actually delivered to it in payment of the subscription?

Section 5 of the act of March 20, 1851 (2 Acts 1850-51, p. 444, c. 505), reads as follows: "Said company shall allow to all subscribers and holders of stock under the company, interest on the same from the time of paying for said stock up to the time of making the first dividend, and issue to the holder stock therefor; and when stock shall be subscribed for a branch they may provide that said stock shall not be entitled to draw dividends until said branch is completed, but may allow interest on the payments up to the completion thereof, and pay it in stock." It will be observed that it is made the duty of the company to allow interest on the stock issued by it, from the time of paying for the stock up to the time of making the first dividend, and issue to the holders of stock certificates therefor. The counties were authorized to issue bonds to pay their stock subscriptions. Although the bonds delivered to the appellee in payment of the stock subscription bore date anterior to the delivery of the same, and although the party who purchased them would be entitled to the interest thereon from their date, still the interest on the subscription for which stock was to be issued did not begin to run until the subscription was actually paid—in this case, until the stock was actually delivered in payment of the subscription. The interest on the bonds and interest on the stock subscriptions are separate and distinct things provided for in the charter and amendments. As an inducement to the counties to subscribe for the capital stock of the appellee, interest was to be paid on the subscription from the date of its payment. Besides, the charter provisions indicated a hope of the promoters that the dividends declared on the stock would pay the interest on the bonds. And it was therefore provided that, if they

did not do so that, the taxpayers who were required to pay taxes for that purpose were entitled to certificates of stock in the company for the amount of taxes paid by each. The bonds having been delivered almost a half century ago, no one could possibly have any recollection as to the dates they were delivered in payment of the stock. It was the business of the company to keep a record of the transactions between the company and subscribers to the capital stock of the company. Their books should have shown who were subscribers, the amount of each subscription, and the date the bonds were delivered in payment of the subscription. This is an action by one who at that time and for many years thereafter in part constituted the corporation. The county had the right at any time to examine the books of the company. In *Turnbull v. Payson*, 95 U. S. 421, 24 L. Ed. 437, the court said: "Where the name of an individual appears on the stock-book of a corporation as a stockholder, the prima facie presumption is that he is the owner of the stock, in case where there is nothing to rebut that presumption; and, in an action against him as a stockholder, the burden of proving that he is not a stockholder, or of rebutting that presumption, is cast upon the defendant." If the books of the appellee are prima facie evidence that one is a stockholder, they would be still stronger evidence, when it is admitted a party is a stockholder, to show when he paid his subscription. There was no evidence offered to impeach the correctness of the record kept by the appellee as to the time the bonds were delivered, nor to overcome the presumption that the record was correctly kept. Counsel for the appellant contend that the presumption should be indulged that the bonds were delivered on day they bear date, but there is evidence in the record which shows that counties frequently delivered their bonds in payment of stock subscriptions after the time they bore date, and this fact tends to overcome the presumption claimed by counsel for the appellant to exist. Our opinion is, however, that the record kept by the company showing date of delivery in this case is the best evidence as to the date when the stock subscription was paid.

The county contends that the holders of tax receipts were only entitled to the dividends that were declared after the stock was delivered to them for same. The appellee claims that it issued to the holders of tax receipts, when presented, an amount of stock equal to the tax receipt, and also all cash and stock dividends which had been declared on the stock issued for the tax receipts. The claim is made that the county is entitled to the dividends as in the case where stock is sold after a dividend has been declared. There was no sale by the county of her stock to a taxpayer. The stock went to the taxpayer by virtue of the statute. At the time these taxes were paid, or at least part of

them, the county did not hold certificates for her stock. Until the certificates for the stock were issued, the county's claim for stock was of the same equitable character as was that of the taxpayer to the stock which the law declared he was entitled to upon the payment of taxes. The law compelled the tax-paying citizens of Hart county to pay for the stock for which she subscribed, by paying taxes to be used in the payment of interest and principal of her bonds. Section 15 of the act of January 9, 1852 (Acts 1851-52, p. 742, c. 429), reads as follows: "That the said Louisville & Nashville Railroad shall, upon the date of the first dividend, and thereafter upon presentation and surrender, at the office of the company, of tax receipts for taxes paid to defray interest upon bonds given by any county, under this act, issue to the holders thereof stock for the same. Said tax receipts shall be negotiable by endorsement, and no stock shall be issued for a less amount than one share." By section 4 of the act of January 17, 1856 (1 Acts 1855-56, p. 188, c. 20), it was provided that the county courts shall appoint the clerk of the county or circuit court, or one of the commissioners of the sinking fund, to issue certificates to the taxpayers, etc., of taxes paid, when the amount due the holder is \$100. This is to be done at the end of each month. The concluding clause of section 4 is as follows: "The holders of such stock shall, to all intents and purposes, be entitled to all the rights and privileges of stockholders, but such stock shall not bear interest." The stock thus held by a taxpayer or his assignee was entitled to all rights and privileges of other stockholders, except such stock "shall not bear interest." The ownership of the stock by a taxpayer did not depend upon the fact that he held a certificate from the clerk or commissioner, but upon the fact that he had paid taxes. It is shown that the appellee delivered the stock to the taxpayers or their assignees as required by the act. After having fully and satisfactorily met the demands of the taxpayers or their assignees, the county is here asking that she be adjudged certificates for part of the amounts for which the appellee has issued stock to the taxpayers or their assignees. In other words, the county demands certificates of stock, and dividends thereon, which by the express terms of the statute are declared to belong to others. There is absolutely no merit or justice in the claim, and it would certainly be very inequitable to allow it.

There is another question in the case, involving the right of the county to have issued to her stock for interest which accrued on her subscription between April 1, 1862, and June 30, 1864; the latter being the date on which the first cash dividend was made. In October, 1861, at a stockholders' meeting, a one-fourth of 1 per cent. stock dividend was declared, of date of April 1, 1862. Hardin county, being one of the counties which had

subscribed for stock, denied the right of appellee to stop the running of interest on stock subscriptions by declaring the stock dividend mentioned; her contention being that nothing but the declaring of a cash dividend would stop interest on the stock subscriptions. Although her representative was present at the meeting, and made no objection to the proceedings declaring the dividend, yet the county repudiated it, and continued to do so, and at subsequent meetings of stockholders protested against it, which culminated in a suit which finally reached this court, which held that the interest did not cease to run on the subscription until the cash dividend was declared, in June, 1864. *Hardin County v. Louisville & Nashville Railroad Company*, 92 Ky. 412, 17 S. W. 800. The conclusion of the court is now adhered to. Therefore the necessity is obviated to again discuss the question. The course Hart county pursued is entirely different from that of Hardin county. At the meeting declaring the one-fourth of 1 per cent. dividend, Hart county was represented by one of her sinking-fund commissioners. At the meeting of the stockholders in 1865 the question arose as to the claim and position of Hardin county; she claiming that she was entitled to stock for interest which accumulated between April 1, 1861, and June 30, 1864, and the dividends on that stock, as well as other stock held by her. At this meeting Hart county was represented by two of her three commissioners, and Hardin county's claim was unanimously denied, and proper record was made thereof. This action was acquiesced in until this suit was filed. In the meantime several cash dividends were declared upon the basis that none of the counties (and there were many of them) were entitled to stock for interest during the time mentioned, or dividends thereon. Hart county joined with all the other counties in thus constraining their rights under the charter. All other counties, except Hardin, acquiesced in this interpretation of their rights under the charter as amended, and never did assert any claim against the company for interest stock covering the period in question. Thus Hart county voted that she and the other counties were not entitled to this stock, and the other counties adhered to that conclusion, and never claimed or received such stock. Hart county now attempts to repudiate the action taken with the approval of her representatives at the stockholders' meetings, and claims that which she formerly said she did not own. After the proceedings at the stockholders' meetings, she stood by and saw other counties who had subscribed for stock acquiesce in the action of the stockholders; saw the appellee declare and pay dividends upon the basis that the right to such stock did not exist in stock-subscribing counties and municipalities. It is suggested that there is nothing to show that these commissioners were present at the meeting of the stock-

holders by authority of Hart county. The law authorized them to be present at such meetings to represent the county, and we must presume, after the lapse of so many years, that they were there acting with the consent and approval of the county, and we therefore say that Hart county acquiesced. The reason for refusing to grant relief on this claim of Hart county is as good as it was in the case of *Simpson County v. Louisville & Nashville Railroad Co.*, 19 S. W. 693, wherein Judge Lewis, delivering the opinion of the court, said: "If the county court had authority to so order application of the stock dividends, the county and sinking-fund commissioners as well are estopped to claim the stock from the company, for it was disposed of and applied precisely in accordance with the order and direction of that court. And if it be conceded, as is argued, that the sinking-fund commissioners, and not the county court, had the right to control and dispose of the dividend stock, their conduct was not such as to entitle them to relief that involved injustice to the company, that is not shown to have acted in bad faith. For the evidence is entirely satisfactory that they knew of and consented to, if they did not directly advise, the action of the county court, and also were aware of the fact that the company was applying the stock as directed and authorized by the county court. Yet they made no objection then, nor thereafter, for more than five years. To suppose the commissioners were not aware of the disposition that was being made of the stock in question, that they now claim to have had the exclusive right to hold and control, is to assume they were utterly unmindful of their duties; and, if they did know, it was their duty to then speak, and, having acquiesced so long, they cannot now equitably ask the relief sought." We are of the opinion that it would be inequitable to the other stockholders and to the appellee to grant this relief, and we therefore conclude that Hart county has been estopped by her action to demand it.

From the conclusion we have reached, that Hart county was not entitled to the stock claimed, it necessarily follows that she is not entitled to any dividends thereon.

In addition to the other reasons given for denying the county's right to recover interest stock, there is another which we deem conclusive. Hart county in 1879 sold her principal stock. By section 5, *supra*, she was entitled to interest on her principal stock from the time she paid for it to the date of the first cash dividend, and for which she was entitled to have stock issued to her. This interest was like any other interest that might accumulate upon a debt, but, instead of its being paid in cash, it was to be paid in stock. It was an incident to the principal stock, exactly the same as interest is an incident to a debt. If the debt is assigned, and interest has matured thereon, the interest passes to

the assignee as effectually as the debt. If the interest had been payable in cash instead of stock, the party to whom the county transferred the principal stock would certainly at the same time have acquired the interest due thereon. This is because it would have been an incident to the stock. The mere fact that the appellee could pay it in stock did not make it different from what it would have been, had it been payable in cash. We are of the opinion that, when she sold and transferred her principal stock, if any interest had been due thereon (we have said none was), it would have passed to the purchaser. This view is supported by Boardman v. Lake Shore R. Co., 84 N. Y. 157; Jerman v. Lake Shore R. Co., 91 N. Y. 483; and Manning v. Quicksilver Mining Co., 24 Hun, 361.

In view of the conclusions reached, we have not thought it necessary to discuss the effect of the 10½ per cent. stock dividends declared, nor the question of limitation.

The judgment is affirmed on the appeal of Hart county, and reversed on the appeal and cross-appeal of the Louisville & Nashville Railroad Company, for proceedings consistent with this opinion.

**S. BLAISDELL, JR., CO. v. CITIZENS'
NAT. BANK OF TYLER et al.**

(Supreme Court of Texas. June 22, 1903.)

**SALES—DRAFTS—DISCOUNT OF DRAFTS ON
BUYER—PAYMENT—BILLS OF LADING—
FRAUD—LIABILITY OF INDORSER—PETITION
—CONCLUSIONS.**

1. Where drafts with bills of lading attached, purchased by a bank from a consignor of merchandise for value and without notice of fraud, have been fully paid by the consignee, the bank is not liable to the consignee for any fraud perpetrated by the consignor in making out the bills of lading.

2. In an action by a consignee to recover from a bank money paid on drafts purchased by the bank from the consignor, with bills of lading attached, plaintiff alleged that the drafts and bills of lading were indorsed in blank by the consignor and transferred to and purchased by the bank. *Held*, that the allegation showed the transaction to have been a mere purchase of the drafts, with the bills of lading as security, and not a purchase of the bills of lading so as to in any way make the bank liable for the performance of the consignor's contract.

3. The averment that, by the transaction, the bank became the owner of the drafts and bills of lading and the merchandise represented thereby was only a statement of a conclusion.

Certified Questions from Court of Civil Appeals of First Supreme Judicial District.

Action by the S. Blaisdell, Jr., Company against the Citizens' National Bank of Tyler and others. From an order sustaining a general demurrer to the petition, plaintiff appealed to the Court of Civil Appeals, which certified a certain question to the Supreme Court. Affirmed.

W. S. Thomas and J. Q. Mahaffey, for appellant. Gregory & Batts, Marsh & McIlwaine, and Fiset & Miller, for appellees.

WILLIAMS, J. The Court of Civil Appeals for the First District have certified for decision the case stated as follows:

"In this cause now pending before this court on motion for rehearing, the trial court sustained a general demurrer to the plaintiff's petition, and the latter, refusing to amend, has appealed. The petition is as follows:

"Now comes the S. Blaisdell, Jr., Company, complaining of Newell W. White and A. Hicks, who compose the firm of Newell W. White & Company, both as individuals and as a firm, and the Citizens' National Bank of Tyler, defendants, and, leave of the court first had and obtained, files this its first amended original petition, in lieu of and amending its original petition filed herein on the 6th day of May, 1901, and, so amending, respectfully shows and represents to the court as follows, to wit:

"1st. That the plaintiff is a private corporation duly incorporated under the laws of the state of Massachusetts, and having its place of business in the city of Chicopee, in the county of Hampden, in the said state. And the defendants Newell W. White and A. Hicks are resident citizens of Smith county, Texas, and are and have been since prior to the first day of October, 1900, partners in trade under the firm name of Newell W. White & Company, and that the defendant, the Citizens' National Bank of Tyler, is a private corporation, duly incorporated under the laws of the United States of America, with its place of business in the city of Tyler, Smith county, Texas, of which J. W. Wright, whose residence is said Smith county, Texas, is president, and upon whom service can be had.

"2nd. That heretofore, to wit, on or about the 26th and 29th days of October, 1900, and the 13th day of November, 1900, plaintiff, then doing business in the said city of Chicopee, offered and proposed to the defendants, Newell W. White and A. Hicks, who were then doing business in the city of Tyler, as partners under the said firm name of Newell W. White & Company, to purchase from them certain bales of cotton at the prices hereinafter stated, to be delivered by the said defendants to plaintiff as follows, to wit: [Here follow number of bales and place of delivery, which it is not necessary to set out.]

"Which said offer and proposal so made by the plaintiff was on or about said above-mentioned dates accepted by the defendants, and they then and there entered into a contract with the plaintiff whereby it was agreed that the said defendants should in the due course of trade, and at as early date as possible, deliver to the plaintiff at the above-mentioned points said bales of cotton as above set out, and that the plaintiff was to pay the said defendants therefor, upon the presentation to it of drafts, with bills of lading attached thereto, showing that said

cotton had been delivered to a carrier for transmission to plaintiff at said points, the amounts above stated for each and every pound of cotton so delivered.

"3rd. That said defendants, Newell W. White & Company, under said agreement, and to the end of fulfilling the same, did, on divers and sundry dates hereinafter shown, deliver to the International & Great Northern Railroad Company, a common carrier, for transmission to plaintiff at said points of delivery, certain bales of cotton, to wit: [Here follows detailed statement of the several shipments.]

"And took and received from said carrier bills of lading in the name of Newell W. White & Company for each and all of said shipments, and said defendants, having so received said bills of lading, drew sight drafts on plaintiff, purporting to be for the amount of the purchase prices of said cotton, calculated upon the true weights thereof, less the freight charges and brokerage, which under the said contract were to be paid by the defendants, and which for that reason were deducted from the purchase prices, the said drafts being payable to the order of Newell W. White & Company, and being in amounts as follows, to wit: [Here follows detailed statement of the amounts of the various drafts.]

"Which said drafts, the said drafts being negotiable instruments, and said bills of lading, were by said defendants indorsed in blank in the name of Newell W. White & Company, and were transferred to and purchased by the defendants herein, the Citizens' National Bank of Tyler, whereby the said bank became and was the owner of said drafts and bills of lading and of the cotton represented by said bills of lading, and whereby said bank undertook, promised, and agreed and became bound unto the plaintiff to carry out and fulfill the defendants Newell W. White & Company's said contract with plaintiff above set out.

"4th. The said bank, having by the means aforesaid become the owner and holder and proper payee of said drafts and bills of lading and cotton aforesaid, forwarded the said drafts, along with said bills of lading, to its agents and correspondents for collection from the plaintiff, which said drafts, and bills of lading accompanying the same, reached plaintiff and were accepted and paid by plaintiff long prior to the time when said cotton which had been shipped by freight did or could have reached its destination, by reason of which plaintiff was forced to and did rely solely on defendants to deliver to it the amount of cotton represented by said drafts, with freight and brokerage added, at the purchase price herein shown, and for which the plaintiff had paid them as aforesaid. And plaintiff, believing that said drafts, less said freight charges and brokerage, represented the true amount of the purchase prices of said cotton, calculated upon

the true and correct weight thereof, paid said drafts, freight charges, and brokerage before it could have examined or weighed said cotton, all of which the defendants well knew the plaintiff would be forced to do when they shipped said cotton and drew and discounted said drafts, and which was also known to the said bank when it purchased said drafts and bills of lading, and it undertook to carry out said contract as aforesaid.

"5th. That the defendants, Newell W. White and A. Hicks, contriving and fraudulently intending to deceive and defraud plaintiff in this behalf, did not deliver to it the amount of cotton in weight represented by the amount of said drafts, freight charges, and brokerage, at said purchase prices, and which plaintiff had paid them for, but falsely made out said drafts for an amount grossly in excess of the amount they were entitled to receive from plaintiff calculated upon the true weight of said cotton, for the purpose of defrauding plaintiff as aforesaid, for all of which the defendant bank, by reason of its having purchased said drafts and bills of lading and become the owner of said cotton and undertaken to carry out said contract, is liable to plaintiff, while in truth and in fact the true weight of said cotton so shipped was only as follows, to wit: [Here follows statement of weights.]

"That had the said cotton been of a weight sufficient at said purchase prices to have made the amount of said drafts, including all freight and brokerage, the same would have been as follows, to wit: [Here follows statement of weights showing the shortage.]

"Which said difference in weight between the cotton actually delivered and the amount for which the plaintiff had paid said defendants as aforesaid at said purchase prices, amounting to the sum of \$3,727.34, as is more particularly shown by the itemized statement which is hereto attached, marked "Exhibit A" for identification, and made a part of this petition, which sum is \$3,727.30, the said Citizens' National Bank of Tyler, by the manner and means herein alleged, has collected, had, and received from plaintiff over and above the amount it was justly entitled to receive, and which it now still wrongfully withholds from the plaintiff, and which amount the defendants, although often requested, have failed and refused and still fail and refuse to pay, to plaintiff's great damage.

"6th. And plaintiff further alleges that if it be mistaken in its allegations that said Newell W. White and A. Hicks were partners, and that said contract of sale was made and said drafts drawn on said cotton shipped, and said drafts and bills of lading were transferred, sold, and indorsed by them to defendant bank as partners, plaintiff alleges that all of said things were done and performed by one or both of them as individuals, and that the said Newell W. White

was, in and about said transaction, doing business under the said name of Newell W. White & Company, and plaintiff alleges that it is unable here to state whether or not in said transaction the said Newell W. White and A. Hicks were partners, or whether said acts and things herein alleged to have been done by them were done as individuals or done by them jointly or severally, for the reason that the knowledge of the true nature and manner of said transaction is unknown to plaintiff and cannot be ascertained by it, and is peculiarly within the knowledge of the said defendants, Newell W. White and A. Hicks.

"Wherefore, the premises considered, plaintiff sues and prays that defendants having been duly cited, that upon final hearing it have judgment against all of the aforesaid defendants for the amount of its said damages, for costs of suit, and for all such other and further orders, judgments, and decrees as it may be entitled to under the law and the facts, both generally and specially, both in law and equity, and in duty bound will ever pray."

"We respectfully propound for your decision the question: Did the trial court err in sustaining the general demurrer?"

The action appears to be founded on the idea that, by the transactions alleged, the bank became a party to the contract of sale between plaintiff and White & Co., bound to perform the undertakings of the latter, and therefore liable for the violation of their agreement. It is not averred that the bank was a party to or had notice of the fraud charged against White & Co., or was guilty of any negligence or misrepresentation, or in any way deceived plaintiff, and hence the action cannot be maintained as for deceit, fraud, or negligence on part of the bank.

The theory of the plaintiff is supported by the decision of the Court of Civil Appeals for the Third District in the case of *Landa v. Lattin*, 19 Tex. Civ. App. 246, 46 S. W. 43, which was followed by the Supreme Court of North Carolina in the case of *Finch v. Gregg*, 35 S. E. 251, 49 L. R. A. 879. We understand the courts to hold in those cases that a purchaser of such drafts and bills of lading is substituted, by the mere purchase, in the place of the vendor in the contract of sale, and becomes bound to perform that contract as a condition precedent to his right to the price of the goods represented by the bill of lading; and that, therefore, although the drafts be actually accepted and paid by the drawee, if the consideration which he was to receive from the drawer fails, the price may be recovered from the holder to whom the payment has been made. It is undoubtedly true that the purchaser acquires by his purchase no greater rights than the drawer has against the drawee. The attitude of the latter is, so far, unchanged, and he is no further bound to the purchaser than he would be bound to the drawer to ac-

cept or pay; but we do not agree that the purchaser becomes bound to perform the contract of the vendor, nor that, when the bill of exchange is subsequently accepted or paid, he acquires no additional right against the acceptor or payor. Transactions of this kind have often come before the courts, and we understand the rule of the commercial law to be thoroughly established that one who has accepted or paid a bill of exchange drawn upon him cannot defeat his acceptance or recover the money paid because there was no consideration, or the consideration has failed, as between him and the drawer, when the payee bought from the latter for value without notice of the defense. The leading cases on the subject have arisen where bills of lading for goods were forged and attached to drafts drawn for the prices of the goods, negotiated with banks, and forwarded to and accepted or paid by the drawees, without knowledge on the part of either holder or drawee of the forgery. Efforts of the acceptors to avoid liability on acceptances, and of payors to recover the money so paid, have been defeated both in courts of law and of equity. *Hoffman & Co. v. Bank of Milwaukee*, 12 Wall. 181, 20 L. Ed. 366; *Goetz v. Bank of Kansas City*, 119 U. S. 551, 7 Sup. Ct. 318, 30 L. Ed. 515; *Robinson v. Reynolds*, 2 Adolph & Ellis, 196; *Thiedemann v. Goldschmidt*, 1 De G. F. & J. 4; 1 Daniel on Negotiable Instruments, §§ 174, 175, and notes; *Marsh v. Low*, 55 Ind. 271. Other authorities are cited in those referred to.

In *Thiedemann v. Goldschmidt*, Lord Campbell said: "I think that dangerous consequences would follow, and the credit of bills of exchange be very much shaken, if the title of the indorsees of bills of exchange as against the acceptor under such circumstances could be called in question. It is allowed that the case of *Robinson v. Reynolds* was well decided, that its authority has never been questioned, and that it is a part of the commercial law of England." After further discussing the cases, he says, "It must be considered that the bills were accepted by Thiedemann [the drawee] on the credit of Homeyer [the drawer and forger], and for that reason it would be alarming if the title of the indorsees [they holding the bills bona fide for value] could be thus impeached."

In the case of *Hoffman & Company v. Bank*, supra, the Supreme Court of the United States thus states the doctrine: "Money paid under a mistake of facts, it is said, may be recovered back as having been paid without consideration, but the decisive answer to that suggestion, as applied to the case before the court, is that money paid, as in this case, by the acceptor of a bill of exchange to the payee of the same, or to a subsequent indorsee, in discharge of his legal obligation as such, is not a payment by mistake nor without consideration, unless it be shown that the instrument was fraudulent in its incep-

tion, or that the consideration was illegal, or that the facts and circumstances which impeach the transaction, as between the acceptor and the drawer, were known to the payee or subsequent indorsee at the time he became the holder of the instrument. * * * Different rules apply between the immediate parties to a bill of exchange—as between the drawer and the acceptor, or between the payee and the drawer—as the only consideration as between those parties is that which moves from the plaintiff to the defendant; and the rule is, if that consideration fails, proof of that fact is a good defense to the action. But the rule is otherwise between the remote parties to the bill, as, for example, between the payee and the acceptor, or between the indorsee and the acceptor, as two distinct considerations come in question in every such case where the payee or indorsee became the holder of the bill before it was overdue, and without any knowledge of the facts and circumstances which impeach the title as between the immediate parties to the instrument. Those two considerations are as follows: First, that which the defendant received for his liability, and, secondly, that which the plaintiff gave for his title; and the rule is well settled that the action between the remote parties to the bill will not be defeated unless there be an absence or failure of both these considerations. Unless both considerations fail in a suit by the payee against the acceptor, it is clear that the action may be maintained, and many decided cases affirm the rule, where the suit is in the name of a remote indorsee against the acceptor, that, if any intermediate holder between the defendant and the plaintiff gave value for the bill, such an intervening consideration will sustain the title of the plaintiff."

It is claimed that the allegation in this case that not only the drafts, but the bills of lading, were purchased by the bank, distinguishes it from those cited, where the bills merely accompanied the drafts as security. The facts alleged in the petition do not show this to have been other than the common transaction in which money is paid for drafts, accompanied by bills of lading representing the goods consigned as security. The allegation is that the drafts and bills of lading were indorsed in blank, and were transferred to and purchased by the bank. The conclusion from these facts is then stated: "Whereby said bank became and was the owner of said drafts and bills of lading and of the cotton represented." This is only a conclusion from the facts previously stated, and cannot be held to enlarge the legal effect of those facts. The drafts were for the price of cotton which the drawer was under obligation to deliver to the drawee on payment. The bank's right was therefore only to receive the amount called for by the drafts, and on payment thereof it was bound to deliver to the payor the bills of lading rep-

resenting the cotton. The bank became the owner, only as the facts alleged made it the owner, of the cotton; and this was only in the limited sense that it could hold and control the cotton until the drafts were paid, and as a means of insuring payment or recovering loss. No contract or agreement of the bank, either with the drawer or drawee, is alleged to make its relation to the contract of sale other than that which resulted from the simple fact that the drafts for the price of the cotton and the bills of lading were purchased by it from the vendors of the cotton. The concluding language in the fourth and fifth paragraphs of the petition, referring to the undertaking of the bank to carry out the contract, does not charge, nor, as we construe the pleading, intend to charge, that the bank affirmatively agreed to carry out the contract, but states, as the pleader's construction of the facts alleged, that such an undertaking arose from the purchase, as held in *Landa v. Lattin*. Necessarily, the legal effect of the transaction stated between the bank and White & Co. was only to entitle the former to collect, either from the drawee, or, in case of its refusal to pay, from the drawers, the money called for by the drafts, and, to secure this right, a limited ownership and control of the cotton was conferred by the indorsement and delivery of the bills of lading. Such is the legal effect of the facts alleged, and such was the legal effect of the transactions passed upon in the authorities cited; and those decisions clearly control this case. It was as true in those cases as in this that the purchasers of the bills of exchange, secured by the bills of lading, originally acquired only such rights against the drawees as the drawers had against them, and that, in order to put the holders in a position to require acceptance or payment of the bills of exchange, performance of the contract of sale by the drawers was essential; and it is equally true in this case, as it was in those, that, in paying the drafts, the drawees, acting on the credit of the drawers and not of the holder, became bound to the latter, and that a failure of the consideration moving from the drawers to the drawees cannot affect the rights of the payee thus acquired in good faith upon a consideration moving from itself to the drawers.

The latest decision called to our attention is that of the Supreme Court of Iowa in the case of *Tolerton & Stetson v. Anglo-California Bank*, 84 N. W. 980, 50 L. R. A. 777, in which the court, after discussing *Landa v. Lattin* and *Finch v. Gregg*, enunciates what we regard as the correct rule.

The decisions referred to are wholly inconsistent with the theory that in such a transaction the purchaser of the draft and bill of lading becomes substituted for the vendor to such extent that he assumes the obligations of his contract with the vendee. This is not true of assignees generally. While

an assignee may not by his assignment acquire any right against the party against whom the claim is asserted, he does not, by taking the assignment merely, assume the obligations of the assignor. The true question in such cases is whether or not money so paid upon bills of exchange can be recovered as having been paid by mistake, which is negatived by the rules of the law merchant; and not whether or not there has been a breach of contract by the holder, who never has a contract with the drawee of the bill of exchange until the latter honors it.

We answer that the court did not err in sustaining the general demurrer.

NEWSOME v. STATE.

(Court of Criminal Appeals of Texas. June 23, 1903.)

MURDER—EVIDENCE—SUFFICIENCY—INSTRUCTION—AGGRAVATED ASSAULT—SELF-DEFENSE.

1. Evidence held insufficient to support conviction for murder.

2. In a prosecution for murder, where the evidence showed that deceased was assaulting defendant at the time he was killed, and that death was caused by a single puncture inflicted by a small pocketknife, which defendant attempted to use but once, and he testified that he did not attempt to kill deceased, a charge on aggravated assault should have been given.

3. In a prosecution for murder it appeared that deceased had assaulted defendant, and that, as he was renewing the assault after defendant had retreated, a third person appeared, and struck the deceased with a revolver, whereupon deceased attempted to get possession of the revolver, and witnesses testified that deceased told defendant that he would kill him. Held, that a charge on self-defense should have been given.

Appeal from District Court, Anderson County; John Young Gooch, Judge.

Will Newsome was convicted of murder, and appeals. Reversed.

N. B. Morris and C. M. Kay, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of 10 years.

As bills of exception Nos. 1, 2, and 3 are explained by the court, the dying declarations of deceased were properly admitted. They were made on three several occasions to as many different witnesses. Each succeeding witness makes his statement a little more prolix; that is, covering more of the immediate facts attending the homicide. But, as explained by the court, we think the statements of the deceased were properly admitted.

It is contended that the evidence is not sufficient to support the conviction. We have carefully examined the facts, and are

clearly of the opinion that the evidence does not sustain the verdict for murder. The homicide occurred at the residence of Murdoch, where there was a gathering of people for a candy-pulling. Appellant was standing on the gallery, when deceased entered the gate, and approached near to and called appellant. Deceased started in the direction of the gate. Appellant was slow, in deceased's opinion, in coming to him, and he called him in a rather peremptory and somewhat angry tone, to know if he was coming. Appellant answered in the affirmative, and went over to where he was, and reached him at the gate. Deceased asked appellant in regard to some statements imputed to appellant in regard to the daughter of deceased. The first question asked by deceased was, "What kind of tales are these you are telling around?" Appellant replied, "Straight tales." This was repeated a time or two, and deceased grabbed appellant's crutch, and said, "Take it back, you God damn son of a bitch, or I will kill you," and began beating him over the head. This continued for some time. In the meantime appellant was seeking to make his escape. He was badly beaten by deceased over the head and back, and was quite bloody. The crutch was beaten to pieces by deceased while being used on appellant. Some of the witnesses, including appellant, stated that while deceased was beating him, and while in retreat, and seeking to escape from the beating, he pulled a small pocketknife, and struck at deceased several times, and hit him once. While being beaten by deceased and running, appellant halloed, "Help! Murder!" etc., and this continued until appellant reached the gallery, where (to use the expression of one of the witnesses) "he hopped on it, and leaned against the gallery post." Murdoch had in the meantime sought to induce deceased to desist, and, failing in this, went back into the house, and while in the house deceased got on the gallery where appellant was, and began beating him again with the crutch. Murdoch then ran out with his gun, and struck at deceased, when deceased reached for the gun, and a scuffle ensued. While this was going on, one or more of the witnesses state that it was at this point appellant stuck his knife into deceased. Appellant was a one-legged crippled youngster, and walked on crutches, and was anything but a vigorous, stout boy. About the time of this second transaction—that is, about the time Murdoch appeared on the scene with gun—deceased remarked that appellant had cut him, and that he intended to kill him. This is the substance of the remark made by deceased. The strongest testimony for the state is found in the dying declarations of deceased, as set out in the court's explanation to the bill of exceptions. The first part of this explanation shows that deceased approached the front steps of the gallery, where defendant was standing on

the gallery talking to some one. That deceased went to the steps, and spoke to defendant, saying, "Come out here, William, I want to talk to you." That he came down the steps. That they walked six or eight steps out and near the front steps, and that there deceased asked defendant what kind of tales was it he was telling about his daughter. Defendant said in an abrupt and insulting manner, "Straight talk," or "True talk." That thereupon deceased slapped defendant, and just after the lick Martin Murdoch came upon him with a gun, holding it in a shooting position. That he (deceased) grappled with the gun, and he and Murdoch were struggling for the possession of it, and when his side or back was towards defendant, during the struggle for the gun, defendant stabbed him with a knife. This is a more favorable statement to appellant's side of the dying explanation than that given by the witnesses as shown in the statement of facts. But the explanation of the judge to the bill, being accepted without contest, will be held to control the remaining portions of the record in regard to this matter. The state used none of the eyewitnesses in regard to the difficulty. These were all placed on the stand by appellant, except Crawford, called in rebuttal. The court refused to permit Crawford to testify in regard to the difficulty; and only permitted him to state what he understood the language used by appellant was with regard to the daughter of deceased. The dying declaration, with the exception, perhaps, of one phase of it, is in no way inconsistent with the testimony of the eyewitnesses, and that may be more a conclusion of the court in making the statement than as a fact, because the court in the explanation apparently places Murdoch on the scene at the gate where deceased slapped appellant at the inception of the trouble. Doubtless the court did not intend to place it in this light, because all the eyewitnesses testify that, when the difficulty began at the gate, while deceased may have slapped appellant, he at once jerked one of his crutches from him, and began beating him most violently, and that appellant began running and hobbling away from him as fast as he could, and continued to do so until he reached the gallery and climbed upon it. And it was at this point, as we understand, all the witnesses place it that Murdoch came upon the scene with the gun and struck at deceased. There is some conflict in the testimony as to what point and time the stabbing occurred—whether while appellant was in the yard, and fleeing from deceased, or whether it occurred at the gallery after Murdoch came on the scene with the gun. However this may be, under all the facts, it is shown that deceased began the difficulty; that deceased took his crutch from appellant, and beat him in a very violent manner over the head, back, and shoulders; that appellant was very bloody, sought

his safety in flight, and made no resistance otherwise than by using his knife as heretofore indicated. There is no possible standpoint from this testimony that justifies a conviction for murder. The witness testified that after the difficulty, during the same night, appellant stated, if he had not finished him with the knife he would get a pistol and finish him, or words to that effect. But this language does not alter the situation. The beating given appellant by deceased with the crutch justified him in resisting and in using the knife as he did. The fact that deceased may have felt outraged at the language used by appellant towards his daughter did not forfeit the right of appellant to defend himself against such violent and serious attack. Deceased was not on trial for beating appellant, but appellant was being tried for resisting an attack made by deceased upon him, and the facts will be viewed from appellant's standpoint in regard to the issues raised.

It is further contended for reversal that the charge on aggravated assault should have been given. It is conceded that deceased had only one wound, which was a stab, or, as the physician called it, a "puncture that went directly in; the width of it being about one-fourth of an inch." It seems that the instrument was a small pocket knife, an inch and a half or two inches long, with a blade in each end, and that there was no other or further attempt to use it than the one single puncture. Appellant, in this connection, testified that he did not intend to kill deceased. We believe that the law applicable to aggravated assault should have been given. If the instrument used was one not likely to produce death by the manner of its use, and there was no intent to kill, under the statute such a stabbing might be of no higher grade than an assault.

It is also contended that the charge on self-defense should have been given, pertinently applied to the facts incident to the trouble on the gallery when Murdoch appeared on the scene with the gun. Such a charge should have been given. Deceased had renewed the difficulty and began beating appellant with the crutch at this point, and, immediately upon Murdoch striking at him with the gun, deceased undertook to take the gun from Murdoch, or at least a struggle ensued between Murdoch and deceased over the gun. It was about this juncture that some of the witnesses impute the language to deceased as having been said to appellant, "You cut me; now I intend to kill you." If appellant believed at the time deceased was undertaking to get the gun from Murdoch for the purpose of killing him, then he had the legal right to use his knife, or any other legitimate means, to prevent being killed.

For the errors discussed, the judgment is reversed, and the cause remanded.

SMITH v. STATE.*

(Court of Criminal Appeals of Texas. June 3, 1903.)

THEFT—EVIDENCE—INSTRUCTIONS—TRIAL—JURY—PEREMPTORY CHALLENGES.

1. On trial of a criminal case defendant's counsel was furnished with a list of the jurors consisting of seven names, and before exercising peremptory challenges he requested to be furnished with a full panel of talesmen. This was refused, and he was compelled to pass on the names on the regular list, from which he challenged three. He was subsequently furnished with an additional list of five talesmen, and the jury was completed from this, and he was refused permission to peremptorily challenge two of the jurors. *Held* not error.

2. On a prosecution for larceny of an overcoat it appeared that defendant was a guest at the house of prosecuting witness, and that he claimed to be practicing medicine, and had given or sold medicine to the wife of prosecuting witness. On trial prosecuting attorney asked the prosecuting witness the following question: "You call him 'Doctor.' Was he doing any doctoring?" To which the witness answered that he did not know whether he was a doctor or not, but that he was passing as a doctor. *Held* not prejudicial to defendant.

3. In a prosecution for theft of an overcoat, evidence by the wife of the prosecuting witness that when defendant disappeared from the residence the overcoat also disappeared, and that she was in an adjoining room, and did not notice defendant when he left, but the coat was hanging at the head of the bed in the room where defendant was immediately before leaving, and was not there after he left, and that she and defendant were the only persons in the house, was properly admitted, though elicited in answer to a question by defendant's counsel.

4. In a prosecution for theft of an overcoat, in which defendant claimed that prosecuting witness had loaned him the overcoat, a charge that if the jury believed the prosecuting witness loaned defendant the overcoat, and that defendant wore it off with the belief that it was a loan, they should find defendant not guilty, was a sufficient charge on this phase of the case.

Appeal from Falls County Court; W. E. Hunnicutt, Judge.

Doc. Smith was convicted of theft, and appeals. *Affirmed*.

J. W. Spivey and N. J. Lewellyn, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of stealing an overcoat, his punishment being assessed at a fine of \$25 and 30 days' confinement in the county jail.

When the parties announced ready for trial, the clerk furnished appellant's counsel with a list of the jurors, consisting of seven names. Before exercising peremptory challenges, he made request of the court to be furnished with a full panel of talesmen. This was refused, and he was required to pass upon the seven names in the regular list, from which he challenged three. He was subsequently furnished with an additional list of five talesmen summoned by the sheriff, and from these the jury was com-

pleted. He undertook to peremptorily challenge two of the jurors, but was not permitted to do so. There was no error in this action of the court.

While prosecuting witness Clark was testifying, state's counsel asked him the following question: "You call him [defendant] 'Doctor.' Was he doing any doctoring? Did he do any doctoring?" To which defendant objected on the ground that it was leading, irrelevant, and immaterial to any issue in the case, whether collateral or direct, and because, appellant being a negro, this evidence was calculated to prejudice the jury against him. The witness answered "that he did not know whether he was a doctor or not; that he was going for a doctor, and selling physic." All the parties to this transaction are negroes, and appellant had been the guest of the prosecutor, representing he was practicing his profession as a physician in that immediate neighborhood, and when he took his departure from the residence of prosecutor took the alleged stolen overcoat with him. We do not see how this could have injured appellant in any way. It seems to have been a fact that he was practicing his profession, or claiming to be practicing it, and was selling medicine, and gave or sold medicine to the wife of prosecutor.

Prosecutor's wife testified to the effect that when appellant disappeared from their residence the overcoat also disappeared; in other words, that he carried the coat away with him. Upon further questioning she stated that she was in the adjoining room, and did not notice appellant when he left, but the coat was hanging at the head of the bed in the room where appellant was immediately before he left, and it was not there after he left, and she and appellant were the only persons in the house. The testimony objected to seems to have been in answer to a question propounded by appellant's counsel, and he moved to exclude it because he did not anticipate this answer. The testimony was properly admitted, and the court did not err in refusing to exclude it. Appellant admitted taking the coat, but defensively set up that it had been loaned him.

Witness McCoy, as deputy county clerk, was permitted to detail before the jury some of the evidence given by defendant on his former trial, defendant not taking the stand upon the trial resulting in this conviction. This matter was discussed in *Preston v. State*, 41 Tex. Cr. R. 300, 53 S. W. 127, 861. Under that decision the action of the court was proper and legal.

As explained by the court, there is no error shown in the exception taken to the argument of counsel for the state in regard to the witness Minnie Smith.

Appellant's defense to the taking was that prosecutor had loaned him the overcoat; that otherwise he would not have taken it. It is contended the law applicable to this explanation of appellant was not submitted to

*Rehearing denied June 23, 1903.

the jury, and the court erred in this as well as in refusing his requested charges. The court thus charged the jury: "If you believe from the evidence that Butler Clark loaned defendant, Doc. Smith, the overcoat in question on the occasion testified by the witnesses, and that defendant wore it off with the belief that it was a loan from Clark to him [defendant], then, if you so believe, you will find him not guilty." This was a direct, pertinent application of the law to the matter set up in defense, and this manner of charging such issue has been repeatedly indorsed by this court.

The record presents no reversible error, and the judgment is affirmed.

BOWERS v. STATE.*

(Court of Criminal Appeals of Texas. May 27, 1908.)

CRIMINAL SLANDER—LOST PAPERS—SUBSTITUTION—AFFIANT'S FAILURE TO READ COMPLAINT—PHYSICAL EXAMINATION OF PROSECUTRIX—RIGHT TO COMPEL—PROSECUTRIX'S REPUTATION AT TIME OF TRIAL—ADMISSIBILITY OF EVIDENCE—OPINION EVIDENCE—REMARKS OF COUNSEL—ERROR.

1. White's Ann. Code Cr. Proc. art. 470, provides that, when an indictment or information has been lost, etc., the state's attorney may suggest the fact, and another pleading may be substituted on his statement that it is substantially the same. *Held* that, as the allowance of the substitution was a judicial act, accused had the right to contest it, and could not be relegated to a motion to quash the substituted papers.

2. The fact that the original complaint was not read by the person verifying it, who did not intend to swear to material matters therein, is not ground for quashing a substituted complaint, the original having been lost.

3. The court cannot compel prosecutrix in a slander prosecution to submit to a physical examination to support the defense that accused's statement that she had lost her virginity was true.

4. In a prosecution for slandering a female, admitting evidence that her father was a renter and had a wife and four children is not ground for reversal.

5. In a prosecution for slander in accusing a female of unchastity, evidence that at the time of the trial, about a year later, prosecutrix's reputation for chastity was good, is inadmissible to show that the slander was discredited, and so indirectly impeach defendant's witnesses, who testified to acts and conduct indicating prosecutrix's unchastity.

6. Permitting witnesses to state how they regarded the character of prosecutrix at the time of the trial, and to testify that their families associated with and received her, as did the neighbors, on terms of social equality, state's counsel remarking on the objection thereto that it was admissible to show that prosecutrix was so received notwithstanding the slanderous reports, whereby the good people said they did not believe them, and that he believed in the doctrine "Vox populi, vox Dei," was aggravated error.

Appeal from Coleman County Court; B. F. Rose, Judge.

Will Bowers was convicted of slander, and appeals. Reversed.

F. L. Snodgrass and T. B. Austin, for appellant. Woodward & Baker and Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of slander, and his punishment assessed at a fine of \$500 and 12 months' confinement in the county jail.

By bills of exception Nos. 1 and 2 appellant calls in question the action of the court permitting the state to substitute the lost complaint or affidavit on which the information was filed, and the information. It appears that when the state was substituting said lost papers appellant desired to interpose an objection to the same, and to be heard by evidence on his contest. This the court refused, remarking that he could not intervene or contest the substitution; but when the papers were substituted the court would entertain his motion to quash or abate the substituted papers. In this, we think, the court was in error. The substitution of a lost complaint or information is a judicial act, and is upon notice; and it is competent for the defendant to contest the substitution of said papers if he sees fit. Article 470, White's Ann. Code Cr. Proc.; Carter v. State (Tex. Cr. App.) 58 S. W. 80. However, inasmuch as appellant asserted the same matters on his motion to quash, we see no error in the action of the court, as, in our opinion, the same did not present any sufficient reason for contesting the substitution or quashing the complaint and information, as was attempted.

Appellant proposed to show by W. C. Erwin, the party who swore to the complaint, that the complaint was not read over to him; and that he did not state that said Bowers falsely or maliciously made the statement in said affidavit alleging a want of chastity of prosecutrix, or that the said allegation was false, or that he believed such to be the case. It will be observed that this witness does not undertake to say that the substituted complaint was not an exact copy of that sworn to by him, and, as we understand it, the only contest that can be made when a complaint is proposed to be substituted is that the substituted paper is not a substantial copy of the original. If Erwin did not read the complaint, or have it read over to him, it was his fault. He swore to it. Of court, if he did not make the affidavit or swear to the complaint, there was no complaint, and this could be shown. Carter v. State (Tex. Cr. App.) 58 S. W. 80. However, such is not the case as presented here. We do not believe the court committed an error in overruling appellant's motion to quash and strike out the complaint and information.

As to the motion for continuance, we do not believe appellant used proper diligence, either to get the witnesses or take depositions—this being his second application for continuance.

*Rehearing denied June 23, 1908.

During the trial appellant made a motion to have the court order an examination of the private parts of the prosecutrix by reputable physicians, alleging that such examination would show that her hymen had been ruptured and destroyed by a male organ penetrating the same. (In this connection it is proper to state that appellant's defense consisted of an effort to prove the truth of the allegation; that is, that he had had carnal intercourse with prosecutrix.) This motion was objected to by the state on the ground that the court had no authority to make such order. The court sustained the objection, and declined to appoint the committee of physicians, and to authorize them to subject prosecutrix to a private examination. In *Whitehead v. State*, 39 Tex. Or. R. 89, 45 S. W. 11, some of the authorities bearing on this question were examined. Although the case is not decisive of the question here presented, it was intimated there that the court had no authority to enforce such an order; and we now hold that the court did not err, when prosecutrix objected to the examination, to refuse to make the order. Of course, if prosecutrix had been willing to submit to the examination, and such examination would tend to solve a disputed issue in the case, it would be entirely competent for the court to make the order.

It does not occur to us that it was pertinent or material to prove by the father of prosecutrix that he had a wife and four children, and that he was a renter. However, we do not believe this testimony was calculated to injure appellant's rights; certainly not to the extent as requires a reversal.

Appellant presented a number of bills of exception to the action of the court permitting the state to prove that the character of prosecutrix for virtue and chastity at the time of the trial was good. This was objected to on the ground that the alleged slander occurred about a year before the trial, and that the reputation of prosecutrix should be confined to the time of the alleged slander and prior thereto; that to permit the evidence would be placing before the jury the opinion of the community upon the alleged slander long after it occurred; and that this testimony was calculated to discredit appellant's witnesses who testified to acts and conduct of prosecutrix showing a want of chastity. In civil cases of slander we understand the rule to be that it is competent to show an impairment in the plaintiff's character attributable to the alleged slander, and this would seem to be a correct rule as applicable to criminal cases. But here the proposition is to show that prosecutrix had sustained no damage or injury to her character, occasioned by the alleged slanders, which would tend to show that the community discounted or did not believe the charge, and so af-

ford an indirect method of impeachment of appellant's witnesses. At least, it was strongly urged in the argument for this purpose. We hold that this evidence was not admissible.

To intensify the error discussed in the foregoing paragraph, the court permitted a number of witnesses to state how they personally regarded the character of prosecutrix at the time of the trial, and to testify that their families associated with prosecutrix, and they received her into their families since the alleged slander had been promulgated, and that the neighbors received her on terms of social equality, and evidently did not believe the charge. When this character of testimony was objected to, counsel for the state replied that this testimony was admissible, and remarked: "Because it shows that, notwithstanding these slanderous reports, that Willie Conner is taken and received into the homes and families of the best people in the community where she lives. By that act these good people say they don't believe these reports, for, if these people had the least doubt about it, she would be excluded from their homes. I, for one, believe in the doctrine 'Vox populi, vox Dei'—the voice of the people is the voice of God. This is true. In my judgment, in all cases, and should be true in this." This character of argument was objected to. Of course, if, as held above, the general reputation of prosecutrix as proven was not admissible in evidence, the individual opinions of the neighbors, and how they received prosecutrix, was much more objectionable, and the vice of its admission was emphasized by the argument of counsel. This evidence, as offered and as used before the jury, was evidently hurtful to appellant. It was calculated to discredit his witnesses, and may have indirectly enhanced the verdict against him.

The state was permitted to prove, over defendant's objections, by another witness, and also by himself, that when some one told him that Will Gibson had stated that he had had intercourse with Willie Conner he (appellant) said Gibson ought not to have told it; that, if he was old man Conner, he would shoot his head off. Appellant further testified that, if he had a girl, and a man would say that about her, he would never bring it into court, but would hurt him pretty bad. This was objected to because it was not a confession, but related to what some one else had done and said; was not pertinent to this case, but was prejudicial to defendant. We do not believe this testimony was admissible.

It is not necessary to discuss other assignments, but for the errors pointed out the judgment is reversed, and the cause remanded.

Ex parte CONLEY.

(Court of Criminal Appeals of Texas. June 10, 1908.)

LOCAL OPTION LAW—ADOPTION—NOTICES OF ELECTION—NECESSITY OF PROPER POSTING—COURTS—DECISION AS AUTHORITY—CORAM NON JUDICE.

1. An election on the question of the adoption of the local option law is invalidated by failure to post one of the five notices for the requisite number of days, and the fact that the election was fair is immaterial.

2. The force of a decision of an intermediate appellate court as an authority is destroyed by a holding of the Supreme Court that the questions passed upon were not involved in the case.

Brooks, J., dissenting.

Appeal from Hunt County Court; F. M. Newton, Judge.

Habeas corpus by Frank Conley for discharge from arrest. From a judgment remanding him to custody, relator appeals. Reversed, and relator discharged.

Looney & Clark, for appellant. C. E. Mead, Co. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The main proposition suggested for reversal is that the local option law is invalid because the notices of the election were not posted in accordance with the terms of the statute. Four of the five notices were posted the requisite number of days. The fifth was not. The election was conceded to be fair, and that no actual injury resulted from the failure to post the fifth notice the requisite number of days. So we have the proposition, sharply put, that the law is invalid by reason of the failure to post one of the five notices the legally required number of days (twelve). The fifth notice was posted nine days. Appellant contends this renders the law invalid, although the election was conceded to be fair; that the statutory prerequisite steps to put the law in operation are mandatory, and without a compliance therewith the law would be invalid; that the posting of the notices is necessary, before the people have the right to assemble and vote on the question of local option. It is asserted, and it may be true, that the authorities in the different states are divided upon this proposition. However, they are not divided on the proposition in Texas, unless it is made so by the recent case of *Norman v. Thompson*, 72 S. W. 64, 6 Tex. Ct. Rep. 641. The question is not novel, and, in one form or another, has frequently been before the courts of last resort in this state. In *Kramer's Case*, 19 Tex. App. 123, it was said: "If the election was not conducted in accordance with the requirements of the law, it is void, and not merely voidable, and all proceedings had under and by virtue of such void election are absolutely void, and may be questioned not only directly, but collaterally. Ex parte Schwartz, 2 Tex. App. 74; Ex parte McGill, 6 Tex. App. 498; Ex parte Kilgore, 8 Tex. App. 247; Ex parte Mato, 19 Tex. App. 112. In *Donaldson*

v. State, 15 Tex. App. 25, this court held that, the local option law 'being for a particular locality only, it is a quasi local or special law, and depends for its validity upon its adoption in conformity with the law permitting its adoption.' And in *Boone v. State*, 10 Tex. App. 418 [38 Am. Rep. 641], and other subsequent cases, it is held that the election, and all of the steps taken in reference thereto, must have been in strict pursuance of the act governing the same; otherwise such election is void. *Prather v. State*, 12 Tex. App. 401; *Akin v. State*, 14 Tex. App. 142; *McMillan v. State*, 18 Tex. App. 375; *Stallworth v. State*, Id. 378. In this case several reasons are presented and urged why the election adopting the local option law in Young county was illegal and void. We shall notice but one of these. In the statute providing for such elections, it is required that the clerk shall post or cause to be posted at least five copies of the order for election at different public places in the county, for at least twenty days prior to the day of election. Rev. St. 1879, art. 8230. It appears from the evidence in the record before us, and is a fact admitted by the prosecution, that this requirement of the law was not observed. But one copy of the order for the election was posted twenty days prior to the election. The other four copies were posted less than twenty days prior to such election." Because of the failure to post the four notices in the *Kramer Case*, supra, the election was held void. It seems that the notices were posted, but only one of the number a sufficient length of time. The difference, upon this phase of the testimony, between *Kramer's Case* and the one in hand, is only in the number of notices that were not properly posted. In the case at bar, four of the notices were posted properly, and one was not. In *Kramer's Case*, one was properly posted, and four were not. If it is necessary to post five notices, as a prerequisite step for the legality of the law, then it would be as erroneous and invalid to omit the proper posting of one as of four. If one could be omitted, and the law held valid, four could be omitted, and the law still remain valid; and if four, then why not all five? The law requires five notices to be posted, as a prerequisite, and has not commissioned or authorized any authority to discard or dispense with the whole or any one of the requisite five notices. This has been the universal holding in Texas, as we understand the authorities, from the inauguration of the local option law. See, also, *Smith v. State*, 19 Tex. App. 444; *Swenson v. McLaren* (Tex. Civ. App.) 21 S. W. 300; *Frickie v. State* (Tex. Cr. App.) 45 S. W. 810; *Bowman v. State* (Tex. Cr. App.) 40 S. W. 798; *Bowman v. State* (Tex. Cr. App.) 41 S. W. 635; *James v. State*, 21 Tex. App. 353, 17 S. W. 422.

Following this same line of thought, the decisions have held the law invalid where

the election was not held within the specified time set out by the statute—not less than fifteen nor more than 30 days after the order was entered for the election. *Curry v. State*, 28 Tex. App. 475, 13 S. W. 732; *King v. State*, 28 Tex. Cr. R. 547, 28 S. W. 201. We understand this to be the same proposition, except one applies to the limitation as to the time of holding the election after the order is made, and the other to the requisite number of notices, and the length of time of posting said notices. The principle is the same in both propositions.

Since the case of *Irish v. State* (Tex. Cr. App.) 29 S. W. 778, there is an unbroken line of authority to the effect that if there is no issue upon these prerequisite steps, such as giving notice, etc., the prima facie case can be charged by the court to be conclusive of the fact that prohibition law is in effect. But it is also the unbroken line of authority that, if there is an issue as to whether these prerequisite steps were taken, the jury shall be appropriately charged on the matter, and thus left to their decision as to whether or not the law has been put into operation, and, if found not to have been properly and legally put into operation, the instructions have been to acquit. This is in accord with the unbroken line of authorities. *Gaines v. State*, 37 Tex. Cr. R. 73, 38 S. W. 774; *Chapman v. State*, 37 Tex. Cr. R. 167, 39 S. W. 113; *Bowman v. State*, 38 Tex. Cr. R. 14, 40 S. W. 796, 41 S. W. 635; *Shields v. State*, 38 Tex. Cr. R. 252, 42 S. W. 398; *Frickie v. State*, 39 Tex. Cr. R. 254, 45 S. W. 810; *Jones v. State* (Tex. Cr. App.) 43 S. W. 981; *Grammer v. State*, 61 S. W. 402, 2 Tex. Ct. Rep. 85. Many more decisions of this court might be added, to the same effect, but we deem these sufficient.

If the failure to post the notices or to hold the election within the prescribed time—not less than 15 nor more than 30 days—renders the election void, then the fact that it may have been fair, and that no actual injury resulted in the failure to comply with these prerequisites of the law, cannot render the law valid. A matter that is void is void. If simply because the election was fair, and the people may have turned out and voted, would be sufficient answer to the failure to post the notices or to hold the election at any time not less than 15 nor more than 30 days, then it would be a fair and legal election if none of the notices were posted, and although held before the 15 days or after the 30 days. The fact that there may have been a political campaign, which stirred the people and caused them to go to the polls on a certain day by common consent, whether any of these orders were entered or notices published, etc., would make the election valid on the ground of fairness, because every citizen in the county could have voted, and the notice given by the speakers from the rostrums would notify them of the fact that they had agreed to hold the election at a cer-

tain time, whether or not that election was ordered by the commissioners' court. The Legislature have seen proper to prescribe these rules in obedience to the mandates of our constitutional provision. They might have prescribed other methods or rules, but they did not. This court would not be authorized to prescribe other and different rules than those fixed by the Legislature, no more than the commissioners' court or the people themselves. One would be as powerless as the other, or as powerful as the other. The result may have been the same, but one is legal and the other is void, simply because one follows the law and the other has nothing to support it. The recent case of *Norman v. Thompson*, 72 S. W. 64, 6 Tex. Ct. Rep. 641, decided by the Court of Civil Appeals at Dallas, is cited in opposition to this long line of decisions, and heretofore settled construction of this law. That decision, as we understand, is in opposition to all of the authorities in Texas, and is unquestionably utterly at variance with all the decisions of this court. Besides, on a writ of error granted by the Supreme Court in that case, the doctrine was laid down by the Supreme Court that the Court of Civil Appeals was in error in assuming jurisdiction of the election contest as to those matters which occurred prior to the day of the election; that the only contest that could be entertained was with regard to such matters as occurred on the day of the election, as to the manner in which the election was held, and votes cast and counted. That the contest provided for by the local option statute pertained only to matter of holding and conducting the election itself. Antecedent matters, such as ordering the election, posting notices, etc., cannot be considered in such contest. We quote from the opinion of the Supreme Court in that case (72 S. W. 62, 6 Tex. Ct. Rep. 607), as follows: "The contest of an election is a special proceeding authorized by the statute, and the courts are limited in their investigation to such subjects as are specified in the law. *Wright v. Fawcett*, 42 Tex. 205; *Rogers v. Johns*, *Id.* 340. * * * As used in the foregoing article, the term 'election' means the act of casting and receiving the ballots from the voters, counting the ballots, and making returns thereof. *State v. Tucker*, 54 Ala. 210. This is the meaning of the word 'election' in ordinary usage, and it must be so construed, there being nothing in the law to suggest that the Legislature intended to use it in a different sense. On the contrary, wherever the word 'election' appears in the acts of the Legislature upon this subject, it seems to have in view those things to be done on the day of the election, in contradistinction to the acts which are to be done preparatory to the election. * * * A contest of election concludes no question which may be involved in a prosecution for the violation of the law after it has been declared in force. Therefore the question of

conflict between the decisions of the Court of Criminal Appeals and the decisions of the Court of Civil Appeals is immaterial." Under this ruling of our Supreme Court, the decision of the court of Civil Appeals was wrong and without authority of law, in reviewing the matters preceding the election, such as the posting of the notices, etc. In view of this construction by our Supreme Court of the statute in question, it follows that the decision of a contest in a local option election in a civil proceeding is not binding, unless it be as to the regularity and legality of what transpired on the day of the election. It may be competent, or even desirable, that the Legislature provide for a review and final decision of every question connected with the inauguration and putting into effect of the local option law, from the call of the election by the commissioners' court until the close of the polls, but it has not done so. Therefore the decision of the question by the Court of Civil Appeals touching the question of posting notices was not only immaterial, but without authority of law, so far as this court is concerned. As the matter stands, we have no authority on the question, except our own decisions. We see no reason for overruling the long line of decisions in this state holding that the statute with reference to notices is mandatory. It has been the accepted doctrine, and in all the enactments and re-enactments of the local option law this doctrine has not been sought to be changed by legislative action. Besides, this seems to be the rule in this state in regard to other elections where the question of local or special taxes has been involved.

Without pursuing the question further, we are of opinion that the election was void, and the relator is entitled to be discharged, and it is so ordered. Reversed and relator discharged.

BROOKS, J. I dissent from the opinion of the majority, and think that the opinion of the Court of Civil Appeals in *Norman v. Thompson*, 72 S. W. 64, 6 Tex. Ct. Rep. 641, is decisive of this question; and this regardless of whether said decision is antagonistic to the decisions of this court or not. Furthermore, I think the matter is res adjudicata, and this regardless of the late holding of the Supreme Court on this question.

FLOECKINGER v. STATE.*

(Court of Criminal Appeals of Texas. June 8, 1903.)

GAMING—OFFENSE OF PRIVATE RESIDENCE—SUFFICIENCY OF INFORMATION—SUFFICIENCY OF EVIDENCE.

1. Pen. Code 1895, art. 379, as amended by Acts 27th Leg. 1901, p. 26, c. 22, prohibits the playing at a game of cards for money at a private residence commonly resorted to for the

purpose of gaming. *Held*, that an information charging that accused unlawfully played, bet, etc., at a game of cards in the private residence of C., "said private residence being then and there occupied by a family, and said private residence being then and there one commonly resorted to for the purpose of gaming," was sufficient.

2. Where, in a prosecution for gaming at a private residence, the evidence shows that for six months a number of games were played at the residence, witnesses saying that they know six or eight times when they were there and played cards for money, it is sufficient to sustain a finding that the residence was commonly resorted to for the purpose of gaming, within Pen. Code 1895, art. 379, as amended by Acts 27th Leg. 1901, p. 26, c. 22, prohibiting playing cards for money at a private residence commonly resorted to for the purpose of gaming.

Appeal from Williamson County Court; Chas. A. Wilcox, Judge.

F. C. Floeckinger was convicted of gambling, and appeals. Affirmed.

Robertson & Goldstein, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of betting at a game of cards in a private residence, and his punishment assessed at a fine of \$10.

The information sufficiently charges the offense of betting at a game of cards at a private residence, the allegation in this regard being that appellant did "unlawfully play, bet, and wager money and articles of value, and the representative of money and articles of value, at a game of cards in the private residence of Mose Cinnamon, there situate, said private residence being then and there occupied by a family, and said private residence being then and there one commonly resorted to for the purpose of gaming." Article 379, Pen. Code 1895, as amended by the acts of the Twenty-Seventh Legislature 1901, p. 26, c. 22, prohibits the playing at a game of cards for money at a private residence commonly resorted to for the purpose of gaming. This is the allegation in the information. However, appellant contends that the evidence fails to show that said Mose Cinnamon's private residence was commonly resorted to for the purpose of gaming. We have carefully examined the evidence, and it shows there were a number of games played at said residence, extending from a space of time from the 1st of January until the 1st of July, 1902. The witnesses say they know six or eight times when they went to this residence and engaged in games of cards for money. Both on account of the number of parties engaged in such games, as well as the number of games played and the space of time over which these games extended, there was unquestionably sufficient evidence to raise the issue as to whether said private residence was commonly resorted to for the purpose of gaming; and the evidence was ample to authorize the finding that it was commonly resorted to for the purpose of gaming. *Wheelock v.*

*Rehearing denied June 23, 1903.

State, 15 Tex. 284. Appellant also contends that the evidence is not sufficient to establish that said house was a private residence. We have examined the record carefully in that respect, and we do not believe this point is well taken.

There being no error in the record, the judgment is affirmed.

INGRAM v. STATE.*

(Court of Criminal Appeals of Texas. June 3, 1903.)

INCEST — EVIDENCE — ACCOMPLICE — ARGUMENT TO JURY—REMARKS OF CRIMINAL.

1. In a prosecution for incest, testimony of a sister of the woman with whom the incest was committed that, while lying in bed with her sister, she was waked by defendant's presence, and saw him sitting on her sister's side of the bed, did not show that witness was an accomplice.

2. In a prosecution for incest, a sister of the woman with whom the incest was committed testified she heard defendant during the night on the bed on which she and her sister slept, on her sister's side of the bed, and that a day or two afterwards defendant told her that he sat on the bed about an hour and a half, because he heard some one at the window. In commenting on this evidence, the county attorney remarked that, if defendant had heard anybody at the window, he would have told the girls' mother, and not waited a day to tell the sister. *Held*, that the remarks were a legitimate argument on the evidence.

Appeal from District Court, Hill County; Wm. Polindexter, Judge.

Ras Ingram was convicted of incest, and appeals. *Affirmed*.

Thos. Ivy, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of incest, and his punishment assessed at confinement in the penitentiary for a term of eight years.

The first ground of the motion for new trial complains of the failure of the court to charge, in substance, that Myrtle Gant was an accomplice. There is nothing in the evidence to warrant this. The incest was committed upon Ethel Gant, sister of Myrtle, and there is nothing to show that said Myrtle was connected in any way with appellant so as to make her an accomplice. She merely testifies to having seen appellant sitting on the bed at night, after they had retired, and said act waked her up, and she found appellant sitting there on Ethel's side of the bed. Bare knowledge of a fact criminative of appellant would not make the witness an accomplice.

The third ground of the motion for new trial complains of the charge of the court on the law of accomplices. The charge, when considered as a whole, is an admirable one, presenting the law in regard thereto. With-

out copying it in detail, we hold there is no error.

He complains of the following argument made by counsel for the state: "That, if defendant had seen or heard anybody at the window, he would have told the old woman, the mother, and not waited a day to tell the younger sister;" to which appellant objected, and the court refused to stop state's counsel, and counsel repeated the statement to the jury, and appellant again excepted, the ground of objection being that Myrtle Gant, a sister of Ethel Gant, testified for the state, in substance, that one night during the year 1901, some time during the summer, she heard defendant some time in the night on the bed in which she and Ethel, her sister, slept, and on Ethel's side of the bed; and that the next day or two afterwards defendant told her sister, Myrtle, that he sat on the bed about an hour or an hour and a half, because he heard some one at the window. The bill further discloses evidence was introduced to show that Mrs. Gant was the mother of defendant and of Ethel and Myrtle Gant. And the further objection was made that, if defendant had undertaken to prove by any witness that he told his mother what he told the sister or Myrtle Gant, such evidence would not have been admissible in favor of defendant, as it would have been self-serving in this matter, and hence inadmissible. The court appends the following explanation to the bill: "That, in addition to the language imputed to the county attorney, and copied in this bill, and added by the court by way of reason for requiring special charge No. 4, the county attorney added that defendant would have told the mother and aroused the household at the time, and not have waited a day or two to tell the sister whom he suspected had seen him. The court regarded this as a legitimate deduction from the evidence, and proper argument, and upon mature reflection is still of the same opinion." We think the court is correct in his explanation stating that the argument was legitimate under the testimony. So it follows from what has been said that the court did not err in refusing to give special charge with reference to the argument of the county attorney.

The third ground of the motion complains that the verdict of the jury is not supported by the evidence, in that prosecutrix, Ethel Gant, being an accomplice, is not corroborated. In our opinion, the evidence is sufficient, and the testimony of prosecutrix is corroborated by evidence strongly tending to connect defendant with the commission of the crime. The facts in this case are stronger than in *Jackson v. State* (Tex. Cr. App.) 40 S. W. 998. See, also, *Martin v. State*, 21 Tex. App. 1, 17 S. W. 430; *Mercer v. State*, 17 Tex. App. 465; *Barber v. State*, 69 S. W. 515, 5 Tex. Ct. Rep. 604.

The judgment is affirmed.

*Rehearing denied June 23, 1903

LOCKLIN v. STATE.

(Court of Criminal Appeals of Texas. May 13, 1903.)

MURDER—DISQUALIFICATION OF JUDGE—INTEREST AS COUNSEL—CHANGE OF VENUE—RIGHT OF POSTPONING TRIAL—JURY—SELECTION OF TALESMEN—IRREGULARITY—VALIDITY OF PARDON—PREVIOUS PARDON—ADMISSIBILITY OF EVIDENCE—ARGUMENT OF COUNSEL—NECESSITY OF PROMPT OBJECTION—IMPEACHMENT OF WITNESS—REPUTATION FOR MORALITY—CORROBORATION OF ACCOMPLICE—SUFFICIENCY OF EVIDENCE.

1. The fact that a judge trying a murder case was once appointed, though without authority of law, assistant district attorney, and as such aided in presenting to the grand jury the case against an accomplice, does not disqualify him; accused's relation to the crime not being then known or referred to, and on his trial the corpus delicti not being seriously contested.

2. Code Cr. Proc. 1895, art. 707, authorizing a defendant separately indicted with another for the same offense to secure a postponement of his trial till after that of his codefendant, provides that such postponement shall not work a continuance. *Held*, that where, by reason of a change of venue as to one defendant, a postponement of his trial would work a continuance, it was properly refused.

3. An irregularity in the selection of talesmen, the summoning of whom is directed in the same writ with that of a special venire, is not ground for quashing the venire.

4. Code Cr. Proc. 1895, art. 647, provides that a special venire shall be selected by placing the names of those selected for jury service in a box, from which the clerk shall draw the number required. Article 649 provides that, when there is a failure to select a jury from the special venire, the court shall direct the sheriff to summon any number of persons it may deem advisable. *Held*, that it is not necessary that the names of the talesmen shall be selected in the manner provided for the selection of a special venire.

5. The validity of a pardon restoring a convict to rights of citizenship is not affected by a recital of the grant of a previous pardon.

6. A pardon restoring the convict to rights of citizenship may be granted after the expiration of his term of service.

7. A pardon reciting that it is granted because the convict's testimony is needed in a criminal case is not invalid, the motives of the executive not being subject to question by the courts.

8. Where, in a criminal prosecution, an accomplice, who turned state's evidence, testified that he was not induced to do so by the promise of immunity from prosecution for another offense, and this statement is not questioned by accused, the admission of evidence of other witnesses that they did not promise such immunity is not ground for reversal.

9. In a prosecution for homicide, accused's witness, testifying to an alibi, was asked on cross-examination if he did not state to a certain person that on the night before the killing his wife was to go to church with accused, and that accused did not appear, and answered "No." *Held*, that it was proper to impeach him by proving such statement; the impeaching evidence being limited to its effect on his credibility.

10. In a prosecution for homicide, argument by state's counsel that, if accused is erroneously found guilty, he may move for a new trial, has a right to appeal, and may be pardoned, but that, if acquitted, the matter is forever settled, is not so prejudicial as to require a reversal, where no objection is made until after the argument is closed, no exception taken, and

no instruction to the jury to disregard it is asked.

11. In a criminal prosecution, the allusion in argument of counsel for the state to the fact that accused had failed to explain or rebut criminative circumstances by the testimony of his wife, who appeared as his witness, is not erroneous.

12. Witnesses in a criminal prosecution cannot be impeached by showing that their reputations for morality and honesty are bad.

13. Evidence in a prosecution for murder examined, and held to connect accused with the offense so as to sufficiently corroborate accomplices.

On Rehearing.

14. In a criminal prosecution, an accomplice is sufficiently corroborated, under the statute, if the corroboration goes to the main fact, though he may be contradicted as to some details.

Appeal from District Court, Gillespie County; Clarence Martin, Judge.

Sam Locklin was convicted of murder in the first degree, and appeals. Affirmed. Motion for rehearing overruled.

McLean & Spears, M. D. Siator, W. C. Linden, and Will G. Barber, for appellant. Moursaud & Moursaud, James Flack, Moore & Moore, and Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the first degree, and his punishment assessed at confinement in the penitentiary for life; hence this appeal.

The state's testimony shows that appellant and Ike Barber waylaid and assassinated deceased, R. F. Rowntree, about the 20th of July, 1893. Deceased at the time was en route from the town of Llano to his home, situated some 20 miles in a southwesterly direction therefrom. On the night preceding the homicide, which occurred about 9 o'clock, deceased stayed at one Byfield's, about halfway from Llano to his home. Early the next morning, appellant and said Barber, who had secreted themselves on the roadside in a little field, shot and killed deceased, who was riding in a two-horse wagon. The parties escaped, and appellant's connection with the homicide was not developed until some time during the year 1902, when he was indicted. The state's case mainly depends on the testimony of Ike Barber, an alleged accomplice, and one Mon Turner, also claimed to be an accomplice. Appellant defended on the weakness of the state's case, contending that the accomplices were not sufficiently corroborated, and also supplementing this by proof of an alibi. The venue was changed from Llano county, where appellant was indicted, to Gillespie county; the change being made by Hon. Clarence Martin, judge of said district court, of his own motion.

When the case was called for trial, appellant excepted to Hon. Clarence Martin, judge of said district court, trying said cause, on the ground that he had been of counsel for the state in the prosecution of the case. The

† See Pardon, vol. 37, Cent. Dig. § 12.

proof, as presented in the bill of exceptions, shows that during the year 1900 said Martin was appointed by the district judge of Llano county to assist the district attorney in representing the state before the grand jury, and that at said term the matter of the homicide of R. F. Rowntree was investigated by the grand jury, Ike Barber being then charged with his murder, and that, after his appointment, said Martin, who was then a practicing lawyer of said court, did represent the state in the investigation of said charge against Barber of the murder of Rowntree. In that connection it was also shown that Ike Barber was a principal witness for the state against Locklin, and that he was a confessed principal in the murder of Rowntree, and that therefore said Martin was disqualified to try the cause. In connection with the bill of exceptions, Hon. Clarence Martin explains his connection with said cause as follows: That he was appointed by the court to assist the district attorney at the November term, 1900, of said court, and that Ike Barber was then charged with the killing of Rowntree; but there was no charge against appellant in connection with said offense, nor was it then known or suggested that he was implicated therein. That during the investigation said Martin heard some witnesses testify in the case against said Barber—particularly as to statements in the nature of confessions of said Barber—but that no testimony in his hearing or presence connected appellant with said offense. That said Martin did not know said appellant at the time, and had never heard his name mentioned in connection with the killing of Rowntree. The question, as presented, is, was Judge Martin so connected with the prosecution as to disqualify him to act as judge; that is, was he of counsel for the state, as against appellant? In *Reed v. State*, 11 Tex. App. 587, we had a somewhat similar question. In that case the trial judge was disqualified, on account of relationship, from trying one Stillwell, jointly indicted with Reed for murder. Stillwell had not been arrested. Reed was arrested. The judge recused himself on the ground of relationship with Stillwell. It was held in that case that, Stillwell not having been arrested, the fact that he was related to him did not affect his qualification to try Reed, who alone was on trial. The court further say, if Stillwell had been on trial jointly with Reed, that said judge would not have been competent to try the case. In this particular case the fact that the judge had never represented the state as to appellant, Locklin, although he may have been engaged in the prosecution of Barber, and had heard some of the testimony during the investigation of the case against him, it does not occur to us, disqualified him from trying appellant; that is, the same principle would apply as in the case above cited. This is not

like the case of *Utzman v. State*, 32 Tex. Cr. R. 426, 24 S. W. 412, or, rather, in our opinion, that case supports the view here taken. For, as was said in that case, "although Judge Woodard was district attorney at the time the homicide was committed, he had nothing to do with the prosecution of said case." Nor is it like the case of *Terry v. State*, 24 S. W. 510. In that case, Judge Spooner, who had previously been district attorney, actually prosecuted the case against the defendant in the examining trial. It will be noted, furthermore, that, when Judge Martin officiated in Llano county with the district attorney, Locklin was not known to have any connection with the murder, nor was anything developed touching his connection with the crime. Moreover, we are not advised of any statute or law authorizing the judge to appoint an assistant district attorney. Article 38, Code Cr. Proc. 1895, authorizes the judge, in the absence of the district attorney, to appoint a district attorney pro tem.; but this was not the case here. It appears to us that the appointment by the judge of Mr. Martin was without authority of law, and he had no official character as a prosecutor. We hold there was no error on the part of the trial judge in refusing to recuse himself, because he was never of counsel for the state in the prosecution of appellant, Locklin.

On the trial of the case, appellant made a motion to sever from one A. K. Scott, who he alleges was indicted in Llano county as an accomplice in the murder of Rowntree, being the same offense alleged against appellant; that the testimony of said Scott was material for his defense, and that there was not sufficient evidence against said Scott to secure a conviction; that an indictment was then pending in Llano county against said Scott; and he asked that he be first tried, in order that he might avail himself of his testimony when acquitted. The court overruled this. When the venue in appellant's case was changed from Llano county, it does not appear that he objected thereto on the ground that he desired a severance from Scott, in order to procure his testimony, but he only objected generally to the change of venue. It may be if this objection had been urged at the time, the court would not have changed the venue as to appellant, or, if he did, he might have changed the venue in both cases to Gillespie county; and in that event appellant could have exercised his right of severance, both cases being in the same jurisdiction. But here the two cases were pending in different counties, and, if the motion had been granted, it would necessarily have operated a continuance of the case. As we understand, the statute (article 707, Code Cr. Proc. 1895) especially provides that the making of such affidavit for severance, without other sufficient cause, shall not operate as a continuance to either party. And see

King v. State, 35 Tex. Cr. R. 478, 34 S. W. 282; Stouard v. State, 27 Tex. App. 1, 10 S. W. 442.

Appellant made a motion to quash the venire on the ground that 24 names were added to the venire of the week, which consisted of only 36 jurors, and that these 24 were added as talesmen, and summoned by the sheriff, and not drawn by lot. We have examined the writ, and it is somewhat peculiar in form. It first requires the sheriff to summon 36 persons who have been selected in the manner as provided by law to serve as special jurors. These were admittedly the jury for the term, and their names were drawn by lot. After this, in the same writ, the sheriff was instructed to summon 24 additional qualified jurors of Gillespie county to appear before the district court on the day set for trial. The court, in his explanation to this bill, states that on the first day of the term of the court it was ascertained that the jury commissioners had only selected 36 special jurors to serve for the first week of the court, and the court, knowing that said number was insufficient from which to procure a jury, ordered the clerk to draw the names of 36 regular jurors, as required by law, and place them in the list in the order drawn, which was done, and the sheriff was ordered to summon 24 additional qualified talesmen, after summoning the 36 regular jurors, which was done by him; that said 36 regular jurors were summoned, and they were first tendered as jurors upon this trial in their regular order. After this was exhausted, the additional talesmen who had been summoned were brought in, and the jury completed; defendant having exhausted only 14 challenges. The effect of this order for special venire was to order a venire of 36 jurors to try the case, and the remainder of the jurors summoned were talesmen, and not a part of the special venire, which, in accordance with law, is required to be drawn by lot from the body of jurors selected for the term of court. While the action of the court in ordering the sheriff to summon the talesmen, in connection with the special venire, was irregular, yet this was no reason to quash the special venire. If appellant was not satisfied with the mode of summoning talesmen, or dissatisfied with the talesmen brought in in this manner, he might have made a motion to quash that portion of the writ in regard to said talesmen. The court then might have set aside the order for the talesmen, and ordered the sheriff to summon a new list of talesmen. The objection of appellant as to the talesmen, as we understand it, was because they were not placed in the box, and drawn by lot, and placed on the list in the order drawn. We do not understand the statute to require this procedure. Of course, when these talesmen were brought in, if request had been made that their names be placed in the box and then drawn by the clerk, there could have

been no objection, but the statute does not seem to apprehend this method as to talesmen. See articles 647-649, Code Cr. Proc. 1895.

When the witness Mon Turner was placed on the stand by the state, appellant showed that said witness had been indicted for a felony, and was not competent to testify. In response to this, the state presented what was claimed to be a pardon, dated January 9, 1903. The recitals thereof stated, in effect, that said Turner had been convicted of rape in 1874 in the district court of Burnet county, and sentenced to the penitentiary for five years; that he had served out his term, and thereafter, on June 22, 1876, a pardon was issued in his favor by Gov. Coke, but that said pardon failed, in terms, to restore him to citizenship and the right of suffrage. Said document further recited "that inasmuch as the testimony of said witness is required in a criminal case pending in Llano county: Now, therefore, I, Joseph D. Sayers, Governor of Texas, do, by virtue of the authority vested in me by the Constitution and laws of this state, hereby, for the reasons specified, now on file in the office of the Secretary of State, grant the above-named convict a full pardon, and restore him to full citizenship and the right of suffrage." This instrument was objected to on the ground that it was not the original pardon, nor a certified copy, but that it affirmatively showed on its face that another pardon had previously been granted, and that therefore the executive power of the Governor had been exhausted, and that said paper did not constitute a pardon. Of course, this was not a certified copy of an existing pardon, and we may reject that portion of the paper; but the remainder certainly contains the essential elements of a pardon, and as such it authorized the witness to testify. Of course, it will not be contended that a pardon cannot be granted after the expiration of a prisoner's term of service. *Hunnicut v. State*, 18 Tex. App. 498, 51 Am. Rep. 330. Nor can the motives of the executive be questioned in the courts as to his reason for granting a pardon. He may have granted the pardon in the present case, as recited, in order to restore the competency of the witness to testify. This may have been a misapprehension as to the effect of the original pardon, but it was none the less a pardon. *Martin v. State*, 21 Tex. App. 1, 17 S. W. 430.

Appellant assigns as error the action of the court in permitting the witnesses Hargan, Wallace, and Moses to testify that they had not promised Ike Barber that he would not be prosecuted upon a certain charge against him for the theft of hogs if he would testify to what he knew about the killing of Rowntree. This was objected to "because the testimony was calculated to support the testimony of Barber, whom the defendant had not attempted to impeach upon that issue; it being purely collateral (the witness

Barber having previously answered the same question in the negative); that because said witness had been impeached by contradictory statements on other matters, and by showing that he had previously been charged with other crimes, and that his reputation for truth and veracity was bad, this did not justify the state in corroborating him in the method adopted." The court, in his explanation, states an attempt was made by appellant to show that said witness Barber had a motive for fabricating his testimony, and that the testimony was admitted in order to corroborate him. And he further shows by the bill, as we understand it, that appellant placed Ed Stewart on the stand, and he testified, in effect, that Barber did make the statement inquired about, or statements substantially contradictory of his statement. The authorities permit this character of evidence where an attempt is made to show that the testimony has been recently fabricated on some motive suggested, especially when the witness stands contradicted as to his testimony. *Riojas v. State*, 36 Tex. Cr. R. 186, 36 S. W. 268. However, if it be conceded that said testimony was improperly admitted, we fail to see how it could operate to the injury of appellant. If appellant, as contended by him, accepted the statement of Barber as true, the corroborating evidence did not render it any more true, and consequently was not injurious.

During the trial the state was permitted to impeach appellant's witness Jim Wyckoff by Miss Della Edwards. Wyckoff was used to prove an alibi for appellant, and on cross-examination by the state he was asked if, on a certain occasion (naming time, person, and place involved), he did not tell Della Edwards that, on the night before Rowntree was killed, "your wife was to go to church with Sam Locklin, but that he did not come, and your wife did not go to church that night." He answered "No." The state was then permitted to impeach him by Miss Della Edwards. This was objected to because it involved the act and declaration of the wife against the husband as to a matter about which she had not been examined by defendant, and because certain matters involved in the former interrogatory to this witness could not be separated from the matters asked about in the last interrogatory. The court explains this testimony by stating that all declarations, etc., of the wife of defendant, were excluded, and the testimony was only admitted as affecting the credibility of the witness Jim Wyckoff. In this we are unable to discern any error.

Bill of exceptions No. 7 shows that E. T. Moore, in closing the argument for the prosecution, used the following language: "If you find defendant guilty, and you commit any error in doing so, he has a right to make a motion for a new trial, and have it presented to the court, and then he has a right to appeal to the upper court, and have it

reviewed there, and on another trial more evidence may be presented, and then there is the pardoning power, if it is discovered afterwards that any error has been committed in the trial of this case; but, if you find the defendant not guilty, the matter is forever settled." Appellant objected to this, and verbally requested the court to instruct the jury that said argument was improper, etc. The court further explains this bill by stating that no special requested instructions asking the jury to disregard said argument was submitted to the court in writing, and the objection was made verbally after the argument had closed; counsel for the defendant stating that they did not want to interrupt counsel for the state during the argument. In support of his contention that this bill contains reversible error, we are referred to *Crow v. State*, 33 Tex. Cr. R. 264, 26 S. W. 209; *Brazell v. State*, 33 Tex. Cr. R. 333, 26 S. W. 723. In both of said cases, remarks of a similar character were held to be cause for reversal. However, the rule at that time appears to have been different from that since adopted; the general rule now being, in order to constitute improper argument ground for reversal, opposing counsel must have objected at the time, and requested the court to charge the jury to disregard such argument; that is, a charge in writing must be requested and refused, and an exception taken to the action of the court, in order to constitute ground for reversal. See section 776, subd. 2, White's Ann. Code Cr. Proc., for authorities. As an exception to this rule, it is held that, if the language used in the argument is of such an inflammatory character as, under the circumstances, is calculated to injuriously affect the prisoner—such that even a written charge would not ordinarily cure—then the court will reverse, although no written instruction was asked and refused. *Beason v. State*, 67 S. W. 90, 4 Tex. Ct. Rep. 239; *Smith v. State*, 68 S. W. 995, 5 Tex. Ct. Rep. 372. Tested by these rules, it does not occur to us that the language here used by counsel was of that character which relieved appellant from promptly taking a bill of exceptions thereto, and then requesting a written charge on the subject. The language which was imputed to counsel for the state was a reference to appellant's legal rights in case of conviction, and a matter about which the jury must be presumed to have known, as they are charged with a knowledge of the law. It does not occur to us that the argument is of such an inflammatory character as would afford ground for reversal, in the absence of a requested charge on the subject, and a bill of exceptions taken to the refusal of the court to give the same.

Appellant also excepted to the argument of counsel for the state in alluding to the fact that appellant failed to explain or rebut certain criminative matters against him by the testimony of his wife, who was a witness on his behalf. This was not error. Mercer

v. State, 17 Tex. App. 467; *Armstrong v. State*, 34 Tex. Cr. R. 248, 30 S. W. 235.

An exception was taken to the refusal of the court to permit testimony to impeach the witnesses Ike Barber and Mon Turner for morality, honesty, and integrity. The fullest latitude was given in regard to these witnesses as to their reputation for truth, and it was also permitted to be shown that they had been charged with other felonies. It does not occur to us that their reputation for morality and honesty was involved in this case.

A number of exceptions were reserved to the charge of the court, and to the refusal of the court to give certain requested instructions—among other things, that the court should have submitted to the jury whether or not J. E. Davis was an accomplice. We have examined the record in this respect, and do not believe that the court was required to instruct the jury on this subject. As to the other exceptions to the charge, we have examined the same, and believe that the charge is a full and fair exposition of the law applicable to the facts of the case, and that none of the requested charges were called for.

Appellant urgently insists that this case should be reversed because the testimony is insufficient to support the verdict, in that there is no evidence corroborative of the accomplices Barber and Turner, and tending to connect appellant with the offense charged. In support of his contention he cites as to a number of authorities. So far as the rule of law is concerned, that is statutory, and the only difficulty is in applying this rule to the varied facts in each particular case. Whatever apparent confusion may exist in the cases on corroboration arises from the facts developed in each case, and the point of view with which they seem to have been regarded, because it is beyond question that some of the cases seem to apply a stricter rule with reference to the measure of corroboration than do others. However, the same rule of law is adhered to in all the cases; that is, that the testimony aside from that of the accomplices must tend in some degree to connect appellant with the commission of the offense. Without going into the details of the homicide, it is sufficient to state that the two accomplices, Barber and Turner, who in the main corroborate each other, make out a complete case, showing a conspiracy to assassinate deceased, Rowntree, entered into between appellant, Ike Barber, and A. K. Scott, and possibly others. In pursuance of this plan, the murder was consummated on either Wednesday or Thursday morning, about July 20, 1893, by Ike Barber and appellant, who lay in wait for their victim on the roadside between Llano and the home of deceased. One witness, to wit, Henry Haynes, who was not an accomplice, testified to a secret conference between appellant and Ike Barber a few nights before the homicide.

Davis, another witness not implicated in the offense, testified that appellant came to his house on the Saturday evening immediately after the homicide, which occurred on Wednesday or Thursday, and desired him to go to Llano to assist his friend Scott, who was under arrest, and threatened with a mob. In that connection, he proposed that Davis should ride his (appellant's) horse, and he wanted him to take the shoes off the horse before undertaking the trip. Witness told him that he did not want to go, as somebody might know the horse. Appellant desired him to start that evening to Llano, which was some 27 miles distant from Loyal Valley, where they resided. This witness also testified that appellant exchanged his boots with one Forest Commander, as he saw appellant's boots on said Commander on the following Monday. He also relates that he went to appellant's house on this same day, and there saw a new Winchester in the room. Appellant said it was a present to him, and told witness it was not the only gun he had, and then appellant turned up the mattress and showed him another Winchester. Witness remarked to appellant, "Sam, you are a damn fool to have these guns around here, for you know you are under suspicion for killing Rowntree, and you are likely to be arrested at any time." Appellant replied that he knew it. On the next morning Locklin came to him, and desired witness to take the guns and keep them until the excitement was over, which witness declined, stating that everybody knew he had no guns. Hans Marschall, another witness, who was not an accomplice, testified that he was a blacksmith, and about 11 or 12 o'clock on the day of the homicide he was at his home, in Loyal Valley, shoeing a horse. Locklin, who was a near neighbor, came by, and asked him if he had seen his horse going up the lane. Witness replied "No." Another party, standing near, stated that he had seen his horse, and that it looked mighty hard, to which appellant replied that he had reason to look hard; that, if he had gone through what his horse had, he would look hard, too. Later in the same afternoon the same witness testified that he again saw appellant, and asked him if he had seen Bob Moseley; to which appellant replied, "No; but that he had seen another Bob." This was the name by which deceased was familiarly known. This same witness also testified that, about a year after the homicide, he, with appellant and others, were camping out on Hickory creek, fishing; that he heard appellant and one Stone have a conversation together, in which the name "Bob" was mentioned, and appellant stated, "I was standing there, but didn't pull the trigger." Subsequently, in the same conversation, appellant stated to witness that he did not kill Rowntree, and did not have anything to do with it, but that he believed he could put his finger on the man who did. Now, if we look to

other testimony—that of the accomplices—in connection with the physical facts surrounding the homicide, these facts testified to by the above witnesses were significant, and have a bearing on the case, and, in our opinion, tend to connect appellant with the commission of the offense. True, appellant attempted to explain them and show their want of application or connection with the offense; but this was a question for the jury to determine, and they evidently believed that, when appellant sought a secret interview with Barber two or three nights before the homicide, it had reference to the homicide which subsequently occurred, in which Barber admits his participation. Doubtless they believed that appellant felt more than a passing interest in his friend Scott, and wanted to protect him from a mob. But knowing that the horses of the perpetrators had been tracked from the scene of the homicide, and that one of said horses was shod, and also believing that said tracks had been measured, as well as the foot tracks of those who had perpetrated the murder, he desired to rid himself of these inculpatory facts; and, though he manifested solicitude as to the welfare of Scott, he was not willing to risk himself in an effort to protect him, but sought the aid of witness as to that matter. Besides this, the jury may have believed that the conversation detailed by this witness, in which the name "Bob" was used by appellant, and in that connection stating that he stood by and saw it done, but did not pull the trigger, had reference to the previous murder of Rowntree, especially as appellant subsequently in the same conversation informed witness that he had nothing to do with the murder of Rowntree, but he could put his finger on the man who did. In addition to this, the jury might have believed that the conversation between Marshall and appellant tended to connect appellant with the offense, inasmuch as appellant desired to have the witness take charge of his guns and keep them; thus attempting to fabricate evidence, in order to avert suspicion from himself. As stated before, it occurs to us that these circumstances, and others testified to by witnesses other than the accomplices, tended to connect appellant with the offense charged. They were unquestionably of a criminative character, and their reference and bearing was a question for the jury. The facts of this case may not be as strong as some of the cases in which the question of corroboration of accomplice's testimony has been presented to this court, but, to our minds, they are much stronger than the facts presented in some of the cases. See *Martin v. State*, 21 Tex. App. 1, 17 S. W. 430; *Williamson v. State* (Cr. App.) 43 S. W. 523; *Williams v. State*, 33 Tex. Cr. R. 128, 25 S. W. 629, 28 S. W. 958, 47 Am. St. Rep. 21.

We find no error in the record, and the judgment is affirmed.

On Rehearing.

(June 23, 1908.)

The judgment was affirmed at a previous day of this term, and now comes before us on motion for rehearing. Appellant insists on nothing new in his motion for rehearing, but strongly reiterates his contentions which were disposed of in the original opinion. However, inasmuch as he strenuously urges that the court was in error as to some of these propositions, we will again review some of the questions.

It is urged that this court is in error in holding that the judge who tried the case was not disqualified. If the decision in *Utzman v. State*, 32 Tex. Cr. R. 426, 24 S. W. 412, announces a sound doctrine (and we notice that appellant has not criticised or discussed it), then, clearly, the opinion of this court is correct on the issue as presented here. In that case there was no question as to the official character of the district attorney, who was afterwards the judge and tried the case. As such, it was his duty to prosecute the same, and he was the repository of the secrets of the state's case, whether he actually prosecuted said case or not; and it was no answer to say that he did not actually engage in the prosecution. But here the alleged prosecutor was a mere volunteer, with no official character. The judge had no authority to appoint him to go before the grand jury. And we apprehend, if he had undertaken to prosecute a case on behalf of the state, by virtue of an assumed official position (the district attorney being present at the time), on objection he would not have been permitted to do so. But concede his official character (and that was his sole title to appear in the case, as he was not privately employed); he did not appear in this appellant's case as against him. And in this connection we refer to a principle of law which prevails throughout our entire criminal jurisprudence, to wit, that each defendant, although two or more may be charged with the same offense, has a separate and distinct case. Their defenses may not only be distinct and different, but may be antagonistic, so that the same attorney, as is sometimes the case, may be employed to prosecute one and defend the other; and there is no incongruity in such employment. If this be correct, then it would not follow that, although the judge may have been disqualified as to Barber, he could recuse himself as to Locklin, who, at the time he may have prosecuted Barber, was not even known as an accused person. We are familiar with the civil decisions referred to by appellant, and do not believe that, when properly construed, they militate against the views here announced. In *Slaven v. Wheeler*, 58 Tex. 23, according to the opinion, the judge had consulted and given advice in the same case; that is, in regard to the plaintiff's right to the land in controversy in the subsequent

suit, in which it was held he was disqualified. In *Newcome v. Light*, 58 Tex. 141, 44 Am. Rep. 604, the parties were the same, only the positions as plaintiff and defendant in the divorce suit were reversed. In that case it was held that the judge who appeared for the plaintiff in the former suit was disqualified to try the subsequent suit. The cause of action, however, was different in the two suits. We are inclined to believe that the doctrine may have been carried too far in said case. However, we do not believe it impinges on our views in this case. Here the parties were not the same, and we do not believe, simply because the judge may have tried a suit involving some of the same questions, it disqualifies him in a case where the parties are different; and such, we believe, is the holding of the courts. This was a case between the state of Texas and Sam Locklin, and the judge had never previously had any connection with that case, whatever may have been his attitude with reference to the case of the state of Texas against Barber for the same offense. While it is true that the corpus delicti in either case must be determined, the main question—in fact, the only question here—was the guilt or innocence of appellant of the offense charged. Considering the record in this case as the question is presented to us, we do not believe that Judge Martin was disqualified to try the case.

Appellant also maintains that we committed an error in holding that Mon Turner was qualified to testify, and in this connection he insists that the recitals in the pardon presented operated as an estoppel in a deed. We do not understand the pardon here presented recites any outstanding title in some one else, but, if it shows anything, it contains a recital in favor of the witness, and shows that he was the same party previously pardoned. We understand that parol evidence, if not objected to, would prove a pardon. No objection was made to this recitation, and, if it be put on the same plane with parol evidence, it would show a pardon, and the right of the witness to testify. But if this view be rejected as unsound, then, in our opinion, the recitation could be rejected as surplusage, and the paper presented in evidence would be regarded as a pardon, because it contains all the essential elements of a pardon.

Appellant says that we were mistaken in the original opinion as to when the rule was adopted requiring an accused to present written instructions, and have them refused, before he could take advantage of an improper argument on the part of the state; that the same was in vogue prior to the *Cases of Crow and Brazzel*, cited in the original opinion.* Appellant may be correct as to that; but here he did not even take an exception or call the court's attention to the matter while the alleged improper argument was being

made to the jury, and the matter was not called to the attention of the court in any wise until after the argument had closed, and no charge was asked. Under such circumstances, we would only feel authorized to reverse the case when the argument was of such a character as was calculated to operate greatly to the prejudice of appellant, and likely to influence the result. We are of opinion that whatever may have been said as to a matter of this character in *Crow's Case*, under the circumstances of this case as here presented, the remarks of counsel were not of that character so as to authorize a reversal.

It is again contended that the accomplices Turner and Barber are not corroborated, and that the case should be reversed on this ground. In the opinion we mention a number of matters which, in our judgment, tended to corroborate the accomplices; but appellant insists, as we understand it, that the accomplices must be literally corroborated throughout, and, if upon some material issue they are contradicted, the corroboration is not sufficient. For instance, he says that the accomplice Barber is contradicted as to the route taken by him and Locklin after the commission of the homicide; the evidence showing that the parties who did the killing afterwards went to the dead body at the gate, making a loop in their route, whereas Barber testified that they took no such route. And again, that Locklin's statement, proved by another witness, that he did not pull the trigger, but was present when the killing was done (assuming that it referred to Rowntree), contradicted Barber, who testified that Locklin did pull the trigger, and that he himself did not shoot Rowntree. In regard to this matter, we hold that the proper interpretation of the statute with reference to the corroboration of accomplices refers to the main fact—in this case, to the fact of killing—and although the evidence may show, as to some of the details, that the accomplice made a false statement, yet, if he is corroborated as to the main fact, or the testimony tends to corroborate the accomplice as to the main fact, such corroboration is sufficient. To illustrate: Suppose we have in this case unquestioned evidence that defendant did not take the route testified to by the accomplice in leaving the scene of the homicide, or that the killing was done in a different manner from that detailed by the accomplice, but the outside proof shows or tends to show that, notwithstanding this, Locklin was present and participated in the killing; could it be reasonably contended that there was no corroboration? Yet such seems to be the doctrine insisted on by appellant. We do not believe this sound.

We have carefully reviewed the questions presented, and, finding no error such as would require a reversal, the motion for rehearing is overruled.

JENKINS v. STATE.*

(Court of Criminal Appeals of Texas. May 20, 1903.)

HOMICIDE—ALIBI—WITNESSES—CROSS-EXAMINATION—IMPEACHMENT—FOOTPRINTS—EVIDENCE—INSPECTION OF PUBLIC DOCUMENTS—RIGHT OF ACCUSED—ALIBI OF ACCOMPLICE—INSTRUCTION.

1. Whether a record of proceedings before a justice, including testimony of witnesses, and which is in the hands of the state, is of an inquest, or of proceedings to discover the murderer, under Code Cr. Proc. 1895, arts. 941, 942, if the proceedings were authorized by law, it was a public document; and, on proper motion, accused had a right to the inspection thereof.

2. In a prosecution for murder, it was proper for the state to show the movements of an accomplice, who turned state's evidence, in connection with the homicide, up to and including his arrest.

3. Movements of conspirators to commit murder, before and during the morning of the homicide, and both before and immediately after its commission, may be shown by the state.

4. In a prosecution for homicide, where accused's witness testified to an alibi in favor of an accomplice, thus disproving the conspiracy pro tanto, the state may show on cross-examination, and for the purpose of impeachment, that the witness had made statements to others in conflict with her testimony.

5. Where, in a prosecution for homicide, accused's witness testified that when she left decedent's home, about daylight, decedent was still in bed, this testimony being deemed material by accused, the state may impeach her by proving her statements that, when she left the house, decedent was up.

6. Where, in a prosecution for homicide, accused's witness testified that the night before the murder she saw an alleged accomplice, who had turned state's evidence, and who was not of dark complexion, around decedent's house, the state may impeach her by proving her statement that the person she saw was as black as a negro.

7. In a prosecution for homicide, it is proper to show that the impression of a footprint found on the ground at the scene of the murder presented peculiarities corresponding to a shoe worn by accused.

8. A witness in a criminal prosecution cannot be impeached as to his statement of his belief as to who committed the crime, though his belief may have been founded on statements of fact of another witness, as to which she is impeachable.

9. The improper impeachment of accused's witness in a criminal case, whereby his credibility is prejudicially affected, is ground for reversal.

10. In a prosecution for homicide, it is not necessary to instruct as to the alibi of an alleged accomplice.

Appeal from District Court, Bexar County; John H. Clark, Judge.

John Jenkins was convicted of murder in the first degree, and appeals. Reversed.

W. A. H. Miller, F. H. Burmeister, and Jno. T. Bivens, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the first degree, and his punishment assessed at death; hence this appeal.

The theory of the state is that appellant, in conjunction with his father, Fred Jenkins, and one Bee Qualls, murdered Mrs. Jane Barber, for which he is indicted, and also the two sons, Wiley and Levi Barber, on September 13, 1899; that this was done in pursuance of a previously formed conspiracy between said parties, the motive being gain. The testimony showed that Mrs. Bettie Jenkins, wife of Fred Jenkins, was the only heir of the three persons who were killed, and that said persons were possessed of an estate of the value of \$2,500; that appellant and his father were poor, and their motive for the homicide was that they might succeed to the property of the deceased; that the services of Bee Qualls, who was also related to them, were secured by agreeing to divide the money which deceased might have, with him, and also to employ him to superintend and take care of a small bunch of cattle belonging to deceased, which they expected to obtain. The state mainly relied on the evidence of Bee Qualls, who was an accomplice, and this is supported by circumstances proven by other witnesses. Appellant relied on the weakness of the state's case, and also introduced evidence tending to establish an alibi. This is a sufficient statement of the case in order to discuss the assignments of error.

Appellant made a motion to require the state to turn over to appellant or his counsel certain proceedings had before the justice of the peace and Judge Wallace, which occurred shortly after the homicide. The motion and bill do not make it clear whether this was inquest testimony, or proceedings set on foot to discover the murderer under articles 941, 942, Code Cr. Proc. 1895. If these proceedings were authorized by law, and the testimony of the witnesses taken down, it was a public document, and appellant, on proper motion, had a right to inspect and use it, if he deemed it necessary.

With regard to the assignments contained in appellant's second and third bills of exception, we hold that it was competent for the state to show the movements of the accomplice Bee Qualls in connection with the homicide, and up to and including the time of his arrest. And the state was also authorized to show the movements of the alleged conspirators before the homicide and during the morning of the homicide, both before and immediately after its commission. Of course, after the homicide, the acts or declarations of one would not bind the others, and the courts should limit such testimony.

And in this connection it was permissible for the state to prove by Mrs. Bettie Jenkins, the wife of Fred Jenkins, in her cross-examination, statements contradictory to the evidence given by her in her examination in chief. She testified on behalf of appellant as to an alibi in favor of her husband, thus disproving the conspiracy so far as he was concerned. And it was competent on

*Rehearing denied June 23, 1903.

the part of the state to show, if it could, on her cross-examination, that she had made statements to others in conflict with her testimony as to the alibi of her husband; and if she denied the fact, and also denied making such statements, it was competent to contradict her, inasmuch as her alibi testimony was upon a material issue.

We also hold that it was competent to impeach Mrs. Jenkins, wife of Fred Jenkins, by proving that she stated to witness Mrs. Bourroughs that, when she left the Barber home, Mrs. Jane Barber was then up, and said she was going to kill a chicken and make some broth for Wiley Barber. Mrs. Jenkins had been introduced as a witness for appellant, and her testimony tended strongly to show that so far as her husband, Fred Jenkins, was concerned, he could not have been in a conspiracy to kill the Barber family. And in addition she testified on behalf of defendant that when she left the Barber home, about daylight, Mrs. Jane Barber was still in bed. This evidence was evidently deemed by appellant to be material, and upon this point it was admissible to prove by her a different state of facts with reference to Mrs. Jane Barber, or, if she denied such condition, it was competent to lay the predicate to contradict her upon this issue.

What we have said above also applies to this witness and to the witness Conley Jenkins, with reference to the statement to the sheriff and others that the person she saw around the Barber house the night before the killing was black as a negro, and she could identify him. She had testified on behalf of appellant that the person she saw there was Bee Qualls, whom she knew well, and he was not dark-complexioned; and it was proper for the state to show by her, if it could, that she had made a different statement as to the person that she saw there, and, if she denied this, to permit her impeachment, as was done. We gather from the bills of exception, as well as from the conduct of the case, that on the trial it was the endeavor of appellant to fasten the killing solely on Bee Qualls. It appears that some time subsequent to the homicide, and after Quall's arrest, he turned state's evidence, and testified to a joint conspiracy between the two Jenkinses and himself to commit the murder. To rebut this theory, and to fix the homicide solely upon Bee Qualls, Fred Jenkins, and his wife, Bettie Jenkins, and also Conley Jenkins, testified to facts exculpating Fred Jenkins and John Jenkins, but fixing and tending to show that Bee Qualls alone was guilty of the homicide. And in this connection Mrs. Jenkins and Conley Jenkins testified to seeing Bee Qualls lurking around the Barber premises during the night previous to the homicide, and endeavoring to break into the storeroom. In rebuttal of this testimony the state was authorized to show by Mrs. Jenkins and Conley, if it could, that it was not Bee Qualls,

but some one else, as black as a negro, that they saw there that night, or, if they denied this, the state was authorized to lay a predicate and impeach them upon this issue. As we understand it, this was done.

We do not think the court erred as presented in bill of exceptions No. 9. The bill does not show that appellant was ever charged with the offense of theft of chewing gum or tobacco in any proceeding. Before a witness can be impeached by this character of evidence, there must be some sort of charge preferred. *Carroll v. State*, 32 Tex. Cr. R. 431, 24 S. W. 100, 40 Am. St. Rep. 786; *Brittain v. State*, 36 Tex. Cr. R. 406, 37 S. W. 758.

There was no error as presented in bill of exceptions No. 15. It is always proper to show any peculiarity in footprints—as, in this case, to show that the impression of the track found on the ground appeared as if the counter of the shoe projected over the heel, and then to show that appellant wore a shoe corresponding with the track of that character. We understand that the court excluded the evidence of the measurement of the track, inasmuch as the measurements appear to have been lost.

It appears that while Fred Jenkins was on the stand the state was permitted, on cross-examination, to ask him if he did not on Sunday evening, after the killing, tell Sheriff Avant that he (Fred Jenkins) thought or believed that some Mexicans working for Vicente Agurea had committed the murder, to which question defendant objected because the same was a declaration of a co-conspirator after the consummation of the conspiracy. The district attorney informed the court that he was laying a predicate to impeach the witness Fred Jenkins. Thereupon the court overruled the objections of defendant, and, in reply to the question, the witness answered, "No; he did not tell Sheriff Avant as stated." Appellant objected to this testimony because it was an attempt to lay a predicate to impeach the witness Fred Jenkins on an immaterial matter, and because said testimony brought before the jury the opinion of said witness; that the testimony would not afford a predicate for contradiction. In this connection the court refers to bill No. 6, which is really 5 in the record. This bill shows that Sheriff Avant was placed on the stand by the state, and on examination by the state he stated that Fred Jenkins told him that he thought or believed Mexicans working for Vicente Agurea had committed the murder. This testimony was objected to because it was the opinion of the witness, and the declaration of an alleged co-conspirator after the commission of the offense for which the conspiracy was formed, and could not bind or affect defendant, he not being present, and that it was the impeachment of the witness Fred Jenkins upon an immaterial matter. The court overruled this objection, and permitted the testimony, qualify-

ing the bill of exceptions as follows: "Fred Jenkins was one of the alleged conspirators and principals, according to the testimony of Bee Qualls, who was a confessed conspirator and principal in the commission of the offense, and who was a witness for the state. Mrs. Bettie Jenkins, the wife of Fred Jenkins, had testified (being a witness for the defense) that she had seen the said Bee Qualls just outside the Barber yard, where the offense was committed, on the evening before the murder, about dusk, and again later in the night, and that she had told her husband of this on the morning of the murder, and before they had heard of the murder. And the witness Fred Jenkins admitted on the stand that he had been so informed by his wife on the morning of the murder, and said it was before he knew anything of it, and the jury were told by the court at the time said testimony was admitted that it could only be considered by them upon the question of the credibility of Fred Jenkins as a witness." If this impeaching testimony was upon an immaterial matter, it could not afford the basis of an impeachment. Or if it was upon a material matter, and the mere statement of an opinion, when an opinion is not legitimate evidence, it would not be admissible. *Drake v. State*, 29 Tex. App. 276, 15 S. W. 725; *Gill v. State*, 36 Tex. Cr. R. 596, 38 S. W. 190. As explained by the learned judge, the testimony was evidently upon a material issue. That is, according to the state's theory, Bee Qualls, in conjunction with Fred and John Jenkins, were the murderers of the Barber family. Appellant insisted that Bee Qualls alone committed the murder, and, in pursuance of this latter theory, Bettie Jenkins testified to facts suggesting that Bee Qualls alone must have done the murder. While it was competent to contradict her as to what she might have stated as to who she saw at the Barber place on the night of the homicide (and it appears from another bill of exceptions that this was done), still it was not competent to lay the predicate by Fred Jenkins as to what he might have said as to his belief that Mexicans may have committed the murder, although his opinion or belief may have been founded in part on what his wife told him. His opinion or belief as to whether it was Mexicans who may have committed the homicide was not legitimate evidence, and, being inadmissible, he could not be impeached upon this issue. See *Williford v. State*, 36 Tex. Cr. R. 414, 37 S. W. 761. The effect of the impeachment was to discredit the witness Fred Jenkins as to other matters about which he testified, that were material on behalf of appellant, and accordingly was hurtful to him.

Appellant assigns a number of errors to the charge of the court. We believe that the court properly charged with reference to accomplice testimony, and how it should be corroborated; and also the charge with refer-

ence to limiting certain testimony going to the credit of witnesses was in accordance with the authorities, and it was not necessary to give the requested instructions upon these subjects. However, with reference to the charge on limitation of testimony, perhaps on another trial the court should make the charge plainer, so that the jury may have no difficulty in understanding it. And on the subject of alibi it might be well to tell the jury, if they had a reasonable doubt of the presence of appellant at the scene of the homicide, either from the testimony or the want of testimony, to give defendant the benefit of such reasonable doubt and acquit him. With reference to Fred Jenkins' alibi, it was not necessary for the court to instruct the jury at all. It was possible the jury might have believed appellant was present, and they might not have believed that Fred Jenkins was present.

Appellant also strenuously insists that the evidence is insufficient to sustain the verdict and judgment; contending that the accomplice is not sufficiently corroborated by testimony of an inculpatory character tending to connect appellant with the commission of the offense. In view of another trial, we do not deem it necessary or proper to analyze the evidence, or show its bearing on the testimony of the accomplice. We would observe, however, that it occurs to us that the accomplice is sufficiently corroborated. *Looklin v. State* (decided at present term) 75 S. W. 305, and authorities there cited.

For the error in permitting the impeachment of the witness Fred Jenkins, the judgment is reversed and the cause remanded.

BENNETT v. STATE.

(Court of Criminal Appeals of Texas. June 17, 1903.)

MURDER—EVIDENCE—INSTRUCTIONS—WEIGHT OF TESTIMONY—IMPEACHING EVIDENCE—SELF-CONTRADICTORY CHARGE—DYING DECLARATIONS.

1. In a prosecution for murder it appeared that defendant's wife was shot while defendant and another were engaged in a shooting affray with revolvers, that used by defendant being a 38 caliber and that used by the other person a 45. The undertaker who removed the ball from the body of deceased testified that it was a 44 or 45 caliber. The father and mother of deceased, and two other witnesses, testified, for the state, that they were present when the undertaker removed the ball, and that he had stated to them that it was a 38 caliber. The court charged with respect to three of these witnesses, naming them, that their evidence was admitted for the sole purpose of impeaching the undertaker. *Held*, that the charge was erroneous for failure to include the testimony of the fourth impeaching witness.

2. In a prosecution for murder, in which it appeared that defendant's wife was killed while defendant and another were engaged in a shooting affray, the court charged that evidence tending to show that defendant shot at the other person engaged in the affray could not be considered as any evidence of the guilt of the defendant, but that if the jury believed defend-

ant killed deceased they might consider such evidence as showing the condition of defendant's mind at the time he fired and the intent with which he did so. *Held* to be on the weight of the testimony.

3. The charge was erroneous as contradictory.

4. In a prosecution for murder of defendant's wife, wherein it appeared that deceased was shot while defendant and another were engaged in a shooting affray, and defendant claimed that deceased was shot by the other party to the affray, but there was no evidence that the other party intentionally fired at deceased, a charge that if the jury should believe that the other party fired upon and killed deceased, or if they had a reasonable doubt as to whether he did or not, they should acquit, was erroneous as leaving the jury to believe that before they could acquit they must find his wife was shot by the other person.

5. Where a dying declaration contained objectionable matter so interwoven with the unobjectionable portion that it could not be separated therefrom without destroying the sense, it was not error to admit the declaration as a whole.

Appeal from District Court, Hill County; Wm. Poindexter, Judge.

Ben Bennett was convicted of murder, and appeals. Reversed.

C. M. Smithdeal and Walter Collins, for appellant. C. F. Greenwood, Co. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of 45 years.

There are two theories in regard to the difficulty which led to this homicide: The first, that deceased was shot by appellant intentionally; the second, that she was shot accidentally. The evidence discloses that immediately preceding the homicide appellant was sitting near the south wall of the house between two doors, and on the outside of the house; that his wife (deceased) was sitting in the south door. Immediately inside the door sat Dee Evans. A Mexican candy vendor approached where deceased was sitting, and Dee Evans proposed to buy some candy for deceased, stating that he had no money, but would make the purchase. Deceased declined. It seems appellant became offended at this, and remarked, "Why in the hell don't you all shut up that conversation and quit throwing hints at me?" Evans inquired of appellant to whom he directed the remark, himself or deceased. Appellant replied that he was talking to both. Evans picked up his hat and started into the room, with the intention of going out the north door, immediately north of appellant. Seeing this, appellant jumped up, backed off 10 or 12 feet from the house, drew his pistol, and fired as Dee Evans approached the door. Evans ran off. Immediately after this shot, Joe Evans, brother of Dee, who was sitting on the north side of the house, shaving, jumped up, ran around in front of and near the corner of the house, and he and appellant be-

gan shooting at each other. The state's evidence shows that, after several shots were exchanged between the parties on the east side of the house, Evans ran around to the west side of the house and took his position some steps away from the northwest corner of the house, and appellant ran around the south side and took his position a few steps from the southwest corner, and there had another shooting scrape. The testimony for the defense shows the latter transaction did not occur; that all the shooting occurred on the east side of the house. The state's evidence shows further that, when the shooting began on the east side of the house, the witness Ward and deceased ran around the south end and to the west side of the house, and as soon as the shooting began on that side they ran down the west wall and around the south wall, and, just as they were approaching the corner of the house, appellant fired upon and shot his wife. Defendant's testimony denies shooting deceased, and claims that she was shot accidentally by Joe Evans in shooting at appellant. Under his theory of the difficulty, his wife was a little to his left and some distance behind him, and was shot by Joe Evans in shooting at him. She was shot in the back; and the testimony is widely variant, from the circumstances and from the size of the ball, as to whether appellant or Evans fired the ball that entered the body. The evidence for the appellant is that she was shot with a 44 or 45 caliber bullet. Witness White, who testified as to the size of the bullet, is contradicted by some of the state's witnesses, to the effect that he stated to them that the ball was a 38, and not a 45. The evidence is uncontradicted, throughout the statement of facts, that appellant fired a 38 pistol, and Joe Evans fired a 45. The physician who examined the wound on deceased, as well as that inflicted upon Joe Evans, makes it apparent that the wound on deceased was made by a larger ball than that inflicted upon Joe Evans. The undertaker, White, was placed on the stand by appellant, and testified that in examining the body he discovered the ball had entered near the backbone and must have struck it, lodging in the front, near the middle line, and just under the skin; that he cut the bullet out, and it was a 44 or 45 caliber; that he knew the difference between the size of a 44 or 45 and that of a 38 caliber. Fannie and Dink Alexander, mother and brother of deceased, were placed upon the stand, and testified that they were present when White cut out the bullet, as was Sam Connor. These witnesses were placed upon the stand, as was John Stirmin, and contradicted White by showing he stated to them the bullet was a 38 caliber. Fannie and Dink Alexander testified that he so stated to them at the time he cut the bullet out; that White, immediately after cutting it out, handed the bullet to Dink Alexander, who testified that

he carried it in a pocketbook, and subsequently placed it in a clock, and that it had disappeared, and he knew not of its whereabouts. Stirmin's evidence was in regard to statements made subsequently by White as to size of the bullet. White denied all these statements, and appellant introduced evidence of several witnesses, to whom White had made statements similar to the testimony he had given upon the trial, that the bullet was a 44 or 45.

In regard to this impeaching evidence, the court charged the jury as follows: "The evidence of Fannie Alexander and Dink Alexander to the effect, or in substance, that the witness M. T. White stated to them that the ball he took from the body of deceased was a 38-caliber pistol ball, and the evidence of the witness John Stirmin to the effect that said White stated to him that the ball taken from the body of the deceased was so badly mashed that he could not tell its number or caliber, was admitted for the sole purpose of being considered by you for what you may deem same worth, if anything, as contradicting or tending to contradict, or impeaching, the testimony of the said White, and you can consider it for no other purpose." It will be noticed that the witnesses Alexander and Connor did not testify as to the size of the bullet which White cut from the body of deceased in their presence. They were only introduced for the purpose of contradicting White as to what White said at the time he cut out said bullet. So they do not testify of their own knowledge as to the size of the bullet, but only as to White's statement at the time it was taken out. The objection to this charge is that, by omitting the impeaching evidence of Connor from the charge, the jury may have concluded that the testimony of Connor was original testimony, and used this impeaching testimony as evidence of the fact that the bullet was of 38 caliber. The evidence in regard to the size of the ball, in our judgment, was one of the crucial facts in the case. If it be true that deceased was shot with a 44 or 45 caliber bullet, then Evans was her slayer, and not appellant, for the facts are undisputed that appellant fired a 38-caliber pistol and Evans a 45. This evidence was the most vital point in the testimony. The exception to the charge is well taken. In omitting from the charge the question of Connor's impeachment of appellant, the jury may have and doubtless did think his testimony was original testimony, more especially so because he and the two Alexanders were eyewitnesses to the extraction of the bullet; and having instructed the jury in regard to the impeachment of appellant by the Alexanders, and omitting that of Connor from the charge, the jury may have come to the conclusion that the court admitted that as original testimony, and as proving the fact that the bullet was a 44 or 45.

Exception was also reserved to the fol-

lowing charge: "There is evidence before you tending to show that defendant shot at the witness Dee Evans, and also at Joe Evans. You cannot consider said evidence as any evidence of the guilt of the defendant in this case. If you believe defendant fired upon and killed deceased, then you may consider said evidence for what you may deem same worth, if anything, as showing or tending to show the condition of defendant's mind at the time he fired upon the deceased, and the intent with which he did so, but you cannot consider same for any other purpose." We believe the exception to this charge is well taken, as it is a charge upon the weight of testimony. *Cavaness v. State* (Austin term, 1903) 74 S. W. 908; *Cortez v. State* (Austin term, 1903) 74 S. W. 907; *Nelson v. State* (Tex. Cr. App.) 67 S. W. 320. It will be further noticed that this charge is contradictory in its terms. In one portion of the charge the jury are instructed that they cannot consider said testimony as any evidence of the guilt of defendant, and in the other portion of it they are instructed they may consider it as to the condition of his mind at the time he fired upon deceased, and the intent with which he did so. If the jury could not consider it as any evidence of guilt, then the latter portion of the charge is wrong, because the condition of his mind and the intent with which he fired upon deceased, if he did so, was a very material question. The evidence for the defense is to the effect that he did not shoot her at all; that she was shot by Joe Evans.

The court further charged the jury: "If you should believe from the evidence that Joe Evans fired upon and killed the deceased, Lula Bennett, or if you have a reasonable doubt whether he did or not, you will acquit the defendant." To place this matter more correctly before the jury, this charge was requested and refused: "You are instructed, as the law in this case, that, before you can convict the defendant, you must believe beyond a reasonable doubt that Joe Evans did not fire the shot that entered the back of the deceased, Lula Bennett." We believe the charge as given does not properly present the issue made on this phase of the facts. There is no evidence that Joe Evans fired upon deceased. The evidence shows that he was shooting at appellant, and that deceased, if defendant's testimony be true, was to the rear and a little to one side of appellant during this shooting, and that one of the bullets fired from the pistol of Joe Evans accidentally struck deceased in the back as she was going away from the difficulty. Upon another trial, this phase of the case should be properly submitted to the jury, to the effect that if, in firing, Evans shot deceased, or if there was a reasonable doubt on this proposition, appellant should be acquitted. If the bullet fired from Joe Evans' pistol struck her, there is no possible theory upon which appellant could be convicted; and the court's

charge may have impressed the jury, and doubtless did, that before they could acquit under this phase of the testimony they should find that Evans actually fired upon and killed deceased. To say the least of it, the charge is misleading.

The dying declarations of deceased were admitted, over appellant's exception. It occurs to us that, as the bill presents these matters and the grounds of objection urged, the court did not err. As was said in *West v. State*, 7 Tex. App. 150: "If the question of the admissibility of this testimony were to be tested alone by the bill of exceptions, and passed on as there stated, we fail to see that the portion of the witness' statement as to what the deceased said as to the cause of the quarrel can be said to be a statement of the circumstances of the death. Yet, when taken in connection with the rest of the statement, we are of opinion the objectionable portion was so intimately interwoven with the thread of the narrative that it could not be separated without marring, if not destroying, the sense; and taking this in connection with the other testimony bearing on the same subject, and which was admitted without apparent objection, we are unable to see that the error, if any, was material." We think this language is applicable here. Her statement with reference to the beginning of the difficulty between Dee Evans and appellant, and the entrance of Joe Evans into the difficulty, which all occurred in rapid succession, was so interwoven into the transaction which led to the death of deceased that it cannot be well separated from her purported dying statement. It occurs to us that the decision in *West v. State*, supra, is the authority for the ruling of the trial court in admitting the dying declaration.

For the errors discussed, the judgment is reversed and the cause remanded.

MARKOWITZ v. GREENWALL THEATRICAL CIRCUIT CO.

(Court of Civil Appeals of Texas. June 27, 1903.)

Statement of additional facts. For opinion, see 75 S. W. 74.

GILL, J. At the request of appellee, we find specifically the following facts, which are found inferentially in the main opinion:

First. Appellant did not pay or offer to pay the \$3,000 note due on October 1, 1901.

Second. Appellant did not offer to pay the \$3,000 after he became aware that the note theretofore given had been returned to Kempner.

Third. He did not offer to pay the \$1,000 rent due on October 1, 1901. We add, in this connection, that he testified to his readiness to perform his obligation, and that he would have done so but for the repudiation of the contract by appellee.

The fourth requested finding, to the effect that the appellee returned the note to Kempner, believing it was being done with Markowitz's assent, we cannot allow. We think the record shows that Markowitz never ceased to insist upon his rights under the contract. The letter of Weiss to Kempner may be evidence that Weiss thought so, but does not show that Greenwall acted on such belief. Kempner offered to return the note on October 7th, but it was refused. None of the parties had reason to believe that Markowitz was assenting.

MISSOURI, K. & T. RY. CO. OF TEXAS v. MEEK.

(Court of Civil Appeals of Texas. June 12, 1903.)

CARRIER-BAGGAGE-MECHANIC'S TOOLS-LIABILITY AS BAILEE-INSTRUCTION-HARMLESS ERROR.

1. Error in stating, in one paragraph of the charge, that the evidence on a material point was undisputed, was not rendered harmless by submitting the point as being in dispute in other paragraphs.

2. In an action by a mechanic against a carrier for lost tools checked as baggage, it was for the jury to determine whether the tools were reasonable in quantity, and of a character usually carried by mechanics like plaintiff for their personal use at their destinations, and hence such as could be regarded as baggage.

3. It appearing that plaintiff had taken the journey in the summer time, and for a short distance only, it was error for the court to assume as matter of law that heavy winter clothing included among the lost articles would come within the definition of baggage.

4. A carrier's liability as bailee for the storage of unclaimed baggage extends only to such articles as come within the definition of baggage, and does not include articles improperly checked as baggage.

Appeal from District Court, Harris County; Chas. E. Ashe, Judge.

Action by A. E. Meek against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Reversed.

Baker, Botts, Baker & Lovett, for appellant. Lovejoy & Malevinsky, for appellee.

GILL, J. This is an action by appellee to recover of appellant the value of a trunk and its contents, consisting of clothing and tools, which had been shipped as baggage over appellant's line of road, and which was alleged to have been lost through the latter's negligence.

The loss of the trunk and its contents was denied by appellant, and its due delivery was averred. It was further contended by appellant that the articles sued for did not properly come within the definition of baggage, and therefore the company could not be held liable therefor. To this appellee opposed the contention that, even if the articles in question were not baggage, yet the appellant had actual notice of the contents of the trunk, and was therefore liable. A trial by

jury resulted in a verdict and judgment for appellee for \$550, from which the defendant company has appealed.

The plaintiff is a designer, constructor, and mechanical engineer, and on the 21st of June, 1901, was in the employ of the firm of Weld & Neville as such. On that date he was at Belton, Tex., on business for the firm. From that point he was called to Bartlett, Tex., to test and regulate a steam engine belonging to his employers. He bought a ticket to Bartlett over appellant's line, had the agent check his trunk for the destination named, and received the check therefor. The contents of the trunk, as also their values, according to the allegation and testimony of plaintiff, was as follows: "Value of trunk, \$28.00; 1 Thompson steel indicator, \$145.00; 1 Thompson steel indicator with X springs, \$85.00; 1 Willis planimeter, with H. P. attachments, and small Amsler planimeter, \$50.00; 1 boiler inspection and test apparatus and two gauges, \$80.00; 100 feet steel tape, \$15.00; 1 tachometer, two sets of gears, \$55.00; 1 Heath self-timing speed indicator, \$20.00; 1 double dial and alarm stroke counter, \$12.00; 1 draughtsman's diamond point trammel, \$8.00; 1 heavyweight overcoat, \$70.00; 1 lightweight overcoat, \$38.00; 1 fall suit of clothes \$30.00; underwear, \$50.00; furnishing goods, \$25.00." Plaintiff explained the uses and purposes of the tools, and testified that they were necessary for his personal use in performing the duties of his vocation at Bartlett in inspecting, testing, and repairing the steam engines owned by his employers at Bartlett.

On the issue as to notice to the agent of the company that the trunk contained tools, the evidence is conflicting.

As to whether the trunk was delivered to plaintiff at Bartlett, or to some one authorized to receive it for him, the evidence is also conflicting, the plaintiff's evidence being to the effect that he did not call for his trunk at Bartlett until about 10 days after it was due to arrive there, and that the company failed to deliver it to him, and the evidence of defendant tending to show that the trunk was delivered to some one on its arrival at Bartlett, and that plaintiff was afterwards seen in possession of it.

We notice first the second assignment, as that alone presents an error which will require a reversal of the judgment. By the second assignment appellant complains of the part of the seventh paragraph of the court's charge which advises the jury that the undisputed evidence shows that the plaintiff did not apply for the trunk at Bartlett within a reasonable time after its arrival at its destination, and that as a consequence he cannot in any event hold the defendant as an insurer, but only for loss of the trunk through negligence. The objection to the charge is that it is upon the weight of the evidence. A defense finding support in defendant's evidence was delivery of the trunk

to the plaintiff, and the testimony on behalf of defendant tended to show that the trunk was delivered on the day of its arrival, and that it was afterwards seen in plaintiff's possession. Plaintiff testified that he did not call for the trunk until about 10 days afterwards. It is apparent at a glance that the court declares this statement of plaintiff undisputed, and thus puts the defense of delivery out of the case. Of course we understand it was not so intended by the trial court, for in other portions of the charge the issue of delivery vel non is distinctly submitted, but this does not render the error harmless. The fact remains that the trial court has stated in so many words that the evidence upon an important issue is undisputed.

In view of another trial, it is necessary to dispose of certain other questions presented. By the first assignment appellant assails the trial court's definition of baggage. The trial court charged, in effect, that, if the jury believed from the evidence that the tools alleged to have been in the trunk were of a character absolutely necessary and essential for plaintiff to carry with him, on the particular trip alleged, for performing the work in which he was engaged in his vocation at the time, then they should determine the issue of baggage vel non in favor of plaintiff. Appellant contends that the charge contains two distinct vices: (1) It made the personal uses and necessities of plaintiff alone for that trip a test of whether the articles alleged to have been lost were baggage in the legal sense of that term, and ignored the question of amount and value. (2) It was therein assumed as a matter of law that the articles of wearing apparel were not excessive in value and amount, and were suitable and necessary for plaintiff on the trip in question, and for his reasonable needs when he arrived at his destination. The first objection to the definition is sound. As to the general definition of the term "baggage," the authorities differ but little, though in the application of the definition to the facts of particular cases the results reached are varied and discordant. The term "baggage," within the rule determining the carrier's liability, is defined to include whatever the passenger takes with him for his own personal use and convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or the ultimate purposes of the journey. Whether or not certain articles are within the term "baggage" is to be determined from the character and length of the journey, its purposes and objects, the owner's station in life, and the habits and uses of the class of travelers to which he belongs. 3 A. & E. Ency. Law, p. 529; *Railway Co. v. Fraloff*, 100 U. S. 24, 25 L. Ed. 531. See note in *Thompson on Carriers*, p. 510; *Jones v. Priestester*, 1 White & W. Civ. Cas. Ct. App. § 613; *Texas & P. Ry. Co. v. Capps*, 2 Willson, Civ.

Cas. Ct. App. §§ 83, 84; Hutchinson on Carriers, § 683.

Under the rule as stated, articles which may be included in the term are not limited to those which are necessary for use during the journey, but may include articles appropriate or essential for the purposes and ends of the journey. Thus the easel of an artist on a sketching tour, the books of the student, the guns of the hunter, may come within the term. Hutchinson on Carriers, §§ 686, 687. Upon the same principle the tools of the artisan have been included. Hutchinson, supra, § 682. See note to Thompson on Carriers, supra; Railroad v. Morrison, 34 Kan. 502, 9 Pac. 225, 55 Am. Rep. 252. The principle underlying the rule seems to be that the common carrier must know that one making a journey will need certain articles of personal use during the journey and at its end, and is chargeable with notice of the nature, character, and value of such as is usually so taken, so far as notice is necessary to fix the liability of the carrier. It appears that the carrier must take notice of the class to which the traveler belongs, and the nature and object of the journey, and, this being true, it follows, as a matter of common knowledge, that the carrier will know in a general way the character, quantity, and value of the baggage which such travelers generally carry on such a journey. Having this knowledge, the carrier will know in advance what should be the measure of its care in the protection of the baggage, and the measure of its liability in case of its loss. It follows, logically, that whatever articles would not come within the definition of baggage in a particular case, either in their nature, quantity, or value, the carrier could not be held to have foreknown, and it would be unjust to hold it to a responsibility which it had not undertaken. Whatever is baggage the carrier impliedly contracts to carry safely; what is not baggage is not within the implied contract.

From what we have said, the error of the court becomes apparent. In submitting the issue to the jury, the question whether the articles lost were such as are carried by passengers of such a class upon such a journey, according to the habits and customs of such passengers, was eliminated. Under the definition given by the trial court, a mechanic might take as baggage anything in the way of tools and appliances, and in any quantity from a steel tape measure to a ponderous piece of machinery, if only it appears to have been necessary to the use of the particular passenger at the end of the particular journey, without reference to value, quantity, or any other consideration. We think the court might charge, as matter of law, that the tools of a mechanic, if reasonable in quantity, and of a character which such mechanics usually carry on such a journey for their personal use at their destination, are baggage, but the question whether in char-

acter, quantity, and value they come within the definition of baggage, are questions which must be determined by the jury. 3 A. & E. Ency. Law, p. 538; Railroad v. Morrison, supra, and authorities cited. We think the court erred also in assuming, as matter of law, that all the clothing in the trunk came within the definition of baggage. Considering the fact that the journey was short and the season summer, the presence of heavy winter clothing presents the issue of whether or not under all the facts, it came within the definition of baggage.

Inasmuch as, according to plaintiff's own statement of the case, the carrier's liability as insurer ceased before the trunk was demanded, the question whether the alleged lost articles were technically baggage is important only in determining the carrier's liability as bailee, if the jury should find the trunk was not delivered. The fact that the shipment ultimately became a mere bailment was an incident of and grew out of the original contract of carriage. No article would be a legitimate part of the bailment which would not have constituted a liability if lost while it retained its character as baggage in transit. The rigor of the rule which held the carrier as an insurer was relaxed because of the delay of the owner in demanding his own. It would be inconsistent and illogical to hold that the carrier was liable for greater value or greater quantity of goods as a warehouseman than as a carrier. Whatever in amount would have been the carrier's liability, would be the measure of the warehouseman's liability. For the appellant had the right to suppose that the things constituting the bailment came within the definition of baggage, and called only for such care as such things required, the difference being that while occupying the relation of carrier the liability was that of insurer, whereas, in the case as it stands, the liability grows out of negligent loss of the goods.

We conclude, therefore, that the contention of appellee to the effect that, whatever may have been the liability of the appellant as carrier, the liability as warehouseman (negligence being shown) was unlimited, cannot be sustained.

The issues presented by other phases of the case were correctly submitted.

For the reasons given, the judgment is reversed and the cause remanded. Reversed and remanded.

AMERICAN FIRE INS. CO. OF NEW YORK v. BELL.

(Court of Civil Appeals of Texas. June 10, 1903.)

FIRE INSURANCE—VALUE OF PROPERTY—VOID APPRAISEMENT—WAIVER OF REAPPRAISEMENT—PROPERTY INSURED—HARMLESS ERROR.

1. Under a fire policy providing that, in case of disagreement as to the amount of loss, the same shall be ascertained by appraisers, etc.,

the appraisers have no authority to refuse to appraise property claimed by the insured to have been destroyed, and an appraisal omitting such items is void.

2. Where appraisers made a void appraisal, the company, by insisting that it was valid, waived its right to another appraisal.

3. A fire policy on the furniture, chairs, gas apparatus, pictures, paintings, "instruments, appliances, and material incidental to a dental office," does not include dental books.

4. Where, in a suit on a fire policy, the jury was erroneously allowed to consider the value of certain books destroyed, and not covered by the policy, and there was a dispute as to the value of other articles, the error in allowing the jury to consider the value of the books could not be considered harmless.

Appeal from District Court, Galveston County; Wm. H. Stewart, Judge.

Action by H. M. Bell against the American Fire Insurance Company of New York. From a judgment for plaintiff, defendant appeals. Reversed.

Finley & Knight and F. M. Etheridge, for appellant. Marsene Johnson, for appellee.

FLY, J. Appellee instituted this suit to recover the sum of \$1,200, alleged to be due by reason of the destruction by fire of certain property insured by appellant against loss by fire. A trial by jury resulted in a verdict and judgment for appellee for the amount claimed.

Appellee is a dentist, and on April 25, 1901, the following property belonging to him was insured by appellant against loss by fire: "Office and sitting-room furniture, dental chairs, gas apparatus, vulcanizers, electric motors, screens, pictures, paintings and their frames, at not exceeding cost, ornaments, instruments, appliances and material incidental to a dental office, while contained in the two-story brick composition roofed building, occupied for mercantile purposes and offices, situated on lot No. 10, of block No. 560, in the city of Galveston, Texas." Concurrent insurance in the sum of \$4,800 was permitted by the policy, and was placed on the property by appellee. On the night of August 3, 1901, the property described was destroyed by fire. Demand was made upon appellant for the payment of the loss, which was refused. Appellant having disagreed with appellee as to the amount of the loss, the question as to amount of the loss was submitted to two appraisers. The award was not agreed to by the appraiser appointed by appellee, and the other appraiser and the umpire agreed on a certain award, which found the total loss to be \$895, and appellant's proportion thereof \$179. We find that the appraisers refused to estimate the value of numerous articles. The language of the policy as to appraisal is as follows: "In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company

each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire." The appraisers also attempted to determine what articles were covered by the insurance policy, and arbitrarily refused to value certain articles because they did not believe that appellee had such articles, although he had sworn he had them.

It is the contention of appellant that, when an appraisal is had under the provisions of the insurance policy, the award of the appraisers is binding upon both the assured and the insurer, and is only subject to attack on the ground of fraud, accident, or mistake, or incompetency of the appraisers. The terms of the policy clearly indicate the powers conferred and the duties imposed upon the appraisers. Their only duty was to value property which the insured claimed to have been destroyed by fire. They have no judicial powers conferred upon them which would authorize them to determine whether a piece of property was included in that named in the policy, nor did they have authority to decide what property was destroyed, and refuse to appraise certain articles that they did not believe had been destroyed. The appraisers in this case, however, not only assumed the authority to decide what property was included within the terms of the policy, and to reject the claims of appellee as to the destruction of his property because they did not believe he had such property, but they went further, and refused to appraise certain instruments because they did not know what they were, and because they concluded that articles were included that could not have been consumed by the fire, and rejected other items because no fragments or remnants were left by which they could be identified. They also refused to appraise one article because it had a chattel mortgage on it. The appraisers usurped authority that can appertain only to courts or a board of arbitrators with full powers, and their action was binding upon no one. They were appointed to appraise property, and they failed and refused to do it, and their imperfect unauthorized award is claimed to have all the sanctity and force of the judgment of a court of justice. There was no appraisal, in the terms of the policy, and it bound no one. In the case of *Adams v. Fire Ins. Co.*, 51 N. W. 1149, the appraisers rejected and refused to appraise certain property because not included in the policy, and the Supreme Court of Iowa held:

"Clearly, the appraisers were not authorized to exercise their judgment as to what was or was not included within the policy. That was a matter the parties themselves had already determined by the terms of the submission, and the schedule which was placed in the appraisers' hands. They were to appraise certain articles. They only appraised a part of them, and they undertook, without a shadow of authority, to determine that certain articles were not covered by the policy. * * * The law is well settled that an award will be set aside for such material mistakes and errors as prejudice either party, and it will also be set aside if the arbitrators omit to consider matters which were submitted to them." The list of the property made out by appellee, and which he claimed was destroyed, was the only one presented to the appraisers, and, by the very terms of their oaths, they were to make an award "as to loss and damage to such property of Dr. H. M. Bell as was alleged to have been covered by the policy of said company." The property "alleged to have been covered by the policy of said company" was that included in the affidavit of loss made by appellee. They had no other list of property, and refused to be guided by that, and appraised only the articles they deemed should be included in the policy on a dentist's office. The award of the appraisers, not being one authorized by the policy or the terms of the submission, was null and void, and it follows that all errors assigned in connection with charges concerning the award can have no interest or pertinency in the consideration of the case. However erroneous the charge may have been on that subject, it could not have affected the result.

Appellant presents this case as though the policy required, and the parties had fully submitted to, an arbitration of the points of difference between them. But no such case is presented by the record, but it is a case of the appointment of appraisers; that is, persons appointed and sworn to estimate and fix the value of certain goods embraced in a certain schedule. The duties imposed upon them were few and simple, and no authority can be cited that holds that the award of simple appraisers in the construction of the contract embodied in a policy of insurance is binding upon any one. It is not held that appraisers are bound down to strict rules as to the manner of performing their duties, but that they cannot exceed the authority confided to them by the terms of the policy or instrument of submission. It may be true that an appraisal was a condition precedent to a recovery, but the condition does not clothe appraisers with judicial powers.

Appellant has cited the case of *Caledonian Ice Co. v. Traub* (Md.) 35 Atl. 13, as sustaining its contention in regard to the award of the appraisers. In that case the apprais-

er for the insured, after some progress had been made in the appraisal, withdrew, just as the appraiser for the insured in this case did, and refused to have anything further to do with the work, and the work of appraisal was completed by the other appraiser and the umpire, just as was done in this case. The Maryland Court of Appeals held that the appraisal by the one appraiser and umpire was null and void, and held that if the act of the appraiser in withdrawing was without good reason, and was caused by the procurement of the insured, the latter could not recover. If we apply that principle to this case, there was no appraisal, and the question as to whether there was good reason for the withdrawal was a question to be submitted to a jury, unless the evidence was such that a court could assume that it was reasonable. We think the validity of the reason for withdrawal is so apparent that it did not involve any question worthy of submission to a jury.

There is no merit in the argument that, if the award was void, appellant is entitled to another. By standing on the validity of the one made, it has waived a proper and valid appraisal. *Phoenix Ins. Co. v. Moore* (Tex. Civ. App.) 46 S. W. 1131; *Adams v. Ins. Co.*, above cited.

In the list of articles shown to have been destroyed were included 360 dental books, alleged to have been damaged in the sum of \$800, and appellant asked that a charge be given that appellee could not recover for that item, because not included among the property enumerated in the policy. The truth of the affidavit of loss was sharply contested, and circumstances were in proof tending to show that articles had been included that were not possessed by the insured, and that very high values had been placed on most of the articles; and, under that state of case, it was error to permit any article to be considered by the jury which was not included in the property named in the policy. Dental books may be, and doubtless are, very necessary to the proper operation of dental offices, but they cannot be classed as furniture, chairs, gas apparatus, vulcanizers, electric motors, screens, pictures, paintings, "instruments, appliances and material incidental to a dental office." The word "appliances" is very comprehensive in its meaning, but it has never been so broadened and expanded as to comprehend books, and the close conjunction in which it is used with the word "material" shows clearly that it has reference to mechanical appliances, in connection with which the word is generally used.

It is argued by appellee that, if the court did err in not excluding improper articles from the jury, no injury was inflicted, because the other articles more than covered the insurance. That argument is untenable, because the value of many other articles was contested, and it cannot be ascertained

what articles were accepted and what rejected by the jury. It may be that the value of many other articles was not considered or was cut down by the jury, and the amount of the verdict depended on the value of the books.

As to the electric fans and other articles asked to be excluded, it may be stated that there was testimony tending to show that they might be properly included with the articles insured, and it was not error to refuse to instruct the jury not to consider them.

The policy provided that each party should pay the expense and compensation of his appraiser, and an inquiry into the compensation paid to Dr. Patton by appellant was not justified by the facts and circumstances of the case. While the testimony showed that he had very broad and comprehensive ideas about the powers confided in him, there is no evidence of his being actuated by improper motives.

We do not think any of the other errors of which complaint is made are material, and a number of them are not likely to occur on another trial.

For the errors indicated, the judgment is reversed and the cause remanded.

CITY OF PALESTINE v. ADDINGTON.

(Court of Civil Appeals of Texas. June 10, 1903.)

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS—INJURIES TO PEDESTRIANS—CONTRIBUTORY NEGLIGENCE—APPEAL—ASSIGNMENTS OF ERROR.

1. In an action against a city for injuries caused by a defective sidewalk, it is for the jury, and not the court, to decide whether plaintiff's failure to look in the direction he was walking constituted negligence or not.

2. An assignment of error that the court "erred in overruling defendant's motion for a new trial" is too general to be considered on appeal.

Appeal from Anderson County Court; G. W. Hudson, Judge.

Action by W. M. Addington against the city of Palestine. From a judgment for plaintiff, defendant appeals. Affirmed.

P. W. Brown and R. G. Brashears, for appellant. Gregg & Brooks, for appellee.

NEILL, J. The appellee sued appellant to recover damages for personal injuries sustained by reason of the latter's negligently maintaining a defective sidewalk. The defense plead was contributory negligence caused by appellee's intoxication at the time of his injury. The case was tried before a jury, and the trial resulted in a judgment in favor of appellee for \$300.

The evidence is sufficient to show that the appellee, while in the exercise of ordinary care, and not intoxicated, in walking along

a sidewalk of one of the streets of the city of Palestine, stepped into a hole which the city had negligently allowed to be and remain in the sidewalk, fell, broke his arm, and sustained other personal injuries, to his damage in the sum found by the jury.

There was no error in the court's sustaining appellee's third exception to appellant's answer, because appellee never pleaded the loss of position, or his inability to get work, as an element of damage; and the part of the answer to which the exception was sustained constituted no defense to the action, nor any ground for mitigation of the damages alleged.

If special charge No. 2 requested by appellant had been given, the jury would have been required to find against the appellee, if they believed his failure to look in the direction that he was going contributed to his fall and injury, regardless of the question as to whether such failure on his part constituted negligence. It would have been tantamount to saying that the failure of one, while walking along a sidewalk, to look in the direction he was going, constitutes negligence, as a matter of law. It was for the jury to say, and not the court, whether such fact constituted negligence on the part of the appellee.

Appellant's third assignment, which is, "The court erred in overruling defendant's motion for a new trial," is too general to be considered.

The judgment is affirmed.

FREEDMAN v. VALLIE et al.

(Court of Civil Appeals of Texas. June 6, 1903.)

GUARDIAN AND WARD—LIABILITY OF SURETY—GUARDIAN'S MANAGEMENT OF ESTATE.

1. The surety on a bond of a guardian of two wards is not bound for any misapplication of the estate by the guardian prior to the execution of bond, further than that, the estates of the wards being administered jointly, and the state of the accounts as between them being manifest from an inspection of the record, the liability of the surety to each ward is for the share of each in the funds then on hand; and where the interest of the wards is originally equal, and the charges as to each appear from the reports and vouchers filed, the surety must be deemed to have contracted with reference to such conditions.

2. A surety on a guardian's bond is not liable for interest that the guardian could have realized by loaning the ward's money before the execution of the bond.

3. A guardian of two wards equally interested in the estate cannot lawfully expend more than half of the estate for one of them, and this his surety is presumed to know.

4. An action against a surety on a guardian's bond is barred in two years after the ward attains his majority.

5. A guardian may not, without leave of court, use the corpus of the ward's estate for his maintenance.

6. A guardian failing to lend the ward's money is liable for 10 per cent. interest, if by ordinary diligence he could have made the loan.

¶ 1. See *Municipal Corporations*, vol. 36, Cent. Dig. 1678, 1756.

¶ 5. See *Guardian and Ward*, vol. 36, Cent. Dig. § 120.

7. The fact that a guardian loaned to himself a part of the ward's estate did not pass the same out of his hands as guardian, nor affect the liability of the surety on his bond.

8. The fact that a guardian loaned the ward's money without leave of the court did not relieve the guardian or his surety from responsibility therefor.

9. A surety on a guardian's bond is not liable for interest after the death of the guardian until the ward demands a settlement from the surety.

10. A surety on a guardian's bond is not entitled to credit for attorney's fees for making the report after the guardian's death, nor for costs of the guardian's personal suit on a liquor dealer's bond.

11. The share of the estate of one ward cannot be diminished by guardian's commissions on disbursements made on account of the other ward.

Appeal from District Court, Navarro County; L. B. Cobb, Judge.

Action by Arthur Vallie and another against S. S. Freedman. From a judgment for plaintiff Arthur Vallie, defendant appeals. Affirmed.

Shakins & Mays, for appellant. H. L. Stone and W. J. Weaver, for appellee.

BOOKBOUT, J. In about February, 1891, Wm. Vallie died, leaving a life insurance policy for \$1,000, in which his brothers, Frank and Arthur, aged 15 and 12 years, respectively, at the time of his death, were named as beneficiaries. On February 24, 1891, Peter Vallie, the father of said minors, was appointed receiver of their estates, and at the August term thereafter submitted his report. On August 24, 1891, he was appointed and qualified as guardian and returned into court an inventory of the said estate. On November 28, 1892, he filed his account as such guardian, and entered into a new bond with W. R. Bright and S. S. Freedman as sureties, which bond was approved by the court on December 8, 1892. Peter Vallie continued said guardianship, but without filing any reports or accounts, until his death, in about February, 1895; and at the May term thereafter, final report was filed in behalf of W. R. Bright and Steve Elkins, purporting to be sureties upon the bond, and as representatives of the guardian, by attorneys, which, after due notice, was "examined and approved," and by order entered August 28, 1895, the guardianship was declared closed and the sureties discharged. Suit was instituted December 15, 1900, in the county court, and on September 19, 1901, this suit was filed in the district court, and certiorari granted to the county court for transcript of the proceedings relating to said estate, for revision and correction of the errors therein. Defendant's plea in abatement and to the jurisdiction of the court, as well as the general and special exceptions, having been overruled, the cause was tried before the court October 20, 1902, and judgment rendered in favor of plaintiff Arthur Vallie for \$412.06. Defendant's motion for a

new trial was overruled, and he excepted, and has perfected an appeal to this court.

There is no statement of facts in the record. The case was tried by the court without the intervention of a jury, and the court filed conclusions of fact as follows:

"(1) One William Vallie, having insured his life in the sum of \$1,000 for the benefit of the plaintiffs, in equal shares, died in 1891. The plaintiffs were then minors, and their father, Peter Vallie, was appointed receiver of their estate, and as such collected the policy, paid out of the same \$100, attorney's fees; \$58.50, burial expenses of the deceased; \$4 for Arthur, and \$141.68 for Frank; leaving in his hands August 27, 1891, the sum of \$695.82.

"(2) At the August, 1891, term, Peter was appointed guardian of the estates of his two sons, made bond in due time, and filed an inventory showing an estate, in money, of \$695.82. November 28, 1892, he filed an account showing disbursements of said funds, for costs and attorney's fees, \$18.75, and commissions, \$67.22, and for Frank's account, \$21.80, and leaving a balance of \$588.05. And on December 8, 1892, he made a new bond, with W. R. Bright and S. S. Freedman sureties, in the sum of \$1,200.

"(3) From the beginning of the receivership to the making of his last bond, Peter had paid out, in costs, expenses, fees, and commissions, \$244.47; on Frank's account, \$163.48; and on Arthur's account, \$4; leaving the said balance, \$588.05—and had charged no interest against himself. Of this sum, charging each minor one-half the common charges and commissions for disbursing same, and his individual account, with commissions thereon, the share of Frank was \$214.29, and of Arthur \$373.76. None of the aforementioned disbursements were authorized by the court or approved, nor were the reports approved.

"(4) The charge of \$100 attorney's fees was excessive. Fifty dollars would be a reasonable fee. The charge for burial was authorized under the terms of the policy. The guardian ought to have debited himself with one year's interest at 10 per cent on the \$695.

"(5) The guardian died in February, 1895. Between the making of the last bond and his death he had, without authority, appropriated, or as he called it, loaned to himself, \$50, and loaned to one La Bonny \$50; had expended for Frank \$263.60, as to \$225 of which he had the court's order, and for Arthur \$88.85, and improperly used \$92.55 in paying costs in his own suit on liquor dealer's bond; leaving out of the \$588.05, not counting interest, \$48.05.

"(6) He never asked for nor had an order to lend the money. He could have loaned it at 10 per cent. for one year between the first and second bond, and 2 years between second bond and his death, had he used ordinary diligence. He did not use such diligence.

"(7) Taking Frank's share of the above \$588.05, to wit, \$214.29, with interest, and deducting the \$225 spent for him by leave of the court, as per order made August 30, 1893, together with 5 per cent. commissions for disbursing the same, his share of the estate was exhausted at the death of the guardian.

"(8) Arthur's share is charged with no more of the above \$83.85 than will be discharged by the 2-years interest on the above \$373.76, for the reason that the guardian had no order of the court to use the principal. His share, with 6 per cent. interest per annum since suit in the county court was begun, is \$412.60.

"(9) After the guardian's death, his sureties, or, rather, his attorney, acting for them—by what authority does not appear—filed an account showing a balance due the guardian of \$4.40; and this was approved by the county court August 28, 1895, and an order made discharging the sureties.

"(10) This account was erroneous, in that it made no distinction between the estates of the two wards; in that it did not charge the guardian with the \$100 he had used and loaned to La Bounty; in that it charged the estate with \$92.55 paid in court costs in his personal suits not connected with the guardianship; in excess of commissions, \$24; and in failure to charge the guardian with interest; and altogether, as to Arthur, in the whole sum of \$373.76 then due him.

"(11) Frank Vallie reached his majority May 20, 1897; and Arthur, February 6, 1900.

"(12) Plaintiffs filed a petition to review the orders in the guardianship December 15, 1900, in the county court, and began this suit September 19, in this court.

"Upon defendant's motion for additional findings of fact, I find that on December 15, 1900, plaintiffs instituted their action in the county court against these defendants to review the proceedings in the guardianship, and to recover judgment against the surety—in effect, the same action as in this court. I further find that after the suit was begun in the district court, and on September 16, 1902, a writ of certiorari from the district court to the county court was sued out, bringing the entire proceeding set up in the county court into this court for trial; that such action in the county court was not tried therein, nor dismissed, but brought into the district court; that such proceeding in the county court imposed an unnecessary cost; and that the extra cost thereby incurred has been paid by plaintiffs since the trial here."

Upon the above facts the court filed the following conclusions of law, to wit:

"(1) The surety on the bond made December 3, 1892, is not bound for misapplication of the funds made by the receiver or the guardian prior to that date, further than that the estates of the two wards being administered jointly, and the state of accounts as between them being manifest from an inspection of the record, the liability of the sure-

ty to each of the wards was for the share of each in the funds then on hand; and the interest of the two wards being originally equal, and the charges as to each minor appearing from inspection of the reports and vouchers filed before the making of said bond, the surety is deemed to have contracted with reference to such conditions, and to have known the share of each in the \$588.05.

"(2) The said surety is not liable for interest that could have been realized on loan of the money before December 3, 1892.

"(3) The guardian could not lawfully expend more than half of the estate for one of the wards, and this the surety is presumed to know.

"(4) The action of Frank Vallie is barred by the statute of two years allowed for the review of proceedings in probate after the attaining of majority.

"(5) The guardian may not, without leave of the county court, use the corpus of the ward's estate in his maintenance.

"(6) The guardian who falls, when by ordinary diligence he could, to lend the ward's money, is liable for ten per cent. per annum interest.

"(7) Lending the \$50 to himself did not pass the same out of his hands as guardian, nor affect the liability of his surety.

"(8) The loan to La Bounty without the leave or approval of the court did not relieve the guardian, nor his surety, from responsibility therefor.

"(9) The defendant surety is not liable for interest after the death of the guardian until the demand was made on him by plaintiffs, which was made by the filing of the action in the county court. From that time he is liable for 6 per cent. per annum.

"(10) Defendant is not entitled to credit for the attorney's fee charged for making the report after guardian's death, nor for costs of the guardian's personal suit on liquor dealer's bond; nor can Arthur's share of the estate be diminished by guardian's commissions on disbursements made on Frank's account."

"I conclude, as a matter of law, that there was no suit pending in the county court when the case came on for trial in the district court; that, even if mistaken on that point, the suits were not identical, for that whereas the county court, as a court of probate, could review the proceedings in guardianship, it could not, as such, award judgment against the surety; and while the county court, as a court of civil jurisdiction, could try the case against the surety, it could not, as such, review the proceedings in guardianship, and render judgment against the defendant surety. I find, however, that plaintiffs ought to pay the costs unnecessarily incurred in filing the suit in the county court."

We have carefully considered the several assignments presented in appellant's brief, some of which attack the trial court's rulings on the pleadings, and others the conclusions

of law as found by the said court. We are of the opinion that same fall to point out any reversible error, and hence they are overruled. We are also of the opinion that appellee's cross-assignments presented in his brief are not well taken.

We think the learned trial judge arrived at the correct conclusion, and pronounced the proper judgment. We adopt his conclusions of law as the opinion of this court, and the judgment is affirmed. Affirmed.

SONKA v. SONKA.

(Court of Civil Appeals of Texas. June 10, 1903.)

LIBEL AND SLANDER—TRIAL—INSTRUCTIONS—REPETITION OF ISSUES—CONFLICTING INSTRUCTIONS—DAMAGES—PREPONDERANCE OF EVIDENCE—REVERSAL.

1. A repetition in the instructions of the rule as to preponderance of the evidence, and the application of it to different phases of the case, are not erroneous, as tending to mislead the jury.

2. In an action for circulating slanderous reports about plaintiff's wife, an instruction to find for defendant if the jury failed to find that he used the language as alleged is not misleading, because in conflict with a further instruction to find for plaintiff if the names were applied to his wife without the prefix of adjectives used in the petition.

3. In an action for circulating slanderous reports about plaintiff's wife, an instruction that the jury cannot find any damages not alleged and proved, and there can in no event be any recovery for loss of time or sickness not both alleged and proven, is not erroneous, as limiting recovery to such damages as plaintiff had alleged and proved in connection with loss of time and sickness.

4. A mere preponderance of the evidence against the verdict will not authorize a reversal, as the verdict must want the support of evidence sufficient to maintain it, to require reversal.

Appeal from District Court, Guadalupe County; M. Kennon, Judge.

Action by Joseph Sonka against Anton Sonka. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Dibrell & Mosheim, for appellant. W. R. Neal, for appellee.

FLY, J. The appellant instituted this suit to recover damages of appellee alleged to have accrued through slanderous reports circulated by appellee about the wife of appellant. A trial by jury resulted in a verdict and judgment for the appellee. The evidence as to the utterance of the slanderous words was conflicting, but, in deference to the verdict, we conclude that the slanderous words were not spoken by appellee.

The first assignment presents as error the charge of the court on the question of the amount of proof required of appellant, in that it was four times stated in the charge that appellant could only recover upon a preponderance of the evidence. In the first paragraph of the charge it was stated: "The

burden is upon the plaintiff to establish by a preponderance of the evidence all the allegations of his petition substantially as alleged." In the third section the jury were told that "damages must be proven by a preponderance of the evidence," and that the jury should find for appellee if they failed "to find from a preponderance of the evidence that he used the language as alleged." Again in another section the jury were informed that they could not find for damages from loss of time or sickness not "proven by a preponderance of the evidence." It is not the contention of appellant that the instruction on the preponderance of the evidence was not a correct legal proposition, but that the proposition was repeated so often that it was calculated to mislead the jury. It is undoubtedly true that repetition of the presentation of an issue may give such undue prominence to it as would necessitate a reversal of a judgment, if it reasonably appeared that the repetition prejudiced the cause of appellant. No issue was emphasized by the charge as to preponderance, but it was merely a general statement of the rule as to the preponderance of proof, and an application of it to the different phases of the case. As said by the Supreme Court in *Ratto v. Bluestein*, 84 Tex. 57, 19 S. W. 338: "It is only where the repetition of instructions gives undue prominence to one phase of the case, and such prominence is calculated to prejudice a party by inducing the jury to believe that the issue presented is the controlling one, that such additional instructions are objectionable." The principle reiterated was an abstract one as to the quantum of proof required of a plaintiff, and was not the application of a principle of law to disputed facts, and it could not have been instrumental in causing the jury to decide against appellant. *Railway v. Larkin*, 64 Tex. 454.

It is contended that the charge that the jury should find for the appellee if they failed to find that "he used the language as alleged" is in conflict with another part of the charge, where the court told the jury they might find for appellant if the names were applied to appellant's wife without the prefix of adjectives used in the petition. The charge complained of was followed by the charge which made proof of the epithets without the adjectives sufficient to establish the case, and it is not reasonable to suppose that the jury was misled by the first charge. In one part of the petition the name applied to appellant's wife was given without any qualifying or descriptive words.

The court charged the jury as follows: "You are further instructed that, if you find for plaintiff, you cannot find any damages for him not alleged and proved. There cannot, in any event, be any recovery for loss of time or sickness not both alleged and proven by a preponderance of the evidence." Appellant claims that the charge is not a correct enun-

ciation of the law, because it limited appellant's recovery to such damages as he had alleged and proved in connection with loss of time and sickness. We do not think the charge is open to that construction. It merely informed the jury that damages must be predicated on allegation and proof, and that in no event could damages arising from loss of time or sickness be recovered, unless supported by allegation and proof. If the latter part of the charge could have improperly influenced the jury, it might have been that it would cause them to believe that while it was important that damages for loss of time and sickness should be alleged and proved, in order to justify a recovery, it was not so essential as to other damages. We do not think there is any cause for complaint as to the charge.

The fourth assignment of error insists that the verdict was against the great preponderance of evidence. In the Larkin Case, above cited, the Supreme Court said: "That the preponderance merely of evidence is in favor of the defendant in regard to the alleged defects in the hand car, or as to whether the accident resulted from such, does not furnish a rule to the Supreme Court for setting aside the verdict after a new trial has been refused in the court below. The rule ordinarily applied in such cases is that the verdict must want the support of evidence sufficient to maintain it—there must be such a want of evidence as would fail reasonably to satisfy the mind in favor of the conclusion of the jury." *Wagoner v. Ruply*, 69 Tex. 700, 7 S. W. 80.

The judgment is affirmed.

BLUNTZER v. HIRSCH.

(Court of Civil Appeals of Texas. June 4, 1903.)

PARTNERSHIP—SETTLEMENT—RIGHT OF ACTION—SUFFICIENCY OF PETITION—LIMITATIONS—DEMURRER.

1. An amended petition, in an action by one partner against his copartner for the settlement of the accounts of a copartnership for dealing in cattle, stated that of the cattle purchased some were sold and the balance died, and gave the date of the last sale, and then averred that it was not known to either partner that all the cattle had either died or been sold until more than a year after the last sale. *Held* to show that the last transaction in which the parties were interested was the mentioned sale, and that limitations commenced to run at that time.

2. It was further averred that up to a given date several years after the last sale, and up to the time of the action, there had not been any settlement of the partnership, and that the partnership continued in force to the date mentioned. *Held* a mere conclusion of the pleader.

3. A general demurrer setting up the plea of limitations to an action goes to the entire petition, and should be sustained if it appears from the facts alleged that the action is barred, though special exceptions addressed to particular allegations may not be well taken.

Appeal from District Court, Nueces County; Stanley Welch, Judge.

Action by N. Bluntzer against D. Hirsch. Pending trial, both plaintiff and defendant died, and Justina Bluntzer and Olivia B. Hirsch were substituted as plaintiff and defendant respectively. From a judgment for defendant, plaintiff appeals. Affirmed.

D. McNeill Turner, for appellant. G. R. Scott and J. B. Wells, for appellee.

GARRETT, C. J. This action was commenced in the district court of Nueces county March 28, 1898, by N. Bluntzer against D. Hirsch, for the recovery of the plaintiff's alleged share of the profits of a joint enterprise or partnership for the purchase and marketing of beef cattle. On April 13, 1898, the defendant filed his original answer, consisting of a general demurrer and general denial. The cause was continued from term to term until the November term, 1902, when Justina Bluntzer filed, in writing, a suggestion of the death of N. Bluntzer and of D. Hirsch, and prayed to be permitted to prosecute the suit as survivor of the community estate of herself and her deceased husband, N. Bluntzer, and for *scire facias* to Olivia B. Hirsch, as independent executrix of D. Hirsch. The proper order was made by the court, and the said Justina Bluntzer and Olivia B. Hirsch were substituted on the record as plaintiff and defendant respectively.

On November 27, 1902, the plaintiff filed her fourth amended original petition, and the defendant pleaded limitation by demurrer to the cause of action set up therein. The court sustained the demurrer, and rendered judgment in favor of the defendant. The cause of action set out in the petition was that on or about May 1, 1888, the said N. Bluntzer and the said D. Hirsch entered into a parol agreement of partnership for the purchase and sale of beef cattle for their mutual profit and advantage; that no time was fixed for the duration of said partnership; that by the terms thereof Hirsch agreed to furnish the money for the purchase of beef cattle, and for carrying on said copartnership, to the extent of and not to exceed \$10,000, and Bluntzer agreed to buy the cattle, and to handle, manage, and care for the same, and to pasture them, during the continuance of the business, and to market and sell the same whenever it might appear advantageous so to do, and return to Hirsch an account of sales thereof; that the profit in the business was to be divided between the parties equally for "ones" and "twos," and, for "threes and ups," two-thirds to Hirsch and one-third to Bluntzer. It was alleged that under said agreement Bluntzer purchased, for the joint account of himself and Hirsch, from divers persons, 506 head of steer or beef cattle for the aggregate amount of \$3,457.75, all of which was paid by said Hirsch. An itemized statement thereof showed that the purchases were all made during the months of July, August, and September, 1888. It was

further alleged that the said Bluntzer had-
 died, managed, and cared for and pastured all
 of said cattle, and from time to time ship-
 ped and marketed 360 head thereof, and real-
 ized from the sales thereof the sum of \$6,
 124.28, all of which, in accordance with the
 terms and conditions of the partnership
 agreement, was returned to and deposited
 with said Hirsch by said Bluntzer to the
 credit of their joint account. An itemized
 account of sales was set out, which showed
 that the sales were made on sundry dates
 from April 15, 1889, the first sale, to May 2,
 1893, the last sale; and it was alleged that
 of the profits of said copartnership the said
 Bluntzer was entitled to receive sums aggre-
 gating \$1,292.52. The petition proceeded as
 follows: "Plaintiff further represents that
 the balance of said beef or steer cattle, to
 wit, 146, died, owing to the severe droughts
 prevailing during the years 1890, 1891, 1893,
 and 1894, and through no fault on the part
 of said N. Bluntzer, and that no profit was
 realized therefrom. That in compliance with
 his said contract of copartnership, her hus-
 band, the said N. Bluntzer, rendered and re-
 turned to said D. Hirsch true and correct ac-
 counts of all sales of said steer or beef cattle,
 as made by him, immediately after same
 were made, and that same were returned to
 said D. Hirsch at the times the moneys real-
 ized from the said sales thereof were re-
 mitted to and deposited with him as herein-
 before alleged. Plaintiff further represents
 that prior to the 1st day of August, 1894, it
 was not known to either the said D. Hirsch
 or the said N. Bluntzer, and could not have
 been earlier ascertained by them or either of
 them, that all the steer cattle purchased by
 them under their said contract of copartner-
 ship had been theretofore disposed of, or
 had died; and that up to the 1st day of Au-
 gust, A. D. 1897, there had never been, and
 up to the present time there has not been,
 any settlement of said copartnership business
 between the said D. Hirsch and the said N.
 Bluntzer; and that the said partnership
 agreement continued as an existing copart-
 nership between them up to the 1st day of
 August, 1897, when for the first time the said
 D. Hirsch disputed or denied the terms of
 said contract as herein pleaded, or the said
 N. Bluntzer's right to his share of the profits
 of the cattle venture as hereinbefore set out.
 Plaintiff further shows that the dealing be-
 tween the said N. Bluntzer and the said D.
 Hirsch with respect to their cattle copart-
 nership never ceased until about the said 1st
 day of August, 1897. Wherefore plaintiff
 prays for judgment for the said sum of \$1,
 292.52, and interest thereon from August 1,
 1897, at 6 per cent. per annum, and for costs
 and general relief."

The facts alleged in the petition do not
 take the plaintiff's cause of action out of the
 bar of the statute of limitation against ac-
 tions by one partner against his copartner
 for a settlement of the partnership accounts.

The cause of action in such case is consid-
 ered as having accrued on a cessation of the
 dealings in which they were interested to-
 gether. Rev. St. 1895, art. 3356 (3). It
 appears from the petition that the last trans-
 action in the dealings in which the parties
 were interested was the sale of 32 head of
 cattle to Chittim & Co., May 2, 1893. The
 averment that prior to August 1, 1894, it was
 not known to either Hirsch or Bluntzer, and
 could not have been ascertained earlier by
 them or either of them, that all of said cattle
 had been disposed of or had died, is not an
 averment that the dealings between them
 had not ceased prior to that time, especially
 so since it had been previously alleged that
 the remnant of the cattle had died owing to
 the severe droughts during the years 1890,
 1891, 1893, and 1894. The averment that the
 agreement continued as an existing partner-
 ship until August 1, 1897, is dependent upon
 the averment that up to that time and up to
 the present time there had never been any
 settlement of said copartnership business,
 and it is consequently a mere conclusion of
 the pleader. The exception setting up the
 plea of limitation goes to the entire petition,
 and, if it appears from all the facts alleged
 that the cause of action is barred, the plea
 should be sustained, notwithstanding the fact
 that special exceptions addressed to particu-
 lar allegations may not be well taken.

There was no error in the judgment of the
 court below and it will be affirmed. Affirm-
 ed.

BEAUMONT IMP. CO. v. CARR et al.
 (Court of Civil Appeals of Texas. June 8,
 1903.)

APPEAL—RECORD—ERRORS REVIEWABLE
 —ABSENCE OF FACTS—FINDINGS—
 TIME FOR FILING.

1. Where the record contains no statement of
 facts, such assignments as involve issues of
 fact, or are dependent on the status of the
 facts, cannot be considered on appeal.

2. Findings of fact filed after the expiration
 of the term of court at which the cause was
 tried cannot be considered on appeal for any
 purpose.

3. In trespass to try title, a certificate of
 acknowledgment in a deed which was set out
 in the petition could not be regarded, on appeal
 from a judgment for defendant, as proven,
 where the petition was met by a general denial
 from all defendants, and there were no facts
 or findings of fact in the record.

Error from District Court, Jefferson Coun-
 ty; J. D. Martin, Judge.

Action by the Beaumont Improvement
 Company against Clarinda Carr and others.
 Judgment for defendants, and plaintiff brings
 error. Affirmed.

Greer, Greer, Nall & Parker and F. J. &
 R. C. Duff, for plaintiff in error. F. G. Mor-
 ris and Greer & Minor, for defendants in
 error.

GILL, J. This suit was brought by plain-
 tiff in error, in the form of an action of

trespass to try title, to recover of defendants in error 56 acres of land near the northern limits of the city of Beaumont. The petition alleged, among other things, that the defendants were asserting some sort of claim to the land by reason of an alleged defect in a certificate of acknowledgment to a deed from Clarinda Carr to Joseph Hebert, under whom plaintiff in error claims. There was a prayer for the correction of the certificate. Defendant in error F. G. Morris answered by plea of not guilty, asserted title in himself to half the land, and asked that his title be quieted. He also pleaded limitation of four years against the prayer to correct the certificate. His answer did not disclose the nature or source of his title. The defendants in error Votaw and Collins answered as purchasers pendente lite from the heirs of Clarinda Carr, pleaded "Not guilty," and limitation of four years, and prayed that their title to a half interest in the land be quieted, both as against plaintiff and their codefendants. A trial before the court without a jury resulted in a judgment for defendants in error.

The record does not contain a statement of facts; hence such assignments as involve issues of fact, or are dependent upon the status of the facts, cannot be considered.

There appears in the record an agreement of the parties litigant whereby certain facts are admitted, and proof of them waived. It was contemplated that this should be used upon the trial in connection with the other evidence adduced. It is not made to appear in any proper way that it was so used, unless the purported findings of fact of the trial court may be properly taken into consideration, as the agreement as to facts is also embodied in them. The record does not show that there was a request presented to the judge for conclusions of fact and law, but there are in the record fact findings prepared and filed by the judge who tried the case. Their date indicates that they were actually prepared both before the end of the trial term of court, and before the expiration of the term of office of the judge who tried the case, but they were filed with the clerk of the district court after the expiration of the term of court and of the term of office of the trial judge. His successor had qualified and assumed control of the court prior to the filing of the conclusions. It is not necessary to the determination of this appeal that we should pass upon the power of the outgoing judge to file conclusions of fact and law after the expiration of his term of office. The other question presented is conclusive. Findings of fact filed after the expiration of the term of the court at which the cause was tried cannot be considered for any purpose. The fact conclusions of a trial judge are the basis of the judgment which he renders. They are analogous to a special verdict. The facts being found, the judgment follows as a matter of law. A trial court might so find the facts as to justify a judg-

ment for appellant, and erroneously render a judgment for appellee. In such a case, if the findings were not excepted to by appellee, the judgment would not only be reversed upon appeal, but judgment would be rendered for appellant, as an inevitable result of the unquestioned facts found. *Drake v. Davidson & Bailey*, 66 S. W. 889, 4 Tex. Ct. Rep. 380. It thus becomes apparent that the conclusions must be filed during the term. Otherwise the objecting party could neither record his objection, nor secure their amplification or correction. It follows, therefore, that the judgment of the trial court must be affirmed, unless appellant's contention be sound, to the effect that the pleadings present the controlling question, and that, as the ruling of the trial court upon that point was erroneous, a review of that ruling should reverse the judgment. The matter upon which this contention is based is the certificate of acknowledgment to the deed to Hebert. The form of this certificate is set out in the petition, but as the pleading was met by a general denial on the part of all the defendants, and as there are neither facts nor fact findings in the record, we cannot say the certificate was proven as alleged.

As the record stands, no reversible error is presented. The judgment is therefore affirmed. Affirmed.

SOUTHERN KANSAS RY. CO. OF TEXAS v. COOPER.

(Court of Civil Appeals of Texas. June 6, 1903.)

RAILROADS—DUTY TO FENCE TRACKS—STATION YARDS—INJURIES TO LIVE STOCK—NEGLIGENCE—DANGEROUS PLACE—QUESTION FOR JURY—INSTRUCTIONS—EVIDENCE—CONCLUSIONS OF WITNESS—DAMAGES.

1. In an action against a railroad for killing a mule while within defendant's station yard, where defendant was not required by law to fence its right of way, plaintiff must prove not only the killing, but that it was negligently done; but proof of any negligence of defendant proximately causing the injury would be sufficient.

2. The maintenance by a railroad of a place dangerous to stock, of a nature to induce them, on the passing of trains, to go across the track in an effort to escape the trains, is not negligence in law, but the jury is to determine from the surrounding circumstances whether it is negligence or not.

3. In an action against a railroad for killing a mule, it was error to permit witnesses to testify that the place where the mule was killed was "dangerous," and that it could be closed up by a fence constructed in a particular manner.

4. In an action against a railroad for killing a mule, a charge that, if the animal was killed at a point at which the railroad "had no right" to fence its right of way, then plaintiff must show negligence, etc., was improper, and should have been to the effect that if the animal was killed at a point where the railroad "was not required" to fence, then, etc.

5. In an action against a railroad for killing a mule, there is no occasion for a charge on the duty of fencing the right of way, if the evidence all shows the killing to have occurred

within the switch limits or station grounds of defendant in a town.

6. On the issue of damages for killing a mule, evidence that the animal was well broken and a good lead mule was admissible.

Appeal from District Court, Roberts County; B. M. Baker, Judge.

Action by J. R. Cooper against the Southern Kansas Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

H. E. Hoover and J. W. Terry, for appellant. L. C. Heare, for appellee.

SPEER, J. Appellee sued appellant and recovered judgment in the sum of \$75 for the value of a mule alleged to have been negligently killed by the railroad company.

The evidence shows that the animal was killed within the appellant's station grounds in the town of Miami, and at a place where it is not required by law to fence its right of way. *Gulf, C. & S. F. Ry. Co. v. Blankenbeckler* (Tex. Civ. App.) 35 S. W. 331, and authorities cited. In such case it is incumbent upon the plaintiff to prove more than the mere killing; he must prove that it was negligently done. But this does not mean negligence of the train operatives alone, for any negligence of the defendant proximately causing the injury will suffice to establish liability. In this case the testimony tended to show negligence in the construction and maintenance of some stock pens and wing fences, forming what the witnesses denominate a "pocket," that was dangerous to stock, and which was the occasion of appellee's mule being caught upon the track and killed. Negligence in this respect might be sufficient to show liability, yet the judgment in the present case must be reversed because of the manner in which the court submitted the issue of negligence to the jury in the following charge: "In this case the plaintiff has adduced evidence tending to show that the railway company in the establishment of its stockyards and fencing—or of fencing—has so arranged them as that horses may go into what has been termed by the witnesses as 'a pocket,' from which there are but two ways of egress, one of which is alleged by the plaintiff to be, in his evidence, the railway track. Now, I instruct you that if, within the knowledge of the defendant company, such a place has been maintained by the company, and if you find this, and also find by a preponderance of the testimony that the same is dangerous to stock, to horses, and that they may be induced, on the passing of trains, to go across the railroad track from such point in an effort to escape trains, and should be killed thereby, that it would be negligence on the part of the railroad company in maintaining such a place at such a point." Now, it cannot be said as matter of law that the maintenance by a railroad company of a "dangerous" place is negli-

gence, and the court erred in so telling the jury in this instance. The jury should be left to determine this matter in view of all the surrounding circumstances. See *Allen v. Frost*, 6 Tex. Ct. Rep. 495, 71 S. W. 767. Every railroad crossing where the right of way is fenced forms a place or pocket into which horses may go, and "from which there are but two ways of egress, one of which is over the railway track," and such place is necessarily "dangerous to stock," which "may be induced on the passing of trains to go across the railway track from such point in an effort to escape trains, and be killed thereby"; yet no court could hold that this constituted negligence upon the part of the railway company. It would be so under the court's definition above.

It was also error to permit appellee's witnesses to testify to their conclusion that the place was a "dangerous" place for killing stock, and that the same could be closed up by a fence constructed in a particular manner. This was an invasion of the province of the jury. *International & G. N. Ry. Co. v. Kuehn* (Tex. Civ. App.) 21 S. W., loc. cit. 60.

In one portion of the charge the jury were told that, if the animal was killed at a point at which the railway company "had no right" to fence in its right of way, then the testimony of the plaintiff must go further and show negligence, etc. This, if a charge upon that question was called for at all, should have been to the effect that, if the killing occurred at a point where the railroad company "was not required to fence" its right of way, then the testimony of the plaintiff must go further, as indicated in the charge. The jury would probably understand from this charge that, although the company was not required by law to fence its right of way at this particular place, yet it had the right to do so, and a failure in this respect would render it liable for the killing, irrespective of other acts of negligence. But there is no occasion for a charge upon the duty of fencing the right of way if the evidence all shows the killing to have occurred within the switch limits or station grounds of appellant in the town.

The appellee was properly allowed to prove the qualities of his mule as affecting its value. Whether the actual or the market value be considered as the measure of damage, the facts that the animal was well broken and a good lead mule were admissible in evidence. See *O. & M. Ry. Co. v. Stribling*, 38 Ill. App. 17; *R. & D. R. Co. v. Chandler* (Miss.) 13 South. 267.

We are not to be understood as holding that the train operatives having in charge the train which killed appellee's mule were not themselves negligent. Appellee testified that the "train came through like a bat out of hell," and, while this language is probably highly figurative, it nevertheless might tend to indicate that the train was running at a

very high speed. We simply express no opinion upon that branch of the case.

For the errors indicated, the judgment is reversed and the cause remanded.

OHIMINE et al. v. BAKER et al.*

(Court of Civil Appeals of Texas. May 27, 1903.)

MUNICIPAL CORPORATIONS—BUILDING REGULATIONS—ORDINANCE—REASONABLENESS—PROTECTION AGAINST FIRE—WOODEN BUILDINGS—INJUNCTIONS—ADEQUATE REMEDY—PLEADING—EVIDENCE—APPEAL—ASSIGNMENTS OF ERROR—SUFFICIENCY—IMPEACHING VERDICT.

1. An assignment of error complaining of the overruling of special exceptions copied therein, without indicating the error, will not be considered.

2. A municipal ordinance, in prohibiting the erection within certain limits of buildings made of combustible material, or of any material not fireproof, does not require the erection of building absolutely fireproof, but only such as will resist ordinary fires.

3. A municipal ordinance, expressly authorized by the charter, declaring that buildings of combustible materials shall not be constructed within certain limits, cannot be attacked as unreasonable.

4. Where a building is being constructed of combustible material within established fire limits, in violation of an ordinance, an adjacent property owner, showing that its erection will cause special and irreparable injury to him and his property, and that he has no adequate remedy at law, may restrain its erection.

5. An ordinance prohibiting the erection within certain limits of buildings constructed of combustible materials, or any material not fireproof, is not uncertain and obscure because of failure to define "combustible" and "fireproof."

6. In a suit to restrain the erection of a building of combustible materials within established fire limits, in violation of an ordinance, allegations in the answer that other buildings in the vicinity were not constructed of proper materials, and that defendants had been informed by experts that the building was very substantial, are properly stricken out.

7. Allegations setting up the failure and refusal of the city to abate the nuisance, as a justification for the erection of the building prohibited by the ordinance, is no defense, and may be stricken out.

8. An assignment of error not accompanied by any statement cannot be considered.

9. The erection of other buildings of combustible materials in established fire limits in violation of a municipal ordinance cannot preclude an adjacent owner from restraining the construction of such a building contiguous to his property.

10. In a suit to restrain the erection of a building of combustible material within the established fire limits in violation of an ordinance, evidence that the mayor had authorized the building, and that other buildings were not fireproof, is properly excluded.

11. Bills of exceptions to the court's refusal to permit witnesses to answer certain questions cannot be considered where it is not shown what the answers would have been.

12. Where the jury find for plaintiffs in disregard of an instruction to find against one of them, the defendants cannot complain because the court conformed the judgment to what must have been the intention of the jury.

13. In a suit to restrain the erection of a building in established fire limits, a verdict for plain-

tiffs will not be disturbed because of statements made after the termination of the trial by a juror as to the jury having looked out of a window at the building.

Appeal from District Court, Harris County; Wm. H. Wilson, Judge.

Bill by James A. Baker and others against Albert Chimine and others. From a judgment in favor of complainants, defendants appeal. Affirmed.

Jas. A. Breeding, for appellants. Baker, Botts, Baker & Lovett and Ford, Stone & Ford, for appellees.

FLY, J. This suit was instituted by James A. Baker, R. S. Lovett, L. M. Rich, W. L. Foley, and A. L. Abrahams and his wife, Carrie B. Abrahams, against Albert Chimine, Alfred Chimine, and A. Pennington, to restrain them from the erection of a building being constructed of combustible material within the fire limits of the city of Houston, near houses owned by them. A trial was had by jury, which resulted in a verdict and judgment for appellees.

The evidence established that appellants had begun the construction of a storehouse, with combustible material and material not fireproof, beside and in close proximity to storehouses owned by the above-mentioned plaintiffs, except W. L. Foley. The houses mentioned are within the limits established by the city of Houston, wherein it is made unlawful, by an ordinance, to build or erect houses of combustible material or material that is not fireproof. The erection of the house by appellants would greatly depreciate the value of the property owned by appellees.

The second and third assignments of error complain of the action of the court in overruling numerous special exceptions, which are numbered and copied. No particular errors are indicated. It has been so often held that such assignments of error will not be considered, that it would seem that they would not be so prepared. *Keowne v. Love*, 65 Tex. 152; *Railway v. Leak*, 64 Tex. 654; *Yoe v. Montgomery*, 68 Tex. 338, 4 S. W. 622; *Paschal v. Owen*, 77 Tex. 583, 14 S. W. 203.

Through the first assignment of error, appellants complain of the overruling of a general demurrer, which goes to the very foundation of the suit, and presents for review the vital questions connected with actions of this character. It was alleged in the petition that, under the authority granted it by its charter, the city of Houston had passed ordinances in 1897 and 1899 prescribing fire limits, in which the erection or placing of any building of combustible material, or any material not fireproof, within certain limits, was prohibited, and penalties fixed for violations of the same; that appellants were constructing a building within said limits of wood and other materials not fireproof and incombustible, in immediate contact with the building and improvements of appellees. The petition

*Rehearing denied June 24, 1903.

proceeds: "Plaintiffs further show that the erection of said building, if the same is permitted to be erected, will be a nuisance, and will subject the valuable buildings and improvements of plaintiffs' property to imminent danger of destruction by fire, and will increase the fire risk on said buildings, and increase the cost of insurance on the same against loss by fire; that it will decrease the value of plaintiffs' property and render the same less salable; diminish the income therefrom, and render the use thereof unsafe and uncomfortable; will increase the cost of insurance on stocks of goods or other property placed therein, thereby and otherwise making the same less desirable and valuable as rent property; that the front end of the defendants' building, as is shown by the framework thereof, has no support except wooden posts, and plaintiffs are informed and believe that, in case of a fire in said building, it would be unsafe for firemen or others wishing to extinguish it to enter said building, on account of the liability of said posts to burn and give way and cause said building to fall, and on account of other defects in said building, rendering the same liable to fall in case of fire. Plaintiffs further say that the injuries to their property and to plaintiffs by the erection of said building would be permanent, continuous, and irreparable, and that they are entirely without adequate remedy at law." It was also alleged that they had applied to the mayor, city council, and chief of police of the city of Houston to enforce the ordinance, but they had refused to do so.

It is the contention of appellants that the ordinance is unreasonable, in prescribing that none but buildings made of "fireproof" or "incombustible" materials should be constructed within the fire limits, and, reason and experience teaching that no such material can be obtained that is suitable for the construction of buildings, it is practically a prohibition of the erection of houses within such limits. The terms "fireproof" and "combustible materials," used in the charter and ordinance, should not be given a literal construction, but a liberal and reasonable one, and the meaning assigned to them in the ordinary and common acceptance of the terms. Experience has shown that during great conflagrations, such as swept the cities of Chicago and Boston a number of years ago, buildings of granite, marble, and steel crumbled into dust before the intense heat, and met with absolute destruction. And yet those buildings were known and accepted as being composed of incombustible or fireproof materials. The term "fireproof," in insurance cases, where used in connection with safes in which books and inventories are to be kept, has been defined as being of materials that will usually resist the action of fires, and not those that will successfully withstand fires under all circumstances. *Ins. Co. v. Hird* (Tex. Civ. App.) 23 S. W. 396;

Underwriters' Fire Ass'n v. Palmer (Tex. Civ. App.) 74 S. W. 803; *Sneed v. Assurance Co.* (Miss.) 18 South. 928. As said by the Supreme Court of Mississippi in the last-cited case: "To impart to the words 'fireproof safe' such signification as would require a safe incapable of injury by fire, to itself or its contents, or one which by the action of any fires could not be rendered useless as a safe, and whose contents, under any combination of circumstances, should and could never be destroyed by the intensity of heat to which the safe and its contents might be exposed, would be to require of the insured, in the vast majority of insurance cases, that which could not have been in the contemplation of the parties in entering into the contract of insurance." The words "fireproof" and "incombustible materials" are often used in connection with houses that are not absolutely proof against fires, but are intended as referring to houses built of brick, stone, iron, or other material, on the outside, so as to form barriers that will resist the action of ordinary fires.

The ordinance of which complaint is made is authorized by the charter of the city of Houston, which empowers the city council to "prohibit the erection, building, placing, moving, or repairing of wooden buildings within such limits in said city as they may designate and prescribe; * * * and may direct, require and prescribe that all buildings within the limits so designated and prescribed shall be made or constructed of fireproof materials." The ordinance uses the words "combustible material or any material not fireproof." The words are practically the same used by the Legislature in the special charter of 1897 granted to the city of Houston. To inquire into the reasonableness of the ordinance would be to inquire into and attack the reasonableness of a law enacted by the Legislature of the state. The ordinance is not dependent for its vitality on some power incidental to some general power granted to the city, but it follows the language of the legislative grant for that specific purpose almost to the letter. After the power of courts to sit in judgment on the reasonableness of city ordinances resting for their authority on some general grant of power had been conceded, Judge Dillen says: "Where the Legislature, in terms, confers upon a municipal corporation the power to pass ordinances of a specified and defined character, if the power thus delegated be not in conflict with the Constitution, an ordinance passed pursuant thereto cannot be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental power of the corporation, or under a grant of power general in its nature." *Dill. Mun. Corp.* § 328. The text is supported by numerous authorities. In the case of *A Coal Float v. City of Jeffersonville* (Ind.) 13 N. E. 115, it is said: "While the reasona-

bleness of an ordinance is a question of law for the decision of the court, an ordinance cannot be held to be unreasonable which is expressly authorized by the Legislature. The power of a court to declare an ordinance unreasonable, and therefore void, is practically restricted to cases in which the Legislature has enacted nothing on the subject-matter of the ordinance, and consequently to cases in which the ordinance was passed under the supposed incidental power of the corporation, merely." That case has been followed a number of times in Indiana. *Railway v. Harrington*, 30 N. E. 37; *Champer v. Greencastle*, 35 N. E. 14, 24 L. R. A. 763, 46 Am. St. Rep. 390; *Rund v. Fowler*, 41 N. E. 456; *Beiling v. Evansville*, 42 N. E. 621, 35 L. R. A. 272; *Shea v. Muncie*, 46 N. E. 138. In the case of *Raffetto v. Mott* (N. J. Sup.) 38 Atl. 857, it was said: "When an ordinance has been passed by a municipal body under legislative power, which is granted in definite and precise terms, such ordinance cannot be set aside as unreasonable."

Even if the strictest interpretation be placed upon the words "fireproof" and "incombustible material," it cannot be claimed that the Legislature of the state has not the power to delegate to cities the authority to prohibit, within certain limits, buildings of that class of materials. Even if the reasonableness of such legislation could be the subject of inquiry, it was one to be inquired into in this case in the light of the evidence, and that tended to establish that absolutely fireproof buildings could be erected.

This action was instituted, not for the enforcement of an ordinance of a city, but to protect property rights threatened by the intended violation of the ordinance. A private right has been invaded, and the enforcement of the ordinance is a mere incident to the protection of appellants against a threatened injury to their property. There are many cases in which it has been held that the fact that a nuisance is a crime, and punishable as such, does not deprive courts of equity of the power and authority to restrain and abate such nuisance by injunction, in order to protect private rights. It is true that an act will not be restrained by injunction merely because it is illegal, but when it is shown to be dangerous to life, detrimental to health, or seriously injurious to property, it will be restrained; and, while it has been held that the erection of a building will not be enjoined merely because it is prohibited by city ordinance, an injunction will be granted when allegations and proof show the infliction of injury for which there is no adequate legal remedy. *Weakley v. Page* (Tenn.) 53 S. W. 551, 46 L. R. A. 552; *State v. Patterson* (Tex. Civ. App.) 37 S. W. 478; *York v. Yzaguirre* (Tex. Civ. App.) 71 S. W. 563. There is some authority to the effect that an injunction will not lie to abate a nuisance that is not one in

itself, independent of statutory declaration; but the weight of authority, we think, favors a different and more liberal doctrine, and permits restraint by injunction against statutory nuisances where it appears that material injury will be inflicted by them. In the case of *Bank v. Sarlis* (Ind.) 28 N. E. 434, 13 L. R. A. 481, 28 Am. St. Rep. 185, the subject under consideration is discussed, and it is said: "When it is shown that the erection of a building, if permitted, will be in express violation of a valid municipal ordinance, although it would not be a nuisance per se, an individual who shows such fact, and shows, in addition, that its erection will work special and irreparable injury to him and to his property, is entitled to relief by injunction." The same principle is enunciated in *Blanc v. Murray*, 36 La. Ann. 162, 51 Am. Rep. 7; *McCloskey v. Kreiling* (Cal.) 18 Pac. 433; *King v. Davenport*, 98 Ill. 305, 38 Am. Rep. 89; and *Kaufman v. Stein* (Ind.) 37 N. E. 333, 46 Am. St. Rep. 368.

It does not appear that appellees had an adequate remedy at law for the injuries about to be inflicted upon them. The rule that denies an injunction, except where there is no adequate legal remedy, has been relaxed to some extent in Texas, where law and equity are administered by the same tribunals. In the case of *Sumner v. Crawford*, 91 Tex. 129, 41 S. W. 994, it is suggested that the rule has been relaxed by the provisions of article 2989, Rev. St. 1895, and the following language is used: "If, as here, the applicant shows a clear right to be left in the undisturbed possession of certain property, and that such right is about to be invaded without semblance of right by another, such invasion, on principle, should be prevented in its incipency by injunction, instead of allowing the injury to be inflicted, and then leaving the party to his legally adequate, but in fact generally very inadequate, remedy of an action for damages."

The ordinance is not uncertain or obscure because it does not define the meaning of "fireproof" or "combustible" material. Those are words well defined and well understood, and on the trial the court instructed the jury that by those terms was not meant materials that could withstand any degree of heat, but such materials as would be proof against such fires as would likely occur in the city of Houston. To the jury was confided the determination of whether the materials used in the building were combustible or not.

The 4th, 5th, 6th, 8th, 10th, 13th and 16th assignments of error complain, respectively, of the overruling of different special exceptions, and the refusal to give different requested charges. That the assignments treat of subjects that are not germane not only appears from the face of the assignments, but from the fact that four propositions having no relation to each other are placed one

immediately after the other. The propositions are so general and indefinite that it would be difficult to ascertain precisely what points it is desired should be passed upon by the court. They might well be disregarded. However, we will say that the court did not err in striking out those portions of the answer that allege that other buildings in the vicinity of appellants' buildings are not constructed of proper materials, that appellees' building is not fireproof, and in striking out that part of the answer that set up the fact that appellants had been informed by experts that the kind of building they intended to erect was very substantial. The authorities cited by appellants do not sustain any propositions of law applicable to the matters attempted to be raised in the assignments of error.

That part of the appellants' answer alleging the failure and refusal of the city authorities to abate a nuisance created by an ordinance of the city, as a justification for the erection of a building prohibited by the ordinance, formed no defense to appellees' action, and was properly stricken out. The ordinance is effective as long as it is unrepealed, and the mayor and chief of police have no more right to violate it than any other citizens of Houston, and have no authority to grant a license to any one else to violate it.

The twelfth assignment of error complains of the refusal of the court to charge the jury that appellees could not recover unless the ownership of all of them in the buildings sought to be protected had been proved. The assignment is not followed by any statement whatever, and should not be considered. An investigation of the record, however, shows that the parties who recovered in the suit established their ownership in the property.

The fourteenth and fifteenth assignments of error are followed by four general propositions, under which appear a statement. A strict application of the rules would inhibit a consideration of them. Their subject-matter has been considered under other assignments.

The ordinance declares that it is unlawful to erect any building of combustible material, or of material not fireproof, and the court very properly so instructed the jury. The uncontradicted evidence showed that the building was being erected within the fire limits established by the municipal government, and the court did not err in instructing the jury that such was the fact.

Appellants prosecute this appeal upon the theory, among others, that, if other people in Houston had violated the ordinance as to the erection of fireproof buildings, this would license them to violate it by erecting buildings contiguous to those of others, and to preclude the latter from any remedy to protect their property. We know of no principle upon which to found such a proposition.

It may be unjust and inequitable to permit others to erect houses in derogation of the statute, but that fact should not deprive appellees of the right to protect their property from a nuisance. The question at issue was, did the building proposed to be erected by appellants contravene and violate the terms of the ordinance, and, if so, did such intended act materially injure the property of appellees? To those propositions the trial court restricted the evidence, and there is no ground for complaint at such action.

None of the bills of exception taken to the refusal of the court to permit different witnesses to answer the questions which are set out in them give the answers expected to have been elicited, with the exception of one in which the mayor would have answered that he had authorized the building of the house, and two in which the witnesses could have stated that adjoining buildings were not fireproof. Those answers were properly excluded, and the other bills of exception cannot be considered, because it is impossible for the court to determine what the witnesses might have answered. It is the unbroken rule that where objections are sustained to a question, the bill of exceptions must show what the answer would have been, the grounds upon which it was rejected, and its materiality.

The court instructed the jury to find against W. L. Foley, one of the plaintiffs, because he had failed to prove ownership of the property claimed by him. The jury ignored the instruction, and returned a verdict for the plaintiffs; but the court rendered judgment in favor of all the plaintiffs except Foley, and decreed that an injunction should not issue in his favor. This action of the court was not disapproved of by Foley, but appellants complain of it. How it effects them injuriously does not appear, and it is a matter of no concern to them. The court properly made the judgment conform to what must have been the intention of the jury.

The court very properly refused to disturb the verdict because of statements made after the termination of the trial by a juror to counsel for appellants as to the jury having looked out of a window at the building erected by appellants, about 300 feet distant. The impeachment of verdicts by the statements of jurors after the trial are viewed with great disfavor, and will not be tolerated by courts. As far back as the case of *Mason v. Russel's Heirs*, 1 Tex. 725, the Supreme Court said: "The permitting such evidence cannot be too strongly reprobated, as leading to improper tampering with the jurors to procure such affidavits after verdicts." As said by the Supreme Court in *Bank v. Bates*, 72 Tex. 137, 10 S. W. 348, "if there be any exception to this rule, it has not been defined in any case in this state."

We conclude that none of the assignments of error is well taken, and the judgment is therefore affirmed.

WORD v. KENNON.*

(Court of Civil Appeals of Texas. June 3, 1903.)

HUSBAND AND WIFE—COMMUNITY PROPERTY—RECOVERY BY WIFE—PLEA IN ABATEMENT—ABANDONMENT—EVIDENCE—INSTRUCTIONS—HARMLESS ERROR.

1. An allegation by a married woman that her husband had permanently abandoned her, without her fault, and had left the state, is sufficient to authorize her to sue for the community property.

2. Where no action appears to have been taken on a plea in abatement, it will be presumed to have been abandoned.

3. An assignment of error cannot be extended by the brief to include a bill of exceptions not referred to therein.

4. In a suit by a married woman to recover horses belonging to the community estate, it is not prejudicial to exclude a conversation between defendant and the husband, from whom he claimed to have bought the horses, to establish the sale, where it showed that no sale was ever consummated.

5. In a suit by a married woman to recover horses belonging to the community estate, admission of her evidence as to a mortgage by her of the horses was not prejudicial error.

6. Where, in a suit to recover horses, the evidence fails to establish a purchase of them by defendant, as claimed, an instruction assuming that there was no sale is not error.

Appeal from Sutton County Court; R. C. Dawson, Judge.

Action by Mrs. M. A. Kennon against O. T. Word. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Anderson & Hill, for appellant. Tayloe & Cornell, for appellee.

FLY. J. Appellee sued appellant to recover 10 head of horses, or their value, at \$50 each, and in a trial by jury was awarded a verdict for the property, upon which was rendered the judgment from which this appeal has been perfected.

It was alleged in the petition that D. D. Kennon, the husband of appellee, had permanently abandoned her, without fault on her part, and had left the state, and this was a sufficient allegation to clothe her with authority to institute suit for the community property. *Railway v. Hennesey*, 20 Tex. Civ. App. 316, 49 S. W. 917.

Appellant asked that the suit in this case be abated because there was another suit pending in the same court, in which the matters in this suit could have been litigated and determined. No action appears to have been taken on that plea, and there is nothing in the record to sustain the complaint that it was overruled. It must be presumed that it was abandoned.

It was not error to exclude evidence as to what appellant stated about it being just as easy to get 50 cents a head for pasturage of the horses as 25 cents. It could have no possible bearing on the case.

The tenth assignment attacks the exclusion of testimony offered by appellant as to a

conversation between him and D. D. Kennon. In the assignment of error the third bill of exceptions is referred to as containing the conversation desired to be introduced, but in a statement made in the brief an effort is made to extend it to another conversation contained in another bill of exceptions. The assignment will be confined to the error of which complaint is made. It is not well taken, for the reason that appellant, in his answer, claimed to have bought the horses of D. D. Kennon; but the conversation, had it been admitted, showed that no sale was ever consummated, and consequently its rejection could not have injured appellant. The conversation set out in the other bill of exceptions above mentioned did not show a consummated sale, because no price was ever agreed on between the parties. The evidence leads to the irresistible conclusion that appellant had never bought the horses.

The introduction in evidence by appellee of her mortgage on the horses in controversy to one McCrohan could have had no possible bearing on the case, and it should not have been admitted. Still there is nothing to indicate that it had any effect on the issues in one way or another. It must be presumed that the jury had average intelligence, and, if such was the case, the evidence could not have influenced their verdict.

The evidence totally failed to establish that appellant had purchased the horses, and it was not error to assume that there was no sale, and to instruct the jury to find in favor of appellant for the pasturage.

The special charges asked by appellant were properly refused. Appellant claimed to own the horses, and he could not shift his position by means of a charge. Neither of the charges contained the law of the case.

The judgment is affirmed.

PEARSON v. WEST.*

(Court of Civil Appeals of Texas. June 3, 1903.)

ABATEMENT—DOMICILE—PLEA OF PRIVILEGE.

1. Where defendant's domicile is in a county other than that in which he is sued, and the cause of action arose in such county, his plea of privilege to be sued in the county of his residence is well founded.

Appeal from District Court, Bexar County; S. J. Brooks, Judge.

Action by Annie M. Pearson against George West. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

M. W. Davis, for appellant. Denman, Franklin & McGown and Proctors, for appellee.

NEILL, J. On October 9, 1902, the appellant sued appellee in the district court of Bexar county to recover \$10,000 damages for an

*Rehearing denied June 27, 1903.

*Rehearing denied June 27, 1903.

assault alleged to have been committed by him upon her on the 14th day of August, 1902, in Live Oak county, Tex. The appellee pleaded in abatement that when the suit was instituted and process served on him he resided in Live Oak county, Tex., and had his domicile there, and not in the county of Bexar; that ever since the commencement of the suit he has resided in, and has had his domicile in, Live Oak county, where he still resides, and not in the county of Bexar, as alleged by plaintiff; that plaintiff's cause of action, if any she had, did not accrue in Bexar county, but is founded upon an assault which, if committed, was made in Live Oak county, and not in Bexar county, Tex. Wherefore he claimed the privilege of being sued in the county where he had his domicile. The issue raised by this plea was submitted to the court without a jury, and, upon hearing the testimony, it was adjudged that the plea be sustained, and the cause dismissed. From this judgment this appeal is prosecuted.

From a careful examination and consideration of the testimony, we have concluded that the evidence is sufficient to support the finding of the court that the residence and domicile of George West was in Live Oak county at the time the suit was filed, and from then down to the time of the trial continued to be in said county. *Benavides v. Gussett* (Tex. Civ. App.) 28 S. W. 113.

The judgment of the district court is therefore affirmed.

CONNER v. DOWNS et al.

(Court of Civil Appeals of Texas. June 4, 1903.)

APPEAL—RECORD—STATEMENT OF FACTS—TIME OF FILING—TRESPASS TO TRY TITLE—INNOCENT PURCHASER.

1. A statement of facts filed more than 10 days after adjournment of the court cannot be considered, though the parties agreed that it might be filed later.

2. In the absence of a statement of facts, the facts found by the trial judge will be regarded as conclusive by the appellate court.

3. In trespass to try title, findings that the parties claimed from a common source, and that defendants were the innocent purchasers, without notice of a deed to plaintiff, justified a judgment for defendants.

Appeal from District Court, Newton County; W. P. Nicka, Judge.

Trespass to try title by L. H. Conner against E. D. Downs and another. From a judgment for defendants, plaintiff appeals. Affirmed.

W. W. Blake, for appellant. West & Howard, for appellees.

GARRETT, C. J. This was an action of trespass to try title brought by L. H. Conner against E. D. Downs and D. A. Rogers for the recovery of two tracts of land, a part of the Williams league, situated in Newton county. The defendants pleaded "Not guilty,"

and limitation of five years, and valuable improvements. The case was tried to the court below without a jury, and a judgment was rendered in favor of the defendants, from which the plaintiff has appealed.

Ten days after adjournment were allowed the plaintiff by the court within which to file a statement of facts. Court adjourned on December 6, 1902. The parties failed to agree on a statement of facts, and the presiding judge made one from statements furnished to him by them, respectively. The statement copied in the transcript bears no date, but it appears to have been filed December 20, 1902, which was more than ten days after adjournment. A motion has been made by the defendant Rogers to strike it out because it was not filed in time. In reply to the motion, the plaintiff states that the case was tried near the end of the term, and that, before the court adjourned, counsel for the defendants left Newton county and went to Houston on business; that plaintiff made up his statement of facts promptly, and tried to submit it for agreement, but, counsel for defendants being absent, it was left with the clerk of the court, with instructions to deliver it promptly to counsel for defendants, which was done; that, before the 10 days allowed had expired, counsel for plaintiff went to Newton, and insisted on the statement's being sent to the district judge. Counsel for defendants stated that they would agree in writing that the statement might be filed at any time before December 22, 1902, and such an agreement was made and signed by counsel for both parties on December 15, 1902, and is copied in the record. The statement, having been filed more than 10 days after the adjournment of the court, cannot be considered, although the parties agreed that it might be filed later. *Wilcox v. League* (Tex. Civ. App.) 71 S. W. 414. The motion to strike out the statement of facts appearing in the record will be sustained.

The following conclusions of fact was filed by the trial judge:

"(1) I conclude that the evidence establishes the fact of common source of title in R. P. Hext to the 477 acres of land on the Wm. Williams headright league of land, in Newton county, Texas, in controversy.

"(2) On October 31, 1877, R. P. Hext and his wife, Elaphare Hext, resided on the J. R. Williams headright, adjoining the said 477 acres, and about 100 yards from the west line, and cultivated a field on the said 477 acres, and that said 477 acres was all the land they owned on the 31st October, 1877.

"(3) R. P. Hext died at his home on the said J. R. Williams headright about 12th day of January, 1878, leaving surviving him his wife, Elaphare Hext, and ten children, to wit, Susan Toney, J. R. Hext, Annie Phillips, Julia Hext, J. H. Hext, Lewis Hext, Mary Christian, R. L. Hext, B. Smith, and Camille Ferguson.

"(4) That prior [to the death] of R. P. Hext, and on the said 31st day of October, 1877, R. P. Hext conveyed the said 477 acres of land in controversy, without being joined by his wife, Elaphare Hext, to the heirs of Lewis and Elizabeth Conner, and J. T. Ramsey and J. R. Mattox appear as subscribing witnesses to said deed. This deed was duly proven as at common law as to R. P. Hext by R. H. Windham, and was executed and duly acknowledged by Elaphare Hext on the 23d day of September, 1902.

"(3) I find that J. R. Mattox was about 14 or 15 years of age when his name was signed to said deed from R. P. Hext to the heirs of Lewis and Elizabeth Conner; that he did not know what the instrument was, to which his name was signed, and had no knowledge of such facts until after he had, for a valuable consideration paid, purchased an undivided $\frac{13}{20}$ interest in said 477 acres of land from the surviving heirs of R. P. Hext on 2d day of January, 1894, and without notice of the existence of the deed from R. P. Hext to the heirs of Elizabeth and Lewis Conner.

"(6) I find that defendant E. D. Downs purchased $\frac{2}{20}$ of the land in controversy from the heirs of R. P. Hext, and $\frac{13}{20}$ of same from J. R. Mattox, on the — day of July, 1894, and December 22, 1894, respectively for a valuable consideration paid, without notice of the existence of the deed from R. P. Hext to the heirs of Lewis and Elizabeth Conner, and immediately placed his said deed on record.

"(7) I find that plaintiff, L. H. Conner, claims the land in controversy as one of the heirs of Lewis and Elizabeth Conner, and by conveyances from J. J. Love and wife, who was a child of Lewis and Elizabeth Conner."

In the absence of a statement of facts, the facts found by the trial judge will be regarded by this court as conclusive; and the court having found that the defendants were innocent purchasers of the land in controversy, from a common source, the judgment in their favor appears to be correct. None of the assignments of error present any questions that appear to have been incorrectly decided. The judgment of the court below will be affirmed. Affirmed.

HILLSBORO OIL CO. v. CITIZENS' NAT. BANK OF HILLSBORO.

(Court of Civil Appeals of Texas. June 6, 1903.)

USURY—CONTRACTS FOR COMPOUND INTEREST—VALIDITY—PRESUMPTIONS.

1. A verbal contract between a bank and one of its customers that the latter should pay interest at the rate of 10 per cent. per annum on all overdrafts, the interest accruing each month to be payable at the end of the month, and, if not paid then, to bear interest at the agreed rate, was lawful, and not usurious.

2. No presumptions of illegality would be indulged against such contract, and the customer could avoid it only by pleading and proving that

the real contract was different, and was violative in its terms of the provisions of the statute.

Appeal from District Court, Hill County; W. Poindexter, Judge.

Action by the Hillsboro Oil Company against the Citizens' National Bank of Hillsboro, Tex. Judgment for defendant, and plaintiff appeals. Affirmed.

Vaughan & Works, for appellant. Wear, Morrow & Smithdeal, for appellee.

TEMPLETON, J. Suit by the Hillsboro Oil Company against the Citizens' National Bank of Hillsboro, Tex., to recover the statutory penalty on account of the collection by the defendant of the plaintiff of interest which was alleged to be usurious. A jury trial resulted in a judgment for the defendant.

The plaintiff was for several years one of the defendant's customers. There was a verbal agreement between the parties that the plaintiff should pay interest on all overdrafts at the rate of 10 per cent. per annum. In keeping the account the defendant charged the plaintiff interest at the agreed rate on the daily balances. At the end of each month the interest which had accrued during that month was charged to the plaintiff's overdraft account. By this method the interest was compounded monthly. The plaintiff's suit was brought on the theory that the manner in which the account was kept enabled the defendant to collect interest at a greater rate than that allowed by law. The contention of the defendant was that the interest was compounded in accordance with a contract to that effect. The court instructed the jury that there was no usury in the transaction if the plaintiff contracted that the interest should be so compounded. The evidence was sufficient to warrant a finding by the jury that the plaintiff had so contracted. If there was a contract between the parties that the interest which accrued each month should be due and payable at the end of the month, and, if not paid when due, should bear interest at the agreed rate of 10 per cent. per annum, then the contract was not usurious, and the plaintiff was bound by the terms of its obligation. The compounding of interest in that way was permissible. *Crider v. Ass'n*, 89 Tex. 597, 35 S. W. 1047. The question was whether such contract had been entered into, not whether such contract, if made, was a scheme and device to cover up usury. It was lawful for the parties to so contract, and, if such was the real contract between them, the affair was not tainted with usury. There was no evidence tending to show that the parties agreed in fact that the interest should not mature monthly, but that the same should be declared due at the end of each month, in order that the defendant might thereby be enabled to receive interest in excess of the rate allowed by law. The contract established by the verdict of the jury was valid in its terms, and no pre-

sumptions of illegality will be indulged against it. The same could be avoided only by the plaintiff pleading and proving that the real contract was different, and was violative in its terms of the provisions of the statute. No such case has been made, and the plaintiff must fail in its suit. In view of this holding, the other questions presented are not material.

The judgment is therefore affirmed.

L. EPPSTEIN & SON v. WEBB et al.*
(Court of Civil Appeals of Texas. June 6, 1903.)

LOCAL OPTION—INJUNCTION—PETITION—
AMENDMENT.

1. The petition by liquor dealers to enjoin publication of an order declaring the result of a local option election is insufficient to show plaintiffs entitled to any relief, it not alleging that they were lawfully engaged in the business of selling liquor, though alleging that they are threatened with arrest and prosecution, and that their right to continue in the business is worth a certain amount.

2. The right to amend a petition for injunction, to show that plaintiffs were entitled to relief, was not denied by the trial court where it merely refused to render judgment on the petition, but offered to hear the case on the merits, whereupon plaintiffs dismissed the suit.

Appeal from District Court, Grayson County; J. M. Pearson, Judge.

Suit by L. Eppstein & Son against G. P. Webb and others. From the judgment, plaintiffs appeal. Affirmed.

Mosely & Eppstein, Standifer & Kone, Don. A. Bliss, and C. L. Galloway, for appellants. A. L. Beaty, for appellees.

RAINEY, O. J. The following statement of the case is taken from the brief of appellants, to wit:

"M. L. Eppstein and H. Eppstein, copartners doing business under the name of L. Eppstein & Son, plaintiffs herein, presented their bill of complaint to the Honorable L. W. Moore, judge of the Twenty-Second Judicial District of the state of Texas. In said bill they stated that they were wholesale liquor dealers at Denison, in Grayson county, Texas, on March 7, 1903, and at all times thereafter; that on said date an election was held in Grayson county, Texas, under the circumstances fully detailed in complainants' bill. Said bill prayed for no other relief than for an injunction against respondents. On May 9, 1903, the Honorable L. W. Moore granted complainants the writs of injunction prayed for in said bill, and ordered the district clerk of Grayson county, Texas, to issue such writs restraining defendants from doing the acts complained of in said bill. On May 10, 1903, complainants filed their bond in the amount required by said fiat, conditioned as required by law. On the same day writs of injunction were issued by the clerk of

the district court of Grayson county, Texas, and served upon all of the defendants. On May 11, 1903, the Honorable J. M. Pearson, judge of the Fifty-Ninth Judicial District of the state of Texas, without notice to complainants, dissolved said injunction. On May 12, 1903, complainants filed a motion asking the court to revoke and set aside the order entered in this cause on the 11th day of May, and to reinstate the injunction granted by the Honorable L. W. Moore. This motion the court overruled, except in so far as to grant complainants an exception nunc pro tunc to the action of the court dissolving the injunction. Thereupon complainants' bill was dismissed. To this action of the court and the judgment complainants in open court excepted, gave notice of appeal to this court, and on, to wit, May 12, 1903, filed their appeal and supersedeas bond, and the record was on the same day filed in this court." The relief sought was to restrain the commissioners' court of said county from publishing the order declaring the result of a local option election that had theretofore been held in Grayson county, Texas. Numerous propositions are urged in support of appellants' contention that the action of the trial court in dissolving the injunction was error, but we deem it unnecessary to discuss them, because the petition fails to show that plaintiffs were entitled to any relief, in that the petition does not allege that plaintiffs were lawfully engaged in the business of selling liquor. The petition is not relieved by the further allegations that they are threatened with arrests, prosecutions, etc., and that their right to continue in such business is worth the sum of \$50,000, etc. If plaintiffs were not lawfully engaged in the business of selling liquors, equity will not shield them from the consequences of which they complain. If they were legally so engaged, it should have been alleged. The case of *Harding v. Commissioners' Court* (Tex. Sup.) 66 S. W. 44, is decisive of this question, and upon that case we rest our decision.

It is contended by appellants that, if the petition was wholly defective in the respect stated, they should have been allowed to cure the defect by amendment. This right was not denied, as we construe the record. When the trial court overruled the plaintiffs' motion to revoke and set aside the order dissolving the temporary injunction, counsel for plaintiffs stated that, the petition being for an injunction only, they waived their right to further hearing thereon, and asked the court to render judgment upon the said petition, which the court refused on the ground that he had not decided any question except that it was proper to dissolve the temporary injunction because the judge granting same was without jurisdiction to do so, and stated to counsel, if they desired to press their petition for an injunction, he would proceed to hear it at once. Counsel did not

*Rehearing denied June 20, 1903.

avail themselves of this offer, but excepted to the action of the court, and thereupon plaintiffs, by their attorneys, in open court dismissed their said suit, and judgment was accordingly so entered. The trial court having proffered to hear the case on its merits, it is not clear that the plaintiffs are entitled to an appeal from the judgment dismissing the cause at their instance, but, if this right be conceded, the proceedings fail to show that they were deprived of the right to amend. They did not ask leave to do so before dismissing their suit, and we do not feel authorized to assume that the court would have refused to allow it had the request been made. Nor can we assume that the fact existed which authorized such an amendment, or that it would have been made had it existed. We are of the opinion that there is no merit in the contention.

Being of the opinion that appellants are not entitled to relief, the restraining order heretofore issued by this court is set aside, and the judgment of the court below is affirmed.

SHELTON v. NORTHERN TEXAS TRACTION CO.*

(Court of Civil Appeals of Texas. May 23, 1903.)

MUNICIPAL CORPORATIONS — DEFECTIVE STREETS—LIABILITY OF STREET RAILROAD—CONCURRENT NEGLIGENCE OF RAILROAD—EFFECT—INSTRUCTIONS—WAIVER.

1. Plaintiff alleged that defendant negligently permitted its street car track to project above the surface of the adjacent street, and permitted the street near its track to become scooped out and worn into holes, and that while endeavoring to cross the track the wheels of his wagon struck the projecting rails, dropped into said holes, and slid on and against the rails, jolting him from his seat. It appeared that the accident occurred where defendant's track crossed those of a railroad; that the tracks of both companies were in bad condition; that the wagon wheel slid along defendant's track until it struck the railroad track, whereon plaintiff fell off. *Held*, that defendant was not relieved from liability by reason of the concurrent negligence of the railroad.

2. Though the petition did not aver that the culminating force causing plaintiff's fall was the impact of the wheel with the railroad track, the mere appearance of such fact on the trial did not justify a charge relieving defendant from liability because of the concurring negligence of the railroad.

3. Error in so charging was not relieved by a charge that if defendant was guilty of negligence in failing to fill the holes, and the wheel dropped into one, and struck or slid against the rail, and plaintiff was injured by reason thereof, he should recover.

4. Plaintiff waived the bar of "privilege" to a communication testified to by defendant's counsel by failing to object to the testimony of another witness relative thereto, and by himself testifying with respect to the same.

Appeal from District Court, Tarrant County; Irby Dunklin, Judge.

Action by W. A. Shelton against the North-

ern Texas Traction Company. Judgment for defendant, and plaintiff appeals. Reversed.

Carlock & Gillespie, for appellant. Capps & Cantey and Theodore Mack, for appellee.

CONNER, C. J. Appellant was denied a recovery for damages resulting from personal injuries received while driving over appellee's street railway track along Main street, in the city of Ft. Worth, where it intersects, and at substantially a right angle crosses, the main track and several switch tracks of the Texas & Pacific Railway Company. It was alleged that, in violation of a city ordinance pleaded, appellee "negligently permitted its said iron rails so laid in said traveled thoroughfare to project above the surface of the adjacent street for a distance of, to wit, four inches, and negligently permitted the street lying near its said rails and tracks to become scooped out and worn and cut into holes, so as to become a menace and danger to those driving vehicles over and along the said street, and thereby rendering the use of said street unnecessarily dangerous to the traveling public," and that "while the plaintiff was in the exercise of reasonable care in the prosecution of his said work and business, and endeavoring to cross the tracks of the said defendant, the wheels of his said loaded wagon came in contact with the said projecting or protruding rails of said defendant, * * * the plaintiff's wheels dropped into said excavations or depressions, and were caused to be jolted or slid upon and against the said rails of the defendant's track, thereby causing him to be jolted from his seat and thrown to the ground, a distance of some ten feet, inflicting upon him serious injuries, as hereinafter set out." There was evidence in behalf of appellant tending to show that the tracks of both the railway company and appellee were in bad condition, and also that the wheel of appellant's wagon struck the street car track, and slid along several feet, until it came in contact with the track of the railway company, whereupon appellant fell off. Appellant himself testified in the latter particular: "I was crossing these tracks at right angles. When the sprinkling wagon struck the street car tracks, the wheels slipped and threw me off. * * * The wheel was in a hole when it was sliding. It slid about two and a half or three feet. When it struck the rail, it went down in the hole, and slid along the street car rail until it struck the T. & P. track or rail which runs east and west, and threw me out."

The court charged the jury, among other things, that if they found that "plaintiff attempted to drive across said track, and that in so doing one of the wheels of the wagon he was driving dropped into said hole and against said rail, and slid against said rail, and that by reason of said wheel so striking and sliding upon said rail the plaintiff was thrown from his wagon and injured, and if,

*Rehearing denied June 26, 1903.

under foregoing instructions, you find that the defendant was guilty of negligence in failing to fill said hole or depression, if any, to a level with said rail, then your verdict will be in favor of plaintiff, unless, under instructions hereinafter given, you find that plaintiff was himself guilty of negligence which proximately contributed to his injury." The court also gave the following charge, to which error is assigned, to wit: "If you believe from the evidence that plaintiff's wagon wheel struck the rail of the Texas & Pacific Railway Company, and that the striking of the same was the proximate cause of plaintiff's fall and injury, and that the striking and the sliding of the wheel upon the defendant's rail, if it did so strike and slide upon the same, did not cause plaintiff's fall, then your verdict will be for the defendant."

We are of opinion that the charge last quoted is erroneous, and that the error is not relieved by the state of appellant's pleadings, to which there was no special exception, nor by the court's charge as herein first quoted. The authorities clearly establish appellant's proposition under the assignment under consideration, to the effect that "if an accident occurs from two causes, both due to the negligence of different persons, but together the efficient cause, then all the persons whose acts contribute to the accident are liable for the injury resulting, and the negligence of one furnishes no excuse for the negligence of the other." See *Markham v. Navigation Co.*, 73 Tex. 247, 11 S. W. 181; *G., C. & S. F. Ry. Co. v. McWhirter*, 77 Tex. 357, 14 S. W. 26, 19 Am. St. Rep. 755; *Gonzales v. City of Galveston*, 84 Tex. 3, 19 S. W. 284, 31 Am. St. Rep. 17; *G., C. & S. F. Ry. Co. v. Godair*, 3 Tex. Civ. App. 517, 22 S. W. 777. While in describing the manner of the accident no specific mention was made of the fact, if so it was, that the culminating force causing appellant's fall was the impact of the wheel of his wagon with the rail of the railway company, yet the petition did not exclude such a state of fact; and merely because, in the development of the case on the trial, it so appeared, did not justify a charge to the jury which in effect relieved appellee from the consequences of its negligence, if any, because of concurring negligence on the part of the railway company. Appellee's negligence, if any, was, in this phase of the evidence, at least a concurring proximate cause; and, if so, appellee was liable for the consequences thereof, unless relieved upon some ground other than that the immediate cause of the fall was the sudden contact with the railway track. The charge as first quoted was in harmony with the general allegations of the petition as to the manner of the accident, and the charge objected to, if not in conflict therewith, must at least have tended to mislead and confuse the jury.

We think appellant clearly waived the bar of "privilege" (if it ever existed) to the communication of which one of appellee's coun-

sel testified. The testimony of another who was present at this conversation had been received without objection on appellant's part, and he also had fully and freely testified in relation thereto. Nor can we sustain the objection made to the charge on contributory negligence, but, for the error in the charge of the court discussed, the judgment is reversed and the cause remanded.

Judgment reversed and cause remanded.

LANCASTER COTTON OIL CO. v. WHITE.

(Court of Civil Appeals of Texas. June 6, 1908.)

SERVANT—INJURIES—DEFECTIVE MACHINERY—INSTRUCTIONS—HARMLESS ERROR.

1. Plaintiff testified that, while working at a cake-forming machine, the block used to press the cake fell on his hand, without having been set in motion by the operator; the inference being that the catch holding the block was defective. Defendant's witnesses testified that the machine was new and of standard make, that the catch was never known to fail to work properly at any other time, and that the machine was carefully inspected both before and after the accident, and no defect discovered. The jury were instructed to find for plaintiff if they found that defendant failed to use ordinary care in respect to the machine, but not as to what they should do if they believed that defendant exercised such care. *Held*, that as the main charge was so meager, and the evidence so inconclusive, the failure to give a special charge requested by defendant, that it was not liable if it used ordinary care to have the machine in reasonably safe condition, was not harmless error.

2. It was not necessary to charge that defendant was bound to use ordinary care to have the machine in an actually safe condition.

3. The charge requested was not calculated to cause the jury to excuse defendant for a failure to furnish suitable machinery, or to have the same in proper condition.

Appeal from District Court, Dallas County; T. F. Nash, Judge.

Action by Ernest T. White against the Lancaster Cotton Oil Company. Judgment for plaintiff, and defendant appeals. Reversed.

Etheridge & Baker, for appellant. Turney & Lewis and Louis Wood, for appellee.

TEMPLETON, J. This suit was brought by Ernest T. White against the Lancaster Cotton Oil Company to recover damages on account of the loss of his left hand while engaged in the service of the company. The plaintiff was injured while working at a cake-forming machine. The accident was caused by the block which pressed the meal into cakes coming down on his hand while he was in the act of removing a cake from the cake former. The block was intended to be held suspended above the cake by an automatic catch while the cake was being removed. It was alleged in the petition that the catch was defective, and that the block was thereby caused to fall or come down

unexpectedly and without the intervention of the operator. The defenses were no defect and contributory negligence. A jury awarded the plaintiff damages in the sum of \$700.

Complaint is made of the action of the trial court in refusing a special charge asked by the defendant which reads thus: "You are instructed that the defendant was not an insurer of the safety of the cake former, whereon the plaintiff was hurt, but it was the duty of the defendant to the plaintiff to exercise such care as an ordinarily prudent person would have used under the same circumstances to see that said machine was reasonably safe, and, if the defendant discharged its duty to the plaintiff in this respect, you will return a verdict for the defendant." This charge was a substantially correct statement of the law and should have been given. Appellee insists that the issue was sufficiently covered by the instructions embraced in the main charge, but we do not think so. The jury was instructed that "it was the duty of the defendant company to exercise such care as a person of ordinary prudence would have exercised under similar circumstances to see that the machinery with which the plaintiff was working was reasonably safe," and that "the plaintiff had a right to assume that the machinery was in good order and would properly do the work for which it was intended; and if you find and believe from the evidence that the defendant failed to exercise that degree of care mentioned in the first paragraph of this charge [referring to the paragraph just quoted] to see that the machinery was in good condition, and you further find that the machinery was not in good condition, but defective, and that the plaintiff was thereby injured while in the exercise of that care for his own safety which a person of ordinary prudence would have exercised under similar circumstances, you will find for plaintiff." The other instructions given to the jury did not relate to the issue of negligence on the part of the defendant. The special charge included two propositions which were not embodied in the main charge. They were (1) that the defendant was not an insurer of the safety of the machinery; and (2) that the defendant was entitled to a verdict if it had used ordinary care to have the machine in a reasonably safe condition. It is not usually necessary to give the first proposition in charge, but it was undoubtedly error to refuse to direct the jury to find for defendant if they believed that the defendant had used ordinary care in respect to the machine. No such instruction was contained in the main charge. The jury was instructed to return a verdict for the plaintiff if they found that the defendant had failed to use ordinary care, but was not informed what they should do in case they believed that the defendant had exercised such care. The main charge is so meager, and the evidence

so inconclusive that the slightest error cannot be disregarded. The only evidence tending to show the existence of any defect in the machine was that of the plaintiff himself, who testified that the cake had been pressed and that the block had raised up, that he put in his hand to take out the cake, and that the block came down on it without having been set in motion by the operator. The inference is that the catch was defective, or the block would not have fallen. On the other hand, the defendant proved by a number of witnesses that the machine was new and was of standard make, that the catch was never known to fail to work properly at any other time, and that the machine was carefully inspected both before and after the accident, and no defect discovered. We cannot say that the refusal of the special charge was harmless error. But appellee insists that the special charge incorrectly stated the law, in declaring that the defendant had discharged its duty if it had used ordinary care to have the machine in a reasonably safe condition; the contention being that the defendant was bound to use ordinary care to have the machine in an actually safe condition. The rule is frequently stated in the language of the special charge, and such statement of the rule is ordinarily sufficient. There is nothing in the facts of this case which required a more exact statement of the rule. The requested charge was not calculated to cause the jury to excuse the defendant for a failure to furnish suitable machinery, or to have the same in proper condition. The special charge followed the rule declared in the main charge, and we think the objection urged by the appellee is without merit.

The judgment is reversed and the cause remanded.

ST. LOUIS, I. M. & S. R. CO. v. DOBIE & BILLINGSLEY.

(Court of Civil Appeals of Texas. June 3, 1903.)

APPEAL—ASSIGNMENTS OF ERROR—GENERALITY.

1. An assignment of error that "the trial court erred in overruling defendant's motion for a new trial" is too general to require consideration on appeal.

Appeal from District Court, Bexar County; S. J. Brooks, Judge.

Action by Dobie & Billingsley against the St. Louis, Iron Mountain & Southern Railroad Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Denman, Franklin & McGown, for appellant. Ball & Ingram, for appellees.

NEILL, J. The only assignment of error insisted on is as follows: "The trial court erred in overruling defendant's motion for a new trial." This assignment is too general to require its consideration. City of

Stephenville v. Bower (Tex. Civ. App.) 68 S. W. 833; Hughey v. Mosby (Tex. Civ. App.) 71 S. W. 395; Hillebrant v. Brewer, 5 Tex. 569; Flisk v. Wilson, 15 Tex. 435; Wright v. Hays, 34 Tex. 260; Dunson v. Payne, 44 Tex. 543; Austin v. G. C. & S. F. Ry., 45 Tex. 260; Clements v. Hearne, Id. 416; Lumpkin v. Murrell, 46 Tex. 56; Tompkins v. Toland, Id. 591; Pearson v. Flanagan, 52 Tex. 276; Carter v. Roland, 53 Tex. 545; Flanagan v. Womack, 54 Tex. 52; Green v. Dallahan, Id. 285; H. & T. C. Ry. v. Shafer, Id. 647; John v. Battle, 58 Tex. 599; H. & T. C. Ry. v. McNamara, 59 Tex. 256; T. & P. Ry. v. Kirk, 62 Tex. 233; Hodde v. Susan, 63 Tex. 310; O'Neil v. Willis Point Bank, 67 Tex. 40, 2 S. W. 754; Bumpass v. Morrison, 70 Tex. 758, 8 S. W. 596; Falls L. & C. Co. v. Chisholm, 71 Tex. 528, 9 S. W. 479; Mayer v. Duke, 72 Tex. 449, 10 S. W. 565; Brooks v. Price, 2 Posey, Unrep. Cas. 119; Gilleland v. Drake, Id. 509; Splers v. Purcell, Id. 625; Wilson v. Lucas, 78 Tex. 294, 14 S. W. 690; Driscoll v. Morris, 2 Tex. Civ. App. 608, 21 S. W. 629; McCown v. Terrell (Tex. Civ. App.) 29 S. W. 484; Tronnier v. Munger Mfg. Co. (Tex. Civ. App.) 31 S. W. 245; Laing v. Hanson (Tex. Civ. App.) 36 S. W. 117.

As no fundamental error appears on the face of the record, and we are not authorized to consider the only error assigned, the judgment is affirmed.

BARR v. CARDIFF.*

(Court of Civil Appeals of Texas. May 20, 1903.)

JUDICIAL NOTICE—CONTRACT—CONSTRUCTION—GARNISHMENT—DAMAGES.

1. The court may take judicial notice that rice cannot be grown to maturity without water.

2. Defendant's contract to rent land for plaintiff to a good reliable tenant, who can carry himself with feed, provisions, etc., and to plant not less than 400 acres to rice, does not bind him that the land shall in any event be planted, but only to furnish a tenant able, etc., who will agree to and is able to so plant.

3. Plaintiff is liable to defendant for suing out a writ of garnishment in a suit against him, the alleged ground therefor not existing, though his agent believed its existence.

Appeal from District Court, Harris County; C. E. Ashe, Judge.

Action by John Barr against John R. Cardiff. Judgment for defendant, and plaintiff appeals. Affirmed.

L. B. Moody, for appellant. Hutcheson, Campbell & Hutcheson, for appellee.

NEILL, J. This suit was brought by appellant to recover damages for an alleged breach of that part of a contract between the parties set out in our conclusions of fact. A writ of garnishment was also sued out and served in the cause. The defendant de-

nied the breach of the contract, and pleaded that he did everything in its performance that he obligated himself to do, and pleaded in reconvention damages for wrongfully suing out the garnishment. The question as to whether the contract was broken was the crucial issue in the case. It was submitted to the court without a jury, and determined in favor of the defendant, and from the judgment rendered against the plaintiff he has appealed.

In a contract for the sale of a certain tract of land, entered into between the parties on January 21, 1901, in which contract the defendant is referred to as "party of the first part" and plaintiff as "party of the second part," as a part of the consideration for the sale the following paragraph occurs: "First party hereby agrees to rent said land to a good, reliable tenant, who can carry himself with feed, provisions, etc., and to plant not less than 400 acres of land to rice this year, the rent of said land to be $\frac{1}{6}$ of the crop delivered at the thresher, the tenant to pay the water rent in addition to this rental." The plaintiff alleged as his cause of action the failure and refusal of the defendant to carry out his promise and obligation to rent said land for plaintiff to a tenant as thus provided, and that by reason thereof the land was not planted in rice during that year. That, had defendant complied with his obligation, plaintiff would have received by way of rental for said land, according to the terms of the contract, 800 bags of rice, each weighing 162 pounds, and each of the reasonable value of \$3 per bag, and that by reason of defendant's default he did not receive said rice, or any part thereof, to his damage in the sum of \$2,400. The undisputed evidence shows that the defendant did for the year 1901 rent the land for plaintiff to a good, reliable tenant, who could carry himself with feed, provisions, etc., to plant not less than 400 acres of the land in rice for that year; that the tenant, in pursuance of the contract of rental, went into possession of the premises, entered into a contract with the Raywood Canal Company to furnish water for the purpose of planting and cultivating said number of acres of land to rice; that, after the tenant had planted a part of the land, the canal company notified him that it was unable to and would not furnish the supply of water for its cultivation. There being no other means of procuring water necessary to the cultivation of the land under the contract, the tenant, with his employes, ceased planting, and in consequence no rice was grown on the premises. It is the contention of plaintiff that, because the tenant to whom the land was rented did not plant the 400 acres, he is entitled to recover from the defendant the damages sued for. If rice could not have been cultivated and grown without water, it were useless for the tenant to plant it after he ascertained that water would not and could not be sup-

*Rehearing denied June 24, 1903.

plied for that purpose. Under such facts the tenant would simply have lost the rice planted, as well as the time and labor of himself and employes had he planted the rice, and the plaintiff would in no way have been benefited. There is nothing in plaintiff's position that there is no evidence tending to show that rice cannot be cultivated and grown without water. The contract contemplates and provides for a water rental to be paid for by the tenant. Besides, courts will take judicial notice of the phenomena of vegetable life and growth. To illustrate: It is held that judicial notice will be taken of maturity and immaturity of the cotton crop on certain dates. *Loeb v. Richardson*, 74 Ala. 311. Judicial notice will be taken of the general course of agriculture. *Floyd v. Rix*, 14 Ark. 286, 58 Am. Dec. 374. They will take judicial notice of facts of unvarying occurrence. *Dixon v. Niccolis*, 39 Ill. 372, 89 Am. Dec. 312. In *Meyers v. Menter*, 88 N. W. 662, the Supreme Court of Nebraska took judicial cognizance of the fact that in the latitude of that state potatoes, sugar beets, and turnips are not spontaneous products of the soil. We see no reason, if it were necessary, why courts of Texas should not, under the principle of evidence stated, take judicial notice of the fact that rice cannot be planted, cultivated, and grown to maturity without water. When the contract is construed in the light of its nature and purpose, we do not think that it intended to bind the defendant that the land should, in any event, be planted. Its fair intendment was that he should only furnish a tenant able to provide himself with provisions, etc., who would agree to and was able to plant not less than 400 acres of the ground in rice during the year. We therefore conclude that the court did not err in holding that the plaintiff was not entitled to recover in his action against the defendant.

The evidence shows that the ground alleged by plaintiff for suing out the writ of garnishment did not in fact exist, and that by reason of the wrongful suing out and service of the writ the defendant was actually damaged in the amount found by the trial court. As the ground for the writ did not exist, it is a matter of no moment that plaintiff's son, an agent who made the affidavit therefor, believed its existence.

The judgment of the district court is affirmed.

GRANT v. HASS.*

(Court of Civil Appeals of Texas. March 25, 1903.)

NEGLIGENCE—SPRING GUN—PERSONAL INJURIES—DEFENSE OF PROPERTY—RIGHT TO KILL PARTY COMMITTING THEFT.

1. If plaintiff entered defendant's field in the daytime, and was shot by a spring gun set by defendant to protect his melon patch, which

adjoined the field, defendant was liable for damages.

2. Defendant set a spring gun to protect his melon patch, and plaintiff was shot thereby while walking in the edge of a field near the patch, not intending to steal melons. Pen. Code 1897, art. 790, makes the stealing of melons a misdemeanor, punishable by fine not exceeding \$100. Article 675 provides that homicide for theft at night is justifiable if it reasonably appears, by the acts or words of the person killed, that he intended to commit theft, and the killing takes place while the person killed is in the act of committing the offense, or while the offender is within gunshot of the place where the theft was committed. *Held* that, even if plaintiff entered the field at night the statute was no defense to an action for the injuries inflicted on him.

3. The fact that defendant set the gun in the belief that nobody but a thief would go within range of it was no defense.

Error from District Court, Mills County: John W. Goodwin, Judge.

Action by A. Hass against J. H. Grant. Judgment for plaintiff, and defendant brings error. Affirmed.

Leonard Doughty, for plaintiff in error.
R. L. H. Williams, for defendant in error.

FISHER, C. J. This is an action by Hass against the defendant, Grant, for damages on account of injuries sustained by plaintiff, resulting from the discharge of a spring gun located upon the inclosed premises of the defendant. The amount sued for was \$1,000. The defendant, Grant, in his answer, alleged: That the spring gun was set out by him in his inclosed field at nighttime for the purpose of protecting his melon crop against thieves. That previous to that time his melon patch had been depredated upon, and melons stolen. That he guarded the melon patch in the daytime, and only set out the gun at night. That the gun was set in a position to fire across the patch. A wire was attached to the trigger, running across the melon patch. The gun was loaded with powder and small shot, the range of which would not extend beyond the premises of the defendant. That he exercised proper caution and care in setting out the gun, and that his purpose and intention were that it should only be discharged at those who might be stealing his melons in the nighttime. That he removed the gun during the day. That plaintiff was guilty of negligence in going upon his premises, and in putting himself in a position to be shot. That he was shot in the nighttime, when he had invaded the premises for the purpose of stealing the melons.

A verdict and judgment were in favor of the plaintiff for \$60.

The charge of the trial court is as follows:

"First. If from the evidence in this case you believe that on the 24th day of July, 1901, the defendant, J. H. Grant, set upon his inclosed land or premises a gun charged with gunpowder and shot, and that he attached to the trigger of said gun a wire, which he laid along or across defendant's melon patch in

*Rehearing denied June 10, 1903.

such manner as to conceal the wire, and in such manner that one walking across said melon patch might strike said wire with the foot, and thereby discharge said gun, and with the intent on the part of defendant Grant that any one trespassing on his said melon patch would strike said wire and discharge said gun; and if from the evidence you further believe that plaintiff, A. Hass, did on July 24, 1901, enter the inclosed premises of the defendant, and did strike said wire attached to the gun with his foot, and thereby discharged the same, and was in consequence shot by said gun and injured; and if from the evidence you further believe that if from the time plaintiff, Hass, entered defendant's said inclosed land, he did not know that said gun was so set and wired, and that he did not know that defendant, Grant, guarded and protected his melon patch with spring or wired gun, or that he kept such guns on his said premises; and if, from the evidence, you further believe that said trespass by plaintiff upon the inclosed premises of defendant was in the daytime, as that term is hereinafter defined, or if, from the evidence, you believe that said trespass on said inclosure was in the nighttime, as that term is hereinafter defined, but said entry into said inclosure at nighttime, if it was at night, was not with intent on the part of plaintiff to steal defendant's melons—then you will find for plaintiff, Hass. But if, from the evidence, you believe that said entry of plaintiff, Hass, upon said inclosure of defendant, was in the nighttime, and with intent to steal the melons of defendant, and if, from the evidence, you believe that at the time he was shot by said spring gun or wired gun, if shot, he was in the act of stealing defendant's melon or melons, then you will find for the defendant, Grant.

"Second. By the terms 'daytime' and 'nighttime,' as used in this charge, is meant, first, by 'daytime,' any time from thirty minutes before sunrise to thirty minutes after sunset; and by 'nighttime,' any time from thirty minutes after sunset to thirty minutes before sunrise.

"Third. You are further instructed that if, from the evidence, you believe that at the time plaintiff, Hass, entered upon defendant's inclosed land, he knew that defendant kept a spring or wired gun on his premises to guard and protect his melon patch from depredators, then you will find for defendant."

The balance of the charge is on the measure of damages, about which there is no complaint.

It appears from the facts that the defendant's field, wherein the melon patch was situated, was inclosed by a fence, and through it was no public or usually traveled road or highway; that the melon patch was some little distance from his residence; and that the year previous, and the year that plaintiff was injured, his patch had been depredat-

ed upon and melons stolen during the nighttime. The plaintiff made some effort to guard the patch during the day, and the night that the injury occurred he set out a spring gun, loaded with powder and small shot, near the melon patch, with the muzzle pointing across the same. To the trigger of the gun was attached a wire, which extended across the melon patch, upon or near the ground, in such a position that one going between the gun and the end of the wire would strike the latter, and cause a discharge of the gun. The defendant's cornfield was near the patch, and in it the gun was placed. The defendant put out the gun for the purpose of protecting his melon crop from thieves. He only placed it out at night, and removed it in the daytime. Previous to putting out the gun, he had notified some of his neighbors that he intended to protect his melons by means of a spring gun; but the plaintiff, before he entered the melon patch and was injured, had no notice or knowledge of the existence of the gun, nor did he know that the defendant guarded his patch by such means. The defendant was not present when the gun was fired, nor did he arrive on the scene until after. The plaintiff, with some members of his family, was in camp near the fence of the defendant's field; and early on the morning of July 25, 1901, wishing to see the defendant about some guinea fowls and grass seeds, and get directions from him as to the road he should take to another place which he desired to visit, he started to the defendant's house, and climbed the fence into the defendant's field, which was the nearest way from that point to the defendant's residence, when, in walking through the field, close to the edge of the corn, with defendant's melon patch on his right, and between the same and the cornfield, his foot struck the wire attached to the gun, which caused it to discharge, and about 300 shot struck and penetrated the plaintiff. The plaintiff did not see the wire nor the gun until after its discharge and he had received its contents. The gun was loaded with small shot, the range of which would not extend beyond the private grounds and premises of the defendant. The evidence is conflicting as to the exact time that the gun was discharged and the plaintiff received its contents. According to his evidence it was in the daytime, as daytime is defined by the charge of the court. According to the evidence offered by the defendant, the discharge of the gun was early in the morning, but in the nighttime, as defined by the charge of the court. The evidence warrants a conclusion that the plaintiff, in entering the defendant's field, did so for the purpose stated by him in his testimony, without any intention to steal the defendant's melons, but was merely walking through the field to the defendant's house, in order to see him about the matters testified to by the plaintiff.

The plaintiff in error complains of the first

section of the charge quoted, because it is on the weight of evidence, in that it assumes that the defendant would, as a matter of law, be liable if the jury should find that the facts existed which are submitted in the charge, and that the court should not, as a matter of law, assume that the combination of facts stated would create liability, unless it should also be determined that the defendant was guilty of negligence or want of ordinary care in setting the spring gun upon his premises, and that the solution of these questions should be by the jury. If the liability is to be determined solely from the conditions existing at the point of time the spring gun was set, then there would be much force in the contention that that act, with its accompanying circumstances, should be submitted to and passed upon by the jury, in determining the question whether the defendant was excusable or justifiable, under the circumstances; but the facts of this case call for the application of a different principle, which will be stated later on.

On the subject of an owner, in his absence, defending and protecting his property by means of mantraps, spring guns, and other dangerous agencies calculated to destroy life or inflict serious bodily injury, some of the English cases, as well as a few from the American courts (*Deane v. Clayton*, 7 Taunt. 489; *Ilett v. Wilkes*, 3 B. & Ald. 304; *Bird v. Holbrook*, 4 Bing. 628; *Loomis v. Terry*, 17 Wend. 496, 31 Am. Dec. 306; *Johnson v. Patterson*, 14 Conn. 1, 35 Am. Dec. 96; *Townsend v. Watham*, 9 East. 142; *Hooker v. Miller*, 37 Iowa, 613, s. c. 18 Am. Rep. 18), create liability, as a matter of law, merely from the fact that a known dangerous agency is intentionally employed to prevent or repel trespass; and in this respect, justly, as said in *Aldrich v. Wright*, 53 N. H. 398, 16 Am. Rep. 347, and *State v. Barr*, 11 Wash. 485, 39 Pac. 1080, 29 L. R. A. 154, 48 Am. St. Rep. 890, they have incorrectly turned a question of fact into one of law, for the reason that the liability or nonliability of employing a dangerous agency upon the private grounds of the owner, and setting it in motion, so as to inflict injury, are questions to be determined from all the varying facts and circumstances of the particular case.

In the defense of person or property, one cannot go further than is reasonably necessary for that purpose; and in pursuit of this purpose he may employ agencies and means destructive of life, provided he acts at a time and place and under circumstances authorized and justified by law. The determination of this question is one of law and fact, the latter of which is within the province of the jury. It does not follow, from the admission of this principle, that the charge is subject to the objection urged, for it is not, when the facts of this case are fully understood. The chronological order of events, and their causation, that may happen, with the accompanying explanatory acts and circumstances, from

the time that the spring gun is set out, are not in all cases necessary to be considered in determining what effect should be given to the discharge of the gun under the circumstances and conditions then existing; for in the latter case the discharge and the consequent injury inflicted upon a trespasser may be without excuse or justification, although setting the gun may have been lawful and without negligence or want of care. The owner of private grounds is under no duty to keep them in safe condition for the protection of a mere trespasser. *Dobbins v. M., K. & T. Ry. Co.*, 91 Tex. 62, 41 S. W. 62, 38 L. R. A. 573, 66 Am. St. Rep. 856. And one of this class who intrudes must take the premises as he finds them. *Parker v. Portland Pub. Co.*, 69 Me. 173, 31 Am. Rep. 262. But when the owner employs upon his premises and sets in motion dangerous agencies, such as spring guns, mantraps, etc., of a nature calculated to cause death or inflict serious bodily injury, with the intention of inflicting injury upon a trespasser, and injury results, he is liable, unless facts and circumstances exist which in law would amount to an excuse or justification. As said in the case of *Dobbins v. The M., K. & T. Ry. Co.*, supra, the liability in such a case is not based upon the idea that the owner owes any duty to a trespasser to keep his premises in a reasonably safe condition, but is predicated upon the fact that he owes a duty to such a person not to intentionally injure him, or, as some of the cases state the rule, he is liable when he recklessly or wantonly or intentionally inflicts the injury. *Barney v. Hannibal Ry. Co.* (Mo.) 28 S. W. 1069, 26 L. R. A. 850; *Delaware & S. W. R. Co. v. Reich* (N. J.) 40 Atl. 682, 41 L. R. A. 833, 68 Am. St. Rep. 727; *Phillips v. Library*, 55 N. J. Law, 310, 27 Atl. 478; *Walsh v. Fitchburg R. Co.* (N. Y.) 39 N. E. 1068, 27 L. R. A. 724, 45 Am. St. Rep. 615. This last case, together with *Aldrich v. Wright*, 16 Am. Rep. 340, are instructive, on account of the citation of a number of cases to some extent similar to the one in hand. In *Bird v. Holbrook*, 4 Bing. 637, it appears that the defendant set a spring gun in his walled garden for the protection of his property, some of which had been previously stolen from the garden. The plaintiff climbed over the wall in pursuit of a stray fowl, at the time in ignorance of the existence of the spring gun, with which he came in contact, causing its discharge, which inflicted injuries upon him. In defense it was contended that the defendant had the right to protect his property by means of a spring gun, and that he was not liable to a trespasser unlawfully upon his premises. It was held that the action was maintainable; otherwise it would result that a mere trespass would be a capital offense. But in the course of the opinions delivered in the case, stress is laid upon the fact that liability exists by reason of the intention and purpose to injure. In *Hooker v. Miller*, 37 Iowa, 613, s. c. 18 Am.

Rep. 18, it appears that the defendant set a spring gun in his vineyard to protect his fruit from trespassers who were in the habit of appropriating it. The plaintiff, having no knowledge of the gun, entered the vineyard for the purpose of stealing fruit, when the gun was discharged, and thereby injured him. The defendant was held liable. It appears from the facts that the plaintiff entered the vineyard in the nighttime for the purpose of theft of the fruit, which, under the laws of that state, was a misdemeanor; and, from the manner in which the case is treated in the opinion of the court, it is obvious that no statute existed in Iowa, similar to the one that we have in this state, that justifies and excuses the killing of one who is about to commit the crime of theft in the nighttime. But the solution of the question of liability is placed upon the high ground that the duty looking to the protection of human life will not countenance its destruction merely for an act that amounts to a trespass or a misdemeanor; that an act towards property, punishable as a misdemeanor, so far as justifying homicide, is no more than a mere trespass; and that intentional resort to dangerous means to prevent it is justifiable in neither instance. The report of the case of *State v. Barr*, 11 Wash. 482, 39 Pac. 1080, 29 L. R. A. 154, 48 Am. St. Rep. 890, shows that the defendant was convicted of murder in the second degree, which judgment the court, on appeal, affirmed. The defendant, on absents himself from his cabin, fastened the door, and attached to the inside a spring gun, with the purpose that it should be discharged at and against any one who might undertake to enter the cabin by the door. The deceased, during the absence of the defendant, thinking no one lived in or occupied the cabin, for an innocent purpose undertook to enter by the door, which caused the discharge of the gun, the contents of which entered his body and caused his death. The defense was that the defendant had the absolute and lawful right to set the spring gun, and that he owed no duty to a trespasser; consequently, that he had committed no crime. In effect, it was held that means calculated to produce death or serious bodily harm could not be intentionally resorted to for the purpose of preventing a trespass. In *Jobe v. Houston* (Tex. Civ. App.) 23 S. W. 408, and *Ford v. Taggart*, 4 Tex. 492, it is held by the courts of this state that it is no justification for the killing of animals that they were trespassing upon another's premises, or doing injury to his property. If we view the conduct of the plaintiff in entering the melon patch of the defendant as that of a mere trespasser, or as one entering in daytime with the intention of stealing, the facts of this case call for an application of the principles decided in the foregoing cases, and the defendant was properly held liable.

Article 790 of the Penal Code of 1895 makes the theft of melons a misdemeanor,

punishable by a fine not exceeding \$100. Article 674, Pen. Code, which justifies homicide in defense of property, in so far as it refers to the crime of theft, is as follows: "Homicide is permitted in the necessary defense of person or property under the circumstances and subject to the rules here set forth." Article 675 provides that homicide for theft at night is justifiable, when committed under the following circumstances: "First. It must reasonably appear by acts, or by words coupled with the acts of the person killed, that it was the purpose and intent of such person to commit one of the offenses above named," which includes theft at night. "Second. The killing must take place while the person killed was in the act of committing the offense, or after some act done by him showing evidently an intent to commit such offense. Third. It must take place before the offense committed by the party killed is actually completed." "Eighth. In case of burglary and theft by night, the homicide is justifiable at any time while the offender is in the building or at the place where the theft is committed or is within reach of gunshot from such place or building." If the plaintiff had entered the premises at night with the purpose and intention of stealing the melons and his conduct had been of such a character as to make it reasonably appear that such was his purpose, his killing would have been justifiable. The killing must take place while the offender is in the act of committing the offense, or after some act done by him showing an intention to commit the offense, or, if the theft is completed, the killing must occur within gunshot distance of the place where the theft was committed. We are also of the opinion that, in a proper case, the rule of law just stated will justify the homicide of one who in the nighttime unlawfully invades or trespasses upon the premises of another, with no purpose or intention to steal, but whose conduct is of such a character as to make it reasonably appear to one exercising proper care and caution that such was his intention. The apprehension upon the part of the slayer must be reasonable—not merely conjectural, such as might arise from the mere presence of the intruder, but must be predicated upon some act upon the part of the deceased of a nature calculated to arouse in the mind of one of ordinary prudence and caution that a theft is about to be committed. But in our opinion, the facts of this case, as settled by the verdict of the jury, or when considered as aided by the verdict, viewed in the light of the charge, render inapplicable either of the defenses stated.

From these considerations, it will be assumed that the plaintiff entered the premises without knowledge of the existence of the spring gun, or that the defendant guarded and protected his melon patch by the use of such means; that he either entered in the daytime or nighttime, for as to this fact

the evidence is conflicting. In the manner that the issue was submitted by the charge of the court, the jury could find for plaintiff in either event. Therefore it cannot be said that the verdict determines the time when the entry was made. But it may be assumed that, if he entered the premises in the night, it was not with the purpose and intent to steal, for, if such had been the case, the jury could not, in view of the charge of the court, have found in favor of the plaintiff. The charge of the court does, in effect, assume that the gun, loaded and charged as it was shown to be, was a deadly weapon, or, more properly speaking, one calculated to produce serious bodily injury (and this assumption, in view of the facts, was the only conclusion that could be reached) and then, in effect, instructs the jury that the use and employment of such means would be unlawful and without justification, unless the plaintiff entered the premises in the nighttime for the purpose of stealing the defendant's melons. The determination of this fact by the verdict in favor of the innocence of the plaintiff of any criminal purpose and intent puts him, in entering the premises, so far as the right of the defendant to use violent and dangerous means to repel him is concerned, in the attitude of a mere trespasser, whom the defendant would not be justified in firing upon, unless the entry in the nighttime, although not criminally made, was under such circumstances and with such conduct as was reasonably calculated to create in the mind of the defendant, acting with ordinary prudence, the belief that the plaintiff was about to steal the melons. Under the facts of the case, this defense is not available, for two reasons:

First. Because it appears that, at the time that the gun was discharged, the only act of the plaintiff indicating an unlawful purpose was his mere presence in the defendant's inclosure near the melon patch. There were no words, acts, or conduct up to that time, other than might arise from his mere presence in near proximity to the patch, that indicated a purpose and intent to steal. In order, under the statute, to justify firing upon the intruder upon the supposition that he was about to steal, it must be done after words, acts, or conduct upon his part indicating that such was his intent or purpose. If the defendant had been present and actually fired the gun, in the light of the facts then existing, he would have been guilty of a crime, as the assault would not have been justifiable. When he set the spring gun, and undertook by that means to use and put in motion a deadly weapon, the discharge of which he must have known would inflict serious bodily injury, its discharge could only be justified by the conditions existing at that time; and, if they were such as would not have excused him if he was present and actually fired the gun, they would not excuse him if fired in his absence. He cannot

legally indirectly do that which the law directly prohibits. The views just expressed are limited to the facts of this case, and are not intended to state a rule of law applicable to all cases that might arise when a trespasser is injured by the owner when found upon his premises. There may be parts of premises, such as rooms of a residence, that may be so private and secluded that the bare presence therein in the nighttime of an intruder might be considered an act or conduct indicating a purpose to commit some one or more of the crimes that justify homicide at night; and in such a case homicide, if committed, might be excusable. Nor do we mean to intimate that the owner may not, under some circumstances, resort to dangerous means to prevent a forcible and violent invasion or destruction of his property. The act of the intruder may be so wanton, willful, and destructive that exceptional instances might arise that would authorize the application of force to force, which might be necessary to overcome the destructive violence of the intruder.

Second. If it is possible that we are mistaken in the views just expressed, and the construction we have placed upon the evidence, the defense interposed would not justify, because it appears from the facts that the discharge of the gun that occasioned the injury was hours after it was placed in position, and at a time when the defendant was not present. To perfect this defense, he must act upon the reasonable assumption, predicated upon the immediate conduct of the intruder that he is about to commit the offense, and will do so unless the dangerous means employed prevent him. The defense arises at the time that the shot is fired, or upon conduct existing immediately preceding it, and cannot be predicated by relation back to the time that the spring gun was set, so as to make that act operate as an excuse for conduct which subsequently occurred, which in its nature could not be available as a defense unless the defendant was present, so as to act upon the reasonable appearances indicating that the trespasser is about to steal.

As said before, the defendant may have lawfully placed in position a spring gun as a protection to his property against a thief in the nighttime, and, if one of that class is shot at night, he would not be liable; but he could not lawfully employ it in firing upon a mere trespasser, unless upon one whose conduct in the nighttime was of a character to produce the reasonable belief that he was about to steal. The very nature of the defense, to be justifiable upon this last ground, calls for the presence of the party inflicting the injury at the time and place it occurred, for his state of mind, aroused and then existing by the conduct of the trespasser, as he views it, is what gives rise to the occasion to fire the shot, and is what completes the defense.

In one of the charges of the plaintiff in error, which was refused by the court, an instruction is asked to the effect that if the defendant, in the use of ordinary care, set out the spring gun at night, under the reasonable belief and anticipation that no one but a thief at night would go before the gun, then he would not be liable to the plaintiff. Every man is held to the necessary, natural, and probable consequences of his act, the contemplation of which the law presumes, whether or not he does so in fact. The defendant, it is true, placed the gun with the view of firing upon a thief, with the intent and purpose to injure, and with the knowledge that the means employed were of a nature calculated to produce that result. If the gun was fired at a time and under circumstances for which the law would furnish no excuse or justification, the fact that it was prepared and set for a lawful purpose would furnish no excuse for the consequences that resulted from its unlawful discharge. The setting of the gun is one of the incidents in the chain of causation that produced the effect, but the immediate and proximate cause of the injury was its discharge at a time and under circumstances which made the act unlawful. The original purpose, however innocent, became immediately criminal as soon as the innocent means were employed in an unlawful way. The intent to injure some one was in the contemplation of the defendant when he set out the gun. The fact that in executing this purpose a mistake was made, and one of a class was injured that was not within his contemplation, may remove the act from a higher to a lesser degree of criminality, but will not excuse. If one with so little regard for human life sets out a spring gun with the purpose and intent to injure, he must accept the chances of its discharge at the wrong time, and under circumstances that may occasion injury to an innocent trespasser. He cannot be heard to say that that was a consequence unforeseen, and therefore it was not the proximate result of his acts.

It is contended that the court erred in not submitting to the jury the question of contributory negligence. The court did instruct the jury that the plaintiff could not recover if, when he entered the premises, he had notice of the existence of the spring gun, or if he knew that the defendant guarded his premises by such means. Further than as the question was submitted by the charge, we do not believe that the issue of contributory negligence was in the case. Plaintiff, when injured, was walking through the defendant's field, near the melon patch, going to the latter's residence. There is no evidence whatever of a want of care upon the part of plaintiff, and the evidence shows that he did not see the gun, or wire attached to the same, until after he came in contact with it and the gun discharged. The evidence does not show that the plaintiff possessed knowl-

edge of any fact that would arouse anticipation that he would likely encounter dangerous agencies to life, planted and fixed in defendant's field. He was not bound to guard against a danger that he possessed no knowledge of, and had no reasonable expectation existed. A similar defense was raised in *Hooker v. Miller*, 37 Iowa, 613, 18 Am. Rep. 18, but was refused by the court.

We find no error in the record, and the judgment is affirmed. Affirmed.

MENSING BROS. & CO. v. CARDWELL et al.

(Court of Civil Appeals of Texas. June 10, 1903.)

ACTION FOR RENT—VALUE OF CORN—EVIDENCE—APPEAL—COMPLAINT NOT MADE BELOW—LANDLORD'S LIEN—CONVERSION OF CROPS.

1. Where the petition alleged a tenant agreed to pay as rent \$1,200, and 1,200 bushels of corn, and that \$410 had been paid, and the value of the corn was \$300, and the prayer was for \$1,090, testimony of the tenant that he was indebted to the landlord in the sum of \$1,090 for balance due on the rent is sufficient to authorize judgment against him, without any other testimony as to the value of the corn.

2. Complaint cannot be made in the appellate court for the first time that a contract was proved by secondary evidence.

3. Where a tenant sent cotton on which there was a landlord's lien to a mortgagee of the tenant, with the understanding that it was to be applied on the mortgage debt, there is a conversion of it when it is received; and the landlord's lien cannot be defeated by a claim of the mortgagee that he held the cotton as that of the tenant till after the lien ceased to be in force.

4. Under Rev. St. 1895, art. 3236, making it unlawful for a tenant to remove products of rented premises without the consent of the landlord, it is a conversion for the tenant to send it away, without the landlord's consent; and the party receiving it, with knowledge of the lien, whether handling it as his own property or that of the tenant, is also guilty of conversion.

Appeal from District Court, Wharton County; Wells Thompson, Judge.

Action by Mamie Cardwell and others against Mensing Bros. & Co. and another. Judgment for plaintiffs. Mensing Bros. & Co. appeal. Affirmed.

Terry, Ballinger, Smith & Cavin, for appellants. G. G. Kelly, for appellees.

FLY, J. This suit was instituted by Mamie Cardwell (who has since married George W. Neville, who has been joined in the suit) and Estelle Cardwell against J. R. Masterson, Jr., and Mensing Bros. & Co., to recover of the first named a debt of \$1,090, and of the latter the value of 41 bales of cotton converted by them, or so much thereof as was necessary to liquidate the debt aforesaid, and for a foreclosure of a landlord's lien on all cotton and corn raised on the farm of appellees during the year 1907. The cause was tried by the court, without the aid of a jury, and resulted in a judgment

by default against Masterson for the amount of the debt, and against appellants for the sum of \$1,090, with interest thereon at the rate of 6 per cent. per annum.

It was proved that James R. Masterson was a tenant of Mamie and Estelle Cardwell, on their farm in Wharton county, during the year 1897, and that at the end of the year he owed appellees the sum of \$1,090 for rent of the premises, and they had a valid landlord's lien on all the crops raised on the land to secure their rents. In February, 1897, James R. Masterson executed a mortgage to appellants on 150 bales of cotton to be grown during the year 1897 on "that certain plantation in Wharton county, known as the 'Cardwell Plantation,'" the consideration being goods and money advanced and to be advanced by appellants. At the time the mortgage was executed, appellants were fully informed of the fact that Masterson was living on a farm belonging to appellees, and had agreed to pay them money rent for the farm and the amount of the rent, and that the cotton mortgaged by him was to be raised on that farm. It was understood and agreed between appellants and Masterson, at the time the mortgage was executed, that all cotton raised on the Cardwell farm in 1897 should be shipped to them, and that "they should have all moneys obtained from the sale of said cotton after the rents had been paid to Dr. Rutherford for the account of his nieces, the Misses Cardwell." In October and November, 1897, Masterson shipped 41 bales of cotton, raised by him on the farm belonging to appellees, to appellants, to be credited by them on their debt due by Masterson, and they received and converted the same to their own use and benefit. The cotton was worth \$1,090 when it was converted to appellees for rent of the farm for 1897, in the sum of \$1,090.

The first assignment of error complains of the action of the court in overruling appellants' plea of misjoinder of parties and actions, and the second assignment of error presents error in the action of the court in overruling appellants' plea of privilege to be sued in Galveston county, where they resided. Both of the questions raised have been definitely settled against the contention of appellants on a former appeal of this case. 68 S. W. 1121. In that opinion the authorities are cited and discussed, and we do not feel disposed to further discuss the question or to go back of the opinion.

In the petition it was alleged that Masterson had agreed to pay appellees the sum of \$1,200 in cash, and 1,200 bushels of corn to be taken by appellees at one-half of its market value, that Masterson had paid \$410, and the aggregate value of the corn was \$300. The prayer was for \$1,090. It is insisted by appellants that, because there was no proof of the value of the corn, the court erred in rendering judgment by default against Masterson for \$1,090. There can be no force or

effect in the contention, because Masterson testified that he was indebted to appellees in the sum of \$1,090 for balance due on the rent of the Cardwell plantation for the year 1897.

In the petition it was alleged that Masterson had entered into a written contract with appellees for the rent of their farm during 1897, and the written contract was attached as an exhibit to the petition, but was not introduced in evidence. No point was made in regard to it in the trial court, but, by an assignment of error in this court, appellants attack the judgment because the contract was not introduced in evidence. Masterson was permitted, without objection, to swear to the existence of a rental contract with appellees, that he had told appellants about it, and that he still owed \$1,090 on it. If appellants desired the best evidence of the existence of the contract, they should have demanded it in the trial court, and undoubtedly they would have received it. They will not be heard to complain in an appellate court because the contract was proved by secondary evidence. There was no contention in regard to the rental contract between appellees and Masterson, and the trial judge seems to have proceeded on that theory, and appellants have lost their right to demand the best evidence by permitting, without objection, secondary evidence. *Hunter v. Waite*, 11 Tex. 85; *Matlock v. Glover*, 63 Tex. 231; *Brown v. Lessing*, 70 Tex. 544, 7 S. W. 783; *Long v. Garnett*, 59 Tex. 229.

The 41 bales of cotton, the subject of contention between appellants and appellees, was, according to the testimony of Masterson, delivered to appellants for the purpose, and with the understanding between them, that the cotton was to be applied to his indebtedness, and he further testified that they received it with the intention, as previously understood between them, of applying it to the indebtedness. They cannot defeat appellees' lien by a claim that they held the cotton for more than a month as the property of Masterson. The court was justified in finding that they intended to convert and did convert the cotton as soon as they received it in Galveston, a few days after it was shipped from Wharton county, at a time when the landlord's lien of appellees was in full force and effect. "One who purchases agricultural products produced upon rented premises or other property liable to the landlord's lien for rent, within the time that the lien continues thereon, and converts the same to his own use, may be sued by the landlord for the value of the property, if it does not exceed the rent due, and, if it should exceed the rent, then for the amount of the rent." *Zapp v. Dick*, 87 Tex. 641, 30 S. W. 861. Appellants had possession of the cotton at the time when the lien was in force, and were claiming rights in it by reason of their mortgage, which amounted to a conversion. *Sandford v. Wilson*, 2 Will-

son, Civ. Cas. Ct. App. § 249. It is clear from the evidence that appellants had intended from the inception of their possession of the cotton to sell it and appropriate the proceeds. It was a possession to the exclusion and in defiance of appellees' rights therein, and it was in law a conversion. *Cooley, Torts*, p. 524; *Baker v. Beers* (N. H.) 6 Atl. 35; *Donahue v. Shippee* (R. I.) 8 Atl. 541. It is held in the last cited case that it is not necessary to a conversion that the property should have been applied to the use of the taker, but the least intermeddling with it in a manner subversive of the dominion which the owner has over it is sufficient evidence of conversion. In article 3236, Rev. St. 1895, it is made unlawful for a tenant to remove agricultural products produced on rented premises without the consent of the owner. When Masterson sent the cotton to Galveston without the consent of appellees, it was a conversion of the beneficial interest appellees had in the cotton, and whether handled by appellants as the property of Masterson, or as their own, they, too, became guilty of conversion. *Carter v. Kingman*, 103 Mass. 517.

The judgment is affirmed.

PENDLETON v. McMAINS et ux.*

(Court of Civil Appeals of Texas. May 27, 1903.)

ADVERSE POSSESSION—POSSESSION AGAINST JUDGMENT TITLE—TENANCY IN COMMON.

1. Adverse possession of land for 10 years establishes a title against one whose title is derived from a judgment, though the adverse possessor be the defendant in such judgment.

2. Plaintiffs in a judgment whereby title to land was obtained sold their interests, and subsequently one of them acquired a portion of the land under a trust deed of defendant executed prior to the judgment. Subsequently the defendant purchased such portion from one claiming under the plaintiff. *Held*, that such purchase was no recognition of the judgment title, the title to the portion in question not having been deraigned through the judgment.

3. Where plaintiffs in an action in which the judgment divested defendant of title to land did not claim an undivided interest, and the judgment decreed the title to be in plaintiffs, except a homestead, the decree amounted to a partition, and there was no joint tenancy as between plaintiffs and defendant which could prevent the running of the statute of limitations in favor of defendant, who remained in possession.

Error from District Court, Dimmit County; R. W. Hudson, Judge.

Action by George C. Pendleton against J. W. McMains and wife. Judgment for defendants, and plaintiff brings error. Affirmed.

F. Vandervoort, for plaintiff in error. W. A. H. Miller, for defendants in error.

FLY, J. This is an action of trespass to try title, instituted by George C. Pendleton,

to recover of J. W. McMains and Mary E. McMains, his wife, an undivided two-thirds of 640 acres of land originally patented to B. F. Neill, assignee of J. Poltevent survey No. 25, and $2\frac{1}{4}$ of 320 acres, being the south half of survey No. 27, patented to same party, less 200 acres, the homestead of defendants. The cause was tried by the court, and judgment was rendered for defendants.

The facts are these: On April 24, 1888, W. W. Sloan, S. E. Pfeuffer, and Geo. H. Pfeuffer, composing the Cotulla Lumber Company, and H. Riley, M. J. Barlow, and M. F. Barlow, composing the firm of M. J. Barlow & Co., recovered judgment in the district court of Frio county for the land sued for in this action, as well as survey 26, consisting of 640 acres of land, situated in Dimmit county, Tex. A writ of possession and execution for costs were awarded, but it was not shown that either had ever been issued. Geo. H. Pfeuffer made a quitclaim deed of all his interest in the land to the Cotulla Lumber Company on June 10, 1892. A quitclaim deed was made on May 12, 1890, by M. J. Barlow & Co., to E. A. Sterling, to all their interest in the land. On May 5, 1890, Mrs. Susan Pfeuffer, John Buenz, and W. W. Sloan, composing the Cotulla Lumber Company, sold their interest in the lands in controversy to E. A. Sterling. In June, 1892, Buenz released a vendor's lien retained in the last above mentioned conveyance to E. A. Sterling. In March, 1898, Sterling conveyed the land to S. H. McMurry, and in March, 1901, McMurry conveyed it to George C. Pendleton, plaintiff in error herein. In the judgment and deeds 200 acres of land, the homestead of defendants in error, were excepted. Defendants showed title from the patentee, B. F. Neill, to surveys 25 and 27, and introduced in evidence a deed to the land from J. W. McMains to his wife, Mary E. McMains, of date May 30, 1881. On March 11, 1884, defendants in error executed a deed of trust to S. M. Ellis, trustee, conveying the south half of section 27 and section 25, except their homestead of 200 acres, to secure Edward Polk in a debt of \$2,000. A deed purporting to have been executed by J. M. Knott, substitute trustee for Ellis, was placed in evidence, which conveyed to W. W. Sloan the land described in the deed of trust. On August 24, 1885, McMains and wife conveyed to J. H. Reese, in trust to secure H. Riley in a debt, survey 25, one-half of survey 27, and survey 26. William H. Riley, described as substitute trustee, conveyed the lands described in the trust deed to W. W. Sloan on November 17, 1887. Sloan conveyed his interest in survey 25 and one-half of survey 27 to H. Riley, who conveyed to D. and A. Oppenheimer, and they conveyed to Andrew Armstrong, Sr., who conveyed the land by warranty deed to Mary E. McMains on November 20, 1897. The last-named deed was recorded on December 20, 1897.

It was established by uncontroverted ev-

*Rehearing denied June 27, 1903.

idence that the land in controversy has been inclosed by a fence since 1881, and defendants in error have been in the peaceable, continuous, open, and adverse possession of the same, cultivating a portion of it, and using the other portion as a pasture, for more than 10 years after the judgment was obtained by W. W. Sloan and others, and before this suit was instituted. The judgment obtained by Sloan and others against defendants in error in 1888 divested them of all title owned by them in the land in controversy at that time, but did not prevent them from obtaining title to it again by adverse possession after that time. More than 13 years had elapsed after the rendition of the judgment before this suit was instituted, and during all those years defendants in error had been in possession of the land, and claiming title to it against the world. There is no peculiar sacredness in a title to land obtained through a judgment that lifts it out of the scope and purview of statutes of limitation, and, if the possession be adverse for 10 years, whether it be by the defendant in the judgment or any one else, it will perfect a title.

The acts of the defendants in error in buying from Armstrong was no recognition of the title held under and by virtue of the judgment. Armstrong's title was not de-raigned through the judgment.

No question of joint tenancy interposes itself as between those claiming under the judgment and defendants in error, so as to prevent the running of the statute of limitations. The plaintiffs in the original action did not claim an undivided interest in the lands, and the judgment decreed the title to all the land to be in the plaintiffs, except a homestead belonging to defendants, which was described in their answer as "200 acres off the S. W. corner of said survey No. 25." The homestead had been surveyed and set apart before the trial of the original suit. The decree amounted to a partition of the land, the homestead being given to the defendants, and the balance of the land to the plaintiffs; and it is clear that there was no joint tenancy in the land now in controversy.

Under our view that the defendants in error established title by 10 years' limitation, it becomes immaterial whether the substituted trustees' deeds were properly admitted in evidence or not.

The judgment is affirmed.

MAAS et al. v. TACQUARD'S EX'RS.

(Court of Civil Appeals of Texas. June 10, 1903.)

VENDOR'S LIEN—RELEASE—INTENTION—WAIVER OF PRIORITY—NOTES—ASSIGNMENT—DATE—PRESUMPTION.

1. A vendor reserved a lien on the land sold, and took a deed of trust. His purchaser resold to defendant and two others, who assumed the original debt and gave an additional note

and deed of trust, under which the land was sold to W., who sold to defendant, he again assuming in turn the debt to the original vendor, and also executing an additional note, which was assigned to plaintiff, who took with notice of the original lien. The original vendor, wishing to release the first purchaser from liability, but not intending to waive his lien, filed a release acknowledging payment in full, and immediately took new notes and a deed of trust for the amount from defendant. Held, that the intention must govern, and the act of the original vendor did not operate as an actual release giving plaintiff priority.

2. Where the date of assignment of notes for the purchase money of land for which a vendor's lien was reserved was not shown, on a question of priority of liens the presumption would be that the assignment was on the date of the notes.

Appeal from District Court, Galveston County; Wm. H. Stewart, Judge.

Action by Adolph A. Tacquard and others, as executors of Jacques Tacquard, deceased, against William Skirvin, Max Maas, and others. From a judgment for plaintiffs, defendant Maas and others appeal. Reversed in part.

Lovejoy & Malevinsky, for appellants. Wm. T. Austin, for appellees.

FLY, J. This is a suit instituted by Adolph A. Tacquard, as executor, and Faustine Tacquard and Emma Reitmeyer (with her husband, W. F. Reitmeyer), as executrices, of the will of Jacques Tacquard, deceased, against William Skirvin, James Sherwood, Edward Sherwood, Sarah Sherwood, Mary Smith, and her husband, Milton Y. Smith, Max Maas, as trustee and independent executor of the will of Sam Maas, deceased, and Nathan Redlich, independent executor of the same estate, to recover of the said Skirvin the sum of \$5,037.50, as evidenced by two promissory notes for \$393.75 each, payable to Jacques Tacquard, said notes having been given for the purchase money of 175 acres of land, part of the Lemuel Crawford survey No. 39, in Galveston county; four promissory notes, one for \$500, and three for \$1,000 each, executed by Skirvin to M. S. Waller, which were for part of the purchase money on the north-west block of outlot number 82, in the city of Galveston, and which notes were transferred by Waller to appellees; and also a note for \$750, executed by Skirvin to Jacques Tacquard; and to foreclose the liens set forth as to all the parties. The executors of the estate of Sam Maas claimed a first lien on lot 82, above described, for purchase money, and they asked for judgment against Skirvin for the sum of \$2,000, and for foreclosure of their vendor's lien on said lot. The court tried the case, without a jury, and rendered judgment against Skirvin for the respective debts of the two estates, and decreed liens on the property described in favor of appellees, and that their lien on lot 82 was superior to that of the estate of Sam Maas.

It was admitted that Skirvin owed appel-

less the sums alleged in their petition, and that the debts were secured by liens as therein stated. On March 7, 1890, Sam Maas, now deceased, sold to J. C. League the northwest one quarter of outlot number 82, and, in the deed conveying the property to League, reserved a vendor's lien to secure two notes for \$1,000 each, given for the purchase money of the lot, and also at the same time took a trust deed on the land to secure the purchase money. League sold the land to William Skirvin, O. W. Shepherd, and J. H. Mayers for \$1,686.66 cash, a note for \$1,333.34, and the assumption by them of the \$2,000 payable to Sam Maas. A vendor's lien was reserved in the deed, as well as in a trust deed contemporaneously executed. The \$1,333.34 note was assigned by League to a loan and trust company, and, default being made in its payment, the land was sold under the trust deed to M. S. Waller, trustee's deed reciting that Waller had paid \$1,200 in cash, and had assumed the payment of the \$2,000 to Sam Maas due on the original purchase money. Waller afterwards sold the property to William Skirvin, the consideration being that Skirvin assumed the payment of the \$2,000 due Sam Maas, and Skirvin's notes to Waller for \$4,500. The vendor's lien was retained to secure the purchase money as evidenced by the notes. Waller transferred the notes for \$4,500 to Jacques Tacquard. The deed from Waller to Skirvin was dated January 18, 1892, and it was recorded March 23, 1892. On March 6, 1892, the following instrument in writing was executed and acknowledged by Sam Maas and filed for record: "The State of Texas, County of Galveston:—Whereas on the 7th day of March, 1890, J. C. League of Galveston County, Texas, did execute, acknowledge, and deliver to Max Maas, of Galveston County, Texas, a certain deed of trust and the following described real estate, situate, lying and being in the County of Galveston, in said State of Texas, to-wit: That certain plot or parcel of ground known and described on the map of the City of Galveston by the Galveston City Company, as the North West Block of Out lot Eighty-two (N. W. Bl. of O. L. 82) in the City and County of Galveston, State of Texas, to secure the prompt payment of his two certain promissory notes executed by the said J. C. League and payable to the Order of Sam Maas as follows: One note for One thousand Dollars, due March 7th, 1891, one note for one thousand dollars, due March 7th, 1892, and bearing interest from date at the rate of eight per cent per annum, and whereas said notes with accrued interest thereon have been fully paid, and at the time of such payment said notes were the property of Sam Maas. Now, therefore, know all men by these presents, that I, Sam Maas of Galveston County, Texas, in consideration of the premises, and of the full and final payment of said notes the receipt of which is hereby acknowledged, have this

day and do by these presents remise, release, and quitclaim unto the said J. C. League, his heirs and assigns, the lien heretofore existing on said premises by virtue of said deed of trust, and do hereby declare the same fully released and satisfied. Witness my hand, this 6th day of March, 1895. Sam Maas." On March 7, 1892, William Skirvin executed his promissory note to Sam Maas for the \$2,000 still unpaid, and, to secure the payment of the same, executed a deed of trust on outlot 82, described in release above copied. The \$2,000 evidenced by the last note was the original purchase money due on the lot. Sam Maas, William Skirvin, and W. J. B. Moore swore that the release was executed and new note taken merely to relieve League from liability, and that it was not intended to release the vendor's lien and to take new security for the debt, the change being made merely because League insisted that the original lien should be foreclosed. That testimony was not contradicted.

The only question at issue is, did the lien held by Sam Maas on the land lose its priority by reason of the release of the lien, the cancellation of the old debt, and the taking of a new note for the same debt and a lien on the same property? The debt of \$2,000 due Sam Maas was for the purchase money of his land, it had never been paid, and up to the time that the release was executed was superior to all other liens on the land, and, unless the release above copied destroyed its priority, it still holds precedence over all other liens. At the time that Tacquard bought the notes given by Skirvin to Waller, he was affected with notice that Maas had a lien, paramount to his own, for \$2,000 on the land. It was not shown when the notes were assigned to Tacquard, and the presumption would obtain that it was on day of date of notes, and consequently long prior to the time when the release was given by Maas, and the release, therefore, did not influence him in his actions. He knew he had only a second lien on the land. No question can arise, therefore, as to his rights and equities as an innocent purchaser. There can be no doubt that, if nothing had been done but the taking of a new note and mortgage on the same land, the lien would still have been superior to all other liens. *Bank v. Taylor*, 91 Tex. 78, 40 S. W. 876, 966. But in this case an instrument in writing has been executed reciting that the purchase money notes have been paid and the lien declared fully released and satisfied. That instrument, however, was intended and operated only as an extinguishment of the particular attributes of a vendor's lien, in order that League might be released from farther liability. All the parties to the instrument swear that it was intended for that purpose alone, and that it was not intended to release Skirvin in any manner so as to affect the security for the debt due by him. The fact that notes were immediately taken for the same debt

from Skirvin, with a lien on the same land for security, substantiate the statements of the witnesses. No other security was taken, the only purpose of the release being to release League of liability and continue the same debt with the same security as to Skirvin. There could be no other reason assigned for the release, and it will not be presumed that Maas, without consideration and with no conceivable purpose in view, deliberately destroyed the priority of his lien and gave some one else a priority that he knew had a lien second to his. It is true that it is recited in the release that the notes were paid, but they were not, and it is not so contended by appellees. The debt still exists, and the mere change in its form, with a release of League from liability, did not rob the lien of its priority and give precedence to the debt held by Tacquard. The intent of the parties at the time the release was given must absolutely control, and, as the uncontroverted evidence shows that there was no intention to waive the lien, it must be held that it was not waived. *Seeligson v. Mitcham*, 74 Tex. 571, 12 S. W. 237; *Pope v. Graham*, 44 Tex. 196; *Slaton v. Welborne*, 78 Tex. 251, 14 S. W. 537; *Ellis v. Singleary*, 45 Tex. 27; *Slaughter v. Owens*, 60 Tex. 668.

The judgment of the lower court is affirmed as to Skirvin, but is reversed as to Maas' estate, and judgment here rendered that the lien of the estate of Sam Maas, deceased, is superior to that of the estate of Tacquard, and the lien of the Tacquard estate is foreclosed, subject to a foreclosure in favor of the estate of Sam Maas.

WESTERN UNION TEL. CO. v. McFADDEN.

(Court of Civil Appeals of Texas. June 4, 1903.)

TELEGRAMS—DELAYED DELIVERY—DAMAGES—MENTAL ANGUISH—PROBABLE RESULT OF DELAY.

1. Plaintiff's daughter was taken sick in a distant town, and a friend telegraphed to plaintiff to that effect, and requested her to telephone. Through defendant's negligence the message was not delivered till too late for plaintiff to take the train to go to her daughter, and she telephoned for the daughter to come home alone the next day. The damages laid and proven were plaintiff's inability to get to her daughter, and mental anguish suffered in not accompanying her home. *Held*, that the damages were not such as arose naturally from the breach of contract to transmit the message, or could have been in contemplation of the parties as a probable result of its breach, and there could be no recovery therefor.

Appeal from Nacogdoches County Court; Robert Berger, Judge.

Action by Lula McFadden against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed and rendered.

Geo. H. Fearons and Young & Stinchcomb, for appellant.

PLEASANTS, J. Appellee brought this suit to recover damages for mental anguish alleged to have been caused her by the negligent failure of appellant to transmit and deliver with reasonable promptness the following telegraphic message: "Nacogdoches, Texas, 7-8-00. To Mrs. McFadden, Alto, Texas. Charles is sick. Call me up over telephone. Mrs. Emmett Smith."

The petition alleges, in substance, that the person named in said telegram, Charles, was the daughter of appellee, and was about 16 years old; that she was, at the time said telegram was sent, sick at the home of Mrs. Smith in Nacogdoches, and appellee was at her home in Alto, Tex.; that said message was delivered to appellant for transmission to appellee at 9:30 o'clock a. m. on the 8th day of July, 1900, but was not delivered to appellee until about 5:55 o'clock p. m. on said day; that the purpose of sending said telegram was to inform appellee of her daughter's sickness in time for her to take the train from Alto to Nacogdoches which left the former place at 5:50 o'clock p. m. on said date and arrived at Nacogdoches 2:30 a. m. of the next day; that the failure of appellant to deliver said message with reasonable promptness prevented appellee from going to Nacogdoches on the evening of July 8th and accompanying her daughter home; that when appellee received said message she went to the telephone office and requested Mrs. Smith to send her daughter home by the first train; that in obedience to said request her daughter was put upon the train at Nacogdoches at 12:30 o'clock on the morning of July 9th, and reached home about 9 o'clock a. m. of that day; that her daughter made the trip alone, and appellee suffered great mental anguish by being deprived of the opportunity of going at once to her daughter and caring for her while at Nacogdoches, and of accompanying and ministering to her during her trip from Nacogdoches to Alto. The prayer of the petition is for damages in the sum of \$999.75.

The appellant answered in the court below by general demurrer and special exceptions, general denial, and special pleas in which it is averred: (1) That the failure to deliver the message more promptly was due to the fact that the 8th of July, 1900, was Sunday, and that the message was not received for transmission within the regular office hours established by appellant for the transaction of its business in sending messages at Nacogdoches and Alto; and (2) that, if appellee suffered any mental anguish by reason of her daughter being alone upon said trip, same was directly due to appellee's contributory negligence in ordering her to come home on the next train.

The case was tried by the court without a jury, and judgment was rendered in favor of plaintiff for \$150.

The evidence is sufficient to sustain the finding of the trial court that appellant was

guilty of negligence in not delivering the telegram earlier, and that, if same had been delivered with reasonable promptness, appellee would have gone to Nacogdoches and accompanied her daughter home. Appellee testified that she suffered mental anguish by reason of her not being able to go to her daughter at Nacogdoches, and not being with her during her trip from Nacogdoches to Alto. The daughter was not known to be seriously sick when she left Nacogdoches, but after her arrival at home became very sick, and died seven days thereafter. Mrs. Smith was able and willing to keep and care for Miss Charles, and there was no necessity shown for her coming home on the night of July 8th. A train left Alto for Nacogdoches on the evening of July the 9th, and appellee could have gone to Nacogdoches on that train, and returned with her daughter that night. Appellant had no notice of the purpose of the telegram, nor of the importance of its prompt delivery, other than as shown by the message itself.

Neither the facts pleaded nor those proven are sufficient to establish any liability on the part of the appellant for the mental anguish suffered by appellee. In order to fix liability upon a telegraph company for damages for the failure to deliver a message intrusted to it for transmission, it must be shown that the damages sustained are such as may be fairly and reasonably considered as arising naturally or in the usual and ordinary course of events from the breach of the contract to transmit the message, or such as may be reasonably supposed to have been in contemplation of the parties, at the time the contract was made, as a probable result of its breach. It cannot be said from the facts in this case that the inability of appellee to take the train for Nacogdoches, and her consequent mental anguish at being thus prevented from going to her daughter and accompanying her on her trip home, may fairly and reasonably be considered as a result that would naturally arise from the failure of appellant to promptly deliver the telegram, nor one which may reasonably be supposed to have been in contemplation of the parties at the time the contract for the transmission of the message was made. The message itself contains no intimation that the purpose of sending same was to induce appellee to come to Nacogdoches, and there is nothing in its language from which it could be presumed that appellee would, if it had been promptly delivered, take the first train to Nacogdoches. It is not stated in the message that appellee's daughter is seriously sick, and appellee is only requested to talk with the sender over the telephone. The idea that the purpose of the telegram was to bring appellee to Nacogdoches is negated by the express language of the message. There is no evidence that appellant had any information as to the purpose of the message, or the probable consequences of a failure to promptly

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deliver same other than was contained in the message itself. If we accept as true the statement of appellee that if the message had been promptly delivered she would have gone to Nacogdoches on the evening of July 8th, and that she suffered mental anguish by being deprived of this privilege, it is nevertheless clear that the mental anguish suffered by her because of her inability to go to her daughter at Nacogdoches and accompany her home, while incident to the failure of the appellant to promptly deliver the message, was not a natural and usual result of such failure. *Telegraph Co. v. Edmondson*, 91 Tex. 206, 42 S. W. 549; *Rowell v. Telephone Co.*, 75 Tex. 26, 12 S. W. 534; *Tel. Co. v. Gotcher* (Tex. Sup.) 53 S. W. 686; *Tel. Co. v. Stacy* (Tex. Civ. App.) 41 S. W. 100; *Johnson v. Tel. Co.* (Tex. Civ. App.) 38 S. W. 64.

We think it is clear, under the decisions above cited, that no recovery can be had upon the undisputed facts in this case. The judgment of the court below will therefore be reversed, and judgment here rendered for appellant, and it is so ordered.

Reversed and rendered.

FORD et al. v. BOONE et al.

(Court of Civil Appeals of Texas. May 28, 1903.)

DEEDS—DELIVERY—EXTENT OF TITLE CONVEYED—PAROL EVIDENCE—BASTARDS—INHERITANCE FROM—TRESPASS TO TRY TITLE—PETITION—ALLEGATIONS—PLAINTIFF'S RIGHT TO RENTS.

1. A man purchased land for certain bastard children reputed to be his own, but took the deed in his own name because the grantor declined to convey to the children an account of the deferred payments of the purchase price. On the same day the purchaser executed a deed to the children for a recited consideration of love and affection and \$1, and on that day took both deeds to the office of the county clerk and had them recorded, and after their record he got them and kept them until he produced them at the trial of a suit for the partition of the land, instituted by the mother of one of the deceased children. *Held* to show a delivery of the deed to the children.

2. Under Rev. St. 1895, art. 1700, declaring that bastards shall be capable of inheriting from and through their mother and of "transmitting estates," and shall also be entitled to distributive shares of the personal estate of any of their kindred on the part of their mother in like manner as if they had been lawfully begotten, the entire estate of a deceased bastard passes to his mother, to the exclusion of his putative father.

3. Where a grantor executed and recorded a deed conveying land, with intent to deliver the same to the grantees therein, evidence that he did not intend to give possession of the land until the youngest grantee became of age was inadmissible.

4. One purchased land, obtaining a deed thereon, and paid a part of the purchase money, and executed his notes for the balance, secured by the vendor's lien. On the same day he conveyed the land to third persons. Subsequently he paid the balance of the purchase money and secured a release of the vendor's lien. *Held*, that his conveyance to the third persons vested

¶ 1. See *Deeds*, vol. 16, Cent. Dig. §§ 124, 129.

in them full title to the entire tract, and not merely to the proportion thereof that the cash payment made by him bore to the whole of the purchase money.

5. In trespass to try title and for partition, the petition averred that plaintiff and three of the defendants were joint owners of the land; that the other defendant forcibly took possession thereof, and appropriated the rents and revenues during specified years to the exclusion of the real owners. *Held* sufficient to admit evidence that the latter defendant was liable to plaintiff for rents.

Appeal from District Court, Wharton County; Wells Thompson, Judge.

Action by Lethe Boone and others against John Ford and others. From a judgment for plaintiffs, defendant John Ford appeals. Modified.

M. D. Ivey and John E. Linn, for appellant.

GARRETT, C. J. This was an action of trespass to try title and for partition, brought by Lethe Boone, as the heir of her bastard son, Raymond Ford, deceased, against John Ford, Walter Ford, Julia Ford, and Johnnie Ford, for the recovery of a one-fourth interest in a tract of 53½ acres of land situated in Wharton county. Plaintiff is the mother of the defendants Walter, Julia, and Johnnie Ford, who, when the suit was brought, were of age, except Johnnie, for whom a guardian ad litem was appointed. Walter and Julia Ford disclaimed title. There was a trial by jury, which resulted in a verdict and judgment for the plaintiff against all the defendants for one-fourth of the land in controversy, and against John Ford for \$80.46 rents, and for Johnnie Ford for one-fourth of the land; and, the said Walter and Julia Ford having disclaimed, it was ordered that they take nothing. Judgment was rendered for John Ford for one-fourth of the land—one-half was perhaps intended. Partition was decreed, and commissioners were appointed.

The plaintiff, Lethe Boone, on May 9, 1894, was the mother of the defendants Walter, Julia, and Johnnie Ford, and of Raymond Ford, all minor children; and the defendant John Ford was their reputed father. The defendant John Ford and the plaintiff were never married. On the date above named the defendant John Ford bought the land in controversy from R. E. Vineyard and wife, who executed to him a deed therefor, in consideration of \$5,975, of which \$1,000 was paid in cash. Notes were executed by John Ford for the balance of the purchase money, and the vendor's lien was reserved in the deed to secure their payment. The purchase money was afterwards fully paid by the said John Ford, and on December 23, 1899, Vineyard executed to him a release of the vendor's lien. John Ford bought the land for the said four children of the plaintiff, and endeavored to get Vineyard to make the deed direct to them, but Vineyard declined to do so on account of the deferred payments of purchase money. On the same day, to wit,

May 9, 1894, John Ford executed a deed by which he conveyed the land to Walter Ford, Julia Ford, Johnnie Ford, and Raymond Ford, for a recited consideration of love and affection and \$1. Immediately after the execution of these deeds, and on the same day, the defendant took them both to the office of the county clerk and had them recorded, and after their record he got them from the clerk and kept them in his possession until they were produced by him at the trial of the case in the court below. The evidence was sufficient to show a delivery of the deed, both as to intent so to do and the record and subsequent custody thereof. At the time of the purchase of the land, and for some time thereafter, the plaintiff and the defendant John Ford were cohabiting, and lived upon the property in controversy. The defendant John Ford had been married to a woman from whom he had not been divorced, and who was living in Houston. John Ford owned a tract of 140 acres of land about 3½ miles from the land in controversy, and occupied and cultivated both of them, living most of the time on the latter tract. Raymond died in 1901, unmarried and without issue. He was only about 8 years of age at his death. The plaintiff testified that John Ford was his father.

At common law a bastard has no heritable blood, but by statute in this state he may inherit from and through his mother, and is made capable of transmitting estates. The article of the Revised Statutes of 1895 is as follows: "Art. 1700. Bastards shall be capable of inheriting from and through their mother, and of transmitting estates, and shall also be entitled to distributive shares of the personal estates of any of their kindred, on the part of their mother, in like manner as if they had been lawfully begotten of such mother." The appellant here contends that under this statute the mother cannot inherit from a bastard, or, if she does, that the reputed father inherits equally with her. It is claimed that "transmitting estates" means that the estate shall descend and vest according to the statute. The capacity of transmitting estates as conferred by the statute seems to be general, but the statute must be construed with reference to the entire context. The bastard is excluded from inheriting through or from his putative father for the reason that the father is uncertain, and for the same reason the father should not inherit from him. Hence "transmitting estates" must be construed so as to exclude the father and pass the entire estate to the mother, since the brothers and sister could only inherit through the father. The language is not clear, but the general purpose of all such statutes changing the common law in this respect is to give the reciprocal right of inheritance to both the bastard and his mother, and the statute of this state seems to intend to make the blood of the bastard heritable only on the part of the

mother, but fully so in that respect. 24 A. & E. Ency. Law, 412 et seq.

The deed was executed and recorded with the intent to deliver it to the grantees therein, and the evidence was sufficient to show the delivery. The court ruled correctly in excluding the evidence of the defendant offered to show that he did not intend to give possession of the land until the youngest child, Raymond, became of age. This would have been to allow evidence to show his intent as to the effect of the deed, which would have been inadmissible as varying the terms of the deed by parol evidence.

John Ford had full title to the land upon the conveyance to him by Vineyard, except as to the right of Vineyard to collect the purchase money, and had a perfect right to convey the same, subject only to the lien for the purchase money. The purchase-money notes were his personal obligations, for which he was bound independent of the land, and his payment thereof invested him with no better right to the land, as between himself and third parties, than he had already acquired by his deed from Vineyard. His conveyance to Walter, Julia, Johnnie, and Raymond Ford vested in them the full title to all of the tract of land, and not merely to such proportion thereof as the cash payment made by him bore to the whole of the purchase money. *Stephens v. Motl*, 82 Tex. 249, 18 S. W. 99; *Minter v. Burnett*, 90 Tex. 249, 38 S. W. 350.

The question of homestead does not arise in the case. There was never any intention to make the land his homestead. He bought it expressly for the children of the plaintiff, and, on the refusal of Vineyard to convey it directly to them, executed the deed to them at once, and on the same day that he received the title. There was never any appreciable lapse of time in which the homestead could attach to the land, or any occupation of it as such, or any intention to so occupy it. The wife from whom he had never been divorced did not live with him, and had not done so for a long time prior to the purchase of the land. She lived apart from him, in another county. But it is not necessary for us to determine whether or not she would be entitled to a homestead right in the 140 acres occupied by the defendant John Ford, it being clear that no such right ever attached to the land in controversy.

We are of the opinion that the pleadings of the plaintiff make sufficient allegations for the admission of evidence to show that the defendant John Ford was liable to the plaintiff for rents. He was not a tenant in common, and is shown to be entitled to recover one-half of the land only on the disclaimer of Walter and Julia Ford. The land was owned jointly by the plaintiff and the said Walter, Julia, and Johnnie Ford. The petition so averred, and further alleged that, while the said John Ford had no interest therein, he forcibly took possession of the

land, and remained in possession thereof cultivating, using, and enjoying the same, and appropriating the rents and revenues thereof during the years 1901 and 1902, to the exclusion of the plaintiff and the other defendants, who were the real owners thereof. It was not necessary for the plaintiff to allege that the defendant had rented the land out, and received rents from his tenants, in order to entitle her to recover rents. The question of the lack of evidence to support the verdict in favor of the plaintiff for rents is not raised by any proper assignment of error accompanied by a statement from the record, and will not be considered.

The assignments of error upon the charge of the court and the refusal of special instructions are not accompanied by statements as required by the rules, and will not be considered. We have considered, however, the legal questions arising out of the record, and find no error, though the construction of the statute on the right of bastards to receive and transmit estates is not free from difficulty.

The judgment which awards the defendant John Ford only one-fourth of the land will be reformed so as to decree him one-half thereof, and, as reformed, will be affirmed.

Reformed and affirmed.

On Rehearing.

(June 25, 1903.)

We erred in the conclusion of fact that Lethe Boone was the mother of Walter, Julia, and Johnnie Ford. The evidence does not show who their mother was. But we do not perceive that this error of fact can make any difference in the disposition of the case. The motion for rehearing is overruled.

Overruled.

WEBB et al. v. GALVESTON & H. INV. CO.
et al.*

(Court of Civil Appeals of Texas. May 27, 1903.)

USURY—INSTALLMENT NOTES—NEW AGREEMENT—EFFECT—PENALTY—AMOUNT OF RECOVERY—PERSON LIABLE.

1. Plaintiffs purchased a house and lot from defendant at an agreed price, and executed 120 usurious notes therefor. After paying 50 notes, they offered to buy a second lot for a certain sum; the terms of payment being that plaintiffs should convey back to defendant the house and lot, should have a credit for their equity therein, should pay \$500 in cash, and should pay the amount of the 70 notes remaining unpaid in 70 monthly installments. Defendant accepted the proposition. Plaintiffs executed new notes for the original 70 remaining unpaid. With reference to the transaction, an agent of defendant testified that plaintiffs wanted to exchange their house and lot for the second lot; proposing that defendant take back the house and lot, and that plaintiffs pay a certain sum in cash. One of the plaintiffs testified that they made an offer for the second lot; that the agreement was that they were to pay a certain sum in

*Rehearing denied June 24, 1903.

cash for the second lot and continue the old contract, though not the old notes. *Held* that, the usury tainting the notes given for the purchase price of the house and lot being carried into the agreement for the purchase of the second lot—such notes not merely going as a part of the purchase money therefor—usury vitiated the contract for the purchase of the second lot.

2. Under Rev. St. 1895, art. 3106, providing that an action of debt may be instituted within two years after payment of usurious interest for the recovery of double the amount so received, a person, though laboring under disabilities, can recover no greater penalty than double the amount of interest paid within two years.

3. Where, in an action to recover the penalty on account of defendants collecting usurious interest, one of the defendants pleaded that it was a purchaser in good faith, and without notice of the notes on which usurious interest was paid, but subsequently filed a joint amended answer with the codefendant claiming that there was no usury, the question of the good faith of the purchaser of the notes did not arise.

4. Under Rev. St. 1895, art. 3106, providing that, when usury is shown, double the amount of the interest received may be recovered from "the person, firm or corporation receiving the same," a corporation to whom usurious notes were indorsed, and who received the usurious interest, was alone liable for the penalty.

Appeal from District Court, Harris County; Wm. H. Wilson, Judge.

Action by Nettie G. Webb and husband against the Galveston & Houston Investment Company and the People's Loan & Homestead Company. From a judgment for defendants, plaintiffs appeal. Affirmed as to the Galveston & Houston Investment Company, and reversed as to the People's Loan & Homestead Company.

R. L. Whitehead, Brooks & Shelly, and S. P. Welsiger, Jr., for appellants. Hutcheson, Campbell & Hutcheson, for appellees.

FLY, J. This suit was instituted by Mrs. Nettie G. Webb, joined by her husband, W. R. Webb, to recover of the Galveston & Houston Investment Company and the People's Loan & Homestead Company the sum of \$644.41, amount paid in excess of the principal on certain notes executed by them to defendants, and the sum of \$533.28 penalty on account of usurious interest collected by them on the notes. The cause was tried by the court without a jury, and judgment rendered for appellees.

The facts are these: In 1893 the Galveston & Houston Investment Company conveyed to Mrs. Webb lot No. 11 in block 20 of the Fair Grounds addition to the city of Houston for the sum of \$720, and entered into a contract to build, and did build, her a house thereon for \$1,800. On the house and lot she paid the sum of \$95, and she and her husband executed to the investment company 120 promissory notes, the first for \$31.67, and each of the others for \$31.32, one to be paid on the 13th of each month, until all were paid; the last note being payable in 10 years, of course, and each bearing 10 per cent. interest from maturity. The total value of the house and lot was \$2,520, which, after de-

ducting the \$95, left \$2,425, which was secured through the 120 notes and a vendor's lien. In 1897, after appellants had paid off 50 of the promissory notes, they became desirous of buying lot No. 5, block 20, from the investment company, and proposed to give it \$3,000 for the lot; the terms of payment being that appellants should convey lot 11 to the company, and should pay \$500 in cash, and should have credit for their equity in lot 11, amounting to \$1,010, and should pay the balance in 70 monthly payments, of \$31.32 each. The 70 original notes given for lot 11 were delivered to appellants, and they executed for the balance of the purchase money on lot 5 70 notes, for the same sums and payable at the same dates as the old notes returned to them. They paid 48 of the last 70 notes to the People's Loan & Homestead Company, to which company they had been indorsed by the Galveston & Houston Investment Company. It is clear that each one of the 120 notes executed by appellants in 1893 contained \$20.21 principal, and, with the exception of the first, each contained \$11.11 interest. The first had embodied in it \$11.46 interest. The 70 notes given in the transaction for the purchase of lot 5 each contained \$21.28 principal and \$11.04 interest. This suit was filed on August 19, 1901.

The original contract between appellants and the investment company is identical with that in the case of the latter against Grymes, 94 Tex. 609, 63 S. W. 860, 64 S. W. 778, in which a majority of the Supreme Court held the contract usurious. The question as to usury in the original contract is not an open one, therefore, and the sole question to be considered is as to usury in the second contract between the parties.

It is the contention of appellants that the old contract formed the basis of the new, and that the usurious interest therein entered into and vitiated the new contract, while it is insisted by appellees that the last contract is independent of the first, and that appellants cannot set up usury in the last contract, because whatever interest there may be in the notes was given as part of the purchase money of lot No. 5. The contention of appellees is based on that doctrine which is to the effect that the purchaser of mortgaged property from the mortgagor, who assumes a usurious debt as part of the purchase money, cannot take advantage of the usury, on the principle that he has kept back enough of the purchase money to pay the mortgage, and to allow him to plead usury would be to give him the property for less than he agreed to pay for it. *B. & L. Ass'n v. Price* (Tex. Civ. App.) 46 S. W. 94; *B. & L. Ass'n v. Winans* (Tex. Civ. App.) 60 S. W. 826; *Jones, Mort.* § 745. All the authorities apply the doctrine, however, to third persons who buy the mortgaged premises, and we have seen no case where the doctrine has been applied to a new contract made between parties to other contracts; the prior contract entering to some

extent into the new contract. But let it be admitted that, where the usurious interest contained in the old contract is used as part of a purchase price which the maker of the note has agreed to pay for a parcel of land, usury cannot be pleaded; still we do not think that the facts of this case would entitle appellees to the application of the rule. The usurious interest embodied in the 70 notes remaining unpaid when the second contract was made was carried into the 70 notes given in their place, and did not go as a part of the purchase money on the second lot bought by appellants, as an analysis of the facts, we think, will fully show. In 1897 appellants desired to buy lot 5 from the investment company, and made an offer of \$3,000 for it, which was accepted. Mrs. Bryan, the agent of the investment company, testified thus as to the transaction between Mrs. Webb and Lasker, acting for the company: "In 1897, when the question came up about the exchange of the property, the proposition she submitted to me, and which I submitted to Mr. Lasker, was that she wanted to exchange her property, and put in what she had paid on that property, and get back exactly what she had paid—and I think she had paid on the other property something like \$1,000, as she claimed—and the difference between those notes (55 of them) and other notes. Now, the offer, as I remember it, that was made by Mrs. Webb, was that the company was to take her property back at \$2,500, and she was to pay the company \$3,000 for the other property, which stood the company at more than that. That was her proposition, and Mr. Lasker accepted it, provided she paid \$500 in cash." The only other witness that testified as to the second contract was Mrs. Webb, and she said: "In 1897 I offered the company \$3,000 for lot 5, because I intended to carry out my contract and pay the difference between the price of the two lots. I agreed to pay \$500 cash. My agreement with Mr. Lasker was that I was to exchange, and in this exchange I was to pay \$500 cash and continue the old contract. I was not to continue the old notes, but was to continue the old contract. The company wanted more than \$3,000 for lot 5, but I got it for that amount. It was a fair price for the lot. I paid \$500 cash. I did not surrender my equity. I just continued the old contract to pay notes I had agreed to pay, and did pay \$500 cash. I wanted to continue the old contract and pay the difference in cash. I expected the company to take back lot 11 and release me from any obligation on that lot. My equity in lot 11 was at that time \$1,010." It is clear from the testimony that the company accepted \$3,000 for lot No. 5, to be paid \$500 in cash, \$1,010 in the equity held in lot 11, and the balance in notes. The cash payment and the equity amounting to \$1,510, being deducted from the \$3,000 purchase price, leaves \$1,490 unpaid on the lot. For this sum 70 notes, aggregating \$2,192,

were given by appellants, and in those notes must have been included \$702 interest. Interest at the rate of 10 per cent. per annum on the several sums expressed in the 70 notes would amount to \$434.65, which, deducted from the amount of interest included in the notes, would give the sum of \$267.15 usurious interest. In the 48 notes paid by appellants on the last contract were included \$1,021.44 principal and \$481.92 interest. Of the latter amount, \$184.07 was usurious. Appellants would be entitled to recover only the interest paid within the two years immediately before the suit was instituted; that is, on the last half of the 48 notes. The interest on the 24 notes last paid would amount, at 10 per cent., to \$155.40, while there was actually paid thereon \$240.96. Adding the \$1,021.44 principal paid through the 48 notes to double the amount of the interest paid on the 24 notes, of \$481.92, and we have the sum of \$1,503.36, from which deduct \$1,490, the principal of the 70 notes, and there remains \$13.36, which appellants should recover.

No question of limitations arises in this case. Independent of any plea of limitations, article 3106, Rev. St. 1895, gives as a penalty double the amount of the interest paid within two years immediately preceding the institution of the suit, and the law makes no exception as to persons laboring under disabilities. No person can recover a greater penalty than double the amount of interest paid within two years.

The People's Loan & Homestead Company filed an original answer, in which it set up that it was a purchaser in good faith, without notice, of the promissory notes, and praying that, if judgment should be rendered for appellants, it recover judgment over against the Galveston & Houston Investment Company for principal, interest, and attorney's fees due on the 22 notes remaining unpaid. That pleading was abandoned, however, and in an amended answer the first-named company filed a joint defense with the investment company, the ground of defense being that neither of the contracts was tainted with usury. The question of the bona fides of the People's Loan & Homestead Company does not, therefore, arise, and need not be discussed. It is provided in article 3106, Rev. St. 1895, that, where usury is shown, double the amount of the interest received or collected may be recovered from "the person, firm or corporation receiving the same." The testimony in this case indicates that the interest paid in the two years immediately preceding the institution of the suit was received by the People's Loan & Homestead Company, and it follows that from it alone should the penalty be recovered. The fact of payment to the loan company is inferred from the circumstance that the 48 notes paid as a part of the consideration for lot 5 were indorsed to the People's Loan & Homestead Company, and it will be presumed they were the property of that company.

The judgment of the district court, in so far as it affects the Galveston & Houston Investment Company, is affirmed, but as to the People's Loan & Homestead Company it is reversed, and judgment here rendered that appellants recover of said People's Loan & Homestead Company the sum of \$13.36, with all costs of this and the lower court, and that the 22 notes for \$31.32 each remaining unpaid be canceled, and that the lien evidenced by them and the deed from the Galveston & Houston Investment Company be canceled and declared of no effect.

RODDY v. WHITE et al.*

(Court of Civil Appeals of Texas. May 9, 1903.)

PUBLIC LANDS—FREE SCHOOL LANDS—PURCHASERS—WHO MAY BECOME OWNERS OF OTHER LANDS.

1. Sayles' Civ. St. 1897, § 4218f, authorizes any bona fide purchaser of any of the public free school lands to purchase other lands in addition thereto, provided that his total purchases do not exceed four sections. Section 4218fff provides that any bona fide owner of and resident on other lands within a radius of five miles of such free school lands may also buy any of said lands, but must reside on his other lands, or upon a part of the additional lands so purchased, for three continuous years, or the lands so bought will be forfeited, unless sold by him to another, who completes the three-years ownership and occupancy. *Held*, that the statute authorized persons owning and occupying lands other than those purchased from the state to purchase additional lands from the public domain, without limitations as to amount, character, or source of title of their other lands.

Appeal from District Court, Ector County; W. R. Smith, Judge.

Action by M. L. Roddy against Charles White and others. From a judgment for defendants, plaintiff appeals. Reversed.

W. W. Martin, for appellant. Bryan & Whitaker, for appellees.

SPEER, J. Appellant, who was plaintiff below, complains of the judgment of the court in sustaining a general exception to his petition. He sought to recover from appellees section No. 34 in block No. 42 of the public free school lands in Ector county, which he claimed to be entitled to by virtue of his application to purchase the same as additional lands under the act of 1897 (Gen. Laws 1897, p. 184, c. 129). Whether or not his petition discloses a cause of action depends upon the following paragraph contained therein, to wit:

"That on said 6th day of September, 1902, and at the time plaintiff made his said application to purchase said land, he was over twenty-one years old, was the head of a family, had never prior to the date of said application purchased any public lands from said state, was at the time of said applica-

tion, and still is, bona fide, actually settled and making his home upon lots Nos. 6 and 7 in block 24, situated in the town of Odessa, Ector county, Texas, which lots were at the time of said application owned, and are still owned, by plaintiff, and are a part of section 27 in block 42, township 2 south, surveyed by virtue of land certificate No. 4,130 issued to the T. & P. Ry. Co., and are within a radius of five miles of said section No. 34."

Article 4218f, Sayles' Civ. St. 1897, authorizes any bona fide purchaser of any of the public free school lands to purchase other lands in addition thereto, provided that the total of his purchases shall not exceed four sections, etc. Article 4218fff is as follows: "Any actual bona fide owner of and resident upon any other lands contiguous to said lands, or within a radius of five miles thereof, may also buy any of the aforesaid lands, but in such a case a failure to reside upon either his other lands or upon a part of the additional lands so purchased by him, so as to make his ownership and occupancy thereof continuous for three years, shall work a forfeiture of such additional lands so bought from the state, unless he shall have sold his land to another who may and does complete a three years continuous ownership and occupancy of said residence upon his said lands as above stated and as is herein required of actual settlers." It is evident the Legislature intended by this article to authorize persons who owned and occupied lands other than those purchased from the state to become the owners of additional lands out of the public domain upon a compliance with the statute regulating such sales; and it is equally evident that no limitations as to amount, character, or source of title of such "other lands" has been prescribed. *Smith v. Rothe* (Tex. Civ. App.) 55 S. W. 734. We cannot read into the article, "provided such other lands be agricultural lands," or "provided such other lands be rural lands," or "provided such other lands be not town lots," for the language is clear and unambiguous. It is not a case for construction. The contention of appellee that the statute contemplates sales of additional lands to the owners and occupants of rural lands only upon the ground that such course fosters the settlement of the western part of the state is not even plausible, in the light of the provision requiring such purchaser or his vendee to occupy some part of his lands continuously for three years. Whether the purchaser occupies his additional lands or not is in all cases optional with him. So that it cannot be said that the purpose of the statute was to bring about actual settlement of the additional lands. We see no reason for holding that under the statute a farmer or stockman who may own a section of railroad land may purchase additional lands from the state, while a blacksmith or school-teacher who owns but a town lot may not do so. Each is a citizen and a landowner, and can

*Rehearing denied June 20, 1903.

meet the requirements of the statute, and the only difference is in the quantity of land owned. The interests of the state are as well conserved by a sale to one as to the other.

It follows that we are of opinion the trial court erred in sustaining the exception to appellant's petition, and the judgment is therefore reversed and the cause remanded.

WESTERN UNION TEL. CO. v. BROWN.*

(Court of Civil Appeals of Texas. May 20, 1903.)

TELEGRAMS—ERROR IN TRANSMISSION—NEG-LIGENCE—EVIDENCE—ADMIS-SIONS—HEARSAY.

1. Where a telegram was not repeated, though the contract contained the usual provision in reference thereto, the company is not liable for transmitting the word "8th" as "6th," unless it was due to want of ordinary care.

2. To show that error in the transmission of a telegram was not due to the company's negligence, it offered evidence to show that in transmitting it the mistake made could easily occur without negligence of the operator. This was excluded because of plaintiff's admission that the error, which was prima facie proof of negligence, could have occurred without negligence of the company. *Held*, that this was error, the admission not being the equivalent of the testimony offered; as with the testimony the jury would have been in a position to determine not only whether error could occur without negligence, but also whether it could readily so occur, or did so occur.

3. A fact may be proved by hearsay evidence not objected to.

Appeal from Harris County Court; E. H. Vasmer, Judge.

Action by T. L. Brown against the Western Union Telegraph Company. Judgment for plaintiff. Defendant appeals. Reversed.

Norman G. Kittrell, for appellant.

JAMES, C. J. We think the judgment should be reversed on account of the second assignment of error.

The negligence, if any, sought to be proved, was an error in the transmission of the message, the word "8th" being transmitted so as to read "6th." The contract contains the usual provision in reference to repeating the message. Under the circumstances, defendant would not be liable for the error committed in transmitting, unless it was due to the want of ordinary care. *Tel. Co. v. Norris* (Tex. Civ. App.) 60 S. W. 984. The commission of the error indicated negligence prima facie. To rebut this, or to show that it was not due to defendant's negligence, it offered, by the testimony of a witness, evidence by facts which would have tended to prove that in transmitting the message this particular mistake could by reason of such facts easily occur without negligence on the part of the operator. The evidence was excluded because of the express admission by

plaintiff's counsel that the change could have occurred without any negligence on the part of defendant. The admission was not the equivalent of the testimony offered. The jury, if said facts were before them, would have been in a position to determine, not only whether such error could occur without negligence, but also whether or not it could readily occur, or did occur. As it was, there being no other testimony on the subject, the admission only enabled them to surmise as to whether or not defendant was negligent. It seems to us that the admission alone, without said evidence, left the jury at sea on the issue of negligence, and enabled them only to guess in determining the issue. Defendant was entitled to have the jury consider the testimony it offered, and the admission did not supply its place.

Appellant also insists that there was an allegation that the bank would not have paid the check if the message had been properly transmitted. The allegation was probably not a necessary one, but there was evidence sustaining it. Plaintiff was allowed, without objection, to give hearsay evidence of the statement of one of the men in the bank to the effect that it was paid because the message mentioned a check dated the 6th instead of the 8th.

We think it unnecessary, in view of the reversal, to determine a question of variance presented by the first assignment. This, doubtless, will be avoided on another trial. We perceive no other error.

Reversed and remanded.

LUM & FRY v. HALE.*

(Court of Civil Appeals of Texas. June 3, 1903.)

SALES—DELIVERY—DESIGNATION OF PROPER-TY—SUFFICIENCY.

1. Where a contract for the sale of rails provided that the seller should deliver 400 cords of rails piled at a side track, evidence that he had a much larger quantity of rails piled at the track, ready for delivery under contracts with the buyer and other parties, but that he did not set out any particular 400 cords for delivery, did not show a performance of the contract.

Appeal from Gonzales County Court; W. D. C. Jones, Special Judge.

Action by W. F. Hale against Lum & Fry. From a judgment for plaintiff, defendants appeal. Reversed.

B. R. Abernethy, for appellants. Thos. McNeal, for appellee.

NEILL, J. On the 18th day of September, 1890, W. F. Hale entered into a written contract with Lum & Fry, by which the former agreed to sell and deliver the latter 400 cords of good, merchantable rails, which were to be of oak timber, and closely piled

*Rehearing denied June 24, 1903.

*Rehearing denied June 27, 1903.

on side track of the Galveston, Harrisburg & San Antonio Railroad, where they could be easily loaded on the cars and shipped to San Antonio under the \$1.25 rate, or inside of what was then that rate. By the contract Lum & Fry agreed to pay \$2.10 per cord for the rails, to measure them on the 1st of December, 1890, and settle for the quantity then measured, and then on the 15th day of each succeeding month measure and settle for the balance of them, the agreement being that the contract should be filled on or before the 1st day of March, 1891. During the period of the contract there was a freight rate of \$1.25 per cord on the Galveston, Harrisburg & San Antonio Railroad from Sandy Fork Siding on to Seguin, west of Sullivan Switch, and the rate from Seguin to San Antonio was \$1 per cord. The suit was brought on March 24, 1891, by Hale against Lum & Fry to recover damages for an alleged breach of said contract. The plaintiff alleged that he complied with the terms of the agreement by delivering the rails at the time and places stipulated, and that defendants had failed and refused to accept, measure, and pay for them; that, by reason of such failure, plaintiff was compelled to dispose of 150 cords of the rails at \$1.30 per cord, which was their market value, to his damage in the sum of \$120; and that at the date of filing his petition he had on hand 250 cords of the market value of \$1.25 per cord, which by defendants' refusal to accept he was damaged in the sum of \$212.50, the aggregate damages claimed being \$332.50. The defendants answered by a general denial, and by a special plea admitting the execution of the contract, but denied that plaintiff at any time during the period covered by it delivered such rails as contracted for; that the rails which he claimed were delivered were of inferior quality, mixed with rotten poles and rotten pieces of rails, so they could not be measured without being segregated, and were not piled where they could be easily loaded on the cars. They also pleaded in reconviction for damages on account of plaintiff's failure to deliver the rails in compliance with his contract. The case was tried before a jury, and the trial resulted in a judgment in favor of plaintiff for the amount sued for, with legal rate of interest from date of the institution of the suit.

In determining this appeal, we do not deem it necessary to take up and consider seriatim each of the 18 assignments of error insisted upon by the appellants, but will only consider such matters involved in them as go to the merits and determine a proper disposition of the case. To entitle the plaintiff to recover, it was incumbent upon him to prove that he had delivered defendants 400 cords of good, merchantable rails, closely piled on the side track of the railway in the manner and at the place and within the time prescribed, and that, after doing so, the defendants refused to accept them, and that

he had been damaged by such failure on defendants' part.

The crucial question in this case is, did the plaintiff deliver the rails to the defendants in accordance with the terms of the contract? Plaintiff testified: "From September 18, 1890, until March 1, 1891, I had on the track of the G. H. & S. A. Railroad, between San Antonio and Sandy Fork switch, between 800 and 1,000 cords of rails; had about 60 or 70 cords at Ivey siding, and 60 or 70 cords at Sandy Fork, and about 700 cords at Sullivan switch. I had wood contracts with other parties, one with Carr & Robertson, of San Antonio, for 1,000 cords, and with another party for 500 cords, and during the contract period I must have handled 1,500 cords of wood and rails. At the points named, on the 1st of December, 1890, and during each month thereafter, I had all the time, ready for delivery to defendants under the contract, rails in compliance with said contract. I did not, during the continuance of the contract from September 18, 1890, to March 1, 1891, set out 400 cords of rails for defendants at any of the points mentioned on the railroad, but all the time I had more than 400 cords at different points ready for delivery." As between the parties themselves, the general rule is that goods are delivered whenever, at the time and place which the law fixes or the parties have agreed upon, the seller has done everything which is necessary to be done in order to put the goods completely and unconditionally at the disposal of the buyer. *Mechem on Sales*, § 1186. Can it be said, from the testimony of plaintiff himself, that he had done everything necessary to be done in order to put 400 cords of good, merchantable rails, closely piled on the said track of the railroad, completely and unconditionally at the disposition of the defendants? During the contract period he had from 800 to 1,000 cords of rails on the track of the railroad between San Antonio and Sandy Fork switch, but it does not appear that these rails were placed there for the defendants, or were at their disposition, any more than it does that they were placed there for Carr & Robertson and the other parties whom plaintiff had contracted to furnish as much as 1,500 cords. He had not set out 400 cords of rails for defendants at any of the points mentioned on the railroad, and the fact that all the time he had more than 400 rails at the different points for delivery does not tend to show that he put 400 cords of rails completely and unconditionally at the disposition of defendants.

In order to authorize the plaintiff to sell any quantity of the rails and charge the difference between the contract price and what they brought at the sale to the defendants, he must have segregated them from the mass of rails he had on hand, so as to designate and appropriate them under the contract as defendants' property. The evidence shows that there was no segregation

and appropriation of the rails, under the contract, which were sold by plaintiff on defendants' account. Nor does the evidence tend to show that the 250 cords plaintiff had on hand at the time he instituted the suit had ever at any time been, by the plaintiff, appropriated under the contract and put at the disposal of defendants. It simply appears from the undisputed evidence that plaintiff, without ever having segregated the 400 cords of rails which he contracted to sell defendants from a mass of 1,500 cords, which he had on hand after the expiration of the contract period, had 400 cords of rails, 150 cords of which he sold at \$1.30 per cord and charged the difference between that and the contract price to the defendants, and the other 250 cords unsold he charged defendants with the difference between their market value and the contract price. If these 400 cords had, during the contract period, been segregated from the mass of rails on hand at that time, appropriated, set aside, and placed at defendants' disposal under the contract, and were of the quality contracted for, and defendants had refused to accept and pay for them, plaintiff then could have, after the expiration of the contract period, sold as many as he could for the best obtainable price, and charged the difference between what he received and the contract price to defendants, and also have charged the difference between the value of the rails unsold and the contract price to the defendants, and recovered from them as damages the difference in such receipts and value between the contract price. But, under the facts shown by the undisputed evidence, he has wholly failed to make out his case of damages against the defendants.

Therefore the judgment of the county court is reversed and the cause remanded.

FENN et al. v. ROACH & CO.

(Court of Civil Appeals of Texas. June 3, 1903.)

JUDGMENTS—RES JUDICATA—PLEADING—SUFFICIENCY—ACTION ON NOTE—VENUE.

1. In an action on a note payable in a particular county, defendant cannot plead his privilege to be sued in another county.

2. In an action on a note, one of the defendants, after pleading that his codefendant who gave the note had no authority to bind the answering defendant, alleged that in a suit between plaintiff and the defendants the authority of the codefendant to bind the answering defendant was directly in issue, and that it was then decided that he had no such authority, and pleaded the judgment in that suit in bar. Attached to the answer was a certified copy of the judgment referred to, together with certified copies of the pleadings disclosing the issues. The pleadings in the former cause showed that the issues in the former and the present actions were the same. *Held*, that the plea of res judicata was sufficient.

3. A plea of res judicata is not demurrable for failing to show affirmatively that the former judgment has not been appealed from.

Appeal from Kinney County Court; M. P. Malone, Judge.

Action by Roach & Co. against J. R. Fenn and another. From a judgment for plaintiff, defendant J. R. Fenn appeals. Reversed.

W. S. Davidson, for appellant. J. S. Morin, E. A. Jones, and W. S. Clamp, for appellee.

JAMES, C. J. The action is on a note signed J. J. Fenn, and dated June 14, 1898. J. J. Fenn and J. R. Fenn were made the defendants. J. R. Fenn pleaded his privilege to be sued in Harris county, in which plea there was no merit, because the note sued on was payable in Kinney county. He also, under oath, denied any partnership between himself and J. J. Fenn; denied that the note was a partnership matter, or was executed in his behalf or for his benefit; also denied that J. J. Fenn, who gave the note, was his agent, or that he ever held him out as such, or that he ever had authority to borrow money for him. He further pleaded res adjudicata in the following terms: "Defendant, further answering, pleads that this case is res adjudicata for this; that heretofore, in the district court of Harris county, in a suit between the plaintiff and these defendants, the authority of said J. J. Fenn to bind this defendant was directly in issue, and it was then decided that he had no such authority either as agent or partner, and said judgment, which is hereto attached and made a part of this answer, he pleads in bar to this suit." Attached to the plea was a certified copy of the judgment of the district court of Harris county, referred to in the plea, together with certified copies of the pleadings in that cause, disclosing the issues.

The first assignment could not be sustained, because J. R. Fenn testified in person at the trial.

The petition alleged facts which were sufficient, if true, to make J. R. Fenn liable on the note, although his name was not signed to it. The allegations and the relief asked do not present a case of attempting to contradict the terms of a written contract by oral testimony. If the note was given in the prosecution of his business, and by his authority, he would be liable upon it as his own obligation.

The case was tried by the court, instead of a jury, and the matter referred to in the eighth and ninth assignments would, for this reason, not be regarded as cause for reversing the judgment.

We have considered all the other assignments, and find them not well taken, except the sixth.

The sixth assignment complains of the sustaining of a demurrer to the plea of res adjudicata. We have copied the plea in the first paragraph of this opinion. It is very general (*Hanrick v. Gurley*, 93 Tex. 481, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330), but when taken with the exhibit thereto, which

is a part of it, every fact essential to such a plea appears. The grounds of exception stated are that it fails to show it is the same cause of action, or between the same parties. Comparison of the pleadings of that cause with those in this show that the same subject-matter was not involved, but the same issue was. That cause was upon an open account for merchandise and money furnished by plaintiff's firm to defendants, allowing various credits, which account was alleged to be a full and complete statement of all items furnished between June 27, 1896, and March 7, 1900. One of the credits in that account is the note of \$400 sued on here. The note, therefore, was withheld from said suit and not involved in it. But the pleadings in that case show the district court of Harris county had jurisdiction, and that the question there raised and adjudicated between these same parties was that J. R. Fenn was not bound by partnership, agency, or otherwise by what J. J. Fenn did in reference to obtaining supplies and money from plaintiffs between the dates mentioned. In this subsequent suit on said \$400 note, that issue, having been already litigated and adjudicated, cannot be reopened if said judgment be final. Van Fleet on Former Adjudication, § 216; *Hanson v. Hanson* (Neb.) 90 N. W. 208. The plea (that is, the plea and exhibits) fail to show affirmatively that the Harris county judgment had not been appealed from. This was no ground for demurrer. In pleading a judgment it is not necessary to allege that it remains in force and has not been set aside, vacated, nor reversed, as those are matters of defense. Van Fleet, *Former Adjudication*, p. 1329. We conclude that the court erred in sustaining the demurrer to the plea.

The statement of facts was filed too late, and has been stricken out on motion. We cannot look to it for any purpose.

Reversed and remanded.

BAKER v. HAMBLÉN et al.*

(Court of Civil Appeals of Texas. May 27, 1903.)

TRESPASS TO TRY TITLE—ACTION BY HEIRS—WHEN ALLOWABLE.

1. A will provided that the residue of the estate after administration should go to a church. Plaintiff, an heir, sued to recover certain land, alleging that it had been unlawfully conveyed to defendant by the executor; that the rights of the church had been adjudicated by a judgment decreeing that it was entitled to \$1,200 under the will, with a lien therefor on land belonging to the estate, which lien had been foreclosed and the land bought in by the church; that the land was worth \$10,000; that, if anything remains due to the church, plaintiff is ready to pay it. *Held* not to show that the heirs had no interest in the estate.

2. If the land sued for was as valuable as alleged, the heirs would appear to have an in-

terest in the estate, though a debt of \$900 recognized in the will had not been paid.

3. Where the petition did not disclose that there were no debts of the estate existing, or that there was no necessity for further administration, but showed that no administration was in fact pending, and that none had existed for about five years, and the pleadings and the circumstances indicated by them showed that there was a reasonable probability that the estate was in danger of losing part of the property by adverse possession, there was warrant for the proceeding by an heir to recover the property.

4. Where no exception is made to the form or style of a pleading, it is sufficient to be considered.

Appeal from District Court, Harris County; Chas. E. Ashe, Judge.

Action by G. B. Baker against W. P. Hamblen and others. Judgment for defendants, and plaintiff appeals. Reversed.

Brockman & Kahn and J. V. Meek, for appellant. Fisher, Sears & Sherwood, for appellees.

JAMES, C. J. The suit was brought by G. B. Baker against W. P. Hamblen and others to recover a tract of about 200 acres. After the allegations usual in trespass to try title, plaintiff alleged, in substance, that the land belonged to Fannie A. D. Darden, deceased; that he was her heir and next of kin; that she died in 1889, leaving a will, which will provided that the residue of the estate after administration should go to the Episcopal Church at Columbus to build or help build a rectory at that place, which was probated, a copy being attached as an exhibit, and which appointed R. L. Foard her independent executor, who qualified on April 9, 1890; that said Foard, as executor, made a deed to W. P. Hamblen for one-half of the said tract; that he had no power to make such deed—and prayed that the will be construed, that such deed be canceled, and for judgment for the title and possession. Defendant Hamblen pleaded by demurrers, which were not urged, and general denial; also title by the statute of five years' limitations to the north half of said tract, and a partition of the land between himself and the heirs of Fannie Darden, and estoppel. By what was styled a "supplemental petition," plaintiff alleged that, after Foard qualified as executor, the estate was dropped from the probate docket; that Foard died in 1896, and after his death no one was appointed in his place; and that there is now no administration on said estate; also alleged that the rights of the St. John Episcopal Church under the will had been adjudicated in a certain cause, wherein its properly constituted vestrymen, intervened, and had the court ascertain and declare what amount it was entitled to under the will, which the court established at \$1,200, with a lien therefor in favor of the church on 50 acres of land belonging to the estate, which lien had been foreclosed and the land bought in by the church; that the premises in co-

*Rehearing denied June 24, 1903.

troverſy are of the value of \$10,000, and, if anything remains due, the church plaintiff is ready, able, and willing to pay off and diſcharge the ſame; and that, by reaſon of ſaid decree ſo procured by the church, it had no intereſt in the land ſued for. The ſupplemental petition contained other matter not neceſſary to be ſet forth. There ſeems to have been no action requeſted on the demurrers, and the caſe went to trial. After ſhowing title to the tract in Fannie Darden, the following proceeding took place: "He (plaintiff) was then aſked the following queſtion: 'If he was acquainted with Fannie A. D. Darden?'—which queſtion was objected to by the defendant, who, through his counſel, aſked counſel for the plaintiff what was the object of the testimony, to which plaintiff's counſel replied that he expected to ſhow by the witneſs that Fannie A. D. Darden was the child and only heir of Moſely Baker, and that ſhe died a feme ſole, left no children, and that the plaintiff and others named (about 20 other perſons, for whom he was ſuing) were the next and neareſt of kin to Fannie A. D. Darden, and that the plaintiff, G. B. Baker, was the firſt couſin of ſaid Fannie A. D. Darden, and that ſhe left no ſiſters or brothers ſurviving her, and that Fannie A. D. Darden is dead. To all of which propoſed testimony the defendants, by counſel, then and there objected, on the ground that the ſame was wholly irrelevant and immaterial and not admiſſible in this caſe, becauſe the plaintiff's petition alleged that the plaintiff claimed to own the land ſued for as being next of kin to the ſaid Fannie A. D. Darden; the ſaid original petition alſo attaching and ſetting out as an exhibit the will of Fannie A. D. Darden, which contained many directions to the executor, and directions that her property ſhould be ſold, and that the debts ſhould be collected, and the proceeds thereof ſhould pay the expenſes of executing the truſt, the privileged debts, and a certain debt to Albert J. Picket for \$900; and there is no allegation of any kind in the petition that the directions given to the executor had been carried out, or that the debt had been paid, or that the legacy to Albert J. Picket had been paid; and, until ſuch was the caſe, the heirs of Fannie A. D. Darden would have no claim on the property of her eſtate; and for the further reaſon that ſaid will provided that, ſhould the executor have in his hands more than enough to pay off the claims and debts enumerated in the will, then the teſtator directed and wiſhed him to pay over to the conſtituted parties, for the purpoſe of building and helping to build a rectory in Columbus for the Epiſcopal preacher, and that under the will no part of the property would ever go to the heirs of Fannie A. D. Darden. And thereupon, after argument, the court ſuſtained the objection." This ruling of the court excluded proof of title by plaintiff, and the reſult was that the court in-

ſtructed a verdict for defendants, and judgment was entered that plaintiff take nothing by his ſuit.

The firſt assignment of error is that the court erred in not permitting appellant to introduce proof of heirſhip under Fannie Darden. One objection made that it appeared from the petition and the will attached thereto that the heirs of Fannie Darden had no intereſt in the eſtate was not well taken. If it was true that the intereſt or claim of the church on the eſtate had become adjudicated by decree in the manner alleged, and the property in queſtion was as valuable as alleged, the heirs of Fannie Darden had an intereſt in the eſtate. The other objection was equally untenable, and for like reaſon. It was that the heirs of Fannie Darden appeared to have no intereſt in her eſtate, becauſe a certain debt of \$900 recognized in the will was not alleged to have been paid. That debt might exiſt; ſtill, if the property in controverſy was as valuable as alleged in the petition, the heirs would nevertheless appear to have an intereſt in the eſtate. Theſe were the only objections interpoſed to the testimony of heirſhip offered, and we hold that the particular objections ſhould not have prevailed.

But if there was any ſufficient reaſon apparent for excluding the testimony, the action of the court in ſo doing ought to be ſuſtained. The caſe is briefed here by both parties on the queſtion whether or not the circumſtances were ſuch as enabled this action to be brought by an heir, inſtead of by an adminiſtrator. The trial court, ſo far as we are informed by the bill of exceptions, did not have this queſtion preſented to him. But if it was evident that the heir was not authorized to bring the ſuit, the evidence of heirſhip was properly diſregarded, becauſe it would not have availed plaintiff. The pleadings of plaintiff ſhewed intereſt of the heirs of Fannie Darden in her eſtate. They alſo ſhewed that in 1891 Foard qualified as the independent executor of the will, and acted as ſuch until he died, in 1896, and that no attempt has ſince been made to have an adminiſtrator with the will annexed appointed; that is to ſay, that ſince 1896 there has exiſted no adminiſtration on the eſtate. This action was commenced in February, 1901. The law upon the ſubject is conſidered and declared in *Richardson v. Vaughan*, 86 Tex. 94, 23 S. W. 640. There is not enough in the petition to diſcloſe that there were no debts of the eſtate exiſting, nor no neceſſity for further adminiſtration. The petition ſhows that an adminiſtration was in fact opened immediately after Fannie Darden's death, and that therefore, even now, the executor being dead, an adminiſtration could be had in the county court. The only authority for this heir to interpoſe and ſue to recover property of the eſtate would lie in the fact that action by the heir appeared to be a neceſſary act for the preſervation of the es-

tate, which is an exception distinctly recognized in *Richardson v. Vaughan*. Defendants pleaded limitations of five years to the north half of the tract, and this was an issue formed by the pleadings. The lapse of time since the deed by the executor to Hamblen made the plea a possible one. The pleadings and the circumstances indicated by them show that there existed a reasonable probability that the estate was in danger of loss of a part of the property by adverse possession. We think, therefore, from this, and from the fact that no administration was in fact pending, and none had existed for about five years, that there was warrant for proceedings by the heir.

The pleadings of plaintiff consisted, among other things, in an action of trespass to try title, which may be maintained by one tenant in common, as has often been decided. There is nothing in appellees' proposition that the matters alleged in the supplemental petition are not entitled to be noticed, because under the rules they should have appeared in the form of an amended petition. Where no exception is made to the form or style of a pleading, it is sufficient to be considered. We conclude that the court erred in excluding the testimony offered.

As this was really the only ruling made by the trial court, and as the verdict was the effect of the ruling, we decline to pass on other questions. We must assume that the court will rule correctly on other matters when he comes to act upon them.

Reversed and remanded.

CHAS. F. ORTHWEIN'S SONS v. WICHITA MILL & ELEVATOR CO.*

(Court of Civil Appeals of Texas. June 6, 1903.)

SALES—CONTRACT—CONSTRUCTION—WHEN TITLE PASSES—LOSS OF GOODS—HARMLESS ERROR.

1. Following a telephone conversation respecting a sale of wheat by plaintiff, defendant wrote as follows: "We confirm purchase from you to day of — cars, 2000 bushels, No. 4 Red Wheat, new crop, at 65½ cents delivered — Galveston — F. O. B. — shipment within — ten — days. Delivery at — by Fort Worth or Galveston — weights and grades. Ship to Galveston, care Texas Star Mills Elevator. Stop at Fort Worth C. F. O. Son's [defendant's] Elevator A. to clean and don't fail to note, on B. L. 'For Export.' Make draft on us, B. L. attached, at Fort Worth, Texas, leaving fair margin. Exchange to be paid by shipper." Plaintiff on the same day wrote, "We book sale to you 2000 bushels 65½ cents. Galveston." Held, that the reference to Galveston was one of price only, and not as a place of delivery, and title passed on delivery of the wheat to the carrier.

2. In case of an oral contract for sale of wheat, on delivery of the wheat to a carrier, and delivery of the bill of lading to the buyer, title vests in him, and the transportation is at his risk.

3. If a letter confirming a contract of sale is unambiguous, and testimony in explanation inadmissible, but the testimony given is in favor of the true construction, the error in its admission is harmless.

Appeal from District Court, Wichita County; A. H. Carrigan, Judge.

Action by the Wichita Mill & Elevator Company against Charles F. Orthwein's Sons. From a judgment for plaintiff, defendants appeal. Affirmed.

Hume & Hume and W. P. McLean, for appellants. Montgomery & Hughes, for appellee.

SPEER, J. Appellee shipped a number of cars of wheat to appellants at Galveston, Tex., all of which were either destroyed or damaged in the great storm at that place on September 8, 1900. At the time of making shipments, appellants paid or advanced the agreed price of the wheat, less certain margins which were reserved to cover any possible shortage in weights or errors in grades. It was to recover these margins, which were never paid, that this suit was instituted.

It is the contention of appellee that the title to the wheat had passed to appellants at the time of the loss, and upon this view the trial court rendered judgment in its favor. Upon the other hand, appellants contend that under the terms of the contract of purchase the delivery had not been completed, and that the loss should therefore fall upon appellee. The controversy hinges mainly upon the construction to be placed upon a letter of confirmation written by appellants, the original of which has been brought to the court for our inspection. The letter is partly printed and partly written—the written part we italicize—and reads as follows: "Fort Worth, Texas. Aug. 7, 1900. Mr. Frank Kell, Wichita Falls, Tex. Dear Sir: We confirm purchase from you to day of — cars 2000 bushels, No. 4 Red Wheat, new crop, at 65½ cents delivered Galveston, F. O. B. — shipment within ten days. Delivery at — by Fort Worth or Galveston — weights and grades. Ship to Galveston, care Texas Star Mills Elevator. Stop at Fort Worth C. F. O. Son's Elevator A. to clean and don't fail to note, on B. L. 'For Export.' Make draft on us, B. L. attached, at Fort Worth, Texas, leaving fair margin. Exchange to be paid by shipper. All cars must be loaded to full capacity. In referring to this purchase, please use Contract No. 538. Yours truly, Chas. F. Orthwein's Sons, per Butts. No. 3 Wheat, 59 lbs., 1c off, and 1c additional for each pound below 59. No. 4 Wheat, 57 lbs. or better, 4c off, 1c additional for each pound below 57."

The transaction which led up to this letter was as follows: On August 7, 1900, Frank Kell who was the agent of and acting for the mill and elevator company called up

*Rehearing denied June 20, 1903.

the agent of appellants at Ft. Worth by telephone, and asked him what he was paying for wheat; appellants' agent replied, "65½ cents Galveston." Kell then asked what difference he was making in grades, and the agent replied, giving the difference in price of the different grades, and telling him that there was four cents difference between No. 2 and No. 4. Kell then said to him, "I book you two thousand bushels of four, soft, 65½ cents, Galveston." On the same day—and whether before or after the sending of appellants' letter the record does not disclose—appellee wrote and mailed to appellants, at Ft. Worth, the following letter: "Wichita Falls, Texas, August 7th, 1900. Mess. C. F. Orthwein's Sons, Fort Worth, Texas, Gentlemen: In confirmation of your phone talk to day we book sale to you 2000 bushels, 4, soft, 65½ cents, Galveston. Yours truly, Wichita Mill & Elevator Co., Per Kell."

All the wheat involved was sold under the above contract, or under contracts identical therewith, and under identically the same circumstances set out, save only a difference as to dates, amounts, grades, and prices. Bills of lading were taken in the name of appellee, but indorsed and delivered to appellants prior to the loss.

If the contract of purchase was oral—and we are inclined to the view that the respective letters of the parties were but a confirmation of the already completed contract—then there is no question but that the ordinary rule obtains, and upon the delivery of the wheat to the common carrier, and the indorsement and delivery of the bill of lading to the appellants, the title vested in them, and the transportation was at their risk. *Missouri Pacific Ry. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861; *Nelmeyer Lumber Co. v. B. & M. R. R. Co.* (Neb.) 74 N. W. 670, 40 L. R. A. 534.

It will be observed that there is nothing contained in appellee's letter of confirmation which would in any manner indicate that the company understood the contract to be for Galveston delivery. Nor do we construe appellants' letter to be of different meaning. We think the language, "65½ cents delivered Galveston," means the price—the cost to appellants—of the wheat at that place, and has no reference to the place of delivery. See *Nelmeyer Lumber Co. v. B. & M. R. R. Co.*, supra, and authorities there cited; *Cameron Mill & Elevator Co. v. C. F. Orthwein's Sons* (U. S. C. C. A.; not yet reported) 120 Fed. 463. We are strengthened in this view by the fact that the very letter relied upon by appellants to show a contract for delivery at Galveston is silent as to the place of delivery, although the printed skeleton contains a blank space to be filled in where there is a contract place of delivery. We think this is significant, indicating that the place of delivery was not thought to be important, or at least not stipulated, and that the pre-

ceding expression "65½ cents delivered Galveston" had reference to price only, and not place of delivery, as already stated.

We are further strengthened in this view by the fact that the letter provides for a stop, at appellants' elevator at Ft. Worth, to be cleaned. This is not consonant with the contention that the risk was with appellee. Directing a draft to be drawn, with bill of lading attached, also evidenced an intention to take title to the wheat and make payment therefor. The fact that directions were given to leave a fair margin is unimportant, further than to make certain that no overpayment was made.

This being our construction of the letter, it follows that even though the same is unambiguous, and oral evidence in explanation thereof not admissible, the testimony of the witness Kell being in favor of this construction, no harm could have resulted.

The judgment of the district court, is affirmed.

WORD v. KENNON.*

(Court of Civil Appeals of Texas. June 3, 1903.)

HUSBAND AND WIFE—ABANDONMENT—SEPARATE PROPERTY—RECOVERY BY WIFE—PLEDGE—VERBAL CONTRACT.

1. A wife, who averred that her husband had permanently abandoned her without her fault, and gone to the Indian Territory, where he had made his permanent residence, could sue alone to recover her separate property.

2. In an action to recover possession of cattle, wherein defendant claimed a lien for pasturage, a statement by defendant to plaintiff that he could get 50 cents a head for pasturage as easy as 25, and his reasons for taking the latter sum, was properly excluded.

3. A valid verbal contract is not destroyed or affected by an attempt to execute an invalid written one in its stead.

4. An agreement by a married woman, together with her husband, that her cattle should be held as security for community debts to be incurred by him, was valid.

5. Declarations of a husband as to the ownership of cattle claimed by his wife as her separate property, made in her absence, were not binding on her.

Appeal from Sutton County Court; R. C. Dawson, Judge.

Action by Mrs. M. A. Kennon against O. T. Word. From a judgment for plaintiff, defendant appeals. Reversed.

Anderson & Hill, for appellant. Tayloe & Cornell, for appellee.

FLY, J. This suit was instituted by Mrs. M. A. Kennon to recover the possession of 27 head of cattle alleged to be her separate property. Appellant asked that D. D. Kennon, husband of appellee, be made a party, and claimed a lien on the cattle for pasturage, and for cattle sold to appellee and her husband to be butchered by them. Appellee tendered amount of pasturage into court. A

*Rehearing denied June 27, 1903.

trial by jury resulted in a verdict and judgment in favor of appellee for the cattle, their value being fixed at \$11 each, in favor of appellant for pasturage, and in favor of appellee against D. D. Kennon for \$323.

Appellee alleged that her husband had permanently abandoned her, without fault on her part, and had gone to the Indian Territory, where he had made his permanent residence. She was authorized to prosecute the suit. *Railway v. Hennessey*, 20 Tex. Civ. App. 316, 49 S. W. 917.

There was no materiality or relevancy in the statement made by appellant to appellee that he could get 50 cents a head for pasturage of the cattle as easy as 25 cents, and his reasons for taking the latter sum, and it was properly excluded.

Appellant sought to testify that when the cattle were placed in his pasture appellee and her husband agreed that appellant should "hold the title and possession of all the cattle sued for in this cause until said Dan Kennon or he and plaintiff should pay defendant all pasturage due by them, as also for all stock sold by defendant to them, or either of them, for butchering purposes." The testimony was rejected on the ground that some time afterwards a note had been given by D. D. Kennon for the pasturage and butchered cattle, and a mortgage on the cattle sued for, as well as several horses, had been simultaneously executed to secure the note, and that thereby the verbal contract was merged into the written one. The court acted on the theory that the giving of the note and mortgage destroyed the verbal contract, and, the mortgage being void because the property was the separate estate of the wife, both contracts had been destroyed. That theory is palpably wrong. If the verbal contract was a valid one, the attempt to execute an invalid written contract had no effect upon the prior valid verbal contract. The reasons given for rejecting the testimony are not tenable, but, if the result can be justified on any other ground, appellant can obtain no advantage from the error of the court. Suppose it be admitted that appellant and her husband agreed verbally that her separate property should be security for community debts to be incurred by her husband for cattle to be butchered by him in his market, would that agreement be one that was enforceable against such separate property? In the case of *Ballard v. Carmichael*, 83 Tex. 355, 18 S. W. 734, the right of the wife to dispose of her separate personal property by a verbal contract was fully discussed, and the authorities reviewed, and it was held that, even under the act of 1846 (Laws 1846, p. 156) the wife could dispose of her separate personal property by verbal agreement. Speaking of article 559 of the Revised Statutes of 1879, which is the same as article 635 of the present Revised Statutes, the court said: "The article last cited places no restriction upon the conveyance of the wife's

personal property, while the old law did not permit it to be conveyed in writing unless the writing was duly acknowledged by the wife before an officer, and that acknowledgment certified to by him. But while it is true that the law required the wife's conveyance of her personal property, if in writing, to be accompanied by her privy acknowledgment, it does not follow that she could not make a verbal transfer of such property. Such transfer is not expressly prohibited, and we think no implied prohibition upon her power was intended. * * * One of the most valuable incidents of the right of property is the power to dispose of it; and it is held that the power, in the absence of statutory restrictions, ordinarily accompanies the right. When the law permits the wife to take and hold property in her own right, it is generally held that she can transfer it as a feme sole, unless restrained by legislative enactments." Under our present statutes there is no method designated for the disposition of personal property by a married woman, and the only restriction upon her power to dispose of it is that it must be done with her husband's consent. *Speer, Marr. Wom. § 118*. It follows that, if Mrs. Kennon, together with her husband, agreed that the cattle should be held by appellant as security for the debts for pasturage and butchered cattle, she is bound by it, and the court erred in refusing to allow appellant to testify to the agreement. The declarations of D. D. Kennon as to the ownership of the cattle were properly rejected. His wife, not being present, could not be held bound by his declarations.

The other questions presented by the assignments of error are not likely to arise on another trial, and need not be discussed.

The judgment is reversed, and the cause remanded.

EASTERN TEXAS R. CO. v. SCURLOCK.*
(Court of Civil Appeals of Texas. May 22, 1903.)

RAILROADS—INJURY TO PROPERTY—DAMAGES—USES OF PROPERTY—EVIDENCE—MARKET VALUE OF PROPERTY.

1. In an action against a railroad for damages caused by defendant's constructing its tracks along the street in front of plaintiff's property, plaintiff's evidence showed injury to his property as a homestead, for which purpose he occupied it. The court submitted that issue alone to the jury, notwithstanding evidence of defendant that the property was enhanced in market value for general purposes. *Held*, that the court properly refused to submit the issues raised by defendant's evidence, as defendant had no right to lessen its value for home purposes.

2. In an action against a railroad for damages caused by defendant's constructing its tracks along the street in front of plaintiff's property, testimony as to what plaintiff and other witnesses with property similarly situated would take for their property was properly excluded.

*Rehearing denied.

Appeal from District Court, Angelina County; Tom C. Davis, Judge.

Action by J. M. Scurlock against the Eastern Texas Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

E. J. Mantooth, for appellant. M. M. Feagin and J. C. Feagin, for appellee.

GILL, J. The appellee brought this suit against the appellant to recover for damages alleged to have been sustained by him by reason of the construction and operation of defendant's railway in and along the street in front of his home in the town of Lufkin, Tex. It was averred that the noise of the passing trains and the smoke and soot from the engines interfered with the use of the place as a homestead, and that the occupation and use of the street by the defendant practically closed the street to travel, to the plaintiff's further damage in the respect mentioned. Defendant answered by general denial, and alleged that, prior to the purchase of his homestead by the plaintiff, the land on which the city of Lufkin was built was owned by railroad companies and laid out into town lots, blocks, and streets, and that on the east side of Herndon street, and across it from plaintiff's property, the land was reserved for railway uses, and that the maps of the city showing such reservations had been placed upon the public records. It was further averred, in defense and in mitigation, that the plaintiff's property had been benefited and enhanced in value by the coming of appellant's road, by the construction of its freight and passenger depots across the street from it, and by the draining and grading of this street which had been done by the defendant. A trial by jury resulted in a verdict and judgment for plaintiff for \$300, of which the appellant here complains.

The facts are that plaintiff owns a home in the town of Lufkin, fronting on the west side of Herndon street. The appellant's line of railway runs to the town of Lufkin, and it has constructed its freight and passenger depot on the east side of the street, and just opposite plaintiff's property. It has also constructed a side track in Herndon street between the depot and plaintiff's property. Permission thus to use the street was granted appellant by the city council. As to the effect of this use of a portion of this street by appellant, and the operation of trains over it, on the value of plaintiff's homestead, the evidence is conflicting, but is sufficient to support the verdict of the jury.

The plaintiff complained that appellant, by the means alleged, had damaged his property as a homestead. The trial court heard evidence on that issue, and submitted it only to the jury. Appellant contends that this was error, because there was evidence to the effect that for general purposes the property would have brought more money in the

market than prior to the advent of the road. No error was committed in the respect complained of. It is well settled that a man has a right to put his property to such lawful use as he chooses, and that no one has a right to lessen its value for that particular use. *Railway Co. v. Eddings* (Tex. Civ. App.) 70 S. W. 98; *Railway Co. v. Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739.

Objection was sustained to the following question propounded by appellant to the appellee and two other witnesses who have like suits against the appellant: "What will you take for your property now?" The exclusion of the question is complained of as error. We cannot sustain the contention. What either of the witnesses might be willing to take for their property would not tend to establish its market value or its value as a home. Indeed, they might wish to exercise the right to refuse all offers. This is not a condemnation proceeding, but a suit for damages. The witnesses had testified to the market value of this and other properties prior to and subsequent to the acts complained of, and the questions could have served no legitimate end.

The evidence complained of in the fourteenth and fifteenth assignments is not subject to the objection urged against it.

The assignment presenting objections to the court's charge and complaining of the refusal to give requested charges will not be considered in detail. The general charge of the court contains no error prejudicial to appellant, and embodies substantially such requested charges as were correct and justified by the evidence.

Because we have found no error in the record for which the judgment should be reversed, it is in all things affirmed. Affirmed.

PENNIMAN v. TINSLEY.*

(Court of Civil Appeals of Texas. April 11, 1903.)

TRIAL COURT DOCKET—REINSTATEMENT OF CAUSE—NOTICE TO ADVERSE PARTY—NEW TRIAL—DEMURRER.

1. In an action on a debt, defendant pleaded a counterclaim, and recovered judgment, from which he appealed; not being satisfied with the amount. Prior to the reversal of the judgment, the cause was dropped from the trial court docket, but was reinstated, without motion or notice to plaintiff, on the return of the mandate, four years after the reversal, and judgment rendered for the full amount claimed by defendant; plaintiff's suit being dismissed for want of prosecution. *Held*, that plaintiff was entitled to notice of the reinstatement of the cause on the trial court docket, and that a demurrer to his suit for a new trial on the ground of lack of such notice was improperly sustained.

Error from District Court, Dallas County; T. F. Nash, Judge.

*Rehearing denied June 20, 1904.

Action by H. C. Penniman against Thomas Tinsley. Judgment for defendant, and from an order sustaining a demurrer to plaintiff's suit for a new trial he brings error. Reversed.

Church & Doyle and D. H. Morrow, for plaintiff in error. W. H. Clark, for defendant in error.

TEMPLETON, J. In 1888 Penniman sued Tinsley to recover an alleged debt. Tinsley pleaded a counterclaim. A trial was had in 1893, which resulted in a judgment in favor of Tinsley. Not being satisfied with the amount of his recovery, Tinsley appealed, and in 1896 the judgment was reversed. 34 S. W. 365. In May, 1900, the mandate was issued and filed. The cause had been dropped from the docket of the trial court in 1895, and was reinstated, without motion, upon the return of the mandate. In November, 1900, an order was entered dismissing Penniman's suit for want of prosecution, and judgment was rendered in favor of Tinsley for the full amount claimed by him. Penniman filed suit for new trial. A general demurrer and a number of special exceptions to his petition were sustained, and he has appealed.

It was alleged in the petition that Penniman had no notice of any character of the return of the mandate, or of the reinstatement of the cause on the docket of the trial court; that he did not know that the mandate had been taken out or the cause reinstated until after trial, and that he was not represented on the trial; that Tinsley's delay in having the mandate issued was intentional, and was calculated to, and did, induce Penniman to believe that the said suit against him had been abandoned. It was further alleged that Penniman's original suit against Tinsley was based on a just cause of action, and that Tinsley's claim against him was without merit or foundation.

Under the rule laid down by this court in *Beck v. Avondino*, 50 S. W. 207, it must be held that Penniman was entitled to notice of the reinstatement of the cause on the docket of the trial court. According to the allegations of the petition, the judgment sought to be set aside was unjust, in that the same was based on a cause of action which was not meritorious, and barred a valid demand of Penniman. We think it sufficiently appears from the petition that Penniman was not negligent in failing to learn of the return of the mandate and of the reinstatement of the cause. The general demurrer was improperly sustained, and the judgment must be reversed.

Some of the criticisms directed to the form of the petition are not without merit. The plea was unnecessarily voluminous, and the matter therein alleged is not stated in logical order. The cause of action originally sued on by Penniman should have been pleaded

more specifically, and the facts showing the injustice of Tinsley's demand should have been more fully stated. The substance of the matter contained in the exhibits to the petition, in so far as the same is material and relevant, should be alleged in the petition, and the exhibits omitted. But in spite of these defects of form, which doubtless induced the ruling of the trial court, we think that sufficient facts are alleged in the petition to make the plea good against a general demurrer, and the judgment will therefore be reversed and the cause remanded.

Reversed and remanded.

WILSON v. ELLIOTT.

(Court of Civil Appeals of Texas. May 20, 1903.)

DIVORCE—CUSTODY OF CHILD—FOREIGN DECREE—RES ADJUDICATA—EVIDENCE.

1. By a divorce granted in New Mexico, the custody of a child was given to the father, with permission for it to visit the mother for a month each year; the visits to be made within New Mexico, and the mother not to remove the child therefrom; the court having jurisdiction of the parties, including the child. The mother took the child to Texas, and plaintiff, the father, brought habeas corpus to obtain its custody. *Held*, that the decree determined all facts existing prior to its date in favor of plaintiff's rights to its custody, and only such facts could be considered to disturb that adjudicated right which may have come into existence since that time, such as evidence of changed conditions of the parties, bearing on their fitness and the best interests of the child.

Appeal from District Court, El Paso County; A. M. Walthal, Judge.

Habeas corpus by Leander F. Elliott against Effie M. Wilson to obtain custody of an infant child of the parties. Judgment for petitioner, and respondent appeals. Affirmed.

S. P. Weisiger and Turney & Burges, for appellant. Clark, Fall, Hawkins & Franklin, for appellee.

JAMES, C. J. This is a habeas corpus proceeding by appellant, the father of an 11 year old daughter, to obtain the custody of the child held by appellant, its mother. On May 4, 1899, the parties were divorced by decree of the district court of New Mexico. In that, and in proceedings supplemental thereto, that court entered decrees, the substance of which, as finally made, was that the father should have the custody of the child, with the provision "that the child should be permitted to visit its mother once a year for the period of one month during the month of July; that said visits shall be made within the territory of New Mexico, and the said child shall not be removed from said territory by her mother." The said court had jurisdiction of the parties, including the child. The mother remarried in New Mexico, and afterwards she and her husband removed to El Paso, Tex.; she bringing with

her the child, in disregard of the said decree.

At the trial of the present case the parties introduced testimony concerning the character, conduct, and fitness of each other prior to and since the said decree, but the district judge, as shown by conclusions on file, held that the territorial decree was binding on him, under the Constitution and laws of the United States; and, as is evidenced by the certificate to the statement of facts, the court refused to consider as evidence on the trial any evidence of any fact that occurred prior to the decree of divorce in New Mexico, excepting the proceeding in said New Mexico court, "as set out and shown in Exhibit A, hereto attached." This exhibit consists merely of the pleadings and decree. It is made quite clear that the judge treated the decree as *res adjudicata*, absolutely, and as entitling the father to possession of the child, and that all he could consider was evidence of changed conditions of the parties since the said decree, bearing on their fitness and the best interests of the child. The judge expresses his conclusion in these words: "I find that, since the decree or the modified or amplified decree as to the custody of the child, there has been no material change in the status or condition of said parties as to their fitness or qualification as proper custodians of said child." In other words, the New Mexico decree was held to determine all facts existing prior to its date in favor of the father's right to its custody, and only such facts could be considered to disturb that adjudicated right as may have come into existence since that time. We were of opinion that the judge was in error in giving such effect to the decree in this character of case, and filed an opinion so holding; but on motion for rehearing we certified the question to the Supreme Court, and in the opinion of the Supreme Court, delivered in answer to the question (see 73 S. W. 946, 7 Tex. Ct. Rep. 238), the view of the district judge was sustained. It being our duty to observe and follow the decision of the Supreme Court in the disposition of the case, we hold there was no error in giving the territorial judgment such effect.

This practically disposes of the first, fourth and ninth assignments of error; also the second, under which the contention is made that the court erred in the conclusion that the child is now being unlawfully detained by its mother at El Paso, Tex. Under the decree the custody of the child appertained to the father, and the removal of the child from New Mexico and its retention by the mother being contrary to, and in fact in defiance of, its terms, the conclusion was not error. The fifth and sixth assignments are not sustained. The New Mexico decree, and the pleadings upon which it was rendered, were sufficient, without the testimony upon which the court acted. The seventh, also, cannot be sustained, because, under our

statute, a child under 14 years of age is not permitted to choose its guardian. Nor the eighth, which challenges the court's finding of fact, viz., "that relator is engaged in a prosperous business at Rinjon, and is amply able to care for and educate the child." The testimony sufficiently supports the conclusion in all material respects. The Supreme Court in its opinion states that evidence of prior conduct (to the decree) of either party cannot be introduced, except to corroborate some evidence of similar conduct which was developed since the original decree. Nothing in the way of conduct was developed since the decree which would give application to this rule.

The motion for rehearing is granted, and the judgment affirmed. The opinion heretofore filed by this court will be withdrawn.

On Appellant's Motion for Rehearing.

(June 24, 1903.)

The motion cites the following testimony by appellant: "At one time he [speaking of relator] choked me and tore my clothes off from me and cursed me, and broke the catch on the door, and took the child out of my possession by force. This was on the Saturday, the day I was to have the custody of the child under the order of the court." And appellant states that this conduct was subsequent to the New Mexico decree granting the custody of the child to relator. We find from the record that the original decree of the New Mexico court, of May 5, 1899, granted the divorce, awarded the custody of the child to relator "until the further order of the court," and ordered that defendant "be permitted by said plaintiff to have access to and visit said Effie Lee Elliott, her daughter, once during each and every week at such times as said defendant shall designate, and at such place or places as shall afford said defendant reasonable time and facility for making such visits, until the further order of this court in the premises." On September 6, 1901, plaintiff filed a petition for modification and amplification of "the terms of its several judgments and decrees heretofore entered relative to the custody and control of the infant child of the parties hereto," setting forth, among other things, the terms of the original decree; alleging, also, that by virtue of a supplemental decree of August 5, 1899, plaintiff was permitted to place said child in the Academy of Visitation conducted by the Sisters of Loretta at Las Cruces, N. M."; also "that thereafter, on October 24, 1899, a second supplemental decree was entered herein, whereby said defendant was awarded the custody of said infant child, without interference from the plaintiff or any one else, the whole of Saturday of each and every week, until the further order of the court, subject to the restriction that defendant should not remove said child from the town of Las Cruces."

Defendant opposed this petition, and herself prayed for the absolute custody of the child, for matters stated in her answer. The final decree thereon was on April 29, 1902, which awarded plaintiff the absolute custody of the child, providing that it might visit its mother during the month of July in each year, within the territory; the child not to be removed from the territory. The supplemental decrees are not set forth in the record from the New Mexico court, but there was no denial of them by defendant's pleading, and her pleading itself refers to a supplemental decree; and the very testimony in question, and above quoted, recognizes that there was a supplemental or provisional order allowing her to have the child on Saturdays. The conduct which is referred to in the testimony quoted occurred while the supplemental order was in force, and must have antedated the final decree. Consequently it was not conduct which occurred since the adjudication of the matter by the New Mexico court.

With this explanation, the motion for rehearing is overruled.

HEFFRON et al. v. CITY OF GALVESTON.
(Court of Civil Appeals of Texas. June 12, 1903.)

DEDICATION—ACCEPTANCE—TRESPASS TO TRY TITLE—RIGHT TO MAINTAIN.

1. Land dedicated for a public market was designated on a plat dividing a city into lots and blocks. Lots were sold with reference to the plat. The owners of the land making the plat and dedication continuously recognized the right of the public to such land for over 40 years. The city had for more than 40 years recognized its obligation to take the property and preserve it for the use for which it was appropriated, and had claimed it and leased it as public property, though there was no formal acceptance thereof; nor did the city erect any building thereon for a public market. *Held*, that the city acquired a title to the property, to preserve it for the use of the public, and could maintain a suit for trespass to try title.

Appeal from District Court, Galveston County; Robt. G. Street, Judge.

Trespass to try title by the city of Galveston against Isaac Heffron and the Galveston Cement Pipe Works. Defendant Heffron filed a disclaimer. Judgment for plaintiff, and the defendant Galveston Cement Pipe Works appeals. *Affirmed*.

Gresham & Gresham, for appellant. Z. H. Scott and P. A. Drouilhet, for appellees.

GARRETT, C. J. This was a suit of trespass to try title, brought by the city of Galveston against Isaac Heffron and the Galveston Cement Pipe Works, for the recovery of a part of the south half of block 568 in the city of Galveston. Heffron filed a disclaimer, and the pipe works answered by general demurrer, special exceptions, and plea of not guilty, and set up title acquired by limitation against the Galveston City Com-

pany. A jury was waived, and the cause was submitted to the court, and judgment rendered in favor of the city of Galveston for the property in question and the sum of \$185.25, rents.

By the first error assigned, the defendant seeks to question the authority of the city of Galveston as a legally constituted body, under the laws of the state, to maintain this suit. The precise question was determined by the Supreme Court in the case of *G. & W. Ry. Co. v. City of Galveston*, 74 S. W. 537, 7 Tex. Ct. Rep. 489, recently decided, and it is unnecessary to do more than to refer to that case.

The claim of the city to the property in controversy grows out of the alleged dedication of it by the Galveston City Company for the purposes of a public market. The original petition was filed on January 13, 1897, and the case went to trial on the plaintiff's amended original petition filed December 18, 1902. The petition alleged that on the 22d of April, 1840, the site of the city of Galveston was owned in undivided interests by a large number of persons associated and organized as a joint stock company under the name of the Galveston City Company, who committed the management of such property to a board of directors chosen by themselves; that thereafter, on the 5th day of February, 1841, said association was incorporated under an act of the Congress of the Republic of Texas; that said Galveston City Company had surveyed, subdivided, and platted said lands as a site for the city of Galveston, and has ever since sold its lots and blocks to purchasers according to such maps; that they caused a survey and plat to be made of the site in 1839, in 1843, and in 1845; that upon said maps the entire south half of block 568 was conspicuously indicated as a public market, and as such dedicated for the use and benefit of the public; that on the 22d day of April, 1840, the Galveston City Company, by its board of directors, who were by it thereunto duly authorized, and by entry on their minutes, ordered that the said south half of block 568 be reserved for a market, and that it be conveyed by the agent to the corporation of the city of Galveston, "to be used only for the purpose of market places for the public convenience," and that ever since that time "said company has generally and publicly recognized and adopted and advertised said maps as authentic and authoritative, and said dedication and order to that effect as complete and final, and has sold and disposed of the greater part of its said lands, according to and by reference to said maps, to purchasers who made their purchases with reference to said map, plat, and dedication, and relying upon their blinding force and effect"; that plaintiff is empowered and authorized especially "to take, hold, and use lands and other property for corporate and public purposes, and to acquire by donation or other-

wise, and establish and maintain, public markets, market places, and other public grounds and places in said city"; that plaintiff "on the 5th day of January, 1844, as agent and trustee of the public and the inhabitants of the city of Galveston, and in the exercise of its corporate functions and capacity, accepted said dedication, and took charge and possession of said property for preservation, improvement, and use as a public market, as and when the need of the city might require, and thereby and by law was vested with the ownership, control, management, and right of possession and use thereof, in trust for the use and benefit of the public generally, and more especially the inhabitants of the said city of Galveston; that by said acts, conduct, admissions, and dedication by the Galveston City Company, and by plaintiff's acceptance thereof, and by law, plaintiff became, and still is, the owner of said property as trustee for public use, has accepted and still holds the trust as aforesaid, and that the property is now, and has ever been since January 1, 1840, grounds which belong to the city of Galveston, and which have been, as aforesaid, donated and dedicated for public use to said city of Galveston by the owner thereof, and laid out and dedicated to public use in said city as hereinbefore set forth." The title to the present site of the city of Galveston, under grant by the republic to M. B. Menard, of January 25, 1838, made by virtue of an act of the Congress of the republic of December 9, 1836, was, on and before the 22d of April, 1840, vested in Menard and his associates, composing a joint-stock company, under the name of the Galveston City Company, organized for the purpose of establishing a city thereon; and this company was on the 5th of February, 1841, by act of Congress of the republic, duly incorporated. At a meeting of the stockholders April 13, 1838, it was duly ordained that "the care and control of the entire interests and property embracing the league and labor of land upon which the city is placed" should be vested in a board of directors, who should have the power "to lay off the whole of the land belonging to the shareholders into lots of such size as they may deem proper, and to sell and convey" such portion and at such prices as the board may deem advantageous; that the directors shall appoint an agent, who "shall attend personally to carrying into effect the foregoing * * * under the order and direction of the board, and * * * contract for making a survey." The property was to be represented by 1,000 shares, and the trustees in the agreement were to hold the title to the land subject to the orders of the shareholders, as adopted in their general meetings, and the rules and regulations prescribed by them. The trustees were authorized to make conveyances when they might be required by the stockholders at their general meetings, and also authorized to appoint agents for the sale of the shares.

On April 14, 1838, at a meeting of the shareholders, ordinances for the future government and management of the rights and interests of the shareholders of the company were adopted. Under these ordinances the board of directors were authorized to lay off the whole of the land belonging to the shareholders into lots of such size as they might deem proper, and to sell by deed in fee simple such portions of said lots or land as they might deem advantageous. The ordinances did not authorize the directors to make donations of the lots. It was also made the duty of the board of directors to require from the trustees of the company a deed of conveyance, in proper legal form, for all the land held by them in trust for the Galveston City Company, so as to vest the title for the same in the said board of directors, and by resolutions they were instructed to make application to have the company incorporated. At a meeting of the board of directors held in 1838, prior to the incorporation of the Galveston City Company, the city was directed to be surveyed by John D. Groesbeck, who was paid for his services in January, 1839, and in February or March of that year Sandusky was employed to make a map of the city in accordance with that survey. This plat or map was adopted by the shareholders of the Galveston City Company on November 11, 1839.

The books of the company show that on November 12, 1839, at a shareholders' meeting, a resolution was passed setting aside certain property for public improvements, and that at a directors' meeting an order was made on April 22, 1840, before the incorporation of the company, which reserved for a market place the south half of block 568, and other lots, to be conveyed by the company's agent to the corporation of the city of Galveston, to be used only for the purpose of a market place for public convenience. An act of Congress incorporating the Galveston City Company was passed February 25, 1841. The Sandusky map of 1839 was lost, but there was another Sandusky map, of 1843, which is now in the office of the city company, and from which there was a lithograph copy made in 1845. There is a reference on the margin of this map, "Market Square in block 560, 568, and 611." On April 30, 1841, shortly after the incorporation of the company, Gail Borden made to the directors a report of all transactions of the organization from 1839 down to that date; making no mention, however, of the reservation or dedication of the south half of block 568 for market purposes. On February 12, 1847, at a meeting of the directors of the city company, an order was entered rescinding the dedication of the south half of block 568 and other lots for market and other purposes. At a meeting of the directors held on December 17, 1856, there was a report made, in which was given a history of the company's transactions to that date.

This report nowhere refers to the south half of block 568. Extracts from the minutes of the proceedings of the Galveston city council of January 28, 1878, show that the market committee recommended the erection of a market house on the property in question, and an ordinance was introduced for the issuance and sale of city bonds for that purpose. Plans for a market house, and bids for its construction, were advertised for, but the bonds were never issued and the house was never built. In 1875 several communications were made to the city council for permissions to lease this half block. At a meeting of the council on April 16, 1877, the committee on public property reported that this property had been built upon, and was occupied by parties for several years, who had not paid rent since 1873 and 1874; and resolutions were adopted fixing the rate of rent, and requiring the execution of written leases for the property. In 1879 the city council passed a resolution that, until such time as the city is in a financial condition to erect a market house on the property, the mayor be authorized to lease the same. Action was also had July 17, 1882, with respect to terminating the permission of the city to parties to lease this ground, and fixing the price of the lease of the different lots. The Sandusky maps of 1843 and 1845 have been recognized by the Galveston City Company as authoritative, and sales by that company of lots and blocks in the city of Galveston have been made with reference to these maps, which are kept in the private office of that company. The city for many years has maintained market houses on blocks 560 and 611, which were donated to the city for public markets by the shareholders of the joint stock company, but has never erected a market house upon the south half of block 568, or used it for market purposes. A book of the Galveston City Company giving a tabulated statement of lots and lands donated to the city of Galveston and others was put in evidence, which contained an entry, in the handwriting of J. P. Cole, who was the agent of the company from 1854 to 1886, marked opposite the south half of block 568, "See order of Board of Directors, April 22, 1840"; but this entry does not appear upon an older book, from which this seems to have been copied. The present secretary testified that there is nothing in the records of the company as to the property in dispute, except the order of April 22, 1840, reserving it for dedication, and the rescinding order of 1847. No other disposition has ever been made by the city company of this property. It has never assessed it or paid any taxes thereon, and it recognizes and confirms the dedication of the property as it appears on the map. Three-fourths of its property has been sold by the company, and all sales have been made in accordance with and by reference to the Sandusky map. The annual financial statements of the city of

Galveston from the year 1870 to 1881 included this half block as public property, with a valuation set opposite it, and these reports were adopted by the city council and published in the newspapers. There is nothing in the records to show an acceptance by the city of Galveston of the dedication of this property on the 5th of January, 1844, as alleged in plaintiff's petition. The Groesbeck map, which was adopted by the city, does not show that the south half of block 568 was reserved or dedicated for a market, and the report of the committee to the city council in 1854 on the state of public property, including lots and blocks donated to the city for public use, agreeable to the plan of the city, as exhibited at the first sale of property, nowhere referred to the south half of block 568 as belonging to or claimed by the city. The defendant Heffron got possession of the property in controversy, claiming the improvements thereon by purchase from the estate of Hendricks. He either did not purchase the improvements until 1889, or, if he bought earlier, he continued to pay rent to the city, in the name of Hendricks' estate, after that date. Hendricks got the improvements from Spalding, who paid rent to the city. Heffron sold only the improvements to the pipe company, and has disclaimed as to the land.

By the second, third, and ninth assignments of error, the defendant contends that, in an action by the city to recover the property claimed to have been dedicated for the purpose of a market place for public convenience, the city must allege and prove a legal title to the property, or must show possession and use thereof for the purpose for which the dedication was made, and deprivation thereof. The facts alleged and proved showed the purpose of the city company to dedicate the property in controversy to the city of Galveston for use as a public market. The nature of the dedication was such that it was not necessary for the city to show an acceptance, since the company designated the ground on its map, in which the city of Galveston was divided in lots and blocks, and had sold lots with reference to such designation. The public had an interest in the dedication, and it was the duty of the city, representing the public, to preserve and administer the property, and prevent it from being misappropriated. It is true that the city company had not been incorporated at the time it laid out the city and ordered the dedication of the property, yet the acts of the company subsequent to incorporation showed ratification, and at the time of the attempted rescission in 1847 the company had lost its power to rescind the order by which the property was reserved for dedication. The city company, ever since the rescinding order, has recognized the original dedication, and does not claim the property. It has never rendered it for taxation or paid taxes thereon. The city has continuously for

more than 40 years recognized its obligation to take the property and preserve it for the uses to which it was appropriated, by repeated acts of the city council, and claimed it and leased it as public property. The setting apart of the property as a public market did not require the immediate erection of a building in which produce and meats should be exposed for sale, or call upon the new city to formally accept the dedication. Property or lots intended and set apart for such purpose may lie for years before the growth of the town or the needs of its inhabitants will bring them into use; and the nature of the use as a market place for the vendors of meats, vegetables, and other table supplies for daily consumption does not create the necessity of erecting an expensive building in order to manifest a use. It seems to us quite clear from the evidence that the city has always treated the property in controversy as a trust for the purpose of its original dedication, preserving it for use when the growth of the city might demand it, and that for more than 60 years the action of the city company has been consistent with such dedication, for, although at one time it undertook to revoke the dedication, it took no steps to reclaim the property, or to assert any right thereto, either by assessing it for taxes or offering it for sale. There is no controversy here about the purpose to dedicate, or the acceptance of the dedication, between the city company and the city of Galveston. The question is whether the city has shown a title upon which it can maintain the suit. A deed was not necessary, nor was a formal acceptance by the city necessary. The purpose to dedicate, and the sale of lots with reference to a plat showing such dedication, and a continuous recognition of the right of the public on the part of the city company, and an acceptance thereof by the acts of the city, were shown; and these acts put the title in the city, to be preserved for the use of the public, and upon such title the suit was properly maintained.

No other questions have been raised by any proper assignments, accompanied by statements, so as require our attention, and, finding no error, the judgment of the court below is in all respects affirmed. Affirmed.

McCORMICK v. FINCH.

(Court of Appeals at Kansas City, Mo. June 8, 1903.)

SALE OF MACHINE—RIGHT TO RETURN—SATISFYING PURCHASER—CONSTRUCTION OF CONTRACT.

1. A contract of sale of a corn binder, providing that if the machine shall not give satisfaction the purchaser will not take it, gives him the right to refuse to keep and pay for it, if for any reason he is not satisfied with it, though there is a further provision that, if on one day's trial it does not work well, he shall give

immediate notice, and allow time to put it in order, and, if it cannot then be made to work well, he shall return it.

Appeal from Circuit Court, Vernon County; H. C. Timmonds, Judge.

Action by Harold F. McCormick against C. T. Finch. Judgment for plaintiff. Defendant appeals. Affirmed.

Scott & Bowker, for appellant. M. T. January, for respondent.

SMITH, P. J. The defendant purchased of the McCormick Harvesting Machine Company a corn binder, for which he executed to the latter the three promissory notes sued on, and of which plaintiff has become the owner by assignment. Such latter (the machine company), at the time of the sale and purchase, entered into a contract with defendant to the effect that " * * * if machine gives satisfaction, and, if not, will not take it. * * * This machine is warranted to be well made, of good material, and durable with proper care. If, upon one day's trial, the machine should not work well, the purchaser shall give immediate notice to said McCormick Harvesting Machine Company, or their agent, and allow time to send a person to put it in order. If it cannot then be made to work well, the purchaser shall return it at once to the agent of whom he received it, and all cash and notes received in settlement will be refunded. Continuous use of the machine, or use at intervals through harvest time, or failure to notify the McCormick Harvesting Machine Company, or their agent, or to return the machine as agreed, shall be deemed an acceptance of the machine by the undersigned." The defendant by his answer pleaded said contract, and that he had tried said machine, and it had failed to perform the work for which it was purchased; that it was of no value for any purpose; that he was dissatisfied with it; that he had offered to return it, etc. The replication was a general denial. There was a trial, which resulted in judgment for the defendant, and plaintiff appealed.

The appealing plaintiff complains of the action of the trial court in giving the defendant's fourth instruction, which told the jury that the "defendant had the right, under his contract of purchase of said machine, to refuse to keep and pay for it, if he was not satisfied with it. If, therefore, you believe, from the evidence, that defendant was dissatisfied with it, and his dissatisfaction was not feigned, but was real and honest, no matter whether his reasons for being dissatisfied were, in the opinion of the jury, good or bad, and that within a reasonable time after trial in the year 1900 defendant notified the agent of the McCormick Harvesting Company that he was not satisfied with it, and offered to return it, your verdict should be for defendant. On the other hand, if you shall believe, from the evidence, that said machine did give satisfaction to the

defendant, then you should return a verdict in favor of plaintiff for the full amount due on the notes sued on." By the express terms of the contract the machine was to give satisfaction; otherwise, the defendant was not required to keep it. It is true that there was a further provision that if, upon one day's trial, it should not work well, the defendant should give immediate notice to the machine company, or its agent, and allow time to put it in order, and that, if it could not then be made to work well, the purchaser should return it, etc. The evidence shows that the defendant notified the machine company that, on trial, said machine did not work well, and that the latter sent an agent to make it do so; but as to whether, after all, he succeeded, such evidence is quite conflicting. It does show, however, that defendant, from the time he first tried the machine until he declined to have anything further to do with it, was insistent that it was not satisfactory, and the notes given for the purchase price should be returned. No one can read the contract, and give to the words thereof their ordinary meaning, without understanding that something more was required than that the machine should work well before defendant was bound to keep and pay for it. He was not bound to do so unless it gave satisfaction to him.

Suppose there is a choice between machines for cutting corn that work well. It may be that one which will work well may at the same time be heavier than another, or have more side draught than another, or it may be so geared as to require much more power to propel it than another, or its machinery may be complicated, and so constructed as to easily get out of repair, or require greater skill and care in operating it than is at the purchaser's command. How can it be said that, although it worked well, nevertheless it may not fail to give satisfaction? Or why should it be said, where a bargainer has reserved the right to elect whether he be fully pleased or not, that he is bound to be pleased if another reasonable or intelligent man is pleased with the work of such machine? It seems to us that under the contract the defendant had an option to accept or reject the machine, accordingly as it gave him satisfaction or not. We may quote as applicable here what was said in *Wood R. & M. Machine Co. v. Smith*, 50 Mich. 565, 15 N. W. 906, 45 Am. Rep. 57, which was that: "The cases where the parties provide that the promisor is to be satisfied, or to that effect, are of two classes; and whether the particular case at any time falls within the one or the other must depend on the special circumstances, and the question must be one of construction. In the one class the right of decision is completely reserved to the promisor, and without being liable to disclose reasons or account for his course; and a right to inquire into the grounds of his action, and overhaul his determination, is ab-

solutely excluded from the promisee and from all tribunals. It is sufficient for the result that he willed it. The law regards the parties as competent to contract in that manner, and, if the facts are sufficient to show that they did so, their stipulation is the law of the case. The promisee is excluded from setting up any claim for remuneration, and is likewise debarred from questioning the grounds of decision on the part of the promisor, or the fitness or propriety of the decision itself. The cases of this class are generally such as involve the feelings, taste, or sensibility of the promisor, and not those gross considerations of operative fitness or mechanical utility which are capable of being seen and appreciated by others. But this is not always so. It sometimes happens that the right is fully reserved, where it is the chief ground, if not the only one, that the party is determined to preserve an unqualified option, and is not willing to leave his freedom of choice exposed to any contention or subject to any contingency. He is resolved to permit no right in any one else to judge for him, or to pass on the wisdom or unwisdom, the justice or injustice, of his action. Such is his will. He will not enter into any bargain, except upon the condition of reserving the power to do what others might regard as unreasonable. The following cases sufficiently illustrate the instances of the first class: *Gibson v. Cranage*, 39 Mich. 49, 33 Am. Rep. 351; *Taylor v. Brewer*, 1 M. & S. 290; *McCarren v. McNulty*, 7 Gray, 189; *Brown v. Foster*, 113 Mass. 136, 18 Am. Rep. 463; *Zaleski v. Clark*, 44 Conn. 218, 26 Am. Rep. 446; *Rositer v. Cooper*, 23 Vt. 522; *Hart v. Hart*, 22 Barb. 606; *Tyler v. Ames*, 6 Lana. 280. In the other class the promisor is supposed to undertake that he will act reasonably and fairly, and found his determination on grounds which are just and sensible; and from thence springs a necessary implication that his decision, in point of correctness and the adequacy of the grounds of it, are open considerations and subject to the judgment of judicial triers. Among the cases applicable to this class are *Daggett v. Johnson*, 49 Vt. 345; and *Hartford Sorghum Mfg. Co. v. Brush*, 48 Vt. 528." A proper construction of this contract brings it within the first class of such contracts. *Mfg. Co. v. Ellis*, 68 Mich. 101, 35 N. W. 841; *Platt v. Broderick*, 70 Mich. 577, 38 N. W. 579; *McCormick Machine Co. v. Cochran*, 64 Mich. 636, 31 N. W. 561.

The defendant's evidence tended to prove that the machine company endeavored in both the season that defendant purchased the machine and in that following to make the machine work well and give satisfaction, and after it had failed to do so he offered to return it; but the agent of the machine company declined to accept it, saying that he would have nothing further to do with it. Defendant could do no more in that direction.

The giving of the defendant's instruction is fully justified by the great weight of pertinent authority. *Blaine v. Knapp*, 140 Mo. 241, 41 S. W. 787; *Williams v. Ry.*, 85 Mo. App., loc. cit. 110; *Campbell Printing Press Co. v. Thorp* (C. C.) 36 Fed. 414, 1 L. R. A. 645, and the cases there cited; *Machine Co. v. Hardware Co.*, 85 Mo. App. 178.

The instruction fairly and fully submitted the entire case to the jury.

The plaintiff's instructions requested the submission upon what we think was an erroneous theory, and they were therefore properly refused. The case cited by plaintiff from 14 Mo. App. 502 (*Pope Iron & Metal Co. v. Best*), we do not think applicable here.

No reason is perceived for disturbing the judgment, which will accordingly be affirmed. All concur.

CHINN v. CHICAGO & A. RY. CO.*

(Court of Appeals at Kansas City, Mo. May 25, 1903.)

CARRIERS — CARRIAGE OF CATTLE — DELAY — QUESTIONS FOR JURY — JUDICIAL NOTICE — PLEADING — FINDINGS.

1. In an action against a carrier for delay in carriage of cattle, evidence considered, and held sufficient to take the case to the jury on the issue whether the delay was unreasonable and whether the shrinkage and depreciation in the cattle was occasioned thereby.

2. In the determination of defendant's demurrer to plaintiff's evidence, the evidence introduced by the defendant should be regarded as waived by it, or as if it had never been introduced.

3. In an action against a carrier for delay in the carriage of cattle, the court may take judicial notice of the fact that the live stock traffic increases yearly.

4. In an action against a carrier for delay in carriage of cattle, the evidence examined, and held to make a question for the jury whether the delay had been occasioned by an unavoidable "car famine."

5. Where, in an action against a carrier for delay in the carriage of cattle, there is in each count of the petition not only allegations of detention and delay, but also of discrimination, but the latter issue is by an instruction, at defendant's request, withdrawn from the jury, defendant cannot thereafter complain that the jury did not find on all the issues.

Appeal from Circuit Court, Lafayette County; Samuel Davis, Judge.

Action by Thomas M. Chinn against the Chicago & Alton Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

F. Houston, for appellant. Alexander Graves, for respondent.

SMITH, P. J. The petition is in two counts, the first of which is based on a claim made for damages occasioned by the unreasonable delay and detention in shipping a certain number of cattle, of which plaintiff was the owner, from defendant's Mayview station to Kansas City, in consequence of which such

cattle sustained extra shrinkage in weight and depreciation in value; and the second is based on a claim made for damages occasioned by the unreasonable delay and detention by defendant in shipping a certain number of hogs, of which plaintiff was owner, at its Mayview station, to Bloomington and East St. Louis, in the state of Illinois, in consequence of which such hogs sustained extra shrinkage in weight and depreciation in value, etc.

After a general denial, the answer to the first count alleges that defendant kept a large number of extra live stock cars on hand which were ordinarily and reasonably sufficient to meet all the demands of past experience made by farmers and shippers along its lines; that, owing to the extreme drought prevailing in the states through which its lines were located and operated, an unusual and unprecedented number of all kinds of live stock were offered for shipment over its lines, by reason whereof it was unable to promptly meet all the demands made upon it for stock cars, though it used every possible effort to do so; that a "car famine" prevailed, and in consequence of which it was unable to furnish the plaintiff the cars required until the 31st day of July, 1901—the date the shipment was made.

The answer to the second count was similar in allegation to the first. The replication contravened the new matter pleaded by the answer. There was a trial, and at the conclusion of all the evidence the defendant interposed a demurrer thereto, which was by the court denied.

The question thus raised is whether or not the evidence adduced by the plaintiff established his *prima facie* case, entitling him to go to the jury. On looking at it we find that it tends to prove that the plaintiff was the owner of 73 head of fat cattle and 148 head of fat hogs, and that on July 26, 1901, he requested defendant to furnish him four cars on the 29th at its Mayview station in which to ship his cattle to the Kansas City market; that on the 13th of July he requested defendant to furnish a car on the 16th in which to ship part of the hogs to Bloomington, and on the 15th he still further requested the defendant to furnish another car for the 18th to go to East St. Louis. It appears, further, that two days after he had requested the cattle cars he went to the defendant's station agent and told him that he wanted to know for certain whether the cars were going to be furnished at the time for which they had been requested, for if not he wanted to stop his cattle where there was feed and water, and thereupon the defendant's agent stated that he felt sure he (plaintiff) would get the cars, as he had requested them in ample time. On the day the cars had been requested the plaintiff drove his cattle, weighed them on defendant's scales, and put them in its stock pens, relying upon the assurance of the defendant's agent that the cars would

*Rehearing denied June 22, 1903.

be furnished to ship out on as requested. The cattle remained in the defendant's pens from 8 a. m., July 29th, until 6:30 p. m., the 31st, or 58 hours, without food, water, or shelter. It further appears that when the cattle reached the Kansas City market on the 31st they had sustained extraordinary shrinkage, and were greatly depreciated in value. They were in that condition which is known in market parlance as "stale cattle." The shrinkage and depreciation, as alleged in the petition, was well established by the evidence.

The evidence was amply sufficient to carry the case to the jury on the issue as to whether or not the detention and delay was unreasonable, and as to whether or not the shrinkage and depreciation was occasioned by such detention and delay. The hogs were detained from July 16th to the 19th, 84 hours, and what has just been said in respect to the detention and delay of the cattle is equally applicable to them. The contradictory evidence adduced by the defendant in support of the negative of the issue just referred to must, in the determination of its demurrer, be regarded as waived by it, or as if it had never been introduced.

The plaintiff's prima facie case having been established by practically uncontroverted evidence, it devolved upon the defendant to establish the excusatory defense pleaded by it. The facts pleaded as constituting this defense were controverted by the replication. While the defendant adduced evidence tending to support its special defense, it will not do to say this was not contradicted by any evidence of the plaintiff.

As negating the defense of "car famine," the plaintiff testified that on the evening of the 29th of July, from the repeated assurances given by the defendant's agent, he felt so sure that the cars would be furnished him that evening he took a passenger train for Kansas City, expecting his cattle to follow. That night his hand in charge of the cattle telephoned him that no cars had been furnished; and he called up Starr, defendant's superintendent, who informed him that he had a train of empties at Slater (about 25 miles east of Mayview), and that he would have his cattle loaded out early the next morning (July 30th). But he did not do this, and the cattle did not arrive in Kansas City until 7:30 a. m., July 31st, the run being only four hours. Besides this train load of empties, which Superintendent Starr said he had at Slater, plaintiff counted three empty stock cars standing idle at Odeassa, and another at Independence, and no stock in the pens at either place. This he saw himself as he went up on the passenger the evening of the 29th. So far from a car famine, there was a train load of empties at Slater and others scattered idly along the route from Mayview to Kansas City.

Plaintiff's testimony graphically explains the hog situation as follows: "Q. State to

the jury with regard to the shipment of these hogs to Bloomington and East St. Louis. A. I ordered my cars on the morning of the 13th, one car for Tuesday, the 16th, to go to Bloomington, and on Monday, the 15th, another car for the 18th, to go to East St. Louis. The hogs came in on Tuesday morning. Q. What day of the month was that? A. Tuesday was the 16th, but we did not get the cars that day. I asked for cars Wednesday. Wednesday could not get cars. Wednesday night I telegraphed Mr. Starr, and asked him for cars, telling him I had no water and feed there. He did not answer. I got no answer. Wednesday night I went to the telephone and called Mr. Starr up, and told him I had no feed and water, and had another car coming the 18th, and if I was not going to get the cars I wanted to know it so I could haul them to Lexington to the Missouri Pacific; also I would have to move the others. He told me I would not have to do that, as he thought he could get me the cars next day. Q. What happened then? A. The next day would be Thursday; he said he thought he could get them. I talked with the agent several times during the day about the cars, and he said they would not talk to him. Q. That was the Mayview agent? A. Yes, sir. Thursday night I telegraphed to Mr. Starr that the stock was still in the pens without feed and water; that was all I said to him. Friday morning I still heard nothing. The agent said he could not hear anything. Q. What day would that be? A. The 19th. I telegraphed to the railroad commissioner at Jefferson City if they would not please aid me. I got two cars that night."

The uncontradicted evidence of Wm. Kelley and W. E. Johnson, two large stock shippers, was that at the station of Higginsville, only seven miles from Mayview, where they shipped from, and where the Missouri Pacific is a rival of the defendant, they were getting cars from defendant in abundance all through this month, and especially at the times when defendant was holding and delaying plaintiff's shipments from Mayview. They also testified that every shipper at Higginsville was fully supplied by defendant all this time. Again, the defendant's own evidence shows that it was using too many of its stock cars off its Western division, extending from Roodhouse to Kansas City (which the evidence showed furnished it 50 per cent. of its stock traffic), in supplying its stock cars to the Chicago, Lake Shore & Eastern Railroad, which had a contract for shipping rails from the Illinois Steel Company at South Chicago to the M., K. & T. system down in Texas.

Mr. Fellows, superintendent of car service on the Chicago & Alton Railroad, testified for defendant that: "Q. It seems he [A. D. Bethard, superintendent of the M., K. & T. Railroad car service] telegraphed you as follows from Denison: 'We have returned 25 your stock cars and tracing for balance, and

will get them hurried to you as quick as possible. Those just received will be hurried to destination and released soon as possible and returned to you.' So that was only two days preceding the time when Mr. Chinn, the plaintiff here, was wanting cars at Mayview, and you had your stock cars, according to this telegram, scattered down there, and Bethard hunting them up? This was the state of affairs, was it not? A. We had some of our cars down there; yes, sir. Q. The Western division was demanding stock cars, and you could not supply the demand? A. That is right. Q. Now, Mr. Fellows, if your stock cars had not been employed in the steel business—the transportation of steel rails—you could have met the demand for the stock, and the facilities would have been better? A. Certainly; if they had run the cars back empty, the demand then could have been supplied. Q. The demand then could have been supplied if they had run them back empty? A. Yes, sir; after they had got the rails, if they had sent them back empty." Mr. Fellows further testified that in the year 1900 the C. & A. had on hand 619 stock cars, while in the year 1901 it had only 560 stock cars.

It is a matter of current history—of which we may take notice—that the live stock traffic increases yearly, and yet it seems that the defendant, according to this evidence of its agent, had decreased its facilities as a common carrier for handling the live stock business.

Assuming that every fact alleged in the defendant's answer as constituting its special defense had been proved, would any court, in the face of the plaintiff's countervailing evidence, which we have just noticed, have been warranted in peremptorily instructing the jury to find for the defendant? Here was a controverted issue of fact, and, such being the case, it would have been a glaring invasion of the province of the jury by the court to have given such an instruction.

There are, of course, cases where such an instruction may with propriety be given, as, for example, where the plaintiff's case, under the pleadings, turns wholly on the construction of a contract, the construction of which is simply a question of law, or where the answer admits the plaintiff's cause of action, and sets up new matter as a defense, and the evidence fails to make out a prima facie defense. Ordinarily, when the plaintiff produces parol evidence to support his action, or when the defendant has pleaded new matter as a defense and produces parol evidence to support such defense, the issue of fact should be submitted to the jury. The evidence may be all one way, yet it is for the jury to say whether they believe the witness or not. The court has no right to tell the jury that they must believe the witnesses of one party or disbelieve those of the other. This has been the well-settled rule in this

state for a long time. *Bryan v. Wear*, 4 Mo. 106; *Vaulx v. Campbell*, 8 Mo. 224; *Gregory v. Chambers*, 78 Mo. 294; *Wolff v. Campbell*, 110 Mo., loc. cit. 120, 19 S. W. 622; *Gannon v. Gaslight Co.*, 145 Mo. 515, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505. Accordingly, the deduction is irresistible that the action of the court in refusing the defendant's peremptory instruction is subject to no just criticism.

The defendant further objects that the jury did not render a verdict on all the issues made by the pleadings. It is true that in each count of the petition there was coupled with the allegation of unreasonableness, detention, and delay that of discrimination of the defendant against the plaintiff as a shipper; but this latter issue at the conclusion of the evidence was, by an instruction given at the defendant's request, withdrawn from the jury. It does not therefore lie in the defendant's mouth to complain that the jury did not render a verdict on all the issues made by the pleadings.

Our attention has been called to no vice in any of the plaintiff's instructions. Those given for defendant were extremely liberal to it.

The petition sufficiently states a cause of action, and is supported by evidence quite ample to support the verdict, and it must follow that the judgment, which was for plaintiff, must be affirmed. All concur.

SOVEREIGN CAMP WOODMEN OF THE WORLD v. WOOD et al.*

(Court of Appeals at Kansas City, Mo. June 8, 1903.)

INTERPLEADER—BILL—SUFFICIENCY—DOUBT AS TO MATTER OF LAW—COSTS.

1. A bill of interpleader by a mutual benefit association, alleging that, on the death of a member, his widow, who was formerly beneficiary in his certificate, claimed the amount thereof, alleging that a substitution of the beneficiaries which had been made was the result of undue influence, did not show that one of the contesting claimants was clearly entitled to the fund, but stated facts entitling complainant to relief.

2. A bill of interpleader may be maintained where the doubt as to which of the claimants of the fund is entitled thereto is a doubt as to matters of law, and not as to matters of fact.

3. A showing in an answer to a bill of interpleader that one of the contesting claimants is entitled to the fund cannot affect complainant's right to relief by having the interpleas filed.

4. Where complainant in a bill of interpleader has acted in good faith, and is entitled to relief, he is entitled to his costs out of the fund.

5. Where complainant in a bill of interpleader is allowed his costs out of the fund, these costs will be charged against the party whose claim to the fund is found to be invalid.

Appeal from Circuit Court, Jackson County; James Gibson, Judge.

Bill by the Sovereign Camp Woodmen of the World against Ida R. Wood and others.

*Rehearing denied June 22, 1903.

From a decree for plaintiff, defendants Broadwell and Stewart appeal. Affirmed.

Frank Titus, for appellants. Brown, Harding & Brown, for respondent.

ELLISON, J. This is a proceeding by a bill in equity to require the defendants to interplead for a certain sum of money alleged to be due from plaintiff to one or the other of defendants. The court sustained the bill, and ordered that plaintiff deposit the sum in court, and that defendants interplead therefor, and that plaintiff have its costs and \$100 attorney's fee out of the fund. Defendants Broadwell and Stewart appeal.

It appears from plaintiff's petition that plaintiff issued its beneficiary certificate to one Dr. Wood, payable at his death to his wife, the defendant Ida Wood, for \$2,000; that afterwards said Wood procured plaintiff to change such beneficiary, cancel said certificate, and issue a new one, for the same sum, with his sisters, Broadwell and Stewart, the other defendants, as beneficiaries; that Dr. Wood died, and proofs of death were duly made by the latter defendants; that defendant Ida claims the fund, and threatens suit, on the ground that the other defendants by undue influence and persuasion prevailed upon Dr. Wood to make the change of beneficiary, and that he was mentally incapacitated to transact business when he procured the change to be made.

1. When it appears that there are conflicting claims to a sum of money owing by the debtor, each with a color of or apparent right, and the debtor, being disinterested as to the rights of either, would hazard a suit by the other if he paid to either, he may maintain a bill of interpleader. *State ex rel. v. Kumpff*, 62 Mo. App. 335; *Roselle v. Farmers' Bank*, 119 Mo. 84, 24 S. W. 744; *Sullivan v. Knights of Father Mathew*, 73 Mo. App. 45.

2. While the mere statement in the bill of the existence of conflicting claims, without stating their nature or upon what they are based, will not be sufficient (*Robards v. Clayton*, 49 Mo. App. 608; *Varrian v. Berrien*, 42 N. J. Eq. 1, 10 Atl. 875), yet, when the bill shows these additional requisites, it states a case for the interposition of a court of equity.

3. It is furthermore true, as shown by defendants, that where the bill shows that one of the claimants is unquestionably entitled to the property or money, and that the other has no valid claim, the bill will not lie. *Crass v. Ry. Co.*, 96 Ala. 447, 11 South. 490.

4. But it does not appear from the present bill that one of the claimants is certainly entitled to the money. It alleges that defendant Ida Wood claims that the certificate in her favor, and which she retained and refused to surrender, was procured to be canceled, and the new one issued, by the undue influence of the other defendants, and

that her husband, Dr. Wood, was mentally incapacitated for business. This presented such a case of doubt as to law and fact as justified the plaintiff in calling in the aid of a court of equity.

5. It has been sometimes suggested that the doubt as to which of the claimants is entitled to the thing claimed by them must be a doubt as to the facts upon which their claims are founded, and that a doubt as to the law would not justify an interpleader. A remark in *Supervisors v. Alford*, 65 Miss. 63, 3 South. 246, 7 Am. St. Rep. 687, seems to justify the suggestion. But when it is considered that the object of a bill of interpleader is to save the debtor or other party in possession of the thing claimed from the hazard of paying to the wrong party, as well as the harassment of suits, it seems to be clear that a doubt of the law as to the opposing claims should justify a bill for an interplea as well as a doubt of fact. And so it has been decided. *Crane v. McDonald*, 118 N. Y. 648, 23 N. E. 991.

6. The defendants Broadwell and Stewart have filed an elaborate brief, endeavoring to show and demonstrate that they are entitled to the money due from the plaintiff society, and that the claim of Ida B. Wood, widow aforesaid, is ill founded and without legal support. All that may be true, and yet not affect the question of plaintiff's right to have the interplea filed, and the contest made in court, at which time and place all that has been said here as to the merits of the respective claims will receive a hearing and due consideration.

7. The court allowed to the interpleader its costs, including \$100 as attorney's fees, all to be paid out of the fund. We think the court acted within the rule in making such allowance. That rule is that when the plaintiff in the interplea has acted in good faith, and has grounds upon which to base his call for the interposition of a court of equity, requiring the adverse claimants to interplead, he is entitled to his costs out of the fund in his hands, or which he may pay in to court. And these costs may include an attorney's fee. *Louisiana Lottery v. Clark* (C. C.) 16 Fed. 20. The reason of the rule in allowing an attorney's fee in cases of like nature will be found discussed in *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157.

8. Objection is made in this case by defendants Broadwell and Stewart on the ground that their claim to the fund is the valid claim, that the claim of Ida Wood is wholly without merit, and that they are entitled to the whole fund, without depletion by costs which they had no part in making necessary. The reply to this is that, where the plaintiff in the interplea is the disinterested holder of the fund, he is entitled to the protection of the court in its payment; that the successful and rightful claimant simply has the misfortune to have

his right disputed by a contesting claimant, which is the cause of the costs being charged against the fund. But in the end the whole costs, including that taken out of the fund for the plaintiff, will be charged against the party whose invalid claim caused the proceeding to be instituted. 11 Ency. Plead. & Prac. 475; Tiedeman's Eq. Jur. § 573; Farley v. Blood, 10 Fost. 373; Michigan Plaster Co. v. White, 44 Mich. 25, 30, 5 N. W. 1086; Louisiana Lottery v. Clark (C. C.) 18 Fed. 20; Cowtan v. Williams, 9 Ves. Jr. 107; Hendry v. Key, 1 Dick. 291; Dowson v. Hardcastle, 2 Cox, 273.

Upon the whole record, we entertain no doubt but that the judgment should be affirmed. All concur.

FELLER v. McKILLIP et al.*

(Court of Appeals at Kansas City, Mo. June 8, 1908.)

LEASE—EFFECT AS MORTGAGE—FAILURE TO RECORD—DEED OF TRUST—VALIDITY—MISREPRESENTATION.

1. A lease providing that all the property of the lessee, whether subject to legal exemption or not, shall be bound, and subject to the payment of the rent, is, as between the parties, a mortgage.

2. As to creditors of the lessee the agreement is void if not recorded.

3. Under the agreement the landlord could maintain replevin for the lessee's goods on default in payment of rent.

4. A lease provided that all the property of the lessee, whether exempt or not, should be liable for rent; but was not recorded, and hence not valid as against creditors of the lessee. The lessee became in default for rent, and applied to a creditor for assistance. This creditor and his attorney advised the lessee that the lease constituted a mortgage under which the landlord could take all the lessee's goods, and that the landlord's rights were superior to those of the creditor, and by means of such representation induced the lessee to borrow a sum of money to pay the overdue rent, and to execute a deed of trust to secure such sum and the creditor's pre-existing claim. Held, that the representation that the landlord's rights were superior to those of the creditor, though false, was not as to a matter affecting the pecuniary interest of the lessee, and hence did not render the deed of trust void.

Appeal from Circuit Court, Jackson County; Henry L. McCune, Special Judge.

Action by Samuel Feller, as trustee, against Mrs. M. A. McKillip and others. From a judgment for defendants, plaintiff appeals. Reversed.

Karnes, New & Krauthoff, for appellant. Geo. B. Watson and James G. Smith, for respondents.

BROADBUSH, J. The plaintiff sues in replevin as trustee in a certain deed of trust executed by the respondents upon a stock of millinery goods and fixtures conveyed to him to secure a note executed by respondents to Frankel, Frank & Co., wholesale milliners in

Kansas City, Mo. The note was for the sum of \$905.30, and dated, as was also the deed of trust, the 8th day of June, 1901, and due one day after date. At the time of the execution of the note and deed of trust, as well as at the time of the issuing of the writ herein, the property in controversy was situated in a building at number 1300 Grand avenue, in said city, which building was owned by Jenkins, who was the respondents' landlord. At the time of the execution of the note and deed of trust respondents were indebted to the appellant for millinery goods bought by them from appellant, and also indebted to Jenkins, their landlord, for rent, and the note was made to include both of said indebtedness. On September 20, 1900, Mrs. McKillip rented said building at 1300 Grand avenue from said Jenkins for a term of three years at a rental of \$100 per month, payable in advance on the 1st day of each month. By the terms of the lease, which was in writing, it was provided that: "In default of the payment of any installment of rent for five days after the same is due, she [the tenant] will, at the request" of the landlord, quit and surrender to him the possession of the premises; but for such cause the obligation to pay rent shall not cease. And it was further provided that all her property, whether subject to legal exemption or not, should be bound and subject to the payment of the rent. This lease was not acknowledged and recorded. It was shown that just prior to the execution of the note Mrs. McKillip had some trouble with her landlord, and that she was in arrears in the payment of her rent. Her landlord notified her to vacate the building, whereupon she telephoned Frankel, Frank & Co., and asked for an interview with them. This was granted through a member of the firm by the name of Dan Lyons, wherein she explained to him her trouble with her landlord, at which time Lyons called for the lease in question, and said, "I will take this down and show our lawyer." And when she said she would mortgage the fixtures of the store to a "chattel mortgage man" to get the balance of the rent due, he told her not to do it; not to do anything until he came back in the morning, or until he saw her again. He came back next morning with his lawyer, the plaintiff, bringing with him, according to Mrs. McKillip's evidence, the note and deed of trust already prepared. The plaintiff, however, testified that he went back to his office on the same day and got them. At said interview, according to Mrs. McKillip's testimony, Lyons said to her: "This lease, as it reads, is a sort of an ironclad lease. Mr. Feller will explain it to you." Mr. Feller's explanation was that: "According to the terms of this lease, as you are behind in rent, and he has demanded possession of the room, Mr. Jenkins can turn you out immediately, and take possession at once. He can sue you, and get judgment inside of five days, and do what he pleases with the fixtures and your

*Rehearing denied June 22, 1903.

¶ 1. See Chattel Mortgages, vol. 9, Cent. Dig. § 12.

stock, and you will be under that judgment. That judgment will stand against you for the balance of this lease—for the balance of the years—no matter where you are." She said to him, "Can he take everything?" His answer was, "From that thing [the lease], he can take everything you have got." She testified that they told her that they would protect her through the summer, and would see that she did not suffer; that she told them that the fixtures belonged to her daughter, the co-respondent, as she had given her a bill of sale on them for money loaned; that the daughter was asked to sign the deed of trust, but declined to do so until she was told that, if she did not, Mr. Jenkins could take everything under the terms of the lease, because of the nonpayment of the rent. Miss McKillip finally gave her consent, and signed the paper also. The evidence tended to show that Mrs. McKillip, who had previously been in the millinery business at Colby, Kan., on October 1, 1900, opened a store in Kansas City, Mo., at the number already described; that prior to going into business she consulted Frankel, Frank & Co., who advised her to rent the building in question, and also as to the fixtures she would need, the carpets for the floors, and the shades for the windows; that they also advised her what kind of goods to buy for her business; and that she bought largely from them. After the execution of the deed of trust and note, no further rent was paid by respondents, and on the 8th of July, 1901, this action was instituted, under which the goods and fixtures were taken by plaintiff, and later sold under the deed of trust. The jury found the goods and fixtures to be of the value of \$1,800; that respondents were indebted to appellant for the amount of the note and interest at that date in the sum of \$1,061.38, leaving a balance due respondents of \$738.02, to which was added \$41.31 as interest and \$300 as special damages; making a total sum of damage of \$1,082.93. Before the motion for new trial was passed upon, respondents remitted the sum of \$300 as special damages.

The contention of the appellant is: First, that the interpretation of the lease by Mr. Feller was correct as a matter of law; second, that the relation between Mrs. McKillip and Frankel, Frank & Co. was not fiduciary, but that of debtor and creditor; and, third, that, conceding the relation between said firm and Mrs. McKillip was fiduciary in character, and the statements made by Feller as to the force and effect of the provisions of the lease, its falsity is not actionable representation, unless it was made with fraudulent intent. There can be no doubt but what the lease in question, as between the parties, was a mortgage. *Faxon v. Ridge*, 87 Mo. App. 299; *Hargadine v. Henderson*, 97 Mo., loc. cit. 386, 11 S. W. 218. But as to creditors it was void, because it was not acknowledged and recorded. *Mead v. Maberry*, 62 Mo. App. 557; *Rev. St. 1899, § 3404*; *Kendall B. & S.*

Co. v. Bain, 55 Mo. App. 284; *Jewet v. Prelst*, 34 Mo. App. 511. As the lease was not a formal mortgage giving the landlord the right to enter and take possession of the goods and sell them, he would have to resort to the courts in some form of action to enforce his mortgage. This appellant does not deny, but claims that he could have maintained replevin for the goods. In our opinion, he could have so maintained an action of replevin upon the failure of the lessee to pay the rent, as he was entitled to have the security applied for that purpose. Such being the law, the statement of plaintiff that the lease was a mortgage, and that the landlord thereunder could, in five days, take all of respondents' property, was not a false representation and misstatement of the law, but for all practical purposes it was true. But it was not true that said landlord's claim for rent would be superior and prior to that of Frankel, Frank & Co., as represented by plaintiff, but it would not, for that reason, give respondents a cause of action, for it could not be a matter of any pecuniary interest to them. And it must be conceded that representations, in order to be actionable, must be such as would affect the pecuniary interest of the party seeking redress. It is primary law that representations, in order to be actionable, must be false.

The respondents having failed, as we have seen, to prove that the alleged representations were false, it follows that the finding and judgment cannot be sustained. The cause is therefore reversed and remanded. All concur.

BRUER v. KANSAS MUT. LIFE INS. CO.*

(Court of Appeals at Kansas City, Mo. May 25, 1903.)

LIFE INSURANCE—ASSIGNMENT OF POLICY—INVALIDITY—RECOVERY OF PREMIUMS.

1. A life insurance policy was assigned to plaintiff, under an agreement with the beneficiary that plaintiff should receive a certain amount of the insurance in consideration for paying the premiums. The insurance company, on becoming aware of the contract, denied the validity of the assignment, and plaintiff sued to recover the premiums paid by him. *Held* that, plaintiff's right being founded on his illegal contract with the beneficiary, and not on the contract of insurance, he could not recover on the ground that the contract of insurance was executory, and that plaintiff could retire from it at any time.

Appeal from Circuit Court, Jackson County; James Gibson, Judge.

Action by Conrad Bruer against the Kansas Mutual Life Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed.

R. T. Herrick and I. P. Ryland, for appellant.

*Rehearing denied June 23, 1903.

J. H. Orr, W. B. Cline, and J. L. Lorie, for respondent.

An action will lie to recover back money paid under an illegal agreement at any time before the agreement is carried out. *Anson on Contracts*, *264, bottom; *Anson on Contracts*, *201; *Anson on Contracts*, 267, and note, citing *Taylor v. Bowers*, 1 Q. B. D. (C. A.) 300. This is the leading English case on this subject. *Mount v. Waite*, 7 Johns. 434; *Wheeler v. Spencer*, 15 Conn. 28; *Shannon v. Baumer*, 10 Iowa, 210; *House v. McKenney*, 46 Me. 94; *Bank v. Wallace*, 61 N. H. 24; *Skinner v. Henderson*, 10 Mo. 205; *Hickerson v. Benson et al.*, 8 Mo. 8, 11, 40 Am. Dec. 115; *Adams Express Co. v. Reno*, 48 Mo. 284, 15 Am. & Eng. Ency. of Law (2d Ed.) pp. 1004-1007, and notes and cases cited, subject, "Illegal Contracts"; *Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. Ed. 347; 2 *Parsons' Contracts*, p. 746. A contract of life insurance remains executory until the death of the assured. 16 Am. & Eng. Ency. of Law (2d Ed.) 840; *Cohen v. Ins. Co.*, 50 N. Y. 610, 10 Am. Rep. 522; *Clark on Contracts*, p. 1; *Schumaker & Longsdorf's Encyclopedic Law Dictionary*, 202; 1 *Wharton on Contracts*, par. 50; 7 Am. & Eng. Ency. of Law (2d Ed.) 95.

When, in insurance, the risk has not been run, the premium should be returned. *Tyrie v. Fletcher*, Cowper, 666-668; *Delavigne v. Ins. Co.*, 1 Johns. Cas. 310; *Anderson v. Thornton*, 8 Exch., 425; 2 *Joyce, Insurance*, §§ 1390, 1398; 3 *Kent's Commentaries*, (11th Ed.) *341; 1 *May on Insurance*, par. 4; *Insurance Co. v. McCrum*, 36 Kan. 146, 12 Pac. 517, 59 Am. Rep. 537. And, the contract being made in Kansas, the Kansas law will govern. 3 Am. & Eng. Ency. of Law (1st Ed.) 546, and cases cited; *Roach v. St. Louis Type Foundry*, 21 Mo. App. 118; *Stix v. Mathews*, 63 Mo. 371.

Ignorance of the illegality of a contract, where there is no moral turpitude, is strong grounds for granting relief to the party seeking relief on that ground. 15 Am. & Eng. Ency. of Law (2d Ed.) 1004, 1005, and cases cited from 20 states; *Palace Car Co. v. Transportation Co. (C. C.)* 65 Fed. 158; *Hogben v. Insurance Co.*, 69 Conn. 503, 38 Atl. 214, 61 Am. St. Rep. 53.

Upon well-founded principles of equity and right plaintiff should recover the amount paid out by him as premiums. *Supreme Lodge of Knights of Honor v. Metcalf (Ind. App.)* 43 N. E. 893; *Downey v. Hoffer*, 110 Pa. 109, 20 Atl. 655; *Cheeves v. Anders*, 87 Tex. 287, 28 S. W. 274, 47 Am. St. Rep. 107; *Ferry Co. v. Ry. Co.*, 73 Mo. 389, 39 Am. Rep. 519; *McKee v. Phoenix Ins. Co.*, 28 Mo. 383, 75 Am. Dec. 129; 19 Am. & Eng. Ency. of Law (2d Ed.) p. 99; *Green v. Corrigan*, 87 Mo. 370.

ELLISON, J. The defendant issued a life insurance policy, whereby it insured the life of Mrs. Mercy A. Carey in favor of her son,

C. E. Carey, in the sum of \$3,000. Afterwards Mrs. Carey and her son assigned the policy to plaintiff. On the day of the assignment, and in connection with it, plaintiff and C. E. Carey entered into a contract whereby it was agreed that plaintiff should pay the premiums on said policy, and on the death of Mrs. Carey he should secure \$2,000 of the sum payable in the policy, and C. E. Carey should receive the remaining \$1,000. Under this contract plaintiff paid to the company three quarterly premiums, amounting to \$174.39. The defendant assented to the assignment under the impression that plaintiff was a creditor of the insured; but, when it learned of the facts upon which the assignment was based, it wrote plaintiff that it was not lawful for him to take an assignment of the policy merely in consideration of his advancing money to keep up the insurance. Afterwards the company denied any liability to plaintiff; that is to say, denied the validity of the assignment and contract therewith, or that it would become liable to pay plaintiff any part of the policy on the death of Mrs. Carey. The company also denied plaintiff's right to a return of the premiums he had paid. Plaintiff thereupon instituted this action to recover such premiums, and prevailed in the trial court.

Plaintiff had no insurable interest in Mrs. Carey, as a creditor or otherwise, and it is conceded that the contract of assignment, made as stated, was void, as against the policy of the law. We think that plaintiff ought not to be allowed to recover. His right of action is necessarily based on an illegal contract, and, being so, he is shut off from aid at the hands of the courts. To prove his case against the defendant, he must necessarily rely upon the manner of his ownership of the policy. In investigating that question, the consideration leading thereto and supporting such ownership would be brought out, and thus his own illegal and wrongful conduct be made to appear. His case in the brief in his behalf is put upon the idea that the contract of insurance is executory until the death of the assured, and that he has a right to retire from the contract at any time before it becomes executed. That principle of law is not applicable to the facts. The contract whereby he became a party to the transaction was executed. The only thing which gave him any right or interest in the transaction, and upon which he must depend to sustain his claim, is his wrongful act, and it precludes him from obtaining redress at the hands of the law.

We have examined the authorities cited by plaintiff, and have gone over the reasons assigned by him in support of the judgment; and, while not questioning many of the statements of legal principles, we deny their application. The authorities relied upon by defendant will be found collected in briefs of counsel.

The judgment is reversed. All concur.

FISKE v. ROYAL EXCHANGE ASSUR. CO.*

(Court of Appeals at Kansas City, Mo. May 25, 1903.)

FIRE POLICY—VALIDITY—AGENTS—ACTING IN DUAL CAPACITY.

1. A fire policy is not avoided, as to the owner of the property covered, by reason of the fact that the agent of the company, when obtaining the policy, was also, without the company's knowledge, acting as agent for the mortgagee, to whom the policy was payable.

Appeal from Circuit Court, Jackson County; James Gibson, Judge.

Action by Ella M. W. Fiske against the Royal Exchange Assurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Fyke Bros., Snider & Richardson, for appellant. Richard B. Wilcox, for respondent.

BROADDUS, J. On the 26th day of July, 1900, defendant by its policy of that date insured one Harrison R. Gregory against loss by fire to the amount of \$750 upon his dwelling situated in what is known as the "Penn Park Valley District" in Kansas City, Mo. The plaintiff sues as mortgagee, to whom a loss by fire under the terms of the policy was to be paid. Defendant's answer admits the execution of the policy, but seeks to avoid liability because Harrison Gregory was not the sole and unconditional owner, and that a change took place in the title of the insured to the property insured, which by its terms rendered the policy void, viz.: "That before said policy was issued proceedings had been commenced by Kansas City to condemn said property for park purposes under the charter of Kansas City, to which the insured, the beneficiaries named in the deed of trust claimed to be held by plaintiff, were parties. Said proceedings by due course of law resulted in a judgment in favor of Kansas City, condemning said property for park purposes. In and by said proceedings said insured trustee and beneficiaries filed a disclaimer, disclaiming any right to remove the improvements from said property, and the verdict of the jury in said case was rendered assessing the damages for taking said property, including the improvements, all of which proceedings had been had before said policy was issued, and while said proceedings were pending in the Supreme Court said policy was written; that in said cause in the Supreme Court, and before the fire mentioned in the petition, said judgment of the Jackson county circuit court condemning said property and assessing the value of said improvements was affirmed; that afterwards, in compliance with said judgment, said condemnation money so assessed by the jury in said cause was paid into court by Kansas City for the use and benefit of said insured and the plaintiff; that consent by

this defendant that the interest of the insured might be other than unconditional and sole ownership, or for any change in such interest, was not provided by agreement indorsed or added to said policy. Wherefore defendant says plaintiff is not entitled to recover," etc.

The following facts were agreed upon, viz.: "It is admitted that the defendant executed the policy of insurance sued on, on the date mentioned in the petition, and said policy of insurance may be read in evidence, and shall be considered a part of this agreed statement of facts; that plaintiff is the owner and holder by indorsement of a note secured by a deed of trust on the house insured and the lot on which it was situated; that the allegations of the petition as to the destruction of the house by fire, the notice to the company, and proofs of loss are true. The property described in said policy of insurance was situated in what is known as 'Penn Valley Park,' in Kansas City, Jackson county, Mo. Before said policy was issued proceedings had been commenced by Kansas City to condemn said property for park purposes, under the charter of Kansas City, to which the insured, the trustees and beneficiaries named in the deed of trust, were parties. At that time plaintiff was the owner of said note. Said proceedings in due course of law resulted in a judgment in favor of Kansas City, condemning said property and other property for park purposes. In said proceedings said insured trustee and beneficiaries filed a disclaimer, disclaiming any right to remove the improvements from said property, and verdict of the jury in said case was rendered, assessing the damages for taking said property, including the improvements, for the sum of \$675. Thereafter, and while said cause was pending in the Supreme Court, said policy of insurance was written. An appeal was taken from said judgment to the Supreme Court of Missouri, where said judgment was affirmed. These proceedings were had and judgment affirmed before the fire referred to in the petition. At the time of the fire referred to the condemnation money assessed by the jury had not been paid into the court by Kansas City, but since said fire the whole of said money has been paid into court for the use and benefit of said insured and the plaintiff. The amount due plaintiff on said note largely exceeds the sum of the amount of said condemnation judgment and the amount for which said house was insured."

In addition, the following supplemental agreed statement of facts was made: "It is agreed that the Penn Valley Park condemnation proceedings were begun on December 16, 1896, that the disclaimer referred to in the agreed statement of facts was filed on March 16, 1897; that judgment in the Penn Valley case was rendered in the circuit court of Jackson county on November 5, 1898; that an appeal was taken in said

*Rehearing denied June 23, 1903.

case to the Supreme Court by Bacon and Monroe on November 23, 1898; that the judgment of the circuit court was affirmed on June 19, 1900, and was entered of record in the circuit court on July 28, 1900; that the condemnation money assessed by the jury for the house and the lot on which it stood was paid into court by Kansas City on September 18, 1901."

And it was also admitted in said proceedings the value of the land was assessed at \$175, and the house at \$425. The firm of E. W. Fowler & Son, who acted as defendant's agent in insuring the property, were at the same time agents of the plaintiff; but there was no evidence that defendant at the time had knowledge that they were acting in a double capacity. On the trial witness Fowler testified that one Voorhees, who died some months before the policy in question was issued, and who at the time was special agent for defendant, and also agent in charge of the property in question, knew of the pendency of the said condemnation proceedings, for he had talked with him about it. Defendant objected to the competency of this evidence. At the close of the trial defendant offered a demurrer to plaintiff's evidence, which was overruled. The court, sitting as a jury, found for the plaintiff for the full face of the policy, with interest, and the defendant appealed.

The formal points made for a reversal are: That the court erred in permitting Fowler to testify to statements made by Voorhees before his death, and before the policy was written, to the effect that insurance companies allowed him to write insurance on property in Penn Valley Park District; and "that the court erred in refusing to declare that under the law, the agreed statement of facts, and all the evidence, plaintiff was not entitled to recover."

The first objection is without any merit whatever, for the reason that the witness made no such statement; but the statement he did make had reference to what Voorhees said about the city condemning the lands in Penn Valley for park purposes. As we have seen, the defendant's answer set up two defenses, viz.: One, that the insured was not the sole and unconditional owner of the property at the time the policy was issued; and that a change of title to the property had taken place which by the terms of said policy rendered it void as to the defendant. The trial court in its opinion, which is copied into respondent's statement, held that the defendant had waived the said condition set out in its answer. And the defendant seems to have wholly abandoned its said defense so set up, and is now relying on the fact that Fowler & Son, at the time the policy was issued, were acting for both the defendant and the insured without its knowledge, which it claims rendered the policy invalid. Such seems to be the law. *De Steger v. Hollington*, 17 Mo. App. 382; *Bradley v. Ins. Co.*, 90

Mo. App. 372; *Robinson v. Jarvis*, 25 Mo. App. loc. cit. 426; *Hyde v. Larkin*, 35 Mo. App. 365; *Reese v. Garth*, 36 Mo. App. 641; *Smith v. Farrell*, 66 Mo. App. 8. No such defense was ruled on or considered by the trial court. But it does not appear that Fowler & Son were the agents of Gregory, the insured, the owner of the property at the time the policy was written. Therefore the policy was not void as to him by reason of the fact that they were such agents for both plaintiff and defendant.

It follows that the cause must be affirmed. All concur.

SOUTH HIGHLAND LAND & IMPROVEMENT CO. v. KANSAS CITY et al.

(Court of Appeals at Kansas City, Mo. May 25, 1903.)

MUNICIPAL CORPORATIONS—STREETS—GRADING—LICENSES—CHANGE OF GRADE—RIGHTS OF PRIVATE PROPERTY OWNER—COMPENSATION—BOARD OF PUBLIC WORKS—JURISDICTION.

1. A license conferred by a city, permitting another to erect a wall in the street, which, after erection, became a part of the street itself, did not confer on the licensee any property rights in the street, so as to preclude the city from revoking such license and requiring the removal of the wall without compensation of such licensee.

2. Under Rev. Ord. Kansas City 1898, art. 6, § 10, vesting the board of public works with authority to supervise the grading and paving of all streets and public grounds of the city, the board, having granted a license to another to grade a street by means of a certain wall, had authority to revoke such license, and require a reduction of the grade and removal of the wall, when the same became necessary for the benefit of the public.

3. Where a property owner graded a street in a city, and constructed a wall as a part of the work, under authority of the city board of public works, which had jurisdiction of the grading and paving of the city streets, the act of the property owner was the act of the city, and would be presumed to have been done under the supervision of the board of public works, and was therefore subject to such changes as the board might require.

Appeal from Circuit Court, Jackson County; C. O. Tichenor, Special Judge.

Suit by the South Highland Land & Improvement Company against the city of Kansas City and others. From a judgment in favor of defendants, plaintiff brings error. Affirmed.

Cook & Gossett, for plaintiff in error. R. J. Ingraham and J. J. Williams, for defendants in error.

BROADBUSH, J. The plaintiff asks to enjoin Kansas City, its board of public works, and its superintendent of streets from changing or attempting to change the grade of Valentine Road, a street in said city, and from removing or attempting to remove a certain wall in said street. The board of

¶ 1. See *Municipal Corporations*, vol. 36, Cent. Dig. § 1490.

public works permitted the plaintiff to erect said wall and grade the street, so that when it was completed it was above the established grade. The said board, however, has now by resolution ordered the wall removed, and the street put upon the established grade. This, plaintiff alleges, said board has not the authority to do by mere resolution; that it can only be done by ordinance of the city council. The judge who tried the case made the following finding: "The court concludes that the wall was legally constructed under a license therefor by resolution of the board of public works, yet its construction and existence was and is by license merely, which by law is revocable at will; that the defendants, and that the board of public works of the city, may revoke this license at any time, and cause the abatement and removal of the wall; and therefore, upon the facts found as aforesaid, the law is with the defendants, and the petition should be dismissed." And it was accordingly adjudged that plaintiff's petition be dismissed. The plaintiff brings the case here by writ of error.

The question presented is not so much one of precedent, but a construction of the powers and duties of the board of public works of the city. In reference to the subject, 15 American & English Ency. of Law, 496, says: "This power to authorize obstruction may also be delegated by the Legislature to the municipal authorities, and such delegation is to be strictly construed. A grant to an individual by a municipality, under such power, of the right to place an obstruction in the highway, may be revoked, unless it seems that expenses have been incurred on account of such license, in which case the municipality may be estopped to revoke it after a reasonable time, or unless the obstruction becomes an actual nuisance. In the absence of any statutory authorization to the municipality, the latter has no power to authorize obstructions which would otherwise be unlawful." In *Avlis v. Vineland*, 55 N. J. Law, 285, 26 Atl. 149, it was held that under an act for the formation of borough government, which empowered the mayor and council of boroughs to pass ordinances to prevent and remove all obstructions, incumbrances, etc., in and upon any street or road, did not authorize the borough government to remove obstructions from a highway by resolution. It was also held that the authorization of the obstruction by resolution was invalid, but, as the obstruction actually existed, the removal must be exercised in the manner provided by the act forming the borough. In *Savage v. City of Salem*, 23 Or. 381, 31 Pac. 832, 24 L. R. A. 787, 37 Am. St. Rep. 688, it was held that a municipal corporation having control of streets may permit erections or obstructions therein, when they are intended to supply a public demand, and that, when a city has granted a license or franchise to a private person for a public purpose, it cannot, after

he has expended money on the faith thereof, revoke his license without compensating him, unless such obstruction become by subsequent use an actual nuisance. In this last instance the obstructions were water tanks, which supplied the plaintiff with water to sprinkle the streets, for which he was paid by property owners. The plaintiff had a property right in the water tanks, of which it would have been unjust to have deprived him without compensation. A street railroad, for the use of the public, which is a source of income to the owner, would fall within the principle of the case.

The New Jersey case, *supra*, is not authority here, because the decision is predicated upon the plain provision of the borough act, providing for the manner in which the borough must act in cases of obstructions in streets and highways. It may be conceded that Kansas City, as a municipal corporation, has the authority to license or grant to persons or corporations the right to place obstructions in its streets, where the purpose and effect of such licenses or grants is to serve a public want, such, for instance, as tracks upon which cars convey passengers for a compensation to and fro within its limits. In such cases, it is undeniable that the city would not be authorized to revoke the license or grant without at least compensating the owner. But there is a vast difference between licenses of this kind and such as where the licensee is not engaged in a business devoted to a public purpose, but purely personal.

It is one of the contentions of the plaintiff in error that, as it expended, under the license from the board of public works, in building said wall and grade, the sum of \$400, the city cannot remove the same without compensation. This contention cannot be sustained either upon reason or authority; and the cases cited do not warrant such a conclusion. The difference consists in the fact that in one instance the owner has property on, and not in, the street. In plaintiff's case, the property right claimed is in the street itself. All the property that the plaintiff has in the street, except that which pertains to it as an adjoining proprietor, is that which is possessed by it in common with the public. Therefore the license of the city to the plaintiff to erect said wall did not confer any property right in and to the street itself. Under the charter of the city, the board of public works was vested with the authority of supervising the grading and paving of all the streets, avenues, alleys, and public grounds of the city. Section 10, art. 6, Rev. Ord. 1898. Under this provision there can be no question but that the city, by its board of public works, was empowered to license plaintiff or grade the street itself in controversy in the manner and with the wall as it was done by plaintiff. But it cannot be said with reason that, the board having once acted and graded a

street, it must so remain, whether or not it answers best for public purposes.

We have only attempted to discuss thus far the case as presented by the parties; but, after all, it occurs to us that it is not a question of license and its revocation. Because the plaintiff, under authority from said board, constructed the wall and graded the street in question, did not prevent it from being the act of the board itself. The plaintiff undertook to do that which the city might have required it to do. When completed, in law it was presumed to have been under its supervision. It being a street of the city as much after as before the grading, it remained under its supervision, subject to such changes as the board might deem best for public use.

Cause affirmed. All concur.

On Rehearing.

The motion is based upon the ground that the street in question was on grade, and not above grade; that it was only the wall that was some four feet above grade. This is immaterial, as the opinion of the court is based upon the theory that the city has the exclusive control of its own streets, and that the plaintiff has no right therein. The argument presented for a rehearing is that which has been considered in the first instance, and is without merit.

The motion is overruled.

WALL v. HOLLADAY-KLOTZ LAND & LUMBER CO.

(Supreme Court of Missouri, Division No. 2.
June 9, 1903.)

JUDGMENT—PROCESS TO SUPPORT—KNOWN AND UNKNOWN DEFENDANTS.

1. A sheriff's deed, conveying land sold on execution under a judgment for delinquent taxes, recited that the judgment was against the "heirs" of a particular person. The latter in his lifetime resided in another county, where his heirs also resided. The order of publication in the suit in which the judgment was rendered was destroyed. *Held*, that the deed and judgment were void; it being presumed, from the use of the word "heirs," that they were known, requiring the setting forth of their names in the petition and process, so that the order of publication of the process could be procured under Rev. St. 1899, § 575, providing for orders of publication of process against non-resident defendants.

2. The recital, in a sheriff's deed conveying land sold on execution under a judgment for delinquent taxes, that it was executed under a special execution issued on a judgment rendered against the "unknown heirs" of a particular person, presumptively showed a valid judgment, and that the proceedings to collect the taxes were instituted in accordance with Rev. St. 1899, § 580, providing for publication of process against unknown defendants.

Appeal from Circuit Court, Wayne County.

Action by E. R. Wall against the Holladay-Klotz Land & Lumber Company. From
75 S.W.—25

a judgment for defendant, plaintiff appeals. Affirmed.

M. R. Smith, for appellant. James F. Green, for respondent.

BURGESS, J. This is an action by plaintiff, under the provisions of section 650, Rev. St. 1899, to quiet the title to 120 acres of land in Wayne county, of which plaintiff claims to be the owner in fee. David Bollinger is the common source of title. He died in Bollinger county, and plaintiff claims that he left a will, by which he devised the lands in question to his sons, Noah A. Bollinger and Daniel E. Bollinger. This will was never recorded in Wayne county, nor was it offered in evidence; it having been principally destroyed by fire. It was, however, admitted to probate in Bollinger county upon proof of its contents, and a copy of that record was read in evidence by plaintiff. The land in question is embraced in the land described in said will as the "home farm." On the 24th day of February 1898, Emore and Noah Bollinger and their wives, for and in consideration of the sum of \$10, conveyed to plaintiff by quitclaim deed the land in question. Defendant claims title by virtue of two sheriff's deeds—one dated March 19, 1890, conveying the interest of "the unknown heirs of David Bollinger" to H. N. Holladay, for the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section 22, and S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section 23, township 23, range 7, and the other, of the same date, conveying the interest of the "heirs of David Bollinger" to C. A. Bennett for the N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 22, and S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section 23, all in township 30, range 7. The grantees in these deeds subsequently conveyed to defendant.

The court, after hearing the evidence, made its finding as follows: "In this case the court makes the following findings of facts: That the land described in plaintiff's petition was patented by David Bollinger, now deceased; that David Bollinger died in 1869, testate; that he devised the lands in question to his sons, N. A. Bollinger and D. E. Bollinger; that said will was probated and recorded in Bollinger county, which was the home of David Bollinger and his sons, N. A. and D. E. Bollinger, who still live there; that the said devisees paid taxes on the land in question after their father's death until about 1876, and never paid any taxes thereafter; that in 188— the collector of Wayne county, Missouri, commenced a tax suit for delinquent taxes against the unknown heirs of David Bollinger, the last will of David Bollinger not having been recorded in said county of Wayne; that said lands were sold at sheriff's sale in 188—, under execution, for delinquent taxes, and were purchased by H. N. Holladay, and by him conveyed to the Holladay-Klotz Land & Lumber Company; that in 188— plaintiff,

E. R. Wall, called on N. A. Bollinger and D. E. Bollinger, at their home in Bollinger county, and purchased of them said lands for the sum of \$10, taking a quitclaim deed therefor."

It is said for plaintiff that the judgment obtained in the back-tax suit on the order of publication against the "heirs of David Bollinger" is void, and the sheriff's deed from John A. Johnson, sheriff, to C. A. Bennett, purporting to convey the interests of said heirs in part of the lands in question, to wit, the N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ of section 22 and S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$ of section 23, township 30, range 7, passed no title. The order of publication, having been destroyed, is not in evidence; but the deed recites that the judgment, under which the special execution was issued, land sold, and the deed made, was against the "heirs of David Bollinger." The argument is that this deed is void, for the reason that it may reasonably be presumed that the collector knew that David Bollinger was dead, and left heirs or devisees, and that he could have learned their names, and where they lived, had he made an effort; that they could not be both unknown and at the same time known, hence the conclusion must follow, from the deeds and the facts in the case, that the collector did not swear to the petitions filed in the suits, as it would be necessary to swear to the same subject-matter, one way to-day, and another way to-morrow, and hence it will be presumed that he did not swear at all.

The manner of instituting suits, and getting parties defendant into court, so that the court may acquire jurisdiction over them, in actions for the collection of delinquent taxes, is purely statutory, and it makes no provision in such cases for the institution of a suit simply against the "heirs" of any particular person, nor serving process upon them. The presumption is, when the word "heirs" of any particular person is used in such a petition, that their names are known to the plaintiff, and therefore should be set forth as defendants, and process issued against them accordingly. But, if the heirs who are made defendants are unknown to the plaintiff, then the statute points out a way by publication to bring them into court and thus acquire jurisdiction over them. Sections 575, 580, Rev. St. 1899. That is to say, the full names of the defendants should be given in the caption, except in cases otherwise provided for by statute, as, in case the names of parties defendant are unknown to plaintiff, then they may be proceeded against as provided by section 580, Rev. St. 1899. The recital in the deed from John H. Johnson, sheriff, to C. A. Bennett, for the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 22 and the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 23, township 30, range 7, shows that the judgment under which it was sold, and in pursuance of which the deed was made, was against the "heirs of David Bollinger," and must, togeth-

er with said deed, for the reasons stated, be held void.

But it is otherwise with respect to the deed from John H. Johnson, as sheriff, to H. N. Holladay, for all the land in litigation, dated on the 18th day of March, 1890, which shows upon its face to have been made by the sheriff of Wayne county in pursuance of a sale made by him under special execution issued upon a judgment rendered in the circuit court of said county in favor of Wiley Daniel, collector, against the "unknown heirs of David Bollinger," and made a lien on said lands. In the absence of any showing to the contrary, the presumption must be indulged that the proceeding to enforce this tax lien was in accordance with section 580, supra, and "by right and not by wrong." It must follow that the deed in question passed the title of the "unknown heirs of David Bollinger" to Holladay, the grantee therein named; and, as defendant company holds under him, it has the title to said land.

The judgment is affirmed. All of this Division concur.

KURTZ v. LEWIS VOIGHT & SONS CO. et al.

(Supreme Court of Missouri, Division No. 2.
June 9, 1903.)

FRAUDULENT CONVEYANCES—VOLUNTEER PURCHASER—PAYMENT—NOTES—TRANS- FER—PREFERRED CREDITORS.

1. Where notes for the payment of goods were to be transferred by the seller to his brother to pay an indebtedness to him, but the sale was made to hinder and delay other creditors, and this purpose was known to the purchaser, the sale was invalid, though the transferee of the notes did not participate in such purpose.

2. The fact that the transferee of the notes might under certain circumstances hold them as a valid preference of his debt would not inure to the benefit of such volunteer purchaser.

Appeal from St. Louis Circuit Court; Franklin Ferris, Judge.

Action on an attachment bond by Henry G. Kurtz against the Lewis Voight & Sons Company and others. Judgment for plaintiff and certain defendants appeal. Reversed by the St. Louis Court of Appeals, and case transferred. Judgment of Court of Appeals affirmed, and judgment reversed.

F. A. Wind and Johnson, Hqys, Marlatt & Hawes, for appellants. L. Frank Ottofy, for respondent.

BURGESS, J. This case was transferred to the Supreme Court by the St. Louis Court of Appeals because of the dissent of one of the judges of that court from its majority opinion. Since the case has been pending in this court the defendant Henry Troll died, and the suit has been duly revived in the name of Harry Troll, his executor. In the

¶ 1. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 569.

St. Louis Court of Appeals the opinion of the court was delivered by BOND, J., and it and the dissenting opinion of BIGGS, J., are as follows:

"BOND, J. This is a suit brought by the purchaser of a portion of this stock of an insolvent merchant, the remainder of whose stock was assigned for the benefit of creditors. The purchaser gave a chattel mortgage on the goods to secure the price, which was nine notes of \$100 each. After a credit of about \$50 was put upon these notes to reduce them to the amount of goods purchased at the agreed charge, they were indorsed without recourse by the payee to his brother, Leopold Schorle. An attachment suit was instituted by a creditor of the vendor, which was levied by defendant Troll, as sheriff, upon the said goods, which were subsequently sold and applied to a judgment on the merits and also sustaining the attachment, which was entered upon the written offer to that effect of the attachment defendant. The present suit is against the defendant sheriff and the sureties on the attachment bond for an alleged conversion of the goods seized under the writ of attachment. Defendants gave evidence tending to prove that the goods sued for were fraudulently conveyed by the defendant in the attachment suit, and that plaintiff purchased them with knowledge of and participancy in said fraud. This was, however, denied by plaintiff, who claimed, further, that his note for the purchase money had been transferred by the vendor in payment of a debt due the brother of his said vendor. It was further shown that the note evidencing this indebtedness was not surrendered nor delivered up when plaintiff's notes were assigned to the holder. It is not claimed that the market value of the goods exceeded \$850. The jury returned a verdict for \$1,500, of which plaintiff remitted \$650, whereupon the court overruled defendants' motion for a new trial, and they perfected an appeal to this court.

"1. Upon the theory that the notes for the purchase money of the goods were to be transferred by the vendor to pay or secure his indebtedness to his brother, the court instructed the jury that the sale to plaintiff was valid, notwithstanding it was made for the purpose of hindering, delaying, or defrauding the creditors of the vendor, and notwithstanding the further fact that the plaintiff (the vendee) knew of and participated in such purpose and intent, unless it further appeared that the transferee of the notes also knew of and participated in such purpose and intent, and that this latter fact was also known to plaintiff. It is not believed this view of the law can be sustained. The difference in the legal status of a volunteer purchaser and the creditor of an insolvent vendor in a sale or conveyance made by him to defraud his creditors has been so often and so clearly drawn by the decisions in this state and elsewhere that it needs only to be

started to be thoroughly accepted without a citation of precedents. In the case of a sale or conveyance of goods with a fraudulent design on the part of the vendor, a creditor receiving the same in payment on security of a bona fide indebtedness at a reasonable value or price will not lose the preference thus given him, although he is aware that the transaction itself hinders or delays other creditors in seeking redress against said goods, and that such was the purpose of the debtor, provided the creditor does not further participate in such purpose than by the taking payment of his claim or a proper security therefor. On the other hand, a volunteer purchaser, who gets title to goods sold or conveyed to hinder, delay, or defraud creditors of the vendor in the enforcement of their claims, can acquire no right to the property against such creditors, if he either knew of, or participated in, the purpose of his vendor when the transaction was consummated; and this, too, irrespective of the fact that he may have paid full value for the goods. Nor could he acquire a valid title, if, after such a sale, but before payment of the price, he learned of said fraud, and failed to withhold payment, provided his obligation to pay had not become so fixed, by a transfer of negotiable paper evidencing it, or otherwise, that he could not legally resist its enforcement. It needs only a simple application of these principles to settle the rights of the parties to this suit. The hypothesis upon which the court instructed the jury presupposed proof of fraud by the seller and participancy therein by the buyer, but no proof of fraud by the third party, a creditor of the seller, to whom the notes for the price were assigned in payment or security of a demand against the seller. It follows that the transaction, as far as the seller and purchaser were concerned, was in direct defiance of the statute forbidding sales to hinder, delay, or defraud creditors. As to these two parties, there was a shifting of the title to the goods with intent and purpose on the part of both to put the property beyond the reach of creditors' process. Such a transaction was necessarily voidable at the instance of creditors, irrespective of the payment by the buyer of the full value of the goods, and also irrespective of the fact that the vendor assigned the notes which he received for the price of the goods to the holder of a valid demand against himself. As to the latter party, it is true that he could not be compelled to account to other creditors, as trustee for their benefit, except upon proof of participancy in the fraud of the vendor of the goods. But this exemption on his part does not extend to the other two parties, the buyer and seller of the goods. As to the seller, fraud sufficing to sustain an attachment of his property was shown when proof was made of his intent to fraudulently dispose of any part thereof. *Bank v. Lumber Company*, 59 Mo. App. 317; *Bank v. Powers*, 134 Mo., loc. cit. 447, 448,

35 S. W. 1132; *Bank v. Russey*, 74 Mo. App. 651; *Glacier v. Walker*, 69 Mo. App. 288. Now, when this intent was communicated to a stranger, who at once intentionally aided and assisted in its consummation, did he not thereby necessarily subject the property so taken to the same processes to which it would have been exposed if it had been found still in the hands of the fraudulent vendor? In other words, how did the vendee acquire any higher rights to the property than the fraudulent vendor, if both cherished the same fraudulent purpose in the transfer of the title? The only answer to these questions is that the property was equally open to the suit of a creditor, whether in the hands of a fraudulent vendor or fraudulent vendee. Any other view would set at naught the statutes conditioning the validity of sales of property, as against creditors, upon good faith on the part of the purchaser, as well as the payment of a valuable consideration. *Rev. St. 1899, § 3398; Van Raalte v. Harrington*, 101 Mo. 609, 14 S. W. 710, 11 L. R. A. 424, 20 Am. St. Rep. 626.

"2. Neither does the fact that the transferee of the price of the goods could hold it as a valid preference of his debt under certain circumstances inure to the benefit of the volunteer purchaser. The only theory upon which the creditor could retain for himself money so received is that it was taken in payment or security of a bona fide demand, and that he did not further participate in the fraud of the debtor; for, if he did this, he could not retain the money against the suit of other creditors. Now, the assumption of the instruction in this case is that the volunteer purchaser actually shared in the fraud of the debtor. If this had been done, even by the creditor, he would have been compelled to disgorge what he had received with that intent. How, then, can the mere outside purchaser be placed upon a more advantageous ground? It is not believed such a conclusion can be reached by any valid course of reasoning, nor that it can find support in any well-considered case in this state. *Rubber Mfg. Co. v. Supply Co.*, 149 Mo., loc. cit. 551, 50 S. W. 912; *McDonald & Co. v. Hoover*, 142 Mo., loc. cit. 494, 495, 44 S. W. 334, and cases cited; *Hall v. Goodnight*, 138 Mo., loc. cit. 587, 37 S. W. 916; *Martin v. Estes*, 132 Mo. 409, 28 S. W. 65, 34 S. W. 53; *Rinehart v. Long*, 95 Mo., loc. cit. 397, 8 S. W. 559; *Dougherty v. Cooper*, 77 Mo., loc. cit. 532; *Esselbrugge Mercantile Co. v. Troll*, 79 Mo. App. 558-562. It follows that the instructions given by the learned trial judge were radically erroneous.

"Some countenance for the theory expressed by them may be found in what is said by the Kansas City Court of Appeals in *Sammons v. O'Neill*, 60 Mo. App. 530. But the facts in that case were unlike the facts in the one at bar. In that case it appears that the consideration of a fraudulent sale was paid by the purchaser directly to a creditor

of the vendor. In the case at bar the consideration of the sale was expressed by notes executed by the purchaser directly to the vendor, who subsequently assigned them to a creditor. The two cases may be thus distinguished as to the points in judgment. It is argued, under the authority of some general remarks in that case, that the plaintiff in the case at bar only enabled his vendor to do indirectly what he would have had the lawful right to do directly, by transferring the goods themselves to a creditor in payment of a bona fide demand. This argument rests upon an entire misconception of what was in fact done in the present case. In this case the evidence tends to show that the plaintiff bought the goods with a positive intent to assist the seller in defrauding his creditors. The title thus passed. The price paid was turned over by the seller to one of his creditors, who was only entitled to retain it, as he would only have been entitled to retain the goods themselves, had they been given to him at their reasonable value, in payment or security of his demand, provided he did not further assist or participate in the fraudulent design of his debtor. He could retain whatever he took only in payment of his debt, whether it was goods at a fair price, or their representative in money after they had been sold. To the extent of giving his creditor the price of the goods, instead of the goods themselves, the debtor might indirectly vest the creditor with a title to the price, as he could have directly transferred the title to the goods themselves; and, if the argument of the learned counsel for respondent had gone to this extent only, it might have had some force. But his contention does not stop at that point. He insists that the debtor was also entitled to make a fraudulent sale to a mere purchaser, who was cognizant of that intent and actively assisted in its accomplishment, and thereby vest a valid title to the goods, as against creditors, in such purchaser, provided the notes given for the price of the goods were indorsed, under an agreement with the purchaser, to one of the creditors of the vendor. This is vastly more than doing indirectly what the debtor might have directly done. It must be kept steadily in mind that the whole theory upon which the law permits a creditor to retain money or property received in payment of his demand is, not from any leniency to the debtor who uses fraudulent means to effect such payment, but only from a want of complicity in such fraud on the part of the creditor other than in receiving payment of his debt. In all such cases, fraud on the part of the debtor, if shown, entitles his other creditors to any remedy available against him. It is a necessary corollary of this proposition that a remedy available against a fraudulent debtor is equally available against any mere transferees of his title, in privity of estate with him by reason of participancy in his fraudulent designs. So, in the case at bar.

the general creditors of the vendor of plaintiff, upon proof that he was about to fraudulently dispose of his property, might have intercepted it by attachment before the consummation of the fraud. When the fraud in question was effectuated by a transfer to plaintiff, with full knowledge and participation therein, he certainly 'could acquire no higher right to the goods than was possessed by his vendor. This is but an application of the salutary rule which avoids, as to creditors, a sale of their debtors' property resting upon mutual fraud of the seller and volunteer purchaser. It is the essence of this right of relief that it annuls accomplished, as well as intended, frauds, irrespective of the consideration paid, and it would fail of this achievement if it stopped short of any of the guilty participants.

"The argument of respondent does not meet the facts shown in this record, nor can we agree to all of the remarks expressed by the learned court in the case cited, nor are we inclined to follow anything said in that case which is opposed to the conclusions heretofore stated by us. We also experience some difficulty in reconciling the views by our learned Brothers, in the case last cited, to the full recognition by them in a later case (*Haase v. Nelson Distilling Company*, 73 Mo. App., loc. cit. 58, and cases cited) of the principle that, in a conveyance in trust to pay creditors, fraud on the part of the grantor and trustee, without any participation therein on the part of the secured creditors, will vitiate the conveyance. The judgment herein is reversed, and the cause remanded.

"BLAND, J., concurs.

"BIGGS, J. (dissenting). This case was not tried and presented (as stated in the majority opinion) upon the hypothesis that the plaintiff participated in the alleged fraudulent design of Wendell Schorle to hinder, delay, or defraud his creditors. The theory of the appellants (as evidenced by their instructions) was that the plaintiff was a volunteer purchaser, and, if he had knowledge merely of Schorle's alleged fraudulent design, the sale to him was invalid. This is shown by their instruction No. 5, which the circuit court modified by adding that portion in italics, to wit: 'The court instructs you that if you believe and find, from the evidence, at the time of the alleged sale from Wendell Schorle to Kurtz, Wendell Schorle was insolvent, and had formed the design and purpose of transferring and disposing of his property, or any part thereof, for the purpose of hindering, delaying, or defrauding his creditors, and that the said sale to plaintiff, Kurtz, was a part of and in furtherance of said fraudulent purpose and design, if any, and if you further believe and find, from the evidence, that before said sale was consummated, and before the nine promissory notes, made by Kurtz to Wendell Schorle, had been delivered to Leopold Schorle, Kurtz became aware of the

fraudulent purpose, if any, of the said Wendell Schorle, then the court instructs you that it was the duty of plaintiff, Kurtz, to rescind such sale and demand the return of his notes, and your finding must be for the defendants, *provided, however, that you further find that Leopold Schorle participated in the design of Wendell Schorle to defraud his creditors, and that plaintiff knew that Leopold Schorle was so participating in such design of Wendell Schorle before plaintiff signed and delivered the notes and mortgages read in evidence.*'

"The evidence adduced by plaintiff tended to show that the purpose of the sale to plaintiff was to secure or pay the debt due to Leopold Schorle from Wendell Schorle. To accomplish this the goods were sold to plaintiff, for which he gave his notes, which Wendell immediately assigned and delivered to Leopold. This was an indirect way of preferring Leopold's debt; but it was certain, and it was effectual, unless Wendell made the preference with the fraudulent intent of hindering or delaying his creditors, and the plaintiff participated therein, or Leopold was a party to a fraud, and of which plaintiff had knowledge before executing and delivering the notes. In other words, if the sale was a fair one, as above indicated, the plaintiff must be treated as a creditor purchaser. The circuit court so regarded him under the evidence, and it was authorized to do so under the decisions of this court and the Kansas City Court of Appeals in *Tennent Shoe Co. v. Rudy*, 53 Mo. App. 196, and *Sammons v. O'Neill*, 60 Mo. App. 530. In my opinion, the decision of my associates is contrary to the decision in the cases above cited, and I therefore ask that the case be certified to the Supreme Court."

We approve the foregoing opinion of BOND, J., and accordingly reverse the judgment and remand the cause. All of this Division concur.

HAMILTON v. CROWE et al.

(Supreme Court of Missouri, Division No. 2.
June 9, 1903.)

LOST WILLS—ESTABLISHMENT—PRESUMPTIONS—EVIDENCE—WITNESSES—PHYSICIANS—PRIVILEGE—INTRODUCTION.

1. In an action to establish an alleged lost will, evidence of testatrix's physician that she sent for him and talked with him with relation to making a will, and asked him to obtain a lawyer to draw the will, which he did, was not privileged.

2. Where, in an action by a divorced husband to establish an alleged lost will of his wife, her physician testified to part of a conversation with her relative to the making of a will, in which she stated that she cared for no one particularly, except plaintiff, he was properly permitted to testify to the remainder of the conversation, on cross-examination, in which she asked him to procure a lawyer for her, which he did, and that several days thereafter she informed him that she had changed her mind about making the will, and was going to let matters stand as they were.

3. An assignment that the court erred in permitting a witness to testify to a conversation, referring the court to evidence covering several pages of testimony, will not be considered.

4. Evidence of a physician that he asked testatrix if she had made a will, and she replied that she had not, was not privileged.

5. An assignment, that "the court erred in refusing to give questions Nos. 1, 2, and 3," is unintelligible, and cannot be considered on appeal.

6. Where briefs on appeal did not point out wherein instructions objected to were erroneous, such objections will not be considered.

7. In an action to establish a lost will, plaintiff alleged that after the execution of the will it was retained by testatrix among her papers, and after her death could not be found. Plaintiff introduced evidence of a witness who had seen the will in testatrix's trunk, which was under her control during her last illness, and there was no evidence that she thereafter instructed it to any person, and after her death it could not be found by diligent search. *Held*, that under such circumstances an instruction that, if no will was found after searching testatrix's effects for that purpose, the law presumes she had revoked any will she might have made, and the burden of proof was on plaintiff to overcome such presumption, was proper.

8. Error in the admission of evidence which was merely cumulative, and could not have produced a different verdict, was harmless.

Appeal from Circuit Court, Jackson County; James Gibson, Judge.

Action by Thomas J. Hamilton against Edward Crowe and others for the establishment of a lost will. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Leslie & Fontron and I. J. Ringolsky, for appellant. Henry N. Ess and Evans & Finley, for respondents.

GANTT, P. J. This is a suit by plaintiff to establish a will, which he alleges was made by Mrs. Johanna C. Hamilton, and by which she devised and bequeathed to him all of her property, subject only to the payment of her just debts. The petition alleges the will was executed about May 15, 1896. A copy of said will is annexed to the petition. The defendants are the heirs at law of Mrs. Johanna Hamilton, deceased. It is alleged that Mrs. Hamilton died in Kansas City, Mo., on the 27th day of November, 1897, testate; that an attempt to probate the alleged copy of her last will was made in the probate court, and was by that court rejected; that said last will was made in writing and duly signed by said Johanna, and attested in due form by two subscribing witnesses in his presence; that it was not altered, added to, or changed, or revoked by her or any one for her, but was in full force at time of her death; that at the time of its execution she was single and unmarried; that she gave birth to no issue after making it, and remained unmarried until her death; that she was the owner of property of the value of \$15,000; that defendants are her next of kin and heirs at law; that plaintiff

believes there are other heirs besides defendants, but he is unable to state their names or relationship. "Your petitioner further states that after the execution of the said will it was retained by the said Mrs. Hamilton among her papers, and after her death could not be found; that diligent search has been made therefor where the same was likely to be; that said will has been lost or destroyed." Wherefore petitioner asks that said will, so made, may be proven and adjudged the last will of said testatrix, and for other and further relief. Defendants admit Mrs. Hamilton died November 27, 1897, in Jackson county, but deny the execution of such a will as alleged by plaintiff on May 15, 1896. Whether she executed any last will they have no knowledge or information sufficient to form a belief, but state that if she made a will she destroyed it in her lifetime, and that no will was found among her papers after her death. Defendants pray the petition might be dismissed. The administrator, Thomas J. Seehorn, filed a general denial.

Thomas J. Hamilton, the plaintiff, was married to Johanna C. Hamilton, nee Johanna Crowe, July 14, 1864, at Cairo, Ill. They moved to Kansas City from Mound City, Ill., in May, 1868. They lived together as man and wife until December 4, 1864, when plaintiff deserted her and went to California, where he resided until 1894. On October 2, 1886, Mrs. Hamilton was granted a divorce from the plaintiff by the circuit court of Jackson county, on the ground of desertion, and about one year later the plaintiff married another woman in California. At or about the time of the divorce he and Mrs. Johanna Hamilton agreed upon a division of their property, and he deeded her her portion, consisting principally of real estate in Kansas City, on Wyandotte street. In 1894, plaintiff came back to Kansas City to reside, and with his second wife lived there until the death of Mrs. Johanna Hamilton. Thomas J. Hamilton and Johanna had no children born to them, but plaintiff had one son by his second wife. The evidence establishes that after her divorce, and about the year 1889, Mrs. Johanna Hamilton made a will devising her estate to plaintiff for life, remainder to son by his second wife. This son died April 25, 1896, and some time in the following May Mrs. Hamilton executed another will. This will was drawn by Mr. Boggess, of the firm of Boggess & Moore, and was attested by Mr. Boggess and John T. Sullivan. This will was left in the custody of Mr. Boggess. At the time of the execution of this will Mrs. Hamilton was partially paralyzed, and plaintiff went to her rooms, where she was boarding.

From plaintiff's evidence we learn that she suggested that, now his son was dead, she wanted to give plaintiff all of her property, and wanted the will changed. Of course, defendants objected, and properly so, to this

¶ 5. See Appeal and Error, vol. 2, Cent. Dig. § 3036.

evidence, as it had not been established that any will had been executed, or, if it had been, was unrevoked at her death. Anyway, the evidence was heard with a promise to connect. Plaintiff then went to Mr. Bogges' office, and took him out to see Mrs. Hamilton. Mr. Bogges had been plaintiff's attorney in his divorce case with Mrs. Hamilton. Mr. Bogges became ill, and was confined to his home for a long time prior to his death, in August, 1896. Some time that summer Mrs. Hamilton called at the office of Bogges & Moore, and saw Col. Milton Moore, one of the firm, and told him she desired to get her will. Col. Moore spoke to Mr. Bogges about it, and at his direction Col. Moore gave Mrs. Hamilton a bundle of papers indorsed with her name, and she said that was what she wanted. Col. Moore did not open the package, and could not state positively the will was in it. However, the other evidence tends to establish an almost conclusive inference that her will was at that time handed to Mrs. Hamilton by Col. Moore. Prior to this the plaintiff had called for these papers, but Col. Moore declined to give them to him. Mrs. Hamilton, some days later, called and asked for her will, and, when he gave her the bundle, said that was what she wanted. William Miller, another witness for plaintiff, testified that he visited Mrs. Johanna Hamilton at her room in the Burlington Hotel, and during his conversation with her she inquired about Hamilton, the plaintiff, and witness said to her, "I hope you have not forgotten Mr. Hamilton," and she replied, "No; indeed; if you think I have, you just raise that trunk lid," which I did. "Now, you will find a document in such and such a corner. I looked at the place, and found it, and I took it out and looked it over. It looked very much like a will to me. Very soon I saw it was in behalf of Mr. Hamilton [the plaintiff]. I says, 'I guess it is all right.' She said, 'It certainly is.' I laid it back in her trunk. I saw Mr. T. J. Hamilton's signature there, and also other witnesses." After her death in November, Mr. Seeborn, the public administrator, took charge of her estate, and her trunk and papers, but could find no will. Prior to her death, Mrs. Hamilton was taken to the residence or suite of rooms occupied by one of her nephews, Mr. Crowl and his wife, and lived with them until her death. The testimony developed that, on the day the will was drawn by Mr. Bogges, Hamilton, the plaintiff, read it, and after that day the evidence does not show any other visit by plaintiff to Mrs. Hamilton, and he told her brother "he had not seen her for a long time up to her death." There was a great mass of evidence by plaintiff tending to show that Mrs. Hamilton had a purpose to make plaintiff her devisee. In rebuttal of this there was also much evidence tending to show an opposite state of mind and affection, and that she entertained a feeling of

bitterness at having been deserted and abandoned by plaintiff, and a fixed purpose that his second wife should not get her property. There was a material difference between the will propounded and the will which Hamilton, the plaintiff, describes in his evidence. The finding was against the plaintiff, and judgment accordingly. Plaintiff appeals. Many errors are assigned, chiefly in the admission and rejection of evidence and giving of instructions.

1. The first error asserted is in permitting Dr. Horrigan to testify to conversations had with testatrix about wanting to make a will and getting an attorney to draft it. This witness was called by plaintiff himself. He testified he had been her physician from 1892 until possibly two months before her death, when she employed another physician. He saw her afterwards at a hotel at Fifteenth and Campbell streets, but not as a physician. Asked by plaintiff if he talked with her, he answered: "She sent for me. She said she was very low, and had been persuaded another physician would do her more good; that she wished to consult me about a matter of business foreign to my profession. She asked me to tell her as her friend whether I thought she was going to die, and I told her I thought she would, in three weeks. This was in October, 1897. She then said she wanted to make a will. Q. Did she say anything about her feeling for or against Mr. Hamilton? A. Well, she said that—she thought that—there was nobody particularly that she cared for but Mr. Hamilton. When she spoke of the will, she said she wanted to leave it to certain charities—the church, the Little Sisters of the Poor, the German Hospital." Thereupon, upon cross-examination, the witness was asked to relate the remainder of the conversation with deceased. Objection was made that it was incompetent to admit oral testimony either as to the making or the revocation of a will. The court then permitted witness to tell the remainder of the conversation. "She asked if I knew a lawyer who could make a will that could not be broken, and I told her, 'Yes.' I took Frank Walsh out there the next day. He wrote down notes of the disposition she desired to make." Some four days later witness saw her again, and she told him she had changed her mind about making a new will; that she was going to let matters stand as they were; that they would fight over, and she would let them finish it after she was gone.

It is obvious that this witness was not testifying to any information which he acquired from a patient. He was not consulted as a physician, and the information was not necessary to enable him to prescribe for her as such. The assignment otherwise is so general that we are at a loss to understand on what ground error is assigned. If it be, as we surmise it is, that the evidence was incompetent for the purpose of showing a rev-

ocation, it is obvious that it was a part and parcel of the same conversation by plaintiff, and tended to show the state of her affections as much as her examination in chief did. There was no error in admitting it. It certainly rebutted the theory of plaintiff of her fixed intention to give it to her divorced husband.

2. The second assignment is so general that it presents no question of error for our review. To merely say that the court erred in permitting a witness to testify to a conversation, and then refer this court to evidence covering pages of testimony, is no assignment at all, and will not be considered by this court.

3. The same disposition must be made of assignments 3, 4, and 5. As said by Judge Thompson in *Schultz v. Moon*, 33 Mo. App. 320, "the appellant cannot send the court on a search through the record for supposed errors by such a general and sweeping assignment." It is the duty of the appellant to point out in this court specifically the errors of which he complains.

4. The same must also be said of the sixth assignment of error. No legal ground of error is stated under this point, but an inspection of the record shows that all of the objections to Dr. Wainwright's testifying were sustained at first, and that finally he was permitted to state merely that he asked her if she had made a will, and she said she had not. No specific objection was made to this evidence, and it is clear it was not information obtained by him from her to enable him to prescribe for her. It was entirely outside of his professional duty or employment.

5. In the eighth assignment it is said "the court erred in refusing to give questions Nos. 1, 2, and 3, and instructions Nos. 1, 2, 3, and 4 asked by plaintiff." It goes without saying that the first portion of this assignment is absolutely unintelligible. We have no idea what it relates to. As to the instructions mentioned, the objections are not followed up in the brief of counsel, and, as they have not deemed them important enough to point out wherein the error occurred, we shall not delve into them to find error.

6. Counsel do insist that error was committed in the seventh instruction given by the court as follows: "(7) If the jury believe, from the evidence, that there was not found among Johanna C. Hamilton's papers and effects, at or after her death, any will in writing made by her, after search therefor had been made for the purpose of ascertaining whether or not she left a will, then the law presumes that she had revoked any will she might have made, and the burden of proof is upon the plaintiff to overcome such presumption by the greater weight of the credible evidence in the case; and, unless he has done so, your verdict will be for defendants." As to this instruction counsel say: "It is declared to be the law that where a

testator dies, and no will can be found among his assets, if it can be shown that the last time the will was seen it was in the possession of the testator, that then there is a presumption that the testator himself destroyed the will with the intent to revoke it, and some courts hold that it is proper, to overcome this presumption, for contestants or proponents to prove such declarations of the testator as would have a tendency to show that testator did not destroy his will with intent to revoke the same, and, when such proof is made, then it is held the opposing side can introduce the declarations of the testator, not to establish and prove the fact that testator actually destroyed and revoked his will, but to reinforce the presumption, as heretofore stated, arising that the will was revoked." *Behrens v. Behrens*, 47 Ohio St. 332, 25 N. E. 209, 21 Am. St. Rep. 820; *Coleyer v. Coleyer*, 110 N. Y. 486, 18 N. E. 110, 6 Am. St. Rep. 405.

In view of this statement of the law, counsel for plaintiff assigns as error the omission of the court to require the jury by this seventh instruction to find that the will, when last seen, was in the possession of the testatrix. Section 8871, Rev. St. 1889, in force when the will in contest was made, provides: "Sec. 8871. Revocation of Wills. No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked except by a subsequent will in writing or by burning, canceling, tearing or obliterating the same by the testator or in his presence and by his counsel and direction." And this, in substance, is the law of England. 29 Car. II, 1676. Conceding that there was evidence sufficient to establish that Mrs. Johanna Hamilton did in May, 1896, execute her will in writing, and that it was duly attested by two witnesses, and that in substance she gave her former husband, the plaintiff, all her property, and that such will could only be revoked in the manner provided by the above-quoted statute, still we are confronted with the proposition that if the evidence shows that after its execution and attestation this will was retained by Mrs. Hamilton in her own possession, and after her death it could not be found, among her papers or elsewhere, the presumption is that she revoked it by destroying it *animo revocandi*, and this presumption stands in place of positive proof. This was well settled at common law. *Beaumont v. Keim*, 50 Mo. 29; *Betts v. Jackson*, 6 Wend. 173; *Woerner's Law of Administration* (2d Ed.) 91-95; *Knapp v. Knapp*, 10 N. Y. 276; *Loxley v. Jackson*, 3 Phill. Rep. 126; *Shacklett v. Roller*, 97 Va. 639, 34 S. E. 492; *Stewart's Estate*, 149 Pa. 114, 24 Atl. 174; *McDonald v. McDonald*, 142 Ind., loc. cit. 82, 41 N. E. 336; *In re Valentine's Will*, 93 Wis. 45, 46, 67 N. W. 12. While this is the presumption, it is a rebuttable one, and courts receive evidence of declarations of the testator having a tendency to show that,

if he did destroy his will, he did so without intent to revoke it, as by accident or mistake, and declarations per contra, to reinforce the view that he did so with intent to revoke, and to show the state of his mind or affections, but not to establish by oral evidence merely that he had revoked his will. Rule v. Maupin, 84 Mo. 589; Thompson v. Ish, 99 Mo. 170, 12 S. W. 510, 17 Am. St. Rep. 552.

Now, in view of these established principles, let us examine the objection to this seventh instruction. And first we may remark that the propriety or impropriety of an instruction depends upon the state of the evidence and pleadings. Conceding, then, that the rule fully stated requires the will to be traced to and in the possession of the testatrix after its due execution, and not shown to have been out of her possession subsequently and prior to her death, in this case the plaintiff had alleged in his petition "that after the execution of the said will it was retained by the said Mrs. Hamilton among her papers, and after her death could not be found." This allegation was binding on plaintiff as a solemn admission of record, but it was reinforced by the evidence of Miller, for whom he stood sponsor, that in the last illness of Mrs. Hamilton he saw it in her room in her trunk, which was under her control. There was no evidence that she afterwards intrusted it to any person. Thus the pleadings and evidence established a will duly executed, the possession of it by testatrix from the time Col. Moore turned it over to her until a few weeks or days prior to her death, and that after her death it could not be found by diligent search. There was no evidence contradicting these facts. They were practically admitted. When, then, the court instructed that, if the will could not be found, the law presumed she had revoked it, how could it possibly mislead the jury. We think the instruction in the state of the pleadings and evidence was not erroneous, especially since plaintiff did not ask any instruction requiring the jury to find her possession.

7. Having disposed of these propositions it remains only to notice the admission of the evidence of Mr. Walsh. While we think it was incompetent, because it was declarations made by Mrs. Hamilton to Mr. Walsh in his professional character, about a matter which was in the legitimate scope of professional employment, it was admitted solely for the purpose of rebutting the evidence offered by plaintiff to show that Mrs. Hamilton had not destroyed the will with the intention of revoking it, and without this evidence the finding must have been for defendants. It related to the making of a new will which she never executed, and was offered merely to show the state of mind and affections of Mrs. Hamilton at the time. It was merely cumulative to a great mass of like evidence, and in our opinion did not and

could not produce a different verdict. On the contrary, we think that at the close of plaintiff's evidence, under the state of the pleadings, the jury should have been instructed to find for defendants, and nothing that defendants offered strengthened plaintiff's case. While error is presumptively harmful, we are forbidden to reverse a case for error, unless in our opinion it affects the substantial rights of the adverse party. The evidence nowhere rebutted the presumption that the testatrix had destroyed the will animo revocandi. That burden the law placed upon plaintiff, and he did not sustain it; and the verdict was for the right party.

The judgment is affirmed. All concur.

LINN COUNTY v. FARMERS' & MERCHANTS' BANK et al.

(Supreme Court of Missouri, Division No. 2.
June 9, 1903.)

BANKS—INTEREST ON DEPOSITS—PAYMENT—SETTLEMENT—DEMAND BEFORE SUIT—SUFFICIENCY—APPEAL—EXCEPTIONS.

1. Defenses stricken out without any exception to the court's action are not available on appeal.

2. The mere entry by the cashier of a bank of credits on the bank book of a county treasurer for interest due the county on daily balances, daily or monthly, did not amount to a settlement, requiring the county to resort to equity to correct a mistake therein to entitle it to recover.

3. Under the direct provisions of Rev. St. 1890, § 1575, the fact that no demand was made on a bank for interest due on daily balances previous to suit cannot be urged, in the absence of pleading setting up want of demand.

4. Where a bank accepted county funds on agreement to pay interest on daily balances, testimony of a member of the county court that he stated to an officer of the bank that, if he did not pay the money, the county would bring suit, shows a sufficient demand.

5. Where a bank agreed to pay interest on daily balances, which was ascertainable from data at hand and in the bank's possession, it was not necessary to make demand for any specific amount before suing.

Appeal from Circuit Court, Linn County;
John P. Butler, Judge.

Action by Linn county against the Farmers' & Merchants' Bank and others. From a judgment for plaintiff, defendants appeal. Affirmed.

E. R. Stephens, for appellants. Johnson & Bresnehan and Thomas P. Burns, for respondent.

BURGESS, J. This is an action to recover \$424.50, claimed to be the balance due plaintiff by defendants as depository of its funds for two years from the 4th day of May, 1897, at 4 1/2 per cent. interest, on daily balances. Plaintiff had judgment for the sum of \$359.70. Defendants appeal.

The facts, briefly stated, are that the Farmers' & Merchants' Bank was at the

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 123.

time of the institution of this suit, on April 18, 1890, and prior thereto, a partnership banking institution, and C. W. Trumbo, O. E. Trumbo, Marion Oswe, Lee Meyer, and James Brown were the partners, and as such its owners. At the May term, 1897, of the county court of Linn county said defendant bank was selected by said county court depository for plaintiff for the two years next following said May term of said court. A contract was then entered into between plaintiff and defendant bank by which the bank was to pay plaintiff $4\frac{1}{20}$ per cent. interest, computed on daily balances and remaining as a credit to plaintiff, in monthly payments, to the treasurer of said county, one C. E. Kelley. The bank became the depository of the county funds on the 10th day of May, 1897, and continued as such until the 2d day of May, 1899. During that time Kelley, county treasurer, deposited the county's funds with defendant bank, and from time to time the cashier of defendant bank, C. E. Trumbo, entered credits on Kelley's bank book of interest due the county on daily balances, and when such credits were entered there was nothing said as to whether such credits were the full amount of interest due the county on daily balances to its credit at the time such credits were made or not, and no settlement was had with the bank. No dispute arose, and the treasurer did not know whether the defendant bank had given the county credit on his bank book for all the interest due the county under said contract or not, until about the time the contract between plaintiff and defendant expired; but, about the time the term of the defendant as depository expired, Geo. W. Adams, county clerk for plaintiff county, at the instance of the county court, took Kelley's bank book, showing the account of plaintiff and defendant bank, and made a computation on the daily balances to plaintiff's credit with defendant at the rate of $4\frac{1}{20}$ per cent., and it was then discovered for the first time that the interest due plaintiff under said contract was \$1,147.27, whereas the defendant bank had paid plaintiff and entered on Kelley's book only \$722.77, leaving the balance due the county, as shown by the said contract, Kelley's bank book, and Adams' computation, of \$424.50. When the attention of the officers of defendant bank was called to the discrepancy of \$424.50, and demand made on the bank for a settlement with plaintiff, they contended for the first time that some part of the county's fund deposited with the bank belonged to the capital school fund, and that on such part as was capital school fund the county could not require interest under the said contract, and also asserted that the bank had paid the county all it owed under said contract, after the interest on the capital school fund was deducted, so that no dispute arose until the time of settlement between plaintiff and defendant bank arrived, and then the only dis-

pute was the question of whether or not the county was entitled to interest on the capital school fund, if any, which was deposited in defendant bank; the officers for the bank contending that the capital school fund was exempt from the terms of said contract under the law, and the county court contending that the county was entitled to interest on its daily balances, regardless of the question of the capital school fund. The defendant bank failing to pay the balance of \$424.50 claimed by the county, this suit was brought.

The case was tried by the court, a jury being waived. No declarations of law were asked by plaintiff. Defendant asked the court to declare the law as follows: "(1) That the sum of \$722.77 paid the county on daily balances, at the rate of $4\frac{1}{20}$ per cent. interest, by the defendant to C. E. Kelley, treasurer, for the term of two years from the 10th day of May, 1897, to May, 1899, monthly, upon the county funds, was a payment to the plaintiff (Linn county), to be placed to the credit of the road or bridge fund, as the county court might order; and if said sum of \$722.77 was a less amount than the county was entitled to, the excess cannot be recovered, as nothing was shown and no attempt on the part of plaintiff made on the trial to show fraud or mistake of fact by said C. E. Kelley, treasurer, in receiving said daily balances; (2) That no fraud, collusion, or mistake of fact was pleaded or shown by plaintiff in the receipt of the county funds by C. E. Kelley, treasurer of Linn county, Mo. Therefore no recovery can be had by the plaintiff in this action; (3) That C. E. Kelley, county treasurer, had full authority as such treasurer to receive $4\frac{1}{20}$ per cent. upon county funds (except capital school fund), computed upon daily balances monthly, and after the receipt of said interest by him as county treasurer, in behalf of said plaintiff (Linn county), no claim for excess of interest on daily balances could be made by plaintiff, unless fraud, collusion, or mistake of fact was first shown; (4) That no demand for any sum in excess of \$722.77 was made, prior to this suit, of defendant by the county court, or any authorized agent of the plaintiff (Linn county); (5) That the monthly settlements made by the defendant with County Treasurer Kelley in behalf of Linn county, covering the entire term of two years up to May 2, 1900, on daily balances at $4\frac{1}{20}$ per cent. of the county funds, aggregating the sum of \$722.77, were prima facie evidence of payments in full of all interest due plaintiff (Linn county); and, as no fraud or mistake of fact has been shown, the finding should be for defendant." Which declarations of law the court refused, to which refusal the defendants then and there excepted at the time.

It is said for defendants that if \$359.70, the amount of the judgment, was retained by defendant bank as a credit due plaintiff on account of interest, it was by mistake,

and as the total sum of \$722.77 was paid to Kelley, county treasurer, by defendants, covering the entire term of two years from May 4, 1897, to May 2, 1899, at 4 $\frac{1}{2}$ % per cent. interest on all daily balances, which were paid to said Kelley monthly, as a true and correct account, the remedy of plaintiff (if it has any) is not in this form of action, but should be in the nature of a bill in equity to correct the mistake in the payment and settlement with the county treasurer. The action is simply an action at law for money due by way of interest upon deposits as per contract, and no settlement or full payment is set up in the answer. It is true these matters were set up in the answer as first presented, but they seem to have been stricken out upon motion of plaintiff, without any exception having been saved to the action of the court in so doing. These defenses having been stricken out of the answer in the court below, they are unavailable to defendants. Nor did the mere fact of the entry by defendant's cashier of credits upon the treasurer's bank or pass book of interest due the county on daily balances, daily or monthly, amount to a settlement or settlements, or the payment by the cashier to the treasurer of \$722.77 amount to a full payment of all interest due plaintiff. The remedy pursued is the proper one, we think, under the facts disclosed by the record.

It is claimed that the court committed error in refusing instruction No. 4 asked by defendant. The argument is that a demand upon defendant bank for the money claimed, and for which this suit is being prosecuted, should have been made by plaintiff as a prerequisite to its institution. But the failure to make demand by plaintiff before instituting suit is not pleaded, which was necessary under section 1573, Rev. St. 1890, to enable the defendants to avail themselves of the want of demand, as well also as to have accompanied the same with a tender of the amount, etc. *Westcott v. De Montreville*, 30 Mo. 252; *State v. Grupe*, 36 Mo. 365; *Reld v. Mullins*, 48 Mo. 800; *Engel v. Dressel*, 29 Mo. App. 39.

But, even if a demand was necessary before bringing suit, it was sufficiently shown by the testimony of Judge Henry Johnson, a member of the county court of said county, who testified that a month before the institution of this suit, upon either the first Monday or Tuesday in January, 1900, he went to the bank and told Mr. Trumbo that, if "he did not pay the money we [that is, the county] would have to bring suit." It is true the witness did not state which one of the Trumbos it was of whom he made the demand; but that is of no consequence, as they were both officers of the bank, one its president and the other its cashier, and the demand of either was good. In no event was it necessary to have made demand of any specific amount, so that the demand was such that the amount claimed could be ascer-

tained from the data at hand and in possession of the bank.

There was no reversible error in the admission of the testimony of the witness Adams. Nor is the objection to the petition well taken. It states a good cause of action, and all that could be desired.

Finding no reversible error in the record we affirm the judgment. All errors

VIERS v. VIERS.

(Supreme Court of Missouri, Division No. 2.
June 9, 1903.)

RESULTING TRUST—LAND PURCHASED BY HUSBAND AND CONVEYED TO WIFE—PRESUMPTIONS—EVIDENCE.

1. Where a husband purchases real property with his own funds, and causes it to be conveyed to his wife, and there is no intimation in the deed that it is to be held in trust for him, a prima facie case is made out that he intended the conveyance to be a provision or settlement for the wife, and not a resulting trust.

2. While this presumption may be overcome by parol testimony, it must be clear, strong, unequivocal, and so definite and positive as to leave no room for doubt.

3. In an action by a husband against his wife to have a resulting trust declared in his favor to certain lands conveyed to her by absolute deeds, in none of which were words creating a trust or in any way restricting her title, plaintiff testified that he bought the land with his own means and had it deeded to defendant with the intention of making it his homestead. His son testified that the land was bought and placed in defendant's name, and paid for by plaintiff with his own money, for the express purpose of making it his future home. Defendant testified that the land was her father's old home, that she was one of his heirs, that the land was to be sold for delinquent taxes, and that it was bought for her by plaintiff partly with her own money and partly with money given her by plaintiff. *Held* not to warrant a decree for plaintiff.

Appeal from Circuit Court, Taney County; Jas. T. Neville, Judge.

Action by C. W. Viers against Lillie M. Viers. Judgment for defendant, and plaintiff appeals. Affirmed.

Groom & McConkey, for appellant. R. C. Ford, for respondent.

BURGESS, J. The parties to this suit were at the time of the transactions mentioned in the petition, and also at the time of the trial, husband and wife. The purpose of the suit is to have a resulting trust declared in plaintiff's favor to certain lands described in the petition, and to set aside and for naught hold certain deeds—one from J. A. Weatherman, sheriff of Taney county, Mo., to Lillie M. Viers, dated November 1, 1895, and recorded November 1, 1895, in Book 1, at page 80, Taney County Records; also, one from Lillie M. Viers and C. W. Viers, her husband, to Madison B. Viers, dated May 2, 1898, and recorded June 4, 1898, in Book 11, at page 456; also, a deed from Madison B. Viers to Lillie M. Viers, dated May 5, 1898, and recorded September 26, 1898, in Book 11,

at page 537, Taney County Records—and to invest title to said lands in the plaintiff. The answer is a general denial. The court below, after hearing the evidence, rendered judgment dismissing the plaintiff's bill and decreeing title to defendant. Plaintiff filed motion to set aside finding and for new trial, which motion was by the court overruled. Plaintiff appeals.

There is but little conflict with respect to the facts out of which this litigation grew; they being as alleged in the petition, with the exception of the purpose for which the land was purchased by plaintiff, and who furnished the purchase money.

Plaintiff testified in his own behalf as follows: "I live in Taney county, Mo. In 1891 I was married to the defendant, Lillie M. Viers, at Hannibal, Mo., which place was my home at that time. I was then in the employ of the Hannibal & St. Joseph Railroad Company as locomotive engineer, and was receiving a salary of \$115 per month. Up to the fall of 1895 I had saved up from my earnings, and had deposited in my own name in the Farmers' & Merchants' Bank of the city of Hannibal, the sum of \$500, which amount I drew out of said bank some time during the latter part of October of that year, and brought the same with me to Forsythe, Mo., and deposited it in the Taney County Bank. On the 1st day of November, 1895, I purchased at sheriff's sale at Forsythe, Mo., the lands mentioned in this suit, for which I paid the sum of \$118. I purchased the land for a home for myself, and caused the deed thereto to be made to my wife, Lillie M. Viers. In purchasing this land, and in having the sheriff execute the deed to my wife, Lillie M. Viers, it was not my purpose or intention to settle this property upon her for her sole use and benefit, nor as a provision for her; but I had the same deeded to her, in trust for my own use and benefit, for a home. I bought and paid for the land with my own individual money, earned and saved by me at railroad work. Lillie M. Viers, my wife, never at any time put a dollar of her separate money or means into the purchase or improvement of this land, or for the payment of the taxes. In all I have invested between \$500 and \$600 in the purchase of this land and in the payment of current and back taxes against it, and for attorney fees, attachment liens against the land, and traveling expenses from my home at Hannibal to Forsythe, Mo., in looking after it. In the summer of 1899 I left my wife in charge of my business in the city of Quincy, state of Illinois, where we resided together at that time, and I came to Taney county, Missouri, and moved and settled on this land. But before leaving Quincy I had arranged with my wife to remain there and close out our business, and sell the property I had left there in her charge, and which was worth something like \$600, and then she was to come to me

upon the farm here in Taney county, and bring the money, with which we were to stock the farm. She at one time sent me \$10 from Quincy, and in a very short time after I left there she ceased to write or correspond with me, and finally, in the fall of 1899, she instituted divorce proceedings against me in Adams county, Ill., and wrote me that she never intended to live with me any more. The warranty deed from my wife and myself, made to Madison Viers and dated May 2, 1898, and the one from Madison Viers to Lillie M. Viers, dated May 5, 1898, both of which purported to convey the land involved in this suit, were made wholly without any consideration whatever, and there was not a cent of either money or property exchanged on account of either conveyance. I am now in the lawful possession of this land, am living upon it, and making it my home. My wife, Lillie M. Viers, who is the defendant in this case, refuses to live with me upon this land, and she also refuses to longer live with me as my wife."

W. M. Wade, a witness for plaintiff, testified as follows: "I am cashier of the Taney County Bank. Some time about the latter part of October, 1895, the plaintiff, C. W. Viers, deposited \$500 in the Taney County Bank, and he drew the same out again about November 1, 1895. He purchased some land with it at a tax sale about that time. I know he bought the land, for I stood by him when he bid the land in. This money was deposited in the name of C. W. Viers."

Geo. L. Taylor, another witness for plaintiff, said: "In the year 1895 I had an extensive correspondence with the defendant regarding the tax suit then pending against this land. The defendant employed me to look after the same, and paid me \$50 for my services. The defendant did not attend the tax sale, but Mr. Viers was present, and bid the land in under my supervision and instructions as attorney. Mr. Viers afterwards employed me to bring a suit in ejectment for the possession of this land, for which latter services I sued Mr. Viers and his wife by attachment in the circuit court of Taney county, Mo., and procured a judgment against both of them for \$95."

The plaintiff then read from the deposition of Madison B. Viers, which was as follows, to wit: "Q. State your name, age, and place of residence. A. M. B. Viers; 28 years; Kiowa, Baker county, Kan. Q. How long have you resided in Baker county, Kan., and in the city of Kiowa? A. About eight months. Q. Where did you live before you moved to Kiowa, Kan., and how long did you live there? A. Quincy, Ill.; between four and five years. Q. Where did you live on or about the 2d day of May, 1898? A. Quincy, Ill. Q. Are you acquainted with C. W. Viers and Lillie M. Viers? If so, state what relation, if any, each of them are to you. A. Yes. C. W. Viers is my father, and Lillie M. Viers is my stepmother. Q. Is your moth-

er living at the present time? A. I don't know. My father and mother separated in 1884. I have not heard from my mother since. Q. Where did C. W. Viers and Lillie M. Viers reside on or about the 2d day of May, 1898? A. At Quincy, Ill. Q. What was the consideration of the deed made by Lillie M. Viers and C. W. Viers, her husband, to you, dated May 2, 1898, and which conveyed to you the N. E. $\frac{1}{4}$ and S. $\frac{1}{2}$ N. W. $\frac{1}{4}$ and S. E. $\frac{1}{4}$ of section 14 and N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 13, in township 24, range 22, in Taney county, Mo.? A. No consideration at all. Q. State how that deed came to be made to you, whether the transaction was made in good faith or fraudulent, and what amount of money or property you paid them, or was to pay them, in consideration of them conveying this land to you. A. There was a piece of property lying on a creek bank that was in danger of being washed away. Said property was mortgaged by my father, and secured by notes from Lillie M. Viers. This property mentioned in this conveyance was transferred to me for the sole object of defeating any judgment that might be rendered against Lillie M. Viers in case the property mortgaged failed to satisfy the debt. I did not agree to pay any money or property in consideration of the conveyance of the property described in the conveyance to me. Q. State how you came to execute a deed on the 5th day of May, 1898, conveying this same property back to Lillie M. Viers, whether this transaction was in good faith or fraudulent, and what amount of money or property you received from Lillie M. Viers in consideration of you making her a deed back for the same tract of land. A. I conveyed the property back to her in order to keep it in her name, but my deed to her was not to be recorded, and was not recorded, until after the mortgage given by my father upon the property on the creek bank was satisfied. There was no consideration for the conveyance, nor any property or money paid for the same. Q. You may state, if you know, how the property described in the conveyance came to be deeded to Lillie M. Viers in the first instance, and who paid for the same. A. My father was in trouble over several other pieces of property, and this piece of land was bought and placed in the name of Lillie M. Viers, and paid for by my father with his own money, for the express purpose of making it his future home."

The defendant then testified in her own behalf as follows, to wit: "My name is Lillie M. Viers. I am the defendant in this case. I now reside in Quincy, Ill. I am the lawful wife of the plaintiff, C. W. Viers. I was married to him at Hannibal, Mo., nine years ago. I have begun a divorce suit against him in Adams county, Ill. The suit has never been determined, but is now pending in the Adams county circuit court. In the fall of 1895 my husband drew out of the Farmers' & Merchants' Bank at Hanni-

bal, Mo., \$400, and gave the money to me to come to Taney county to purchase at sheriff's tax sale the lands involved in this suit, which was my father's old farm. My father had previously died, leaving my mother and eight brothers and sisters as his heirs. I kept the \$400 for two or three days, and found that I would not be able to make the trip from Hannibal to Taney county to attend the sheriff's sale of this land, and so I gave the \$400 (together with \$100 additional, which I had saved out of the house expenses, and which had been given to me by my husband) to my husband, C. W. Viers, who brought the money to Taney county and bought the land involved in this suit. It is my land, purchased partly with my own money and partly with the money given to me by my husband. My husband was engaged in the saloon business at Quincy, Ill. He left the saloon and fixtures for me to dispose of, which I did. I then went into the saloon business with a gentleman in Quincy. I was in the saloon business about three weeks. I sold out, and have been sewing some since. My object in buying the land was to get my mother off of the land, and get her to make her home with me. My mother, brother, and sister were living on the land at the time it was sold for taxes. They would not give possession after the tax sale, and my husband, C. W. Viers, was obliged to bring an ejectment suit against them before they would get off. My mother never has made her home with me since I have been married."

The plaintiff then testified as follows: "It is not true that I drew \$400 out of the Farmers' & Merchants' Bank at Hannibal, Mo., and gave to my wife at any time, as testified to by her. She never gave me \$100, \$400, \$500, or any amount, with which to buy the land; but I drew from the Farmers' & Merchants' Bank my own money, which I brought direct from the Farmers' & Merchants' Bank to Forsythe, Mo., and purchased the land with it, paying the taxes and other expenses out of this money, which was all my own. I never drew \$400, or any other amount, out of the Farmers' & Merchants' Bank at Hannibal, Mo., or any other bank, and gave to my wife, at any time."

There is some conflict in the testimony as to who furnished the purchase money for the purchase of the land in question; plaintiff testifying that he did, while defendant testified that she did. But, conceding, for the purposes of this case, that plaintiff furnished it, it is well settled that "where the husband purchases real property with his own funds, and causes the same to be conveyed to his wife [as in the case at bar; and there is no intimation in the deed that it is to be held in trust for him], a prima facie case is made out that the husband intended the conveyance to be a provision or settlement for the wife, and not a resulting

trust, as would arise if no such relation existed." *Schuster v. Schuster*, 93 Mo. 438, 6 S. W. 259; *Seibold v. Christman*, 75 Mo. 308; *Berry on Trusts*, §§ 148-147; *Pomeroy's Eq. Jur.* § 1089; *Ilgenfritz v. Ilgenfritz*, 116 Mo. 429, 22 S. W. 788; *Curd v. Brown*, 148 Mo. 82, 49 S. W. 990; *Woodward v. Woodward*, 148 Mo. 241, 49 S. W. 1001. It is also well settled that this presumption may be overcome by parol testimony; but the evidence, in order to do so, must be clear, strong, unequivocal, and so definite and positive as to leave no room for doubt in the mind of the chancellor. *Woodford v. Stephens*, 51 Mo. 443; *Ferrester v. Scoville*, 51 Mo. 268; *Modrell v. Riddle*, 82 Mo. 31; *Sweet v. Owens*, 109 Mo. 1, 18 S. W. 928; *Rogers v. Rogers*, 87 Mo. 257; *Railroad v. McCarty*, 97 Mo. 214, 11 S. W. 52; *Taylor v. Von Schraeder*, 107 Mo. 206, 16 S. W. 675; *Curd v. Brown*, 148 Mo. 82, 49 S. W. 990.

The question for solution is as to whether or not the evidence, when taken in connection with the deeds in evidence, all of which were made at the request of plaintiff, and in none of which were words creating a trust, or in any way restricting defendant's title, is sufficient to overcome the presumption arising from the facts and circumstances in evidence in favor of the position that it was intended by plaintiff that said conveyances should be a provision or settlement for his wife, and not a resulting trust. All of the evidence adduced by plaintiff tending to overcome these presumptions was his own testimony, to the effect that he bought the land with his own means and had it deeded to her with the intention of making it his homestead, and that of his son, who testified that "this land was bought and placed in the name of Lillie M. Viers, and paid for by his father with his own money, for the express purpose of making it his future home." Defendant testified, in her own behalf, that the land in question was her father's old farm; that he had died, leaving her mother and eight children, brothers and sisters, as his heirs; that the property was to be sold for delinquent taxes; and that it was bought for her by her husband, partly with her own money and partly with money given to her by her husband, the plaintiff. Our conclusion, therefore, is that at the time of the purchase of the land, when plaintiff had the deed therefor made to defendant, he intended the property as a settlement upon her, or as a provision for her, and that the evidence adduced for the purpose of overcoming the presumption that he intended to do so falls far short of being clear, strong, unequivocal, and so definite and positive as to leave no room for doubt in the mind of the chancellor, but tends strongly to the contrary.

No error was committed in the decree. The judgment is affirmed. All of this division concur.

RICE, STIX & CO. v. SALLY et ux.*

(Supreme Court of Missouri, June 15, 1903.)

HUSBAND AND WIFE—CONTRACTS BETWEEN—MORTGAGE TO WIFE—RECORD—UNRECORDED MORTGAGE—NOTICE—CHANGE OF POSSESSION—IDENTIFICATION OF MORTGAGED PROPERTY—INTERPLEA.

1. An interplea in an attachment suit being in its essential characteristics an action of replevin, the legal title or right to the immediate possession of the property must exist in the interpleader.

2. Rev. St. 1899, § 4335, which gives a married woman the right to contract and carry on business on her own account, and to sue without joining her husband as a party, is broad enough to permit her to contract with her husband, and to have such contract enforced at law.

3. Under the statute a married woman can interplead in an attachment suit against her husband to recover her separate property, whether acquired from third persons or from her husband.

4. The property covered by a mortgage conveying "all the dry goods, groceries, etc., kept in stock at the storehouse and warerooms" of the mortgagor "at L." was sufficiently identified in an interplea by the mortgagee, in attachment against the mortgagor, by a showing that there was but one store at L., and that the sheriff attached all the goods therein.

5. Under Rev. St. 1899, § 3404, requiring a chattel mortgage to be recorded in the county wherein the grantor resides, the mortgage must be recorded in the mortgagor's county, though the property be in another.

6. In order that notice of a mortgagee's claims to chattels under an unrecorded mortgage shall be imparted to third persons, the transfer of possession to the mortgagee must be so open and notorious as to apprise the community or those accustomed to deal with the mortgagor that the chattels have changed hands.

7. Where, in an attachment suit, in which the wife of defendant claimed the goods in his store under an unrecorded mortgage, the only showing of transfer of possession was that the wife had stayed at the store a short while the day the mortgage was executed, that a red line had been drawn under the previous accounts on the books, that one of the clerks had told inquiring customers that the store was being run in the wife's name, and that a sign with the wife's name on had been seen on the porch one evening, no claim being that it was placed there by the wife's authority, there was no showing of such a transfer of possession as to affect plaintiffs, who attached the goods a few days after the execution of the mortgage, with notice of the wife's claim.

In Banc. Appeal from Circuit Court, Webster County; Argus Cox, Judge.

Two attachment suits by Rice, Stix & Co. against James B. Sally, in which Sarah H. Sally interpleaded, were consolidated. Judgment for the interpleader, and plaintiffs appeal. Reversed.

The following is the opinion of GANTT, J., in Division:

"This is a proceeding wherein the plaintiffs are attaching creditors, and certain goods were attached as the property of defendant James B. Sally, and his wife, Mrs. Sarah H. Sally, interpleads therefor. The action was commenced in the circuit court of Phelps

* 1. See Attachment, vol. 5, Cent. Dig. § 1001.

*Rehearing denied.

county, and a similar one was begun in Dent county, and the venue in each was changed to Webster county. In the latter county the two suits were consolidated. Mrs. Sally, the wife of the defendant in these attachments, interpleaded for the goods seized by the sheriff, and grounds her claim thereto upon a chattel mortgage executed to her by her husband, of date October 21, 1897, to secure the payment of a promissory note executed on that date by her husband, James B. Sally, in her favor, for \$10,590, and payable one year after date. By the terms of said mortgage Mrs. Sally was to take immediate possession of all the stock of goods and personal property therein described, and she was given power to sell at retail or wholesale, and apply the proceeds to the payment of said note, and the balance, if any, to her husband, James B. Sally, or his representatives. James B. Sally, the mortgagor, resided in Phelps county, Mo. The stock of goods was situated at Lecomma, a village in Dent county. The mortgage was not recorded in Phelps county, but was recorded in Dent county, October 22, 1897. On October 25, 1897, the sheriff of Dent county, by virtue of writs of attachment, one of which was issued in the case of Rice, Stix & Co. v. James B. Sally, levied upon and seized the said stock of goods. The said goods were afterwards sold by order of the judge of the circuit court in vacation. The village of Lecomma is in Dent county, 12 or 14 miles from Rolla, in Phelps county. Defendant Sally and his wife, the interpleader, resided in Rolla at the time the chattel mortgage was executed and the writs of attachment were sued out and levied. On a trial before a jury in the circuit court there was a verdict for the interpleader, and the plaintiffs in attachment have appealed to this court.

The interpleader was Miss Sarah H. Bowman prior to her marriage to defendant Sally, and claims the property to satisfy her mortgage, which she alleges was given to secure an indebtedness to her by her husband, growing out of his receiving and appropriating to his own use her distributive share in the estate of her father, James R. Bowman, who died in 1894, leaving a will, and naming his son, W. P. Bowman, and James B. Sally, defendant, as his executors. To substantiate her claim, and show the consideration of the note described in the chattel mortgage, interpleader introduced in evidence said will. The will, so far as it is material to this controversy, bequeathed certain lands and moneys to Mrs. Sally. She next read, over the objection and exceptions of the attaching plaintiffs, receipts of hers filed with a settlement made in the probate court by said executors, from which it appeared she acknowledged she had received of said executors \$8,211.02, and advancements in her father's lifetime amounting to \$3,255. Other witnesses testified to admissions made by James B. Sally, the husband of interpleader,

over the objections and exceptions of plaintiffs, to the effect that he had received the purchase money for certain lands belonging to his wife, and sold by her and her husband, to the amount of \$6,000. Mrs. Sally testified that in truth and in fact she never received any of these moneys from the executors of her husband. Other witnesses, Harrison, Cowan, and Pinto, testified to admissions by James Sally, her husband, that he had received about \$6,000, the proceeds of the sale of his wife's realty. Mrs. Sally testified that no account of these moneys was ever kept between her and her husband, and that she never at any time made any demand for it. No interest was paid on it, or requested, and no separate investment of it was ever made for her benefit, and but for her husband's embarrassment she would not have demanded it. She supposed it was all right, and never inquired about it. In April, 1897, the defendant Sally was very slightly indebted to the wholesale trade, and his credit was excellent as reported by commercial agencies; but according to the evidence for interpleader he was indebted to his wife and other relatives to the amount of nearly \$20,000. He purchased during 1897 large bills of merchandise, with the result that on October 1, 1897, he was indebted in the sum of \$20,000 to the trade. By his chattel mortgage and other dispositions on the 21st of October he had secured his wife and brother-in-law to the full amount of his visible property, and left nothing to satisfy his wholesale creditors for the merchandise bought of them that year. He and his wife had conveyed all his real estate. On October 21, 1897, James B. Sally and Mr. J. B. Harrison, a member of the Rolla bar, went to Lecomma in Dent county, to Sally's store. Mr. Harrison learned that day that Sally was hopelessly involved, and Harrison suggested to him that he should secure his wife the moneys he had received of her estate. Sally and Harrison returned to Rolla that evening, arriving about 9 o'clock at night. Prior to that evening neither Mrs. Sally, the interpleader, or Sally or their attorney, Harrison, had any intimation that Sally's creditors intended to push the collection of their claims. It appears, however, that on the 20th of October, 1897, Sally had an invoice taken of his Lecomma stock. The usual time for taking same had been in March. The interpleader, Sarah H. Sally, had already retired for the night, but at the urgent request of her husband she arose, dressed, and went to the residence of Mr. Harrison. The affairs of Sally were gone over at full length; Mrs. Sally being present during the interview, taking part therein, and fully appreciating all that was being done. The items of the alleged indebtedness, running from 1887 to 1897, were gone over, and David Cowan, circuit clerk and recorder of Phelps county, who was present during this interview, at the request of Attorney Harrison, drew the note and chattel mortgage; the note

being made by J. B. Sally to the order of Sarah H. Sally, and for the sum of \$10,500, dated October 21, 1897, and being payable one year after date. The note was made payable 12 months after date at Sally's suggestion, as 'he thought she could handle the property in a year's time, and not have to close it out.' The chattel mortgage, direct from J. B. Sally to Sarah H. Sally, without the intervention of a trustee, conveyed such goods, wares, and merchandise as were covered by the specific items of an invoice, dated October 20, 1897, and the office fixtures in the Lecoma store, aggregating about \$9,000, and gave Mrs. Sally the right to sell at retail, wholesale, or in any other manner, without notice or publication of any kind of the time and place of sale, all of the said merchandise, and to apply the proceeds toward the payment of her debt; the balance to be returned to James B. Sally, or his legal representatives. The mortgage in terms recites, and the fact is, that accounts due James B. Sally, growing out of the operation of the Lecoma store, amounting to \$1,900, had been made out and had that day been duly assigned by James B. Sally to Sarah H. Sally, and had been delivered to her. During the same night, and at Mr. Harrison's residence, Mr. and Mrs. Sally joined in the execution of a deed of trust for \$3,000, which deed came into the possession of William P. Bowman a week or two after said night, although William P. Bowman had not seen James B. Sally for two or three months prior to said night, and had never asked him for such a deed of trust, nor had he had any previous arrangement or agreement with him concerning it. It appears that the interpleader on the same night executed to Attorney Harrison a power of attorney, the extent of which, however, does not appear, as the power of attorney was not introduced in evidence. Mr. Harrison acted as attorney for both Mr. and Mrs. Sally from the start, and was acting in that capacity at the time of the trial. It further appears that Sally delivered and indorsed over to Mrs. Sally a note dated September 4, 1897, due one year after date, for the sum of \$4,207.60, to secure Mrs. Sally as indorser on two of her husband's notes due the State Bank of Rolla, the two notes aggregating the sum of \$3,000; Mrs. Sally further agreeing to pay two notes due the National Bank of Rolla, aggregating \$950, on all of which notes Sally was liable, and Mrs. Sally further agreeing that, if any surplus remained after paying the above four notes to the State Bank of Rolla, she would pay over such surplus to John P. Kaine and herself. The date when Sally delivered this note to his wife does not appear, but it is admitted that the note was filed with the State Bank on the 23d day of October, 1897. Mrs. Sally in her interplea alleges that the sheriff seized said paper; but the sheriff's return shows no such seizure, and in fact none was made.

"Upon her return to her home on that

night, Mrs. Sally stated to her mother that Mr. Sally wanted her to go to Lecoma and get the property in her name before the St. Louis parties got there. Shortly after midnight of the same day Mr. and Mrs. Sally, together with their attorney, Harrison, drove to Lecoma, arriving there about daylight of October 22, 1897. Mrs. Sally went under these circumstances, because her husband and Attorney Harrison told her to go, and insisted upon her going. The chattel mortgage was recorded on October 22, 1897, in Dent county, but was not recorded in Phelps county, where the defendant, Sally, and his wife, the interpleader, resided. Mrs. Sally and Attorney Harrison told the clerks in charge of the store that she (Mrs. Sally) was the owner thereof. It appears that Mrs. Sally remained about the store for some hours, and returned to Rolla that same night, reaching there at about 8 o'clock in the evening, and never returned to Lecoma until after the property had been levied upon. What the sales were Mrs. Sally did not know. It further appears that the interpleader did not close the store for any purpose whatever, and that without losing a moment's time the store was run up to the time the attachments were levied at 5:30 p. m. on the 25th day of October. The same three clerks were continued, no arrangements whatsoever having been made with them about salary, and no one of them in particular, or any one else, being put in charge for her. The old books were continued in use. No invoice was taken of the stock of goods by Mrs. Sally, or by any one for her, at any time. There was no sign, poster, or notice to indicate a change of ownership. The evidence tended strongly to show that nothing was done to indicate to the public, or advise or inform the public, that there had been a change in the ownership or possession of the stock of goods. This was the status at 5:30 p. m. on Monday, October 25, 1897, four days after the execution of the mortgage, at which time the merchandise and accounts were attached by Sally's creditors, among them the plaintiffs. Other facts, and the several instructions given by the court, will be noted in the opinion as occasion may require.

"1. The first contention of the plaintiffs raises a question of procedure and practice. Their position is that, as the right to interplead in an attachment case is strictly statutory and legal, it cannot be maintained where the interpleader has not a strictly legal right, and that inasmuch as Mrs. Sally, the interpleader in this case, acquired whatever right she has to the attached property through the chattel mortgage of her husband to her, without the intervention of a trustee, it is purely equitable, and hence she cannot recover in this form of action. An interplea under our statute is in the nature of an action of replevin ingrafted upon the suit by attachment. *Burgert v. Borchert*, 59 Mo. 80; *Bank v. Tracey*, 141 Mo. 261, 42 S.

W. 946; *State ex rel. v. Barker*, 26 Mo. App. 487. An interplea being in its essential characteristics an action of replevin, the legal title or right to the immediate possession must exist in the interpleader. We do not understand plaintiffs to contend that in no case can a married woman interplead for her personal property, in which she has a separate statutory legal estate in any of the ways defined by our married woman's acts, but simply that, where her title thereto is equitable only, she cannot interplead at law in an attachment case. By this discriminating we may avoid seeming conflicts in judicial utterances.

"We are thus brought to the question, what was the nature of Mrs. Sally's title to the attached goods under her chattel mortgage from her husband? Did it convey her a strictly legal estate, or did it create merely an equitable lien, which the courts would enforce and protect in equity? It was a maxim of the common law that the husband and wife could not contract with each other during coverture. The reason assigned was that they were one person in law, and that it would be absurd for any person to contract with himself. The disability attached to both husband and wife. However unsatisfactory this reason may appear, in view of the fact that the same law recognized the validity of a deed or devise to the wife, and thus conceded they were two distinct persons, it has been too long settled to be overturned by the judiciary. While this was the rule at law, the courts of equity at an early period recognized the separate existence of the wife, and secured to her her separate estate and equitable rights (*Tennison v. Tennison*, 46 Mo. 77), and, though void at law, an absolute conveyance of real or personal property from the husband directly to his wife was good in equity on a sufficient consideration, so far as the form was concerned, to divest the equity of the husband in such property and to vest the same in the wife as against all persons, when such transfer was fairly made upon a meritorious or valuable consideration. *Wallingsford v. Allen*, 10 Pet. 583, 9 L. Ed. 542; *Lady Arundel v. Phipps*, 10 Ves. 146; *Shepard v. Shepard*, 7 Johns. Ch. 57, 11 Am. Dec. 396. And such was the recognized doctrine generally in all of the states of the Union, prior to the passage of the various married women's acts.

"The great and sweeping changes made, both in this country and England, by this character of legislation, is too well known to require any recapitulation. While similar, each state has made its own changes, and a reference to the statutes of each is necessary to understand the construction of their courts. They all evince a determination to render the husband and wife independent of each other as to their property rights, and to render the wife capable of contracting at law, as well as in equity, as if she were sole. But in some of them it is expressly

provided that the husband and wife are not thereby permitted to contract with each other. Our Missouri statute on the subject governing this case is section 6864, Rev. St. 1889, and remains unchanged in the Revision of 1899, § 4335. By it 'a married woman shall be deemed a feme sole so far as to enable her to carry on and transact business on her own account, to contract and be contracted with, to sue and be sued, and to enforce and have enforced against her property such judgments as may be rendered for or against her, and may sue and be sued at law or in equity with or without her husband being joined as a party.' This section has been construed on various occasions, but the exact point now under consideration has never been decided, so far as the writer can find, by this court, but has been by both of our Courts of Appeal. In *Ilgenfritz v. Ilgenfritz*, 49 Mo. App. 127, the Kansas City Court of Appeals, after quoting sections 6864 and 1996, Rev. St. 1889, in a case in which the wife had sued her husband in equity, and the point was made that her remedy if any was at law by replevin, said: 'In our opinion, neither of these statutes authorize the wife to sue the husband at law. They give her the right to sue without joining her husband as a party plaintiff. She may bring her action independent of her husband, and a third party may sue her without joining the husband as a party defendant. But she is not empowered to sue her husband. The unity of husband and wife is not destroyed by these statutes. They are, as before these statutes, one legal entity in the eye of the law, except as they are separated by the express provisions of the statute, or necessary implications arising from such provisions. We are cited to the cases of *Larison v. Larison*, 9 Ill. App. 27, and *Wilson v. Wilson*, 36 Cal. 451 [95 Am. Dec. 194], where the husband is sued at law by the wife. In the former case the action is for injuries to her property, and in the latter on a promissory note. But in each case a statute is cited giving authority in express words for either to sue the other.'

"In *McCorkle v. Goldsmith*, 60 Mo. App. 475, the husband sued his wife on an appeal bond, and the question was whether a court of law would enforce a contract between husband and wife. The answer involved the construction of section 6864, Rev. St. 1889, the one we are now considering. It was urged that this section, without any restriction or limitation whatever, authorized a married woman to contract and be contracted with and to sue and be sued in all courts as if she were a feme sole, and that this extends to the making and enforcement of contracts with her husband. 'But,' said the Court of Appeals, 'even though this construction be adopted, we cannot see our way clear to an affirmance of the present judgment. At common law husband and wife could not contract with each other, for the

reason that they were regarded as one person. The disability vested in both alike. Therefore, in this case, if the complete emancipation of the wife be conceded, the disability remains with the husband. A contract which a court of law will recognize and enforce must be one entered into by two or more persons who are sui juris and capable of contracting with each other. This disability of the husband was stated and recognized by the New York Court of Appeals in the case of *White v. Wager*, 25 N. Y. 333 [opinion by Denio, J.]. It was there contended that the statute permitted husband and wife to contract with each other. That court denied this, and held that, to have such an effect, the disability of the husband would also have to be removed, and that nothing short of this would entirely destroy the marital unity of the parties or enable them to contract with each other.' After observing that, if the contention of plaintiff were sound, then section 6804 repealed section 6808, the St. Louis Court of Appeals concluded: 'In our opinion it was the intention of the Legislature to confer upon a married woman the absolute power of contract as to all the world except her husband; also the right to the possession and control of her property, subject to such use and enjoyment by her husband as would necessarily result from the marital relation; and also the legal remedies for the protection of her property and the enforcement of her contracts (except those made with her husband) that are afforded other persons who are sui juris. *Major v. Holmes*, 124 Mass. 108.'

"In *Lindsay v. Archibald*, 65 Mo. App. 117, Smith, P. J., after reviewing *Ilgensritz v. Ilgenfritz*, 49 Mo. App. 127, *McCorkle v. Goldsmith*, 60 Mo. App. 475, and *White v. Wager*, 25 N. Y. 333, in a case in which a husband sued his wife's administrator, said: 'Accordingly it is clear from these rulings that the husband can no more sue the wife, or the wife the husband, in an action at law, since the enactment of said married woman's statutes, than he or she could before. The disability of the husband, as well as the wife, has not been removed by said enabling statutes. So the plaintiff could not have sued his wife in an action at law on a contract while she was living.'

"None of these cases deny, but all recognize, the familiar doctrine in this court that in equity husband and wife may contract with each other, and that courts of equity, where the equities require it, will enforce such contracts. *Turner v. Shaw*, 96 Mo. 22, 8 S. W. 397, 9 Am. St. Rep. 319; *Clark v. Clark*, 86 Mo. 114; *Chapman v. McIlwraith*, 77 Mo. 46, 46 Am. Rep. 1; *Morrison v. Thistle*, 67 Mo., loc. cit. 600, 601.

"The decisions of this court construing section 3296, Rev. St. 1879, the act of March 25, 1875 (Laws 1875, p. 61), in *Blair v. Ry. Co.*, 89 Mo. 383, 1 S. W. 350, *Brown v. Bowen*, 90 Mo. 184, 2 S. W. 398, *Broughton*

v. Brand, 94 Mo. 169, 7 S. W. 119, and *Gilliland v. Gilliland*, 98 Mo. 522, 10 S. W. 139, do not reach the exact point under consideration, as the facts involved in them did not call for its determination. In neither of them was the validity of a contract between husband and wife at law, since the enactment of our married woman's acts, the point in judgment, notwithstanding the general language used.

"The question is one on which judicial opinion on similar statutes is by no means uniform. Thus, in Massachusetts, while St. 1874, p. 117, c. 184, § 1 (Pub. St. 1882, c. 147, § 2), permits a married woman to make contracts in the same manner as if she were sole, the Supreme Court of that state held that this act gave no authority to husband and wife to contract each with the other at law, and that their legal incapacity to thus contract remained as at common law, notwithstanding this enabling statute. *Knell v. Eggleston*, 140 Mass. 202, 4 N. E. 573. In Kentucky, section 49 of the Civil Code provided that 'where a married woman is a party her husband must be joined with her, except when the action concerns her separate property she may sue alone and where the action is between herself and her husband, she may sue or be sued alone,' and the Court of Appeals in *Matson v. Matson*, 61 Ky. (4 Metc.) 262, held that 'this gave no new right of action to the wife, but its only effect was to dispense with a next friend in those cases in which the action concerned the separate estate of the wife, or where she sued in equity to enforce some equitable right against her husband.' In New York the act of 1860 (Laws 1860, p. 133, c. 90) provided in section 7 that 'any married woman may bring and maintain an action in her own name for damages against any person or body corporate for any injury to her person or character the same as if she were sole, and the money received upon settlement or judgment should be her sole and separate property.' These words were admitted to be broad enough to cover an action by the wife against her husband for assault and battery or slander, but it was ruled she could not sue her husband under this statute. *Longendyke v. Longendyke*, 44 Barb. 866. In Iowa a statute in all respects similar to the Kentucky act above quoted received a contrary construction to that given by the Kentucky Court of Appeals. *Jones v. Jones*, 19 Iowa, 242. And the Indiana court reached the same conclusion that the Iowa court did. *Scott v. Scott*, 13 Ind. 225.

"The reason which impelled the Court of Appeals of New York and our Courts of Appeal to hold that statutes which simply give the wife's property to her as her separate estate, and permit her to contract and be contracted with, or sue and be sued, do not go to the extent of permitting husband and wife to contract with each other, is that they only render her competent to con-

tract, and do not remove the disabilities of the other party to such contract, to wit, the husband, who at common law was incompetent to contract at law with his wife and have it enforced in a court of law, but relegated each to a court of equity to enforce their agreements with each other. The argument of Judge Denio in *White v. Wagar*, 25 N. Y. 328, is the basis of these decisions, and is contained in the following excerpt from his opinion: 'But it is argued that the power in terms given to a married woman by the act of 1849 [Laws 1849, p. 528, c. 375] "to convey and devise real and personal property . . . as if she were unmarried" embraces all manner of conveyances and necessarily includes any which she might make to her husband. No doubt there was an intention to confer upon the wife the legal capacity of a feme sole in respect to conveyances of her property, but this does not prove that she can convey to her husband; for no such question could possibly arise in respect to a feme sole, there being no person to whom, in respect to conveyances made by her, the rule of common law could apply. By assimilating the case of a wife to that of an unmarried woman, the Legislature merely meant to say that she should have the same power as though she were not under the disability of coverture. Taking away that disability, she would have to make all such conveyances as were not forbidden by special provisions of law; but such general statutes are never understood to overreach particular prohibitions founded on special reasons of policy or convenience. Corporations cannot, in general, take title to lands by will. The removing of the disabilities of femes covert would not allow them to make a devise to a corporation not authorized to take. It is not the disability of the wife alone which would by the common law render void her conveyance to her husband. The husband is as much disabled to take under such a conveyance as she was to convey. Therefore, to render the conveyance valid, the husband's disability, as well as that of the wife, must be removed; but, as has been remarked, there is no language in these acts and nothing in apparent intention which looks to the removal of the disabilities under which he labors.' Again, the learned jurist says elsewhere: 'We would not expect to find, in a law passed professedly to shield the property of married women from the control of their husbands, a provision making it more easy for the latter to acquire such control. Beyond all doubt the greatest peril to which the separate estate of the wife is exposed is her disposition to acquiesce in placing the title to it in the hands of her husband. This the common law prevented to a certain extent by her rendering her direct conveyance to him void.' From these fundamental maxims of the common law, Judge Denio and our own Courts of Appeal reached the conclusion, as

a contract in law requires two competent persons to agree, that at common law the husband is under disability as much as the wife to make a contract with her during coverture, and the removal of the wife's disability only enables her to contract with third persons, who are themselves competent, and not with her husband, whose disabilities have not been removed, but who continues incompetent to contract with her.

"Over and against these cases, which counsel for interpleader concede correctly state the rule at common law, the interpleader insists that our married woman's acts (sections 4385 and 4390, Rev. St. 1890) remove all the disabilities of a married woman, and that it was the intention of the said acts to make legal those rights which, under our laws prior to their enactment, were merely equitable and could not be maintained at law, as by interplea in an attachment case. In support of their argument counsel cite *State ex rel. v. Jones*, 63 Mo. App. 151. But in that case, the wife owned the personal property at the time of her marriage, and it was levied upon and sold as the husband's after marriage. The execution creditor gave the sheriff an indemnifying bond. The wife brought her suit on the bond in the name of the state, and the sole question was whether it was her separate statutory estate, and it was held that it was, and she could maintain the suit. Obviously it does not affect the question now before us. Certainly the Court of Appeals did not so regard it, as they make no reference whatever to their previous decisions as to her rights growing out of contracts during coverture; neither did counsel on either side. *Hopper v. Hopper*, 84 Mo. App. 117, is also cited. That was an action in replevin by a widow against the heirs and executors of her deceased husband to recover personally given to her by her husband, and no doubt could exist as to the right of the husband to give her the property to treat as her own. Her action was against his legal representatives, and the rights of creditors were not involved. In *Mayfield Woolen Mills v. Wilson*, 87 Mo. App. 145, an attachment suit was brought against one Wilson as surviving partner, and a stock of goods in a store run in the name of the wife of Wilson was attached, and she interpleaded therefor. Her right so to do was challenged by the attaching creditor, and no reference is made to her right so to do; but the jury found, and its verdict was approved by both the circuit and appellate court, that the defendant Wilson had borrowed from his wife, the interpleader, certain moneys which she had inherited from her mother and invested in land in her name. She sold this land, and loaned the proceeds to her husband's firm. When afterwards he discovered the firm would be compelled to cease business, the firm transferred to Mrs. Wilson two notes secured by a chattel mortgage, paid her \$800 in cash, and afterwards

paid her \$300 more, or \$900 in the aggregate, to reimburse her for her separate moneys which they had used. She bid in the mill under the mortgage, made \$700, sold the mill for \$1,300, and with these moneys bought the goods which were attached. Having repaid his wife the moneys borrowed of her, which were her legal and statutory separate estate, the wife's interest in these moneys was as if she had remained continuously in possession of them, and her investment of them in the goods attached did not change them into a mere equity; but the goods were her separate legal estate, and when they were levied on by a third person to satisfy her husband's debt we have no doubt whatever that the statute (section 4335, Rev. St. 1899) gave her the right to sue therefor in her own name, without joining her husband, and that the circuit court and Court of Appeals correctly and necessarily so held, although no point was made as to her right to do so by an interplea.

"The more recent cases by the St. Louis Court of Appeals, decided since the preparation of the brief by counsel for the respondent interpleader, to wit, *Grimes v. Reynolds*, 68 S. W. 588, *Grimes v. Reynolds*, 68 S. W. 501, and *Beagles v. Beagles*, 68 S. W. 758, disapprove both *Lindsay v. Archibald*, 65 Mo. App. 117, and *McCorkle v. Goldsmith*, 60 Mo. App. 475, and follow *Locke v. McPherson*, 163 Mo. 493, 63 S. W. 726, 52 L. R. A. 420, 85 Am. St. Rep. 546, and *Winn v. Riley*, 151 Mo. 61, 52 S. W. 27, 74 Am. St. Rep. 517, and hold that a proper construction of our married woman's acts, *supra*, leads to the complete emancipation of the wife from her matrimonial bonds so far as her property rights are concerned, in law as well as in equity, and that she may contract with her husband and sue and be sued by him at law. Plaintiffs, we think, concede that, wherever the statute by its terms creates a legal estate in the wife, then by the right to sue in her own name, with or without joining her husband, she may resort to the statutory legal remedy just as any other person; and so the only question remaining is, what is the nature of the right which a wife acquires by virtue of a chattel mortgage executed directly to her by her husband to secure a note made by him to her?

"That is this case. 'Mrs. Sally's right to goods seized by the sheriff under plaintiffs' attachment depends entirely upon the validity of the chattel mortgage executed to her by her husband, the defendant in the attachment, and her possession thereunder. That this transfer was enforceable in equity, if not made to defraud creditors of her husband, is not questioned; but can it be sustained at law, and in this form of procedure? After a careful consideration we are of opinion that the intention of our Legislature was to remove the disabilities under which a married woman labored at common law, so as to permit her to contract and be contracted

with, sue and be sued, and that the language used, being entirely without exception, is broad enough to permit her to contract with her husband, and that her contracts with him will be enforced at law, just as if she had contracted with third persons; and this, we think, is the weight of judicial opinion in other states, where statutes no broader than ours have been construed. Her right, then, being a legal one, we see no obstacle to her maintaining replevin or interpleading in an attachment case. *Carney v. Gleissner*, 62 Wis. 493, 22 N. W. 735; *Beard v. Dedolph*, 29 Wis. 141; *Fenelon v. Hogoboom*, 31 Wis. 172.

"Profound as our respect is for the judicial utterances of Judge Denio and the opinions of our Brethren of the Courts of Appeals of this state, we are loth to accept the chief premise upon which they bottom their opinions—that the removal by statute of all the disabilities of a wife to contract does not enable her to contract and receive a conveyance or mortgage from her husband. While the common law did not permit the husband and wife to contract with each other, because one person in law, there was a marked distinction between the competency of the two to contract with third persons, as well as each other. No disability attached to the husband by reason of his marriage, but he remained at liberty to contract and be contracted with, save as to his wife, whereas the wife was wholly incompetent to do so. It was the wife who was under dominion, and she constituted one of the exceptions to the general rule that all persons are competent to contract, and it was out of solicitude for the wife that the law prohibited the husband from contracting with her, save under the protection of the court of equity. But now that the statute dissolves the unity of husband and wife as to the property rights enumerated in our married woman's acts, and makes the wife a feme sole, and as the husband could always have contracted with a feme sole, and granted his property after marriage as before, with the exceptions that he could not receive a deed directly from her, and could not dispose of her inchoate dower, there remains no obstacle to their dealing directly with each other, at law as well as in equity. That such was the purpose of these married woman's acts we have no doubt whatever, and we think that releasing the bonds which bound the wife necessarily left the husband free of the disability which rested on him, solely and only because the law rendered his wife incompetent, and when she was rendered *sui juris* nothing remained of the common-law rule as to their incapacity to contract. It follows that the cases of *Ilgenfritz v. Ilgenfritz*, *supra*, *McCorkle v. Goldsmith*, *supra*, and the other cases cited which followed them, must be disapproved and held not to be a correct construction of section 4335, Rev. St. 1899, and that in our opinion a wife can interplead in an attachment suit to recover her separate

property, whether acquired by descent or devise from a third person or by grant or gift from or by contract with her husband; and we approve *Grimes v. Reynolds*, and *Beagles v. Beagles*, supra. We think, however, that *White v. Wager*, 25 N. Y. 328, and *Winans v. Peebles*, 32 N. Y. 423, might have been, under the New York statute, correctly decided, because by express statute a wife in New York could not convey her real estate without joining with her husband, and he could not convey to himself. It was for this reason only that the writer dissented from *Bank v. Hageluken* (Mo. Sup.) 65 S. W. 728, 88 Am. St. Rep. 434, being of opinion that the conveyance act was not repealed by the general language of section 6869, Rev. St. 1889.

"2. We proceed to examine the remaining assignments of error. At the close of the interpleader's evidence, the plaintiffs prayed the court to give a peremptory instruction in the nature of a demurrer to the evidence. Three grounds are advanced why this instruction should have been given. Two of them are based upon the terms of the chattel mortgage, which plaintiffs insist show it to be fraudulent on its face. The first of these is the recital in the chattel mortgage that the defendant J. B. Sally had that day assigned to Sarah H. Sally 'all accounts which are now due to said J. B. Sally by reason of operating and conducting a merchandise business at said place [Lecoma] which now appear on his books of account and ledger of said business, amounting to \$1,900,' and for various amounts against divers persons, because said assignment was for J. B. Sally's use, because counsel insist that the defeasance clause was never finished, and the \$1,900 of accounts were transferred to Mrs. Sally, defendant's wife, with no obligation on her part to account for the same. We are not inclined to give the mortgage such a technical construction as this. If it is not invalid for other reasons, we think the granting words conveyed these accounts, as did the express assignments of each by the defendant, and that the power of disposal for the purpose of satisfying the note is fairly included in the general words of sale contained in the mortgage. Neither do we think there was any failure of proof as to the identity of the goods attached with those covered by the mortgage. The mortgage conveyed 'all the dry goods, groceries, etc., kept in stock at the storehouses and warerooms of defendant Sally at Lecoma, Dent county.' The proof was there was but the one store at Lecoma, and the clerks testified the sheriff attached all the goods in the store.

"It is further insisted that, upon the undisputed evidence in behalf of interpleader at the close of her case, there was no such change of possession as our statute of fraudulent conveyances (section 3404, Rev. St. 1889) requires, and notwithstanding defend-

ant was indebted to his wife, the interpleader, to the amount of his note secured by said chattel mortgage, said mortgage was invalid as against the plaintiffs, who are attaching creditors, and it was the duty of the court to declare the same fraudulent as a matter of law. Section 3404, supra, provides that 'no mortgage or deed of trust of personal property hereafter made shall be valid against any other person than the parties thereto unless possession of the mortgaged or trust property be delivered to and retained by the mortgagee or trustee or cestui que trust, or unless the mortgage or deed of trust be acknowledged or proved and recorded in the county in which the mortgagor or grantor resides, in such manner as conveyances of land are by law directed to be acknowledged or proved and recorded, or unless the mortgage or deed of trust, or a true copy thereof, shall be filed in the office of the recorder of deeds of the county where the mortgagor or grantor executing the same resides, and, in the case of the city of St. Louis, with the recorder of deeds of said city, or, where such grantor is a nonresident of the state, then in the office of the recorder of deeds of the county or city where the property mortgaged was situated at the time of executing such mortgage or deed of trust; and such mortgage or deed of trust or copy thereof may be so filed, although not acknowledged, and shall be as valid as though the instrument were fully spread upon the records of the county, or, in case of the city of St. Louis, upon the records of said city, in the office of the recorder of deeds; and such instrument, when acknowledged and recorded, or when the same or a copy thereof shall have been filed as above provided, shall thenceforth be notice of the contents thereof to all the world.'

"Constructive notice is altogether the creature of statutory enactment, and, when it is invoked, must be shown to be at least a substantial compliance with the statute. It will be observed that the statute requires that, in order to be notice to those to be affected by it, and to dispense with an actual transfer of the possession, a chattel mortgage must be recorded in the county in which the mortgagor resides, though the mortgaged property may be situated in another county. *Fahy v. Gordon*, 133 Mo. 414, 34 S. W. 881; *Bevans v. Bolton*, 31 Mo. 437. The evidence in behalf of interpleader, uncontradicted by plaintiffs, was that defendant James Sally resided in the city of Rolla, in Phelps county, and the mortgaged property, as shown by the instrument itself, was situated at Lecoma, in Dent county. It is, then, clear that the recording of this chattel mortgage in Dent county conveyed no notice whatever to the creditors of said James Sally, among whom are the attaching plaintiffs, and was not a substitute for an actual change of possession. It devolved, then, upon interpleader to maintain her right to recovery by prov-

ing 'that the possession of the mortgaged goods had been delivered to and retained by her'; and it is the settled law that such change of possession must be actual and visible, regard being had to the situation and character of the property, and such change must take place before the rights of other parties intervene. *Bank v. Powers*, 134 Mo. 443, 35 S. W. 1132; *Dobyns v. Meyer*, 95 Mo. 132, 8 S. W. 231, 6 Am. St. Rep. 32.

"We are thus brought to a consideration of the evidence as to the taking and retaining possession of the stock of goods at Lecomma by Mrs. Sally, the interpleader. It has been repeatedly adjudged by this court that the actual and continued change of possession contemplated by the statute must be open, notorious, and unequivocal, such as to apprise the community, or those accustomed to deal with the party, that the goods have changed hands, and that the title has passed out of the seller and into the purchaser. *Clafin v. Rosenberg*, 42 Mo. 489, 97 Am. Dec. 336; *Bishop v. O'Connell*, 56 Mo. 158; *Lessem v. Herriford*, 44 Mo. 325. While the foregoing cases construed the section governing conveyances as between vendor and vendee, the same evidence of change of possession has been adjudged essential as between a mortgagor and mortgagee in a chattel mortgage. *Bank v. Powers*, 134 Mo. 443, 35 S. W. 1132. Whatever the rule in other states, it is the law of this state that when the undisputed facts show there was no such change of possession, and the mortgage was not recorded before the rights of attaching creditors intervened, it is the duty of the courts to declare the transaction fraudulent and void in law, irrespective of fraud in fact. *Wright v. McCormick*, 67 Mo. 426; *Bigelow v. Stringer*, 40 Mo. 135; *Stewart v. Nelson*, 79 Mo. 524.

"What, then, are the undisputed facts as to the change of possession? Mr. Harrison, the attorney who advised and superintended the giving of the mortgage, testified that it was drawn and acknowledged at his residence in Rolla, about 10 or 11 o'clock of the night of October 21, 1897; that about 4 o'clock next morning J. B. Sally, the defendant, and his wife, the interpleader, started in one buggy; and Mr. Harrison in another, for Lecomma, where the stock of mortgaged goods was situated. The three reached Lecomma about 6 o'clock that morning, and went to the house of John Sally, a brother of defendant. They ate a hurried breakfast, and Mrs. Sally and Mr. Harrison went to the store. The defendant had three clerks in charge of the store—John Sally, his brother, Pat Smith, and George Martin. Mr. Harrison remained in Lecomma that morning from an hour and a half to two hours, and then rode on to Salem, the county seat of Dent county, to record the mortgage, and came back about 4 or 5 o'clock that afternoon. Asked if change was made in the clerks, he

answered: 'No, sir; I didn't think it was necessary to make any change in the clerks. I made arrangements with them to stay there for Mrs. Sally; * * * the same ones that Mr. Sally had there.' The doors were not closed, and no invoice was taken. These same clerks had been running the store the day before, and did not stop to make any invoice. 'Q. You didn't put up any signs showing it was Mrs. Sally's store? A. No, sir. Q. Did you put up a written notice? A. No, sir. Q. Did you notify the people there at Lecomma that Mrs. Sally had taken possession of the store? A. Yes, sir. Q. Who did you notify? A. I don't remember the names of all. I remember speaking to Mr. Lenox about it. Q. There was nothing done, except what you said to the parties on the street there? There was nothing to indicate to the public that there was any change in the proprietorship, or that there had been any change in ownership? A. I told the clerks to announce it. I took the keys, and notified the clerks—every clerk in the house.' He further testified that there was nothing that he considered a sign, either on the inside or outside of the store; that he didn't know that he removed anything; that it was his impression that he moved some things to one side, in the way of advertisements, but could not say what they were.

"The interpleader testified, in answer to question by her counsel: 'Q. How did you take possession? A. I authorized the clerks to sell no goods—I told the clerks the goods were mine, that Mr. Sally had given me a chattel mortgage, and that the property was mine, and for them not to sell any goods in Mr. Sally's name.' She remained in Lecomma until 5 o'clock that afternoon, and started for her home in Rolla about 4 or 5 o'clock that evening, and was never back at Lecomma until after the goods were attached. She never took any invoice of the goods; never closed the store for any purpose. There was no sign put in the store in her name. She did not know anything about what sales were afterwards made. She left the same three clerks in charge of the store that her husband had. She designated no particular one to have charge.

"Pat Smith, one of the clerks in charge, testified that he was employed in and around the store from the time of Mrs. Sally's early call in the morning of the 22d of October until the sheriff levied on the 25th; that Mrs. Sally told him the goods belonged to her, and employed him to work for her. The first thing he did was to run a red line under the standing accounts, and then sold goods and transacted business until the sheriff took possession four days later. He knew nothing of any change made or attempt made to get a sign made; * * * did nothing himself to that end.' He did tell inquiring customers 'that it belonged to Mrs. Sally, Jim Sally's wife,' and 'that it

was run in her name. She did not take any invoice. No sign was put up that she was mortgagee in possession. Q. Was there anything done in or about the store to indicate that she was owner of that store, or in possession as mortgagee, or anything to indicate to the public that the public coming there would know who was in possession of the stock of goods? A. Nothing that I know of. Q. Was anything torn down on the inside of the store? A. I don't remember that there was. Q. No visible signs or visible marks there to show who was the owner of the store, was there? A. I think not. Q. No difference in the management? The same clerks remained in there? A. No change in management or clerks whatever. First saw Mrs. Sally on the morning of October 22d, about 7 o'clock. * * * Did not see James Sally that day.' John Sally told him James B. Sally was no longer in business, and that Mrs. Sally was in the store. Mrs. Sally told witness she wanted him to work for her. 'Nothing said about wages. After Mrs. Sally took possession, we used the same books—sales book, day book, and ledger. Never made any changes in the books after October 22d. Didn't see any sign setting out, but on platform.'

"E. L. Taylor testified that one Chamberlain had made a signboard on which he (Taylor) was to do the lettering, but no lettering had ever been done, and the board was at Chamberlain's mill. He further testified that he saw a sign which some one had told him was sent out from Rolla. It was about the platform of the store on Saturday night, the 28d of October, about sundown. It was about four feet long, and had on it 'Mrs. Sarah H. Sally's Store.' He had not put it there, and did not know how it came there. It was never put on the building, and he only saw it once. It was not there on Friday, nor on the following Monday. Lenox testified he saw such a sign, but could not remember whether it was before or after the attachment, and that outside of this sign he saw nothing inside or outside to indicate a change of ownership. Pat Smith, recalled for cross-examination, testified he was there all the time, and saw no such sign as Taylor described.

"For the plaintiffs: Mr. C. H. Fauntleroy, an attorney of St. Louis, representing the Brown Shoe Company, a creditor, testified that he was at the store at Lecomma from 12 to 2 o'clock Saturday, and there was no sign about the premises; that he examined particularly. Charles L. Woods, an attorney of Rolla, testified he was there for eight hours on Monday, the 25th of October, and there was no sign there, or any other indication of a change of possession. Wm. Burbinger, a St. Louis creditor, was there on Monday, the 25th of October, from 6 in the morning until noon, and there was no sign or anything else to indicate Mrs. Sally's possession. E. Y. Mitchell, of Rolla, testified

he was there all day on the 25th of October, and there was no sign.

"Mrs. Sally and her attorney, Mr. Harrison, who was managing the matter for her, gave no testimony as to the said sign. There was no evidence that either of them had employed any one to make a sign in Rolla, or that either of them sent one out to put on the store.

"Giving a fair and reasonable weight to all the testimony on the whole case as to the change of possession, and full credence to all the testimony offered by interpleader on this branch of the case, was there that open, notorious, unequivocal, and continued change of the possession of the stock of goods from James B. Sally to his wife which the statute requires as against Sally's creditors? No invoice was taken, no sign was put up, no written or printed notice posted in the windows or on the doors to indicate Mrs. Sally had taken and was in possession as mortgagee. No change was made in the clerks who had been selling the goods for her husband. Mrs. Sally only remained at Lecomma a part of the 22d, and was never there again until after the sheriff had seized the goods under the attachment. The chattel mortgage was not recorded in the county where her husband resided, as the statute required. No new set of account books was opened in her name, merely a red line drawn under the accounts due up to that day. It is true one Taylor testified to a sign having been seen on the platform for a short while Saturday evening after the alleged change on Friday; but all the evidence establishes that it appeared without the sanction of either Mrs. Sally or her counsel, neither of whom made the slightest pretense of being responsible for such a sign, and no verdict could stand upon such a fragment of evidence as this was as to the putting up of a sign. Even if it was there a few short hours Saturday night, it lacked all the essentials of a continuous assertion of a change of possession, as all agree it was gone Monday.

"In *Lessem v. Herriford*, 44 Mo. 325, this court held that the change must be 'such as to preclude the hazard of the seller deriving a false credit from the continuance of his apparent ownership.' Bump, in his work on *Fraudulent Conveyances* (4th Ed. § 127), lays it down that 'the change of possession must be such as is observable without inquiry.' No other rule will work out the purpose of the statute. Hence the evidence of Smith, the defendant's clerk, to the effect that he told such of the customers as inquired that Mrs. Sally was in charge, and it was being run in her name, was not sufficient by itself to effect the required change. He testified that, outside of his answers to those who inquired, there was nothing whatever to indicate to the public that Mrs. Sally was the owner or in possession of that stock as mortgagee. To all appearances everything remained after the alleged change of posses-

sion just as it had been for weeks prior thereto. Even if doubtful, the law resolves the doubt against the party who should make the change of possession open and visible to the world. It results that the court erred in refusing to sustain the demurrer to the evidence.

"Having reached this conclusion, after a careful consideration of the record, we deem it unnecessary to consider critically the remaining assignments, further than to say that the statements of counsel for interpleader were entirely improper and should have received the prompt reprimand of the circuit court. The attaching creditors were pursuing their lawful actions to collect their claims, which the evidence tended to show very strongly that the defendant Sally was endeavoring to defeat and delay, and they had done nothing to justify counsel for interpleader and defendant denouncing them as 'speculators, driving sharp bargains.'

"The judgment is reversed, and the cause remanded to be tried in accordance with the views herein expressed."

Lyon & Swartz, Thos. M. Jones, A. Hollingsworth, and C. H. Jones, for appellants. J. B. Harrison, H. O. Bland, and L. F. Parker, for respondent.

PER CURIAM. Opinion of GANTT, J., in division, adopted as opinion of court in banc. ROBINSON, C. J., and BURGESS and VALIANT, JJ., concur.

FOX, J. I fully concur in the very able opinion of Brother GANTT in this cause, except as to the conclusion, reached in paragraph 2, "that the court erred in refusing to sustain the demurrer to the evidence." This conclusion was reached upon the theory that, the chattel mortgage not having been recorded in the proper county, it conveyed no notice whatever to the creditors of James Sally; hence it devolved upon the interpleader, in order to maintain her right of recovery, to prove to the reasonable satisfaction of the jury "that the possession of the mortgaged goods had been delivered to and retained by her," and that the evidence on the part of the interpleader in respect to the change of possession was insufficient to authorize the court to submit that issue to the jury.

With the greatest deference to the opinion of Judge GANTT, I have, after a careful consideration of the evidence, reached a different conclusion. It must be conceded that it is the settled law, as applicable to the mortgage in this case, that there must be an actual and visible change of possession of the mortgaged property from the mortgagor to the mortgagee before the rights of other parties intervene. It must also be noted that, in determining the question of such change of possession, due regard must be given to the situation and character of the property. This issue was sharply presented in the trial of this cause. Upon this issue I shall not recite in detail all the evidence on the part of the interpleader as to the

actual delivery and visible possession taken of the property embraced in the mortgage. It will suffice to indicate such testimony as would authorize the trial court to submit that issue to the jury.

James B. Sally and his wife resided in Phelps county, Mo. The stock of goods was situated in a storehouse at Lecoma, a small village, distant about 10 or 12 miles from Rolla, in Phelps county, Mo. It was the only store in the village. On the 19th of October, 1897, an invoice of the stock of goods was completed. On the night of the 21st of October the mortgage was executed to the interpleader, embracing the stock of goods. On the morning of the 22d of October, James B. Sally, with his wife and attorney, J. B. Harrison, whom the interpleader had employed as her attorney, went out to the store. She went into the store, announced to the clerks that the stock of goods was hers, gave them directions what to do, and took possession of the store and goods, remaining there all day. Mr. Harrison, who was representing the interpleader, directed that a sign be made and placed on the store. The clerks, to the customers that came in the store, informed them of the change of his possession. The mortgage to the interpleader embraced all the accounts; hence the interpleader retained the same account books. They were hers, and as to transactions with her the accounts were kept in the old books; but the books were made to indicate the business transacted with her. The people around the little village knew of the change and were told of it. Pat Smith, one of the clerks, testified. He says: "During the whole day and from that time until the store was closed by the sheriff, it was the general talk there. * * * We had to explain it all the time by customers asking the question. * * * I don't know what the reason was for asking, unless they knew of the change."

As to the sign being placed on the store porch, the testimony is as follows: J. B. Harrison (who represented the interpleader in the transaction) testified: "I instructed John Sally to have a sign made as soon as possible to put up on the store." E. L. Taylor (who was employed in the mill) testified as follows: "Q. State what you know, if anything, about a sign being prepared. A. There was a sign made, but it was never finished at all before the sheriff closed the store. It was commenced, but the paint had not got dry, and the lettering could not be done. In the meantime there was a sign sent out from Rolla, and it is there yet, and I guess it can be produced. By the Court: Q. This sign you spoke of being partly prepared was not put up at the store? A. No, sir; it never was finished. Q. Where was it kept while it was being worked on? A. Mr. Chamberlain made the sign, and I was to do the lettering on it; but it was never finished. The paint had not got dry and it could not be lettered. Q. Where was it kept while it was being worked on? A. It was kept at

the planing mill of Mr. Chamberlain. Q. It was not kept at the store? A. No, sir. Q. What was done with the sign that was sent there from Rolla? A. It was about the platform at the store there on Saturday night, Mr. John Sally told me. (Mr. Dickey, counsel for plaintiff, here interrupted the witness.) Q. Did you see it placed upon the platform. A. No, sir; but I saw it there. By the Court: Q. In what position was it when you saw it? A. It was setting up, leaning up against the house. Q. In such a position that it could be read? A. Yes, sir. Q. By any one passing? A. Yes, sir." J. M. Lenox, at whose house a good many of the representatives of the creditors and their attorneys stopped while at Lecoma on Monday, the day of the levy, testified as follows, after saying that he remembered the day that Mrs. Sally and Mr. Harrison were at Lecoma and took possession of the stock of goods: "Q. Did you see any sign after that day around the store or premises? A. I did. Q. State what was on the sign and where it was. A. I don't remember whether I seen that sign before the store was closed down or afterwards. There was a sign there on the porch. It was a small board, probably four feet long, I could not tell the width of it, with 'Mrs. Sarah H. Sally's Store' on it. The sign was afterwards at my house and lay on the portico for awhile. It was on the porch, but how it came there I don't know. Q. That was after the goods were attached that it was at your house? A. Yes, sir; after the goods were attached. Q. Did the sheriff stop at your house? A. No, sir; he stopped at Porter's. A good many of the other gentlemen that were there stopped at my house." And on cross-examination Mr. Lenox testified in part as follows: "Q. Where was the sign when you saw it? A. On the porch. Q. That was after the store closed? A. I could not say whether it was before or after the store was closed down. Q. Your best recollection is that it was afterward? A. My best recollection is that it was there before the store was closed, but I might be mistaken. Q. What porch was it on? A. The porch in front of the store, when I first seen it. * * * Q. You would not swear when you first saw it there? A. No, sir; I would not swear positively. Q. Might it not have been put there after the store was closed? A. It could have been, but my impression is that I seen it before the store was closed; but I could not be positive."

The interpleader, Mrs. Sally, when she went out to the store to take possession, says: "I authorized the clerks to sell no goods— I told the clerks the goods were mine, that Mr. Sally had given me a chattel mortgage, and that the property was mine, and for them not to sell any goods in Mr. Sally's name; that all the business should be carried on in my name from that time on."

While this is not a full and complete statement of all the testimony, it is sufficiently in-

dicated to determine the correctness or incorrectness of the action of the court in submitting the issue to the jury, to which that testimony was applicable. It was the province of the jury, and not of this court, to determine the credibility of the witnesses testifying in this cause and the weight to be attached to their testimony.

The proposition that where there is any substantial evidence tending to prove the matters in issue, or evidence from which the ultimate fact to be proven may reasonably be inferred, it is the duty of the court to submit such issue to the jury, is so firmly settled by the unbroken line of expression of opinion of this court that it seems unnecessary to do more than to state it. In the case of *Donohue v. Ry. Co.*, 91 Mo., loc. cit. 360, 2 S. W. 424, this court said upon the subject now being discussed: "A demurrer to the evidence admits the facts the evidence tends to prove, and in passing upon it the court is required to make every inference of fact in favor of the party offering the evidence which a jury might with any degree of propriety have inferred in his favor." To the same effect is *Kelly v. Ry. Co.*, 70 Mo., loc. cit. 607. It was said by this court: "As there was some evidence, although slight, tending to show that Kelly was killed, by the eastern bound train on which he was a passenger, at the station in Mooresville, the question should not have been withdrawn from the jury, but submitted under appropriate instruction." The same was ruled in case of *O'Hare v. Ry. Co.*, 95 Mo., loc. cit. 667, 9 S. W. 24. The court very clearly announced the rule. It said: "In passing upon a demurrer to evidence, the court is required to make every inference of fact in favor of the party offering the evidence which can reasonably be made." That we may fully appreciate the extent to which this court is committed on this subject, see the announcement of the rule in case of *Buck v. Street Ry. Co.*, 108 Mo., loc. cit. 186, 18 S. W. 1091. It said: "In determining whether the cause should go to the jury, we must give the plaintiff the benefit of the most favorable view of his facts and of every reasonable inference therefrom. So viewed, we think this case is one for triors of fact to decide, and that there was no error in submitting it for their action."

Applying the rule as announced in these cases, in my opinion, the evidence offered by interpleader was sufficient to authorize the court in submitting that issue to the jury. This cause should not be reversed on account of the action of the trial court in refusing to give the peremptory instruction in the nature of a demurrer to the testimony.

In the examination of this record, my attention was directed to the complaint of appellants in respect to improper remarks of counsel for interpleader in their argument to the jury. As to what counsel said will be best understood by quoting from the record:

"In the argument of J. B. Harrison, Esq., on behalf of interpleader, said J. B. Harrison, Esq., used the following language, to wit: 'She [meaning interpleader] did no more than these speculators in St. Louis would have done.' The said J. B. Harrison, attorney for interpleader, in further argument to the jury of said cause, and by way of answer to the objection previously made to the language used by him, used the following language to wit: 'These merchants, speculators and creditors from St. Louis, who by their conduct show a disposition and capacity to drive a sharp bargain, if that will satisfy the gentlemen. * * * That if James B. Sully, the husband of interpleader, had not given his wife the note and chattel mortgage, he would have been meaner and more treacherous than these speculators in St. Louis.' And in the further argument of said cause to the jury by G. S. Dugan, Esq., on behalf of the interpleader, said counsel for interpleader used the following language, to wit: 'Gentlemen of the jury, who is ablest to live without this? Who is ablest to live?' To this improper argument, counsel for appellant promptly objected, and earnestly appealed to the court to rebuke counsel. The court refused the request of appellant, and, so far as the record discloses, did not even intimate that the language used was improper. To this action of the court, appellant has in due form preserved his exceptions."

So far as the record discloses in this case, the appellants compose a firm of reputable business men in the city of St. Louis. They were simply resorting to legitimate legal methods of enforcing their claim against a creditor. In my opinion, the language used by counsel in their argument to the jury was highly improper, and calculated to embroil a fair and dispassionate consideration of the testimony applicable to the issues submitted to the jury. Their reference to the appellants as being mean and treacherous, intimations that they were sharps and speculators, and finally to appeal to the prejudices of the jury by an intimation as to the financial standing of the parties to this suit, was unwarranted by the facts in this case. While it may be commendable in counsel for Mrs. Sully, who, it is claimed, in this legal contest, is fighting for a fragment of her inheritance, to grow earnest, yet this earnestness and deep feeling in the interest of their client must be manifested by appropriate methods. The inclination of this court, as frequently expressed, is to defer to the action of the trial court in passing upon motions for new trial, where the conduct of counsel is urged as one of the reasons in the motion; but this does not mean that this court will sanction the absolute disregard of a litigant's right to have a fair and dispassionate consideration of his case.

The condemnation of this error complained of by appellants is very forcibly and appropriately expressed by Gantt, J., in *Haynes*

v. Town of Trenton, 168 Mo., loc. cit. 133, 18 S. W. 1005. He said: "The disposition of this court is to permit the greatest latitude in the argument of a cause to a jury. But its disposition to trust largely to the discretion of the trial courts must not be construed that we will, on that account, tolerate the clear disregard of a litigant's right to have his cause heard and tried according to the law of the land. The conduct of counsel for plaintiff in making these and other similar statements cannot be excused. Counsel will not be permitted to wring verdicts from juries by statements of matters extraneous to the record, and rely upon our disinclination to interfere."

It was the plain duty of the court, upon the objection of appellants, to have expressed its disapproval of the objectionable remarks of counsel, in the presence of the jury, in sufficiently emphatic language as to destroy any impressions which may have resulted from the use of them. Its silence and failure to do so, in my opinion, was such error as should result in the reversal of the judgment and remanding the cause for a new trial.

For the reasons herein expressed, the judgment is reversed, and the cause remanded for a new trial.

MARSHALL and BRACE, JJ., concur.

BALL et al. v. WOOLFOLK.

(Supreme Court of Missouri, Division No. 2,
June 9, 1903.)

TRUSTS — DEED — CONSTRUCTION — EXECUTION AGAINST HUSBAND—PROPERTY SUBJECT TO INTEREST BY CURTESY—QUIETING TITLE.

1. Under Rev. St. 1899, § 650, providing that a person claiming any title or interest in real property may institute an action against a person having or claiming to have any title or interest in such property to determine the title and interest of the respective parties in the property, an action to quiet title can be maintained against a person claiming only a future or contingent interest in real property.

2. Where a deed conveying property in trust plainly indicated an intention to convey the whole estate, and did not limit the beneficiary's power of alienation, it conveyed the equitable fee to the beneficiary, even though it did not contain the word "heirs," and did not expressly grant the beneficiary and her trustee power to sell and convey.

3. Rev. St. 1899, § 4330, providing that a husband's interest in property which his wife has acquired after marriage shall be exempt from execution for his debts during coverture, absolutely prohibits a levy and sale of a husband's contingent interest of curtesy during coverture for his debts.

4. Where the claim to title by defendant in an action to quiet title was based solely on an execution against a husband who had, previous to judgment, conveyed the property to a trustee for the benefit of his wife, he was not in a position to question the regularity of the proceedings whereby the court had substituted a trustee for the one named in the husband's conveyance,

who, together with the beneficiary and the husband, had conveyed the premises to plaintiff, as defendant acquired nothing by his purchase at the execution sale.

Appeal from Circuit Court, Henry County; W. W. Graves, Judge.

Action by John E. Ball against John L. Woolfolk. Judgment for plaintiff, and defendant appealed. After lodgment of the appeal, plaintiff died, and the cause was revived in the name of Lucy M. Ball and her children. Affirmed.

Campbell & Duckworth, for appellant. C. C. Dickinson, Jas. Parks & Son, and Paxton & Rose, for respondents.

GANTT, P. J. This is a suit, originally commenced by John E. Ball in his lifetime, to quiet title to real estate in the city of Clinton, Henry county, and described as "lot No. 52 and the east half of lot 51 in the original town (now city) of Clinton, and six feet off of the west side of lots 5 and 6 in Davis' addition to the said town. The plaintiff obtained judgment in the circuit court, and defendant appealed. Since the lodgment of the appeal in this court, plaintiff has died, and the cause has been duly revived in the name of his widow and children.

The plaintiff deduced title from Mrs. Augusta Frowein and her trustee, Nasse. The defendants' claim is based upon a purchase at execution sale of the interest of Albert P. Frowein, the husband of said Augusta Frowein. The cause was tried on the following agreed statement of facts:

"The following admissions are agreed upon by and between the parties to this action: It is admitted that on the — day of October, 1872, and for some years prior thereto, Albert P. Frowein, mentioned in plaintiff's petition, was the owner in fee simple and in possession of the real estate described in plaintiff's petition, and that on the — day of October, 1873, and since the — day of —, 1863, said Albert P. Frowein was and still is the husband of Augusta S. Frowein, named in plaintiff's petition; that Albert P. Frowein, for and in consideration of the sum of one dollar and love and affection, on the — day of October, 1873, executed and delivered, and caused to be recorded, his deed of conveyance to the real estate described, in the nature of a deed of trust, wherein and whereby he conveyed to Arnold Krekel, as trustee for Augusta S. Frowein, the property described in plaintiff's petition; and that said deed in trust is correctly set out in plaintiff's petition. It is further admitted that Arnold Krekel died in the year 1889, without having made any conveyance or disposition of the premises so conveyed to him. And, subject to objections for relevancy, it is admitted that in a proceeding instituted in the circuit court of Henry county, Missouri, upon the petition of Augusta S. Frowein, said circuit court of Henry county, Missouri, on March 14,

1890, rendered a decree appointing August Nasse trustee, in the place of said Arnold Krekel, for said Augusta S. Frowein under the said trust deed, and that on or about the 16th day of December, 1898, the plaintiff purchased of the said Augusta S. Frowein said premises for the sum of \$4,550, and that thereupon the said August Nasse, as trustee aforesaid, at the written request of Augusta S. Frowein, and for the said consideration of \$4,550 paid to her, executed, acknowledged, and delivered to plaintiff his deed of conveyance, purporting to convey to plaintiff the fee-simple title to said premises, and that, in addition thereto, the said Augusta S. Frowein and her husband, Albert P. Frowein, did make, execute, acknowledge, and deliver in due form to plaintiff a deed of conveyance to said real estate, in the nature of a general warranty deed, and that both said deeds of conveyance to plaintiff have been duly recorded in the office of the recorder of deeds of Henry county, Missouri, and this plaintiff entered into possession of said real estate under said deeds, and is now in possession of said real estate. It is admitted that on May 21, 1897, upon the indebtedness of said Albert P. Frowein, created by him long after the execution of his said deed to said Arnold Krekel, Calvin & Lewis, as assignees of the Henry County Bank, obtained a judgment against said Albert P. Frowein and one Herman Frowein for the sum of \$14,347.15 in the circuit court of Henry county, Missouri, and that afterwards the defendant became the purchaser and the owner of the assets of said Henry County Bank, including the said judgment, and caused execution to be issued out of the office of the clerk of the circuit court of Henry county, Missouri, upon said judgment, and to be delivered to the sheriff of Henry county, Missouri, and to be levied by said sheriff upon said above-described real estate as the property of the said Albert P. Frowein and Herman Frowein, and caused said real estate to be sold as the property of said Albert P. Frowein and Herman Frowein under said execution, and at the January term, 1899, of said circuit court the defendant became the purchaser of said real estate at said sale under said execution, and did cause to be made, executed, and delivered to defendant a sheriff's deed under said execution sale to said premises, and caused said deed to be recorded in the office of the recorder of deeds of Henry county, Missouri, which deed now appears on page 36 of Deed Book 98 of said Henry county deed records. And, subject to defendant's objection for relevancy and materiality, it is admitted that the defendant is now claiming that the said trust deed from said Albert P. Frowein to said Arnold Krekel only conveyed a life estate for the benefit and use of the said Augusta S. Frowein, and that at the death of the said Augusta S. Frowein the defendant will be the sole owner of said premises and entitled to the posses-

sion thereof, and that the plaintiff, after the death of the said Augusta S. Frowein, would have no title or interest in said real estate. And, subject to the same objections, it is admitted that the defendant is further claiming that in any event the said Albert P. Frowein, as husband of the said Augusta S. Frowein, was entitled to a curtesy in said real estate, and that whatever interest the said Albert P. Frowein had in said real estate vested in defendant under his said sheriff's deed, and that upon the death of the said Augusta S. Frowein he (the defendant) will be entitled to the possession of said premises, either as the absolute owner thereof or as the owner of the curtesy of the said Albert P. Frowein in said real estate. And, subject to the same objections, it is admitted that the defendant is further claiming that said circuit court had no authority to appoint said August Nasse trustee as aforesaid, and that said August Nasse had no right to make said conveyance, and that the said John E. Ball acquired no title in said real estate under the same, but took nothing thereby, and that the said Augusta S. Frowein could not convey said real estate as her sole and separate estate, free from the curtesy right of her said husband, and could not cause the same to be thus conveyed by said trustee. And it is further admitted, subject to the same objections for relevancy and competency, that the defendant has been circulating and is circulating his said claims above set forth."

The foregoing was all the evidence in the case. Thereupon the court rendered judgment in favor of the plaintiff and against the defendant.

1. We entertain no doubt whatever that the petition states a good cause of action under section 650, Rev. St. 1899. It states in a plain and concise manner the title upon which plaintiffs rely and by which they claim the real estate in controversy, and that defendant claims the same, and then, as far as advised, states the claim which defendant is asserting to the property. The proceeding is provided to settle just such adverse claims, in order that the parties may have their rights judicially ascertained and set at rest. The statute is highly remedial and beneficial in its purposes, and supplements the old equitable remedy to remove a cloud from title, and is much more comprehensive in its scope. It lies against "any person having or claiming to have any title or interest in such property," and is broad enough to include a future or contingent interest. *Huff v. Land & Imp. Co.*, 157 Mo. 65, 57 S. W. 715; *Garrison v. Frazier*, 165 Mo. 40, 65 S. W. 229.

2. The deed of A. P. Frowein to Arnold Krekel, in trust for Mrs. Frowein, carried the fee-simple estate in and to the lots, and vested an equitable fee in Mrs. Frowein. The word "heirs" was not at all necessary to create the fee. That word was long ago dis-

pensed with by our statute. Section 4590, Rev. St. 1899. Neither was it necessary to add words expressly granting to her and her trustee the power to sell and convey. The intention to pass the whole estate of A. P. Frowein is plain. The grant to the trustee was couched in words comprehensive enough to carry the fee, and the fee thus conveyed inured to the full benefit of Mrs. Frowein, especially so since there are no words limiting her power of alienation. *Ryland v. Banks*, 151 Mo. 1, 51 S. W. 720. The cases of *Walton v. Drumtra*, 152 Mo. 489, 54 S. W. 233, and *Schiffman v. Schmidt*, 154 Mo. 204, 55 S. W. 451, do not affect the conclusion reached, because in this deed there are no words limiting the estate over after the life estate of Mrs. Frowein, and we have repeatedly held that, in the absence of any words cutting down the fee to a life estate, the whole estate in fee passed to the first taker. *Small v. Field*, 102 Mo. 104, 14 S. W. 815.

3. But the judgment and decree was right for another reason. The defendant only claims title to the interest of A. P. Frowein in the equitable estate of his wife. It must be conceded that A. P. Frowein, in the absence of a fraudulent conveyance to hinder, delay, or defeat his creditors, could convey this land for a valuable consideration or by gift to his wife, and the most plausible claim of defendant is that said Frowein has a contingent estate by the curtesy in the lots if he should survive his wife. Certainly he has no right during her life to the possession or issues and products of the lots, in view of her separate equitable estate therein. *Woodward v. Woodward*, 148 Mo. 241, 49 S. W. 1001. It is plain that by our statute (section 6868, Rev. St. 1889, now section 4339, Rev. St. 1899) the interest of her husband in her right in any real estate which she has acquired by gift, grant, devise, or inheritance during coverture is during coverture exempt from attachment or levy for the sole debts of her husband. The facts of this case bring it within the exact language of the statute. Mrs. Frowein acquired the title to these lots during coverture from her husband, and the coverture still existed when plaintiff obtained his judgment against her husband for his sole debt, and when his execution was levied thereon and his deed was taken. The language of the statute is his "interest shall during coverture be exempt," thus absolutely prohibiting a levy and sale of his contingent interest of curtesy or otherwise during the coverture. The statute is too plain for construction. The defendant had no power to subject A. P. Frowein's interest, if any he had, to his debt during coverture, and therefore the sale and deed were void, and conveyed to defendant no title in present or in futuro. The judgment of the circuit court in so holding was unquestionably correct. *Gitcheil v. Messmer*, 87 Mo. 131; *Burns v. Bangert*, 92 Mo. 167, 4 S. W. 677.

4. As to the proposition discussed in re-

gard to the proceedings substituting Nasse as trustee after the death of Judge Krekel: The record in this case does not disclose who was before the court in that case. Unquestionably the circuit court, as the general chancery court, has power to substitute a trustee; and being a court of general jurisdiction, and having power in that class of cases, and nothing more appearing, every presumption must and will be indulged as to the regularity of its proceedings; and, moreover, no such point as this appears to have been considered in the circuit court. But, in the view we take of the deed from A. P. Frowein to Judge Krekel, the whole equitable fee was conveyed to Mrs. Frowein, and she had full power to convey the same, and, having done so, the plaintiffs have succeeded to her estate, and no one but Krekel's heirs could raise the objection now urged. The defendant, having acquired nothing by his levy and sale, is in no position to question the regularity of the proceedings to substitute Nasse as trustee.

The judgment and decree of the circuit court is in all things affirmed. All concur.

COHN et al. v. SOUDERS et al.

(Supreme Court of Missouri, Division No. 2.
June 9, 1903.)

MORTGAGES—FORECLOSURE—SALE—INJUNCTION—CONVEYANCE BY MORTGAGOR—RIGHTS OF GRANTEE—PLEADING—AMENDMENT—NEW MATTER.

1. Plaintiff sought to perpetually enjoin a sale of lot 63 under a deed of trust on lots 62 and 63, held by defendants; plaintiff's claim being that there was an agreement with the mortgagor that lot 63 should be released from the deed and that he had thereafter purchased it from the mortgagor. Defendants, being temporarily enjoined from selling said lot, sold lot 62. *Held* that, under Rev. St. 1899, §§ 663, 666, permitting amended or supplemental petitions, and requiring them to set forth all matters necessary to determine the action, plaintiff was entitled to amend by pleading as new matter that by said sale defendants' debt had been fully satisfied, and thus add another ground for perpetual injunction, though the matter arose after the filing of the original bill.

2. Defendant's act in selling lot 62 without waiting for the final action of the court was an election to exercise its right to first resort to that lot, eliminating the question whether it could be compelled to first sell said lot.

3. Error in permitting an amended petition was waived by defendants by pleading over after their motion to strike out was overruled.

4. The mortgagor of lots 62 and 63 sold lot 63 to plaintiff, who sought to enjoin a sale of said lot under the mortgage, on the ground that the mortgagee had agreed to release it. Pending a temporary injunction, the mortgagee sold lot 62, together with a hotel thereon. The hotel and personal property therein were also subject to the mortgage. The mortgagee agreed with the mortgagor that, if he would dismiss certain suits, the mortgagee's attorney would buy in the personal property for mortgagor, and this was done; the attorney purchasing \$1,200 worth of such property for \$10, by stating that he was buying it for the mortgagor. *Held*, that this was in equity a release of \$1,200 worth of

property to the mortgagor, and plaintiff was entitled to have this amount applied to the mortgage before the mortgagee could resort to lot 63.

Appeal from Circuit Court, Butler County; John G. Wear, Judge.

Bill by Peter Cohn and others against John H. Souders and others. From a decree for plaintiffs, defendants appeal. Affirmed.

Henry B. Davis, for appellants. E. R. Lentz, for respondents.

GANTT, P. J. This suit was instituted in the circuit court of Butler county, Mo., in February, 1897. The object of the bill was to procure a perpetual injunction against the Nelson Distilling Company and John H. Souders, sheriff of said county, to restrain them from selling the south part of lot No. 63 in the city of Poplar Bluff, in Butler county, Mo., under a deed of trust. A temporary writ of injunction was granted on February 25, 1897. Thereafter, on the next day, the sheriff, as substituted trustee, sold all the remaining property described in the deed of trust, and the Nelson Distilling Company became the purchaser thereof, through its attorney, Mr. H. B. Davis. On May 3, 1897, defendants filed their answer, which was a general denial. On November 2, 1897, defendants filed their motion to dissolve the injunction, and on the same day plaintiffs filed an amended petition, which in substance alleged that in 1888 Henry H. Miles was the owner of a part of lot 62 in the original town (now city) of Poplar Bluff, on which was located a hotel known as the "Morris House," and also the lot in controversy in this suit, designated as part of lot 63 in said city; that Miles borrowed \$6,000 from Judge J. W. Emerson, and gave three notes—two for \$1,000 each, and the third for \$4,000; that Miles paid off one of the \$1,000 notes; that, while Emerson still held said notes and a deed of trust given by Miles and wife to secure the same, Miles sold the part of lot 63 now in suit to one Turner, and that Emerson agreed to release and did release said lot 63 from the incumbrance of said deed of trust; that said deed of trust conveyed, not only the part of lot 62 on which the Morris House was situated and said part of lot 63, but all of the furniture and hotel fixtures, to secure said notes; that afterwards the title of Turner to the south part of lot 63 passed by mesne conveyances to the plaintiffs Cohn & Pelz; that afterwards said Morris House property was sold under execution in favor of the Nelson Distilling Company, and purchased by said company, and an action of ejectment brought, under which possession was obtained by said company; that afterwards, and when said notes were past due, the Nelson Distilling Company bought and said Emerson sold and transferred said notes to said distilling company; that thereafter Ferguson, the trustee in said deed of trust, declined to act, and the sher-

iff, the defendant Souders, at the request of said distilling company, proceeded to advertise all of said property for sale to satisfy said notes; the granting of the injunction as to lot 63, and the sale by the sheriff as trustee of the lot 62, or Morris House property, and all of the hotel furniture; that the hotel property was of the value of \$10,000, and the furniture of the value of \$1,200; that at the date of the sale the debt on said notes amounted to \$5,500; that at said sale the Nelson Distilling Company bid in all of said Morris House property and furniture for \$4,591.25; that it was represented, at and before said sale, by the attorney of the said distilling company, that said sale was being made for the purpose simply of perfecting its title to the Morris House property and clearing it of judgment liens held by others; that the said Nelson Distilling Company voluntarily released, from said deed of trust all of the personal property therein conveyed to H. H. Miles and Laura Miles, his wife; that bidders were deterred from bidding at said sale by the assurances of said distilling company, and the amount bid was a mere sham, and no test of the value of said Morris House property, and the same was fraudulent in law; that said Morris House property was of far greater value than the said mortgage debt, and justice and equity required a fair, open, and bona fide sale thereof before said lot 63, owned by plaintiff, should be subject to any part of said mortgage. The prayer is in the alternative, either to set aside said sale and order a new sale, at which plaintiff offers and agrees to bid the whole amount of said mortgage debt and costs for said Morris House property, or to adjudge that in no event shall plaintiff's lot 63 be subjected to more than its pro rata share of said debt, in the proportion of its value to the remainder of said property, excluding plaintiff's improvements on said lot 63, which amount to \$6,000, and a prayer for general relief. The answer admits the deed of trust to Emerson, denies that Emerson released or agreed to release said lot 63, alleges laches on plaintiff's part, and charges that plaintiff has a complete remedy at law.

The evidence tended to establish the following state of facts: On or about the 1st day of June, 1888, one Henry H. Miles was the owner of a part of lot 62 in the original town (now city) of Poplar Bluff, Mo., on which was located a large hotel building, known as the "Morris House," and worth about \$10,000. He was also the owner of the lot in controversy in this cause, and known as "a part of lot 63, in the said original town of Poplar Bluff." This lot was situated on a steep hillside, was unimproved at the time, and of little value, worth in its then condition from \$150 to \$300. He also owned all the hotel, kitchen, and dining room furniture then in and used by the said Morris House. On the said 1st day of June, 1888, Miles borrowed from Judge Emerson \$6,000,

and executed therefor his three promissory notes, as follows: One note for \$1,000, due one year after date; one note for \$1,000, due two years after date; and one note for \$4,000, due five years after date—all drawing interest at the rate of ten per cent. On the same day, to secure the payment of the said notes, the said Miles and his wife conveyed to William Ferguson, as trustee, the property known as the "Morris House Property," the lot in controversy in this cause, known and described as "a part of lot 63 in the said original town of Poplar Bluff," and also all of the hotel, kitchen, and dining room furniture then in the said Morris House. On the 10th day of December, 1888, Miles paid to the said Emerson the first of the said above-described notes. Some time after that Miles sold that part of lot 63 which was conveyed by the said deed of trust to Henry Turner. There was evidence to the effect that, at or prior to the time of this sale, Emerson had agreed to release the part of lot 63 now in controversy from the lien of the said deed of trust which he held. Emerson denies that he made this agreement. Thereafter by mesne conveyances the said Turner conveyed the lot in question to plaintiffs in this cause. Plaintiffs took possession, and have ever since been in possession, of this lot. That was about 1892, and the lot was then unimproved. Defendants admit that the plaintiffs put all improvements on the said lot in question, and that the said improvements are worth \$6,000.

At the time the plaintiffs purchased this property they had no knowledge or information that this property was included in this deed of trust, or that Emerson had any claim upon it, though the mortgage was of record. The admissions of counsel for defendants show that, some time after the execution of the deed of trust from Miles to Ferguson, the defendant the Nelson Distilling Company obtained a judgment in the circuit court of Butler county against Henry H. Miles and Laura A. Miles for several hundred dollars; that execution was issued upon this judgment, and the same was levied upon the part of lot 62, in the said town of Poplar Bluff, known as the "Morris House Property"; that the said property was sold under the said execution, and at the sale the defendant the Nelson Distilling Company became the purchaser thereof; that thereafter the defendant the Nelson Distilling Company commenced its action of ejectment in the circuit court of Butler county to recover possession of the said Morris House property, and that such proceedings were had as that the defendant the Nelson Distilling Company was put in possession of the said Morris House property, under the judgment rendered therein, in the month of September, 1896, and the said Nelson Distilling Company remained in possession until after sale under the said deed of trust hereinafter mentioned; and that Henry B. Davis, the attorney for de-

fendants in this case, was at all the times mentioned the attorney and representative of the defendant the Nelson Distilling Company. The notes mentioned in the said deed of trust matured on the 1st day of June, 1896. The indorsements thereon show that all interest had been paid on the said notes to March 1, 1896. The following indorsements appear on each of said notes: "Without recourse. J. W. Emerson." "Without recourse. S. M. Emerson." In his deposition Judge Emerson explains these indorsements by saying that S. M. Emerson was his wife, and that his indorsement thereon was made in order to enable Mrs. Emerson, in case of his death, to handle the said notes without the necessity of taking out letters of administration; that on the 1st day of December, 1896, the notes secured by the said deed of trust were assigned by him, without recourse, to the defendant the Nelson Distilling Company, and he had Mrs. Emerson to make the second indorsement thereon, and delivered them to the Nelson Distilling Company. These notes were then long past due.

Afterwards, and some time in February, 1897, the defendant John H. Souders, the then acting sheriff of Butler county, advertised that he would, on February 26, 1897, as trustee in the said deed of trust, sell at public vendue, to the highest bidder, for cash in hand, all of the real and personal property described in the deed of trust, and including the said property so bought by these plaintiffs and improved as aforesaid. On the said 25th day of February, 1897, the plaintiffs herein sought and obtained from the judge of the circuit court, in vacation, a temporary restraining order, restraining the defendants from selling or in any manner interfering with the lot or parcel of land so bought and improved by these plaintiffs until the further order of the court. On the said 26th day of February, 1897, the defendant Souders sold the said property known as the "Morris House Property" to the Nelson Distilling Company, the defendant herein, for the sum of \$4,591.25. At that time there was due on the notes secured by the said deed of trust \$5,000, together with one year's interest on the same, or \$5,500. On the day of sale Henry B. Davis, the attorney for and representative of the defendant the Nelson Distilling Company, went to Mr. Miles and Mrs. Miles, the grantors in the said deed of trust, and told him not to bid on the personal property at the said sale, and that he (Davis) would bid it off, and make them (i. e., Mr. and Mrs. Miles) a present of it, if they would dismiss certain actions at law which they then had pending against the said Nelson Distilling Company, which proposition was agreed to, and Miles therefore refrained from bidding on the said personal property. At the sale, and while the trustee was crying the sale, Davis bid \$10 or \$15. The trustee kept on crying the sale, when Davis said: "That is enough for it. I am going to make

Mrs. Miles a present of it." The personal property was not present at the place of sale, and was put up in bulk, and all sold together. The undisputed testimony is, that this personal property was worth, at the time of the sale, \$1,200.

The court found on the trial of this cause that the personal property was worth \$1,200 at the time of the sale. The court further finds that thereafter the whole of the said personal property was by virtue of said arrangement released and surrendered by the said Nelson Distilling Company to the said Henry H. and Laura A. Miles, and the court further finds that the defendants should be required to give credit on the said notes for the full value of the said personal property so released by them, to wit, the sum of \$1,200, before being allowed to sell the said property hereinabove described as owned by these plaintiffs; and after giving credit on the said notes for the said sum of \$1,200, the value of the property so released as aforesaid, there remained due on the said notes at the time of the said sale the sum of \$4,300. The said Morris House property was sold at the said sale for the sum of \$4,500, and the said notes were thereby fully paid and satisfied by the sale of the Morris House property. The court, by its said decree, made the temporary restraining order perpetual, and forever enjoined the defendants, and each of them, from selling or in any manner interfering with the said property belonging to these plaintiffs under the said deed of trust, adjudging that the said deed of trust be canceled, set aside, and for naught held, in so far as it affects the property of these plaintiffs.

1. The proposition is argued at considerable length that the court erred in permitting plaintiffs to amend their petition; that it was a different cause of action. The original petition sought a perpetual injunction restraining defendants from selling the part of lot 63 in Poplar Bluff involved in this suit to satisfy the deed of trust of defendant the distilling company, on the ground that the original holder of said deed of trust, Judge Emerson, had released or agreed to release this lot when Miles, the mortgagor, sold it to Turner, under whom plaintiffs claim and deduce title. That claim was renewed in the amended petition. In the meantime, however, and before the suit came on for trial, a new state of facts, not existing when the first petition was filed, had arisen. The defendants, being enjoined only from selling lot 63, proceeded to foreclose the deed of trust on the Morris House property, both real and personal. Out of that sale new equities had arisen, in addition to those stated in the original bill, to wit, that by said sale the debt had been fully satisfied in equity, and thus another ground for a perpetual injunction had accrued to plaintiffs.

Conceding there was much new matter included in the amended petition, it does not follow that the circuit court erred in permit-

ting such amendments to be made. The nature of the action, to wit, an injunction, was the same in both. The sole purpose of the amended petition was to obtain a perpetual injunction restraining the sale of the lot under the same deed of trust, and this was the purpose of the original petition. The relief sought was confined to the same subject-matter and was the same in each. The new facts alleged were in no manner inconsistent with those alleged in the original petition, and had originated since the filing of the original. Our Civil Code of Practice recognizes the right to bring before the court new matter arising after the filing of the petition. Section 663, Rev. St. 1899, provides that a party may be allowed to file an amended or supplemental petition, and section 666 requires that such amended or supplemental petition shall set forth in one pleading all matters necessary for the determination of the action. In the old equity practice supplemental bills were allowed to bring matters occurring after the filing of the original bill before the court. 2 Daniell, Chcy. Pl. & Pr. (5th Ed.) 1516, and notes; *Ward v. Davidson*, 89 Mo. 455, 1 S. W. 846; *Bliss on Code Pl.* § 432. We think the amendment was properly allowed by the court; but, if it was erroneous, that was waived by the action of defendants in pleading over after their motion to strike out was overruled. *Scovill v. Glasner*, 79 Mo. 454; *Fuggle v. Hobbs*, 42 Mo. 541; *Williams v. Ry.*, 112 Mo. 485, 486, 20 S. W. 631, 34 Am. St. Rep. 403; *Ely v. Porter*, 58 Mo. 158.

2. The circuit court very properly, we think, held the evidence insufficient to show that Judge Emerson released or agreed to release this south half or part of lot 63, from his deed of trust. This testimony was too inconclusive to base a decree upon it.

3. The equitable doctrine of requiring the Morris House property and the furniture therein to be first sold and applied to the satisfaction of the Emerson mortgage before plaintiff's lot 63 could be required to liquidate any part of said mortgage was practically eliminated from this case by the course pursued by the Nelson Distilling Company. Without waiting for the judgment of the court, it availed itself of its unquestioned right to resort in the first instance to the Morris House lot and the personal property. The sheriff sold these, and nominally they brought \$4,591.25, and the balance only could in any event fall upon plaintiff's lot 63. We are concerned with the question whether or not defendants in equity released the personal property to Miles and wife, and by so doing released plaintiff's lot entirely. The equities, as between Miles, the mortgagor, and plaintiffs, his grantees of a part of the mortgaged premises, in this lot 63 are well settled. Whatever the rights of Emerson, or his assignee, the distilling company, to re-

sort in the first instance to either or both of the parcels, the Morris House in Miles' hands, or lot 63 in the hands of plaintiff, it is plain that, according to equitable principles, it was the duty of Miles, the mortgagor, to assume and pay the whole debt, and thus exonerate plaintiffs, his grantees, from the lien of the deed of trust.

But, whether or not the distilling company would have been compelled, as assignee and grantee of the Morris House, to have first exhausted its power of sale of that before moving against plaintiff's lot, we have seen as a matter of fact he did so proceed, and caused the Morris House and the personal property to be sold first. So that we must now invoke another principle of equity, and inquire into that sale; for although the equities, as between Miles and plaintiffs, did not prevent the distilling company from enforcing its deed of trust for the \$5,500, yet after it was advised of the sale of this south half of lot 63 to plaintiffs, and of their erection of a \$6,000 building thereon, when it came to foreclose its lien against Miles, the primary debtor and maker of the notes and deed of trust, it released the furniture of Miles, which was included in the deed of trust, property which was primarily liable for the satisfaction of its debt, and to that extent it released and discharged the property of plaintiffs, the south part of lot 63, which, as between Miles and plaintiffs, was secondarily liable only. We regard this as a settled and just rule in most of the states of the Union. *Pomeroy* in his *Equity Jurisprudence* (volume 3, § 1226) so announces it, and cites numerous authorities which sustain his text, to which we refer. That the personal property was worth \$1,200 stands admitted. That Mr. Davis, counsel for the distilling company, bid it in for \$10 under an agreement with Miles, the mortgagor, that, if he would not bid on it, he (Davis) would bid it and give it to him, and that he publicly announced he was bidding it in for Mrs. Miles, and stopped the trustee when he had bid \$10 on it, and said that was enough, we are not permitted to doubt, in the light of this record. That this was, in equity and in fact, an absolute release of \$1,200 worth of the mortgaged property to the mortgagor, admits of no sort of doubt. The circuit court so found, and was fully justified in so doing.

The circuit court held that, before the distilling company could resort to plaintiff's lot 63, it must first apply the \$1,200 to its mortgage, and, when that was done, it was fully satisfied, and thereupon decreed a perpetual injunction against the further enforcement of said mortgage against plaintiff's lot 63. This was fully justified by the pleadings and evidence, and was a just and equitable disposition of the case, and the decree of the circuit court is affirmed. All concur.

DODGE v. SHERWOOD et al.*

(Supreme Court of Missouri. June 15, 1903.)

WILLS—CONSTRUCTION—CREATION OF CLASS—SURVIVOR.

1. Testator's will gave his widow certain property for life, and three unmarried daughters were given a certain sum each; it being provided that, if either of the daughters should die before marriage, her portion should go to the "survivors," and that, if there should be any increase in the property, it should be divided among testator's children and grandchildren. Other specific devises were made. Held, that the word "survivors" did not mean all of the children of testator surviving at the death of one of the daughters, but referred only to the unmarried daughters.

In Banc. Appeal from Circuit Court, Greene County; Jas. T. Neville, Judge.

Amicable proceeding by Sarah L. Dodge against Thomas A. Sherwood, as executor of the estate of Julia L. Sherwood, and others, for a construction of the will of Adiel Sherwood, deceased. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

The following is the opinion in Division No. 1:

ROBINSON, J. This is an amicable proceeding to have the will of Rev. Adiel Sherwood, D. D., construed by a court of equity. The plaintiff is the only living daughter of the testator, and the defendant Thomas A. Sherwood is his only living son, and is also the executor of the estate of Julia L. Sherwood, who was a sister to the plaintiff and himself. The other defendants are the legatees under the will of said Julia L. Sherwood.

Briefly stated, the admitted facts are that Rev. Adiel Sherwood died testate, possessed of a considerable estate, which increased in value during administration thereon. The items of the will especially material to this inquiry are the second and ninth, which are as follows:

"(2) I give to my three unmarried daughters, Burmah, Julia and Laura each two thousand five hundred dollars (\$2,500), also to Burmah a feather bed, to Julia my watch and to Laura forty dollars. If either should die prior to marriage her part of the property goes to the survivors. My executors will appoint a trustee or trustees to the property so it may not be squandered or expended in unsafe bargains."

"(9) If there should be increase in my property to warrant it. I wish it to be divided among my children and grandchildren, that is, one-third to my children and one-third to my grandchildren, and one-third * * * to Shurtleff College, Kalamazoo and Denifore University, Ohio."

Laura married, received her legacy, and died, leaving issue. Burmah died, unmarried, and bequeathed all her property to her sister Julia. Subsequently Julia died, unmarried, and left a will, by which the defendant Thomas A. Sherwood is made the

executor of her estate, and whereby she devised her property to the other defendants herein. Her estate consists almost entirely of the \$2,500 bequeathed by her father to her, and the like amount bequeathed by their father to her sister Burmah, and by the latter bequeathed to said Julia as aforesaid. The plaintiff, the only surviving daughter of Rev. Sherwood, contends that under the second and ninth items of the will this \$5,000 so bequeathed to Burmah and Julia passed at their death, unmarried, to herself, the plaintiff, and to her brother, Thomas A. Sherwood, the only surviving children of the Rev. Sherwood, and that therefore the wills of her two said sisters were inoperative to pass any part of their respective legacies. The plaintiff further contends that the term "survivors," in the second item of the will, must be construed in connection with the terms of the ninth item of the will, and, when so referentially construed, the term "survivors" means all the children of the testator who are living at the time of the death of either Burmah or Julia, they dying unmarried. The circuit court held, however, that the term "survivors," as employed in the said second item of the will, referred only to the class of persons named in that item of the will, and therefore decided against the plaintiff's contention. Hence this appeal.

There is, perhaps, no word ever employed in a will that has given rise to more difficulties or to more diverse constructions than the word "survivor." Wood, V. C., in *Re Gregson's Trusts*, 33 L. J. Ch. 532, said: "Certainly this word 'survivor' is one that ought to be avoided by any person who is not a consummate master of the art of conveying, for I suppose no word has occasioned more difficulty." *Theobald on Wills* (2d Ed.) 503, classifies the numerous English cases construing the meaning of the word. Some cases hold that the word is to be construed the same as if the word "others" had been employed, while other cases hold that it ought not to be so construed. "unless there is something in the context to indicate that such construction is necessary to effectuate the intention of the testator." It is, however, generally conceded that "each case will depend largely upon the peculiar context of the particular will." 29 Am. & Eng. Enc. Law (1st Ed.) p. 490, and cases cited in note 2. In *Taffe v. Conmee*, 10 H. L. Cases, loc. cit. 78, the Lord Chancellor (Lord Westbury) said: "The natural and obvious meaning of the word 'survivor' is not the person who shall survive or outlive a particular event, but when it is applied to a class of persons, and individuals of that class are named, the natural and obvious meaning of the word is the longest liver of those who are named; and therefore, in this particular case, as in other cases, the word 'survivor' should, I think, be regarded not as referring to any particular event previously mentioned, but as referring to that which, as I have already

*Rehearing denied.

observed, is the natural meaning of the word, namely, that individual person who, out of the individuals named, shall turn out to be the longest liver." In *Waite v. Littlewood*, L. R. 8 Ch. (App.) loc. cit. 73, the Lord Chancellor (Lord Selborne), after premising with the remark that "there can be nothing more certain than that every will is to be construed by itself, not with reference to other wills, and all the light that can be got from other decisions serves only to show in what manner the principles of reasonable construction have by judges of high authority been applied in cases more or less similar," aptly said that the word "survivor" does not precisely mean "other," but rather conveys the idea of "survivorships," and then construed a provision in the will in question in that case, in some respects bearing close similitude to the second item of the will here in question, as follows: "No one could read the sentence in question as a whole, and not see plainly and distinctly that the general intention of the testator was to keep the property together, and continually to subdivide the accruing shares between the same persons remaining who were to take the original shares, and to refer to the gifts of the original shares as the scheme which was to govern the devolution of the accruing shares." The Lord Chancellor also said: "Moreover, it was quite manifest that the last of the daughters dying might die without leaving a child, in which case the word 'survivor' could not apply; and the children of more than one of them who might die leaving children might be living at the death of the last survivor of the daughters, and might afterwards die under age and unmarried." In the case of *In re Palmer's Settlement Trusts*, L. R. 19 Eq. Cas. 320, Sir R. Malins, V. C., held that the word "survivor," in one clause of a settlement, must be read as meaning the same as the word "other," in order to effectuate the clear intention of the parties, while the same word, in the same settlement, referring to the same fund, in another clause of the settlement, must be read in its natural sense; the learned Vice Chancellor saying: "Now, it is the rule of construction that words must be read so as to effect the intention of the parties, and there is no word more flexible than 'survivor.' It is a doubtful word, used often without being understood," etc. In *Duryea v. Duryea*, 85 Ill. 41, the court said: "Indeed, the authorities seem to hold there is no rule fairly deducible from the cases on this subject, that will justify the reading of 'survivor' as equivalent to 'other,' except it is to be done whenever, from the context or other provisions of the will, it is rendered certain such must have been the intention of the testator."

The will of Rev. Adiel Sherwood gives nothing to either the plaintiff or the defendant Thomas A. Sherwood, except as they are included in the one-third bequeathed to the children of the testator, "If there should be

increase in my property to warrant it," and except, further, as the plaintiff was devised an equal share with her sisters in such of the furniture as the widow did not elect to keep, and as she was given a share with her mother and sisters and brother in the testator's library. The scheme of the will, which was clearly not drawn by a lawyer, was to give the widow, for her natural life, \$2,000, and such of the furniture as she wished, and at her death so much of this bequest as she had not used for her support was left to the testator's grandchildren. Then the three unmarried daughters were given \$2,500 each, with certain specified articles added, as set out in the second item quoted. Then there was provision made for the children of the brother and of the two sisters of the testator. Then there was a legacy to the children of Sarah Mereck. Then there were specific devises to various religious and educational associations and institutions. Then his son, Thomas A. Sherwood, was appointed executor, with power to sell the real estate; and the testator's son-in-law, the husband of the plaintiff, was to aid the executor if he desired assistance. Then followed the ninth item of the will, as herein quoted, by which, in case there should be an increase in his property, the testator devised one-third thereof to his children, one-third to his grandchildren, and one-third to certain colleges. There is therefore nothing in the ninth item or in any other item of the will, nor in the context or scheme of the will, that qualifies, explains, throws light upon, or controls in any way the letter or the spirit and meaning of the second item of the will. The second item of the will clearly carves out a class of persons to whom the original gifts are intended to go, and creates a scheme to govern the devolution of the accruing shares, as was the case in *Waite v. Littlewood*, supra. The scheme contemplated a provision for each of the three unmarried daughters. It provided, "If either should die prior to marriage, her part of the property goes to the survivors." That is, if Laura died unmarried, her share was to go to the survivors. Burmah and Julia would clearly be the survivors of the class. But Laura married, and received her share. Therefore all the conditions and safeguards of the scheme were fulfilled as to her share. She then died. So she passed out of the class entirely. This left only Burmah and Julia in the class. When Burmah died, Julia was the only one of the class left. She could not fill the designation "survivors," for that implies the plural number. But she was all that was left of the class, and the scheme contemplated that this fund should be kept in the class unless one or more of the beneficiaries married. It might be argued, as it was pointed out in *Waite v. Littlewood*, that all three of the daughters might die unmarried, in which case the word "survivor" could not apply. But this is completely answered

in *Taffe v. Conmee*, 10 H. L. Cases, loc. cit. 78, where the devise was to three named persons and the "survivor," as tenants in common, and not as joint tenants; and it was held to mean that, upon the death of one, the devise passed to the two survivors, and, upon the death of one of the two said survivors, the whole devise passed to the one who turned out to be the longest liver; and, as there was no limitation over in case of the death of all of the members of the class, the last one of the class that survived or outlived the others of the class took the whole devise absolutely, notwithstanding the original devise only created a life estate in the members of the class. Thus there is not only high precedent for holding that the word "survivors," in such a scheme in a will, must be construed to refer the persons named in the scheme as the beneficiaries in the proper antecedents, but such a construction accords perfectly with the natural meaning of the word when so employed. There is every reason for holding that, when the testator used the word "survivors" in the second item of the will, he had reference only to his unmarried daughters, Laura, Burmah, and Julia, and not to any other of his children. It is also plain that the testator, when framing the ninth item of his will, did not contemplate that any part of the \$7,500 set apart in the second item of his will would ever be construed as an increase of his property. In fact, if it could be so construed, the plaintiff and her brother—the living children—would only get one-third thereof, and the other two-thirds would go, by the terms of the ninth item, to the testator's grandchildren and to the colleges named. Without invoking the referential effect of the ninth item, it is not contended that there is anything anywhere else in the letter, context, or scheme of the will that could be employed to give countenance to the contention that the word "survivors," in the second item of the will, referred to all the children of the testator, and not simply to the three unmarried daughters named in that item. A very analogous case to the case at bar is that of *Davidson v. Klimpton*, 18 L. R. Ch. Div. 213, where Fry, J., said: "The question which arises is rather a peculiar one. The petitioner is the longest liver of the four daughters. [His lordship read the gifts in question.] In my judgment, there was an anxious desire on the part of the testator to give over the shares of his daughters in the £10,000, in the first place, in the event of their dying leaving issue, and, in the next place, in the event of their dying and leaving no issue. In the case of the death of a daughter without issue, he contemplates that her share shall go over to the survivors, or to the one survivor of the daughters. Inasmuch as a person cannot be his or her own survivor, it remains to inquire whether the real meaning of the words is not 'longest livers, or longest liver' of the

class of daughters. If the words are read in that way, the gift will operate exactly as the testator intended, viz., to give the share of the deceased daughter to three or one of the daughters, as the case may be. The gift would be to the persons who for the time being are properly described as the survivors of the class; that is, those members of the class who have survived the other members of the class. That, in my view, is the true meaning of the words, and it will apply to the petitioner. She has not survived the class of daughters, but she is the longest liver of the class. I might leave the case with this expression of my opinion. But the Master of the Rolls, in the very similar case of *Madden v. Taylor* (1) 45 L. J. Ch. 569, came to a very similar conclusion; and he was greatly influenced by the consideration that it was not likely that the testator should have intended that, if all the nieces should die without issue, the longest liver of them should take the shares of her sisters absolutely, but should take her own share only for her life."

The circuit court construed the will to mean that the fund so created by the second item passed in this way. That is, that Laura got her share and died; that upon Burmah's death, unmarried, her share passed to Julia, and thereupon Julia held her own share and the share she got from Burmah absolutely, and hence had full power to pass the same by her will to the defendants named. This conclusion was right, and the judgment is therefore affirmed.

M. Williams, for appellant.

ROBINSON, C. J. The foregoing opinion, heretofore rendered in Division No. 1, is hereby adopted as the opinion of the court in banc.

VALLIANT, J., not sitting.

WILSON v. CRAIG et al.
(Supreme Court of Missouri, Division No. 2.
June 9, 1908.)

MARRIAGE—ABANDONMENT BY WIFE—SUBSEQUENT MARRIAGE—ADULTERY—DOWER.

1. Plaintiff refused to accompany her husband from Ireland to the United States on the ground of ill health. She received letters from him after his arrival, and subsequently came to the United States; but, after being informed by her husband that by reason of a difficulty with her parents he was going to the territories, she made no effort to live with him again until more than seven years had elapsed, when, on erroneous information that he was dead, under the advice of certain clergymen, she married another. Her husband also remarried without divorce, and died, leaving his property to his children, by his second wife, without having communicated with plaintiff or without her making any effort to ascertain his whereabouts or communicate with him. Held, that plaintiff had voluntarily abandoned her husband, and was not, therefore, entitled to dower in his estate, under Rev. St. 1889, § 4532, providing

that if a wife voluntarily leave her husband, and go away and continue with an adulterer, she will be forever barred from dower, unless her husband be voluntarily reconciled to her and suffer her to dwell with him.

Appeal from St. Louis Circuit Court; P. R. Flitcraft, Judge.

Action by Margaret Wilson, alias Craig, against Mary Louise Craig and others, for partition. -From a judgment in favor of defendants, plaintiff appeals. Affirmed.

L. Frank Ottogy, for appellant. A. R. Taylor, for respondents.

FOX, J. This is an action for partition of real estate described in the petition. That we may fully appreciate the issues determined by the trial court, we will here quote substantially the pleadings in this cause:

The amended petition alleges: That on the 24th day of March, 1897, James Craig died intestate and seised of an estate of inheritance in certain real estate described in the petition, situated in the city of St. Louis, Mo., which is agreed by the parties to have been correctly described. That upon one of said parcels of ground, being lot 24 of Nicholson Place, a deed of trust to secure the payment of a note for the sum of \$2,500 was executed by the deceased, conveying the same to defendant Wade as trustee, and that defendant Bofinger was the owner and holder of said note. That said James Craig left as his sole heirs the plaintiff, who is his lawful widow, and the defendant William John Craig, his lawful child and the only issue of his marriage with plaintiff. That on or about the 8th day of May, 1897, the plaintiff elected to be endowed absolutely in a share of said parcels and tracts of land equal to the share of a child, as will appear from her election to be so endowed absolutely, pursuant to sections 4523 and 4524 of the Revised Statutes of Missouri for 1889, which election was duly filed for record in the recorder's office of the city of St. Louis, Mo., on May 14, 1897, and is recorded in Book 1410, at page 7. That the parties hereto have title to said real estate as follows: The plaintiff is entitled to the one-half part of said estate; and the defendant William John Craig is entitled to and claims the other one-half part; but the defendants Mary Louise Craig and Emma Craig also claim a life interest in the said property by virtue of the will of said James Craig, deceased, dated December 11, 1893, and probated in the probate court of the city of St. Louis on April 5, 1897. That defendant Wade is interested as such trustee, and defendant Bofinger as cestui que trust, and that by the provisions of said will the brothers and sisters of said deceased would be entitled to a remainder therein, contingent upon the death of said defendants Mary Louise Craig and Emma Craig without issue; but that plaintiff is unable to state whether or not any brothers or sisters of said James Craig are in being, and, if dead, of whom

their heirs consist, and hence she is unable to make them parties hereto, and that she does not know what interest said parties do or would have in the property aforesaid, and cannot, therefore, enumerate the same. Wherefore plaintiff prays that partition of said real estate may be made between the parties plaintiff and defendant according with their respective interests therein, and that, if partition in kind cannot be made without great prejudice to the owners, the said real estate may be ordered to be sold and the proceeds appropriated according to the respective rights and interest of the said parties. The said petition was filed June 11, 1897.

The original answer of Mary Louise and Emma Craig was filed June 16, 1897, and admitted that James Craig made his last will and testament, and thereby bequeathed property to them, but denied every other allegation of the petition.

The amended answer of defendants Mary Louise and Emma Craig was filed on the 18th day of October, 1897, and is as follows: "Now come Mary Louise Craig and Emma Craig, and by leave of court file this their separate amended answer to the amended petition, and state that it is true that James Craig made his last will and testament, and that it was admitted to probate on the 5th day of April, 1897. And, further answering, these defendants deny the allegations of the amended petition, except as herein specifically admitted. And these defendants say that they admit that Craig was married to the plaintiff on or about the year 1833, at Garvagh, Ireland. And they further state that after said marriage said James Craig, with the knowledge and consent of the plaintiff, came to the United States of America, and made his home in St. Louis, Missouri; that after said separation between said James Craig and the plaintiff, the plaintiff, well knowing the home and place of abode of said James Craig, did voluntarily abandon and separate herself from him, and did refuse to live with him as his wife, to wit, on or about the year 1836; that afterwards, in the year 1836, the plaintiff, well knowing the residence and abode of said James Craig to be the city of St. Louis and state of Missouri, did come to the state of Pennsylvania, did thereafter continue to live in said state, well knowing the residence and abode of said James Craig to be St. Louis, Missouri, and did voluntarily live apart from and separate herself from said James Craig; that thereafter the plaintiff, after such separation, and well knowing the residence of said James Craig to be St. Louis, Missouri, did voluntarily separate herself from said James Craig, and did intermarry with one Thomas Wilson, to wit, at Philadelphia, on or about the year 1843, and thereafter, with full knowledge that James Craig was residing at the city of St. Louis, unmarried, continue to live and cohabit with said Thomas Wilson as his

wife, and did bear children to him. And these defendants aver that by reason of the foregoing facts the plaintiff forever forfeited all claim as the wife or widow of James Craig. And these defendants aver that James Craig, well knowing of the marriage of the plaintiff to said Wilson, did in the year 1856, thirteen years after the marriage of the plaintiff to said Wilson, lawfully marry the mother of these defendants, who were born of said marriage. And these defendants say by reason of the premises the plaintiff is not entitled to any interest whatever in the estate of said James Craig, but is forever barred therefrom. Wherefore they pray judgment for their costs."

The plaintiff's reply to said amended answer was filed on the 1st day of November, 1897, and is as follows: "And now comes the said plaintiff, and for her reply to the separate amended answer of the defendants Mary Louise Craig and Emma Craig herein denies each and every allegation of new matter therein contained. And for further reply to the said separate amended answer plaintiff says that the said James Craig did against her objection, to-wit, about the year 1835, leave her in Ireland when her son, defendant Wm. John Craig was an infant about four months old, and while she was in delicate health, unable to endure the hardships of ocean travel, and was advised by her attending physician that a journey across the ocean would impeil her life, and that he then promised to return to her, or to send for her, and not forsake her for more than two years; that said deceased thereupon came to the United States, and became a resident of the city of Philadelphia, in the state of Pennsylvania, where he resided for about 12 months thereafter, and, unmindful of his marital obligations to the plaintiff herein, did then and there attempt to contract matrimony with one Miss Woodburn, and that because of his former marriage to plaintiff, then not, nor never since, dissolved, he was apprehended, and fled to the state of Missouri, which was then difficult of access and could only be reached by river and overland by stage; that just prior to his leaving Philadelphia as aforesaid he by letter informed plaintiff that he was 'going to the territories, where no one could touch him'; that thereupon plaintiff continued to abide with her parents in Ireland, and did within a short time, to wit, two years, after the receipt of said information from said James, herself come to the United States, taking up her place of abode with one Robert Craig, a brother of said James, at Summit Hill and Philadelphia, Pennsylvania; that said James Craig well knew all the time that the plaintiff's place of abode was in said Philadelphia with his brother as aforesaid, but that he never communicated with her thereafter, or in any wise apprised her of his desire to live with plaintiff again as her husband; that about the year 1840 the said James Craig

went to said Philadelphia without plaintiff's knowledge; that he well knew at the time that plaintiff was then abiding in said Philadelphia or in its vicinity; that he then visited his said brother Robert, but that he did not in any wise communicate with plaintiff, or attempt to do so, although she was easily accessible to him, and, if he had indicated his desire at any time, she would have readily lived with him as his wife, as she was anxious to do, but that the said James Craig, after advising her of 'going to the territories' as aforesaid, never again communicated with plaintiff in any wise, although plaintiff did, about the year 1840, send a message to him at St. Louis, through friends, but from whom she never heard again; that plaintiff did not voluntarily live apart from and separate herself from said James Craig at all, but, on the contrary, he did voluntarily abandon her, and refused and neglected ever again to live with plaintiff as her husband, and has never thereafter contributed in any wise to the support of herself and his child, the defendant Wm. John Craig, but compelled her to accept support from her parents and his brother, said Robert, as well as to labor herself for her own support and that of his said child; that about the year 1843 the said Robert Craig informed plaintiff that his brother, the said James Craig, had departed this life, and advised her to marry one Thomas Wilson, whom she had known for about one year; that she thereupon consulted a council of clergymen of the Presbyterian Church, whereof she was a member, who upon consultation advised her that she was free before God and man to marry the said Wilson, and that she did thereupon marry him, under the honest belief that her said husband, James Craig, was dead at that time, and that she was persuaded to do so in order to secure a home for herself and said child, because the said James Craig had refused and neglected to provide for her support in any manner whatsoever. And plaintiff says that she did not, until after the birth of two children as the issue of her marriage to said Wilson, to wit, a period of three years after her said marriage, learn that said James Craig was not dead, and that she some time thereafter was informed by said Robert Craig that he meant that the said James Craig was dead to her (the plaintiff) as he had another wife and family, viz., the said defendants Mary Louise Craig and Emma Craig, and their mother. And plaintiff denies that said James Craig did marry the mother of the defendants Mary Louise Craig and Emma Craig, but, on the contrary, avers that said James Craig was in league with his said brother, Robert Craig, and was instrumental in having the false representations made to plaintiff as aforesaid concerning his death, and that he well knew that plaintiff was alive at the time of his marriage, but that he did not, before or after her marriage to said Wilson, claim plaintiff

as his wife, but did willfully and deliberately desert and abandon her. And plaintiff therefore says that she never abandoned said James Craig, that she married said Thomas Wilson without any wrongful intent on her part, and that she is by reason of the premises entitled to her share in the estate of said James Craig, deceased, by virtue of her said election, and again prays judgment as in her petition."

The other defendants have duly entered their appearance and answered, but said answers are not material to the main issues involved, as it is not denied that the deed of trust exists upon a part of the said property, and is a prior lien to that of the other parties hereto.

It was agreed by both parties that the property in question was correctly described in the petition. It was further agreed between the parties that James Craig died on the 24th day of March, 1897, in the city of St. Louis, testate, and was seised at the time of his death of an estate of inheritance of the property described in the petition. The entire bill of exceptions is not before us, and we find that appellants have filed an abstract of the record, purporting to recite the evidence introduced in this cause, and also that respondent filed a statement of the evidence purporting to recite the evidence contained in the original bill of exceptions. As there are no objections indicated by the record before us, by either party, to the statements as to the evidence introduced, we will assume that the recitation by both parties of the testimony introduced is correct. The facts, as indicated by the testimony contained in the abstract of the record as furnished by appellants, supplemented by the statements of the evidence as furnished by respondent, are as follows:

The plaintiff, Margaret Wilson, alias Craig, testified by deposition, taken on the 18th and 19th days of June, 1897, at Catasauqua, Lehigh county, Pa., which said deposition was filed October 1, 1897, as follows:

Direct examination: "My name is Margaret Craig. Have been going by the name of Wilson of late years. My maiden name was Margaret MacAllister. Was born in suburbs of Garvagh, Ireland. My mother's name was Margaret MacAllister, and my father's name Anthony. The first time I was married to James Craig by a Reverend Dr. Brown, a Presbyterian clergyman, at the home of my parents in Garvagh, Ireland. There were present my husband's parents and mine, and my sisters and brothers younger than me—all children most. Daniel was there, but as a child, pretty near. They were all children much younger than me—many years; Mrs. Swan was present. I was about 20 years old when I married James Craig. His age was something like myself. He was of age, because he was free from his trade. He worked—veneering mahogany. We lived together as man

and wife, of course, at my father's; at his father's, sometimes. On account of my brother being ordained and getting a church and a parsonage, I was to go and keep house for him. That is the reason we were not at housekeeping, waiting for that. We lived together as man and wife not quite two years. James Craig's father was John Craig, and his mother Isabella. He had one sister, Ann, the oldest, who was married to John McMullen. They lived in the suburbs of Garvagh. They had children, but I don't know them. His business was a farmer. James Craig's father, John Craig, was a farmer. His other sisters were Nancy, who married Hugh McMullen, a brother of John McMullen. They had children, but I don't know them. They lived in the suburbs of Garvagh. He was also a farmer. Then he had a sister, Mary, who married William Gilmore. I don't know whether they had any children or not. He had no other sisters that I know of. James Craig had brothers named Robert, William, and John. Robert married my sister and came to this country, to Philadelphia. William married a Miss Gilmore in Ireland. I don't know whether they had any children. John Craig married a Miss McMullen. They had children, but I don't know how many. None of these brothers and sisters of James Craig came to this country besides Robert. I knew a Gilmore in this country, a cousin of James Craig, a tailor. He came to this country. I don't know his first name. I knew him, but I didn't know what he was. I heard he was dead. I saw him often at my own house in Philadelphia. That is a good many years ago. I am 40 years in this town. I cannot tell what year. It was over 40 years ago. I heard of him, but I never heard anything in particular of him. I lived with my husband in Ireland not quite two years. After that he left for America. The circumstances of his leaving were that I was not well; I was not in good health, and my parents were not willing for me to leave; that was the most particular thing. Yes; Robert Craig had another daughter, named Margaret Lathrop, living in Philadelphia. Q. You say you were not well enough and strong enough to come to America with your husband? A. That was the objection of my parents. Q. That is the reason why you did not come with him? A. Yes. Q. Was that the only reason you did not accompany him? A. As far as I know, we were very good friends, sir; he making a good resolution to me when he was going away. In the same afternoon when he left, 12 o'clock at night, he asked me to come upstairs, and he would tell me what he would say to me if he would agree to come away without me; my parents not being willing to have me go. I suppose that I could have run away. Then I did not agree myself. Then I gave up to that I would come because they were so opposed to it.

William John Craig, one of the parties to this suit, was a baby yet. He lay seven years awaiting for his papa to do something for him, and he got no support, nor hearing of anything coming. Every one said to me: 'No one will know you are married.' The night before he left, at 12 o'clock, he said: 'Now Margaret, if you will agree for me to go away, I will tell you what I will say to you'— If I can say anything about it, that he would tell me what he would say. 'And if you bring up your mother and aunts'— the sisters, two aunts were there to me— 'I will tell you what I will say: I will go to America with these young men'— If I would say— That is what he wanted me to say. His wishes was that if I would say nothing about it. 'I will say to you, if you say I can go on these terms, I will take my Lord—I will call the Lord my dying judge—if I ever forsake you longer than two years, and my son. I will have you there independent of anybody.' Q. And he left for America then? A. He left then. That was the last conversation. I was married, as near as I can remember, in the year 1832, and came to America in 1836. I brought my child William John with me. He is one of the parties to this suit. He was born in my father's house. The attending physician at the time of his birth was Dr. Kennan or Kernan. There were three physicians. That is why I was too weak to leave with him (my husband) for America. At my son William John's birth, besides the doctors, there was present an old lady they called the 'midwife.' She was the only party, after all the three doctors held the consultation. Daniel MacAlister was there, but he was a boy. He knows nothing about it. Those children know nothing about it. I landed in New York. There were nine of us together—cousins, uncle, and aunt of his and his father's—the whole family. Samuel Craig had his wife come with him. An uncle and aunt of my husband came with us. From New York I went to Summit Hill, Pennsylvania. I stopped in New York about a week, at an aunt's, named Cummins, my father's sister; remained there about two years in Summit Hill, I cannot say exactly. I knew Miss Anne Smith and Miss Kate Smith at Summit Hill. 'Got acquainted with them at Mauch Chunk, a few miles on this side of Summit Hill, right after I came here. The Misses Anne and Kate Smith now live at Catasauqua. I was known at Summit Hill by the name of Margaret Craig, and my son William John Craig. Lived at Summit Hill not quite four years. Then I went to Philadelphia, and lived there about eighteen years, I think. I am not quite sure. From Philadelphia I went to Catasauqua, and have lived there ever since. Forty years this fall, this is, since 1857. While I lived in Philadelphia I knew Robert Craig, my husband's brother. I lived at his home.

That is where my home was. I cannot say exactly for what length of time. Lived there till I went to the country and got married. That was my home. I was married the second time to Mr. Wilson in 1848. After my husband came to America I got a couple of letters from him. I have not those letters. I cannot exactly tell what he said. The substance is, as near as I can remember, about his time, what he was doing, what he worked at, how he liked the place, and all that; that was the first letter. The letters were written from Philadelphia. Then his next letter was that he didn't like the answer he got. He sent a letter then again, saying that my proud father and proud brothers might go to hell's fire, for he was going to the territories, where no one could touch him; and that ended all the friendship with him and with us. That is the truth, and I am going to tell nothing but what I know. I never heard from him ever after that. There was no more correspondence after that. I was advised then to stay at my father's and wait seven years to see what would turn up; and I waited seven years. When I got to Philadelphia, I didn't get any letters from him; never a sentence. He said he was going to the territories, where no one could touch him. Q. Do you know why he went to the territories? A. He was going to get married, and he was defeated there then. Q. Why was he defeated? A. Because they were told that his wife and child were waiting at home for him. He left money on deposit there in the bank when he left. He did not take time to take the money. I know Mr. Bacon well. He was treasurer for a deaf and dumb asylum. Q. Do you know if James Craig ever came to Philadelphia while you lived there? A. I don't know that. I never knew that. I don't know anything about that. It might be, but I don't know. I became acquainted with Thomas Wilson about a year before I was married, in Philadelphia. I think I was married under the name of Craig. Q. How did you come to marry your second husband, Thomas Wilson? Under what circumstances? Just state. A. He was intimate with Robert Craig, and Robert came with him from Philadelphia city on the old stage that was going between Bethlehem and the city, and traveled out here to a little village where William John was at school, and I was at the time at Kreidersville, where William John was going to school. Q. And up came Thomas Wilson and Robert Craig, is that it? A. Yes, sir. Q. What was the object of their visit? A. The object of their visit was for Robert Craig to verify that his brother James was dead, and for me to agree to marry Thomas Wilson. Q. What did Robert Craig say to you? At that place what information did you get about him? A. He told me that James Craig was dead. That was the main thing of the visit. Q.

What were the relations between Thomas Wilson and Robert Craig? Were they friendly or otherwise? A. They were no relations, just friendly. Q. Did you, on that representation, marry Thomas Wilson? A. I did not say that time, but I said I would tell them after a little. I would have to see my ministers—one in Catasauqua, and one in Mauch Chunk. Q. Did you see the ministers? A. I did, sir; and they all agreed together. I first found out that James Craig was not dead after I was married some time. I don't know how long. I can't say exactly how long it was after Robert Craig told me that. I don't know exactly when William John Craig first went to St. Louis. When he came back he gave me some information that was not favorable to him. He told me he had his family there then. I said to Robert Craig, one time after I was married, 'What made you tell me that story that James Craig was dead?' A. 'Well,' he said, 'he was dead to you, Margaret, because he has his wife and family.' That is the way Robert explained why he told me that. I don't know whether my son William John Craig went out to St. Louis a second time. I cannot say for sure. He was out to his uncle's, in Galena, Illinois. If I knew it at the time, I cannot say whether I knew it or not. I will say nothing but what I know. The Lord will know the rest. He will do the just thing. I never applied for a divorce against James Craig, and was never divorced from him; no, sir. I waited all that time, eleven years, before I was married. I never thought of such a thing. My son, William John Craig, went to Ireland twice. I cannot say exactly when. I cannot tell the dates."

Cross-examination: "My present age is something over 86. I don't know what year I was born. I don't know, indeed, that my age is less than 90. I cannot say. I would not be willing to say, without I take time to look over some of my private records and little things. I don't know whether a marriage certificate was procured or not at the time of my marriage. Don't remember that I ever saw one. I don't know that James Craig was six years younger than I. My brother Daniel might have been in the house when I was married. The children were all young then. Daniel might have been seven or eight years old, or something. I cannot say what his age is now. I cannot come near to it. I did not preserve any of the family records of the MacAlisters. After my marriage to Mr. Craig, we continued to live at my father's house till I came to America. Craig's father was just a short distance from my father's. I was as much there as I was at my father's, and so was the baby. We were just like one family, the two families. I think the date of my marriage to James Craig is 1832. I think it was in November. William John's birth was the 8th of January, 1834, I think, as near as I

can say. James Craig's departure from Ireland was not quite two years after the marriage. Indeed, I don't know how long Mr. Craig had been in America when I came over. William John was four months old when he came over, so you can take the date from that. I received two letters from James Craig from Philadelphia. I did not preserve them. None from the territories. Rev. James Brown married us. I don't know whether they kept a record of marriages. The MacAlisters were Episcopalians. I never saw James Craig after he left Ireland. Never saw or heard of him individually, except those two letters. I came in company with an uncle's family when I came to America. They had a grown family. They went to live about New York, some place. I left New York, and came on to Summit Hill; and my brother and Robert Craig met me and took me up home. He met me on the way, and took me to Summit Hill, to his home and my sister's. That was my home until after I was married to Thomas Wilson. I think I landed in September, 1836. The first letter I received from James Craig after he left might be four or five months after he left. Those were all sailing vessels. There were no steamers flying then. It took some time to go and come. Q. Did I understand you to say that in the last of these two letters— What was it that he said? A. I need not use any of the offensive language. I won't use the offensive language. It was pretty much offensive, but not to me—to my father and brothers. He called my father some things that were not nice. 'My proud father and proud brothers might go to hell's fire; for he was away to the territories, and they could do nothing.' That was the substance of that letter. I have no more to tell about it. It was too much to tell, now or any time. Q. He said nothing disagreeable to you in the letter? A. Not a word, sir; he had not aught against me. That is what he said concerning me. The cause of his feeling towards my father and brothers was because my father and family knew I was not fit to come to America at that time on account of my health and the boy being so young; and both his father and my father were willing to take care of us. But he was like the farmer's 'Polly.' He got into bad company, and he made his way to the territories. There was nothing between my father and brothers and Mr. Craig at the time he left Ireland. They never came in contact in bad terms. He was not pleased that I couldn't go along. There were no bad words between them; but their feelings, perhaps, were not the best. It did not grow out of the fact of my marriage. There were other arrangements made for my husband, for me to go and live with my brother, and that arrangement was broken up, and that was all that was between them. I never heard anything about any feeling on their part in regard to his going to America. I don't know

that his father and mother agreed to his going. There was no expression of ill feeling, I never heard anything that I could make any remarks on. His father and mother were very respectful to me, indeed, and all his family. Robert Craig left Ireland before James Craig, many years before; but he was home again. I knew the residence of Robert Craig here to be at Summit Hill. I corresponded with my sister, Mrs. Robert Craig. When James Craig came here, he stopped at Philadelphia, as far as I was informed by his letters. I don't know whether he had any other relatives here. I did not know it. I don't know whether he had a friend in St. Louis, that I know of. I did not know he had any. In late years he had a friend in St. Louis, a cousin or something; but I don't know. I lived in Summit Hill for three years. I went to my sister's. That is all the home I had. I got to Summit Hill in October, 1836, and went from there to Philadelphia. I never slept in a house in Philadelphia, but my own; but I went out occasionally during the day to do my fancy work. I had to make my own living. After I became a resident of Philadelphia, it might be two years until I married Mr. Wilson. I don't remember the date. You gentlemen have a good education, good learning; but it is a hard job for me. I don't remember the date of my marriage to Mr. Wilson. I don't remember the year. It was before 1850. It may be about the year 1840. Robert Craig continued to live in Philadelphia up to the time of his death; had his own home there. Robert Craig died a good many years after I married Wilson. I don't remember the year. I was married in Rev. Dr. Cooper's parlor. I don't know whether I had a certificate of marriage or not. All that were present at my marriage to Wilson are dead. Q. Do you remember the fact of the presence of James Craig in Philadelphia? Do you remember the fact that James Craig was in Philadelphia in 1841 or 1842? A. I don't think he was, sir. I don't remember the fact that he left twenty dollars for William John Craig, the boy. I remained on friendly terms with Robert Craig and wife during their lifetime. There was no ill-feeling between us. I visited their house as long as they continued to live. I went from here (Catasauqua) to Philadelphia frequently to see him. We lived fifteen years in Philadelphia, before coming to Catasauqua, after I married Thomas Wilson. At the time we moved to Catasauqua William John Craig lived there. I saw him frequently every day. I am quite sure I married Wilson in Craig's name. I am called that way in this town yet—Mrs. Craig. I remember when William John Craig went to St. Louis to see his father, but I don't remember the date. When he went there in 1855 he told me he saw James Craig, his father, and saw his family—both, he supposed. He told me he saw his father, but I don't remember about the

family. The next time he went I think he saw his family. I knew in 1855 that James Craig was living. It was then that Robert Craig told me that he was dead to me. I knew, some time before that, that he was living. I could not tell when I learned it. Q. Did you not know that James Craig was there in 1841 or 1842, and visited your sister's house, Robert Craig's, and left a small sum for this boy? A. I never knew that. Q. You never knew that? A. I never knew that; never. There is no deception in my saying that. I never knew it; never knew he was there, about the money, nor never knew he got that. I was kept in the dark about that. I cannot tell exactly when I knew that James Craig was living in St. Louis. I heard he was living there before I came to this country. I don't know whether James corresponded with his brother, Robert. I never knew that he did; I cannot say. I heard it in current news that he was there. Q. Knowing that James Craig was living, how did you understand that you could marry Thomas Wilson without a divorce? A. I did not think of such a thing, nor could not imagine, nor did not understand. Perhaps I was too ignorant to understand that; but the council that met together of the most respectable clergy and doctors of divinity held a council over it, and I was advised by all my friends that I was free from both God and man from the treatment I got. And any well-educated man that has a good education can see that in that I was not well treated. I never told my son John that I was divorced. Q. Did you understand how it would affect your children by marrying a man when you had a living husband undivorced? (Objected to as calling for a question of law.) A. He was a dead husband to me. The doctor of divinity from Belfast said, if I was seven years without his support, and had to support the child, and all that, I was free by the laws of the nation to get married. Then I lived that seven years, and took care of my boy, and worked for them. Then there was no word of his doing anything. Then I lived eleven years altogether without getting married. I was free before God and man for getting a home to myself. As soon as I got married, I got a decent home; and my husband told me to get William John Craig, and take care of him. Before I left Ireland I had a talk with this Belfast man, and he told me that if I lived seven years without marrying, and without support, I was free from him. He consulted me about Mr. James Craig's leaving me. This divine from Belfast was Dr. Cooke, the head professor of the college—the Belfast Presbyterian College. Q. Then before you left Ireland you had consulted about the abandonment and separation from your husband, Mr. Craig? A. Yes, sir; because he had done it himself—because he ran away, and went to the territories, he said, where nobody could touch him. I have had chil-

dren by Mr. Wilson—four of them living. William John Craig was the only child I had by James Craig. Q. What was it that Robert Craig told you before you were married? A. He told me that he was dead. Q. You knew he was not dead? A. I did not, sir. Oh, no, I did not know he was not dead. I was corresponding with the family. I was out here in the country, the time Robert Craig came to tell me. I did not know whether he was dead or not. I cannot say anything I don't know. I was out visiting William John Craig in the country. Robert Craig came out to see me on a visit. He had Thomas Wilson along with him. I can mind that. Then he came to verify that James Craig was dead. After I was married, in my house in Philadelphia, the next house to theirs, I was out every evening. Up to death we were always together. I asked him what made him tell me the story. He said he was dead to me, for he had a wife and family. I knew nothing coming from St. Louis, except what came through him, Robert Craig. They came there and made a visit there at Kreidersville, which is from here about two or three miles. Bath is a few more miles, and there my minister lived, Rev. Irvin. Then I said, when they asked me some more questions, after they told me this time that James Craig was dead— They stopped over night at the old gent's house, and the next day the two traveled from Kreidersville over to Bath, about four or five miles, and went to see my minister. I said I must see Irvin, and must see Webster at Mauch Chunk. I went four years to his church. I said, 'I cannot give you any definite answer on the question you are asking until I saw both of these two men.' They were both my ministers; the one here, and the other in Mauch Chunk. They went over to Irvin, these two men, Robert Craig and Wilson, and Irvin went with them to Mauch Chunk, and saw Webster, and got his letter for me. I think another gentleman was taken in the church at Mauch Chunk, and they all met and had a council, and they all advised me to embrace my opportunity. I was free before God and man. And then I lived a good many years before I got married. So that I did not do it without counsel, and I was well advised. Q. How long after Robert Craig told you this story was it till you learned that James Craig, instead of being dead, was alive? A. Not till after I was married; and when I was married, and had my second child, I found out that first. Then I said to Robert Craig, 'What made you tell me that story when I was at Kreidersville?' A. He said, 'I told you no story, because James Craig was dead to you, for he had a wife and family.' I learned, some time after 1845, that James Craig was not dead. Q. Of course, when you reproached Robert Craig about telling you this story, you then had learned that he was living in St. Louis? A. Yes, sir, and long before; and that was

his answer—he was dead to me. During all those years I remembered what he said the day before he left for America—that God would be his dying judge if he would forsake me more than two years. He said that the night before he left. I made no inquiry as long as he was happy with his family. I had no right to write to him. I never made any complaints on him, nor never made any inquiry about him. I was advised by that counsel that I was free from him. Q. You were advised that way again? A. I was so, conscientiously. I hope you believe me, because my friends are almost all dead. It is very hard for me to remember it exactly—for me to work for my living till my child should come of age without any support from nobody. I think I did say he left his money in the bank in Philadelphia. He left in a hurry. A strange man came to the bank to get the money, and they sent for Robert Craig to verify his brother that came from St. Louis; and when Robert Craig could not verify the strange man that came to take the money, he did not come back himself. If it had not been for me, that man would have gone where he would not have gone home in a hurry; but I would have nothing to do with it. That man was not him. It was a strange man, and he could not get the money. The authorities at the bank sent for Robert Craig to identify the man as his brother. They kept him at the bank till Robert came, but he did not get the money. I knew through the bank that was James Craig's money. I was so informed. I cannot say how long before my marriage this was."

Redirect examination: "I am not sure as to my age. I kept no family Bible where I kept the date of births. I never had it myself. I don't know how old Daniel was. All my family were there. James Craig has never contributed \$1 to my support since he left Ireland. He never sent me any money to Ireland in these two letters. I consulted this minister, Dr. Cooke, after I received the letter from James Craig, my husband, that he was going to the territories. That is the only minister I consulted over there. There was no council of ministers over there. The council I speak of was here, when Robert Craig and Wilson came to Kreidersville. My father was an architect. James Craig's father was a farmer. Originally I came to America to make a visit of a year. After he wrote this letter about my father and brothers, it did not make any difference to me; but my father showed that to Dr. Cooke, and that was when Dr. Cooke gave this advice. I answered the first letter, but did not answer the second. When I came to Philadelphia, I worked for a living with my needles, until I earned my living. William John Craig during this time was at Kreidersville for six years at school. He worked with a doctor and drove out with him sometimes. I am one of the plaintiffs, and William John Craig is one of the parties also.

The reason he felt that way towards my brothers and parents was because I was to go to my brother, the minister, to live. I corresponded with my sister, Mrs. Robert Craig, and she wrote me to come here to see them. I was very delicate, and my father agreed to give me money if I would come in a year, and make a year's visit, and keep the child home. That is the truth. Instead of staying a year, I stayed sixty years. My father gave me plenty of money to bring me back. Robert Craig, when he told me that James Craig was dead, spoke seriously. All that information I placed before these divines, and that council decided that I was entitled to marry. I was not obliged to do it, but I was advised to do so. If James Craig was in Philadelphia at the bank to get this money, I don't know anything about it. I knew about that man being there. The only way that I know of that is that Robert Craig was sent for to identify the man at the bank. It was not his brother James. It was a strange man. I was told afterwards that James Craig came and got his money. I never knew anything about his leaving \$20 for William John. I did not know before I came here to this country that James Craig was in St. Louis. I meant by that that he had gone to the territories. It is a long journey between here and there. I did not know at the time I left Ireland where he was, only he was in the territories. I did not know it was St. Louis, nor did my family. When I married Thomas Wilson I had to take Robert Craig's word for it that James Craig was dead, and I thought he was dead. I heard nothing from James Craig in St. Louis. All I heard was from Robert. Robert Craig was very kind. He was a father to me. He was a great deal older than James. Q. You had heard, as well as anything you did not see, that he was a resident of St. Louis at the time you came to this country? A. Yes, sir. Q. You knew that fact all the time? A. Yes; I knew that all the time. Q. You knew that when you married Thomas Wilson? A. Yes; I did. Q. You knew that James Craig was living in St. Louis when you married Thomas Wilson? A. Yes, sir; and had his family. That is what I understood. Q. You knew the fact of his living there? A. Yes, sir; of living there with his family. [James Craig did not marry until May 20, 1856.] Q. Knowing that James Craig was living, how did you understand that you could marry Thomas Wilson while he was living and without a divorce? A. I did not think of such a thing, nor could not imagine, nor did not understand that; but the council that met together of the most respectable clergy and doctors of divinity held a council over it, and I was advised by all my friends that I was free from both God and man from the treatment I got. And any well-educated man who has a good education can see that in that I was not well treated. Q. Did you make known to the min-

ister, Dr. Cooper, in whose parlor you say you were married, the fact that this undivorced husband of yours was living? A. I don't know. I suppose he did not ask me any questions about it. Q. Did you tell Dr. Cooper that you were a married woman, and that you were undivorced? A. I did not. No, sir; I did not. My husband, Thomas Wilson, was a member of his church, and very intimate with him. I don't know what passed between them. It was all known to him. Q. You say you told your husband, Thomas Wilson, that you had not been divorced from James Craig? A. He knew all about it. Q. I asked you whether you told him? A. He knew I was not divorced from him. Q. Did you understand how it would affect your children by marrying, when you had a living husband undivorced? A. He was a dead husband to me. The doctor of divinity from Belfast said, if I was seven years without his support, and had to support the child, and all that, I was free by the laws of the nation to get married, etc. Q. Then it made no difference to you, so far as your conscience was concerned— So far as you understood your relations before the law, it made no difference to you whether James Craig was living or dead? A. No, sir. Q. There was something said by you, as I remember it, about Craig's leaving Philadelphia and leaving his money in bank? A. I suspect I did say it, because he did. Yes, sir; he left his money, for he went off in a hurry. Q. Do you remember when that was? A. Not exactly, sir. Q. With reference to the time that you came to this country, when was it? After you moved to Philadelphia, or before? A. It was after we moved to Philadelphia, because Robert Craig was living at Philadelphia—being sent for to come to the bank to verify his brother that came from St. Louis. I was sent for to see whether I would accept of that money. It was \$600. I told him I did not want it and did not accept it. Q. Did he send you any money to Ireland in those two letters? A. No, not to me; maybe to that boy. I don't know. Q. Did he ever send any money? A. I believe he did. His father got some money. Q. What was James Craig's father's business? A. A farmer. He was comfortably fixed. Originally I came to America to visit for a year. Never to look after him. Q. You, of course, after he wrote this letter about your father and your brothers, you did not feel very friendly on that account? A. It made no difference to me, but my father showed that to Dr. Cooke. Q. And that was when Dr. Cooke gave this advice? A. Yes. Q. Did you answer the letters that he wrote you? A. I never answered that. Q. Did you answer the first letter? A. Yes, sir; the first letter. Q. The second letter you did not answer? A. Oh, no, sir; that was all. I was asked at home, 'Whenever you need money, tell it,' so I was not much troubled. Q. Mr. Taylor, you say, had, in

answer to a question of his, that you had known all the time—all these years—that Mr. Craig was alive at the time or just before the time you married Mr. Wilson— After Thomas Wilson and Mr. Robert Craig told you that he was dead, did you at that time believe that he was alive? A. I don't know whether I believed it or not. I had a ticket for belief. Q. You did not know, at the time you left Ireland, that he was at St. Louis, or where he was? A. Yes, sir."

The plaintiff, being recalled, on the 14th day of October, 1897, in the city of Worcester, Mass. (depositions filed October 1, 1897), testified:

Direct examination: "At the time my husband was in Philadelphia for that money, I did not know that he was there at the time. I first learned from some of his brother's family that he had been there, not very long thereafter. I slept at Robert Craig's house every night while living in Philadelphia, excepting a few nights when I would be doing some work for a respectable family by the name of Bacon. I was at home during the day while I lived at Robert Craig's, except when I was working out. Yes, I spent a few Sundays at Mr. Bacon's. I was away often from Philadelphia after I moved there to live with Robert Craig, going to Kreidersville, where William John was. I would stay at Kreidersville on these visits several weeks, sometimes a month. James Craig made no effort to see me when he was in Philadelphia for the money. At the time, if I had known that he was in Philadelphia, I think I would have made an effort to see him; but I didn't know it. If he had made any effort to see me, he could have found me at the time he was said to be in Philadelphia. He could have found me easy. William John Craig was born after my marriage with James Craig; certainly. James Craig never denied his paternity of my son, William John, and recognized him as his son. I was a Protestant at the time I married James Craig. I was a member of the Presbyterian Church. I was what was then known as a 'Dissenter.' I was never a member of the Church of Ireland. The reply that I wrote James Craig to his first letter was a pleasant letter. He said in that letter that, if he would like the country, in two years he would have me and his son with him. The reason that I did not answer the second letter was because he said he had gone to the territories. I would have gone with him, and lived with him, if he had sent for me, or had written me to come to him, or asked me to live with him again as his wife. No, sir; I would not have married Mr. Wilson, if I had not been informed by Robert Craig that James Craig, my first husband, was dead. I believed he was dead, when I married Mr. Wilson; for his own brother told it to me. Mr. Wilson died the last of October, 1870. I cannot say from whom I first learned that James Craig was not dead. I

was out in Galena, Illinois, as I testified, with my daughter, now Mrs. Thomas, about 1870. James Craig never entered a suit against me for divorce in Pennsylvania, or any other place. After my marriage to Mr. Wilson, he and I supported William John Craig, my son. The reason that I was too weak to leave with James Craig for America was that the doctors forbid me going; that I was in bad health; that I was not fit to go; that I might never see the other side if I went. At that time it took a vessel nine weeks to come over. The evening just before James Craig left, he called me upstairs, and asked if I wouldn't agree to let him go with the company. I objected, and then he said that, if I wished him good luck, he would not forsake me more than two years. And he lifted his hand, and he said, 'If I ever forsake you more than two years, I will call the Lord to be my dying judge.' What I meant in my cross-examination, that Mr. Craig was about to be married, and that is why he went to the territories, was that he intended to marry a Miss Woodburn, and a servant told of him that he had a wife and child at home, and it was made public, and he had to leave. When I stated in my cross-examination, in answer to a question of Mr. Taylor, that I knew Mr. James Craig, my first husband, was living when I married Mr. Wilson, and that he had his family, I meant by that, that I knew that afterwards. I did not know that he was alive at the time I married Thomas Wilson. I sign my name both Margaret Craig and Margaret Wilson."

William John Craig, in behalf of plaintiff, testified (depositions filed October 1, 1897):

"I live in Catasauqua. I have lived here 44 years. My first recollection of my existence as a child was at Summit Hill. I was between four and five years old at my first recollection. I lived at Summit Hill with my mother. She lived with her brother a while, and also with a Mr. McLann. Lived there, as near as I can remember, until I was between six and seven years old. Went from there to Northampton county, about five miles from here, I suppose. Then went to Kreidersville post office, and stayed there till April, 1847. Went from there to Philadelphia. Stayed there until 1850, and from there to Baltimore; and stayed in Baltimore until late in the fall of 1853. Then came back to Philadelphia, and stayed there till 1854. Then I went from there to Ireland, and stayed there about five months. Then came back to Philadelphia, and stayed a few months, and then took a trip to St. Louis. Stayed there about four weeks; then came back to Philadelphia. Stayed about eight or nine months, and then came to Catasauqua, and have lived here ever since. My first occupation was working on a farm five miles from here. When I was a boy my mother was known as Margaret Craig. I became well acquainted with Robert Craig and his family. The first I learned of my father

was through Robert Craig's family. I learned that he had been in Philadelphia and left me \$20 with Robert Craig. That was along about 1843 or 1844, or perhaps a little before that; I cannot tell exactly. I learned he was in St. Louis. I don't know whether Robert Craig corresponded with him or not. I never saw any letters. My first recollection of seeing my father was in 1855, in St. Louis. Saw him at Second and Chestnut streets. He was manufacturing furniture. I was introduced to him by Mr. John Gilmore, a cousin of his own. He was in the clothing business, a tailor. The object of my visit to St. Louis was to have my father give me a start in business. I stayed between three and four weeks. He recognized me, and introduced me as his son, but gave me no money to start in business. He promised to give me some. He promised to give me \$500, but he did not do it. He promised to send me a draft. My father was not married at that time. He spoke of my mother, and wondered how she was getting along, and asked about the relations in Philadelphia—about his sister, Mrs. McMullen, and his brother, Robert. Then I came back East. When I came back from St. Louis I came to Catsauqua. He did not send me any money. The next time I saw him was in 1856, in St. Louis, at the same place and same business. I wanted to know why he did not send me the money, and he said he had no money to spare now. He never spoke to me about his relations on that occasion. I stayed perhaps five or six days. I saw his wife on that second occasion at her house. He lived five or six blocks from the store. I had a talk with his wife. I asked her if she knew that my father had been married before, and she said that she had not known it; said, if she had known it, her marriage would not stand in the church—that she was married in a Catholic church and it would not stand. She said she did not think he had been married. I came back East again. Did not hear from him for six or seven years after that. Received information from a gentleman named Dempsey that he was still in business. After that I didn't hear much of him until I got the information from Mr. McIntire, about five years ago, that he was still living. I saw Daniel MacAlister the 10th of last June. I went to Ireland the first time in 1854; visited my father's relations. They received me very nicely; treated me as a full-blood relative. I saw my uncles, John and William Craig. I stayed in Ireland about five or six months. I came back, and went to Philadelphia. Went back to Ireland again in 1870 with my wife. I did not learn from any one that my father had ever applied for a divorce. When I was in St. Louis the latter part of April last I called on the defendants, Mary Louise and Emma Craig, but never got to see them until afterwards, when I saw them in court. They declined to see me at their house. The statement in a letter

to Mary Louise and Emma Craig that my father had been divorced was not true. I was under the impression that it was so. She did not tell me that, or any one else."

Cross-examination: "My age is 65. When my mother left to reside in Philadelphia, I was between 6 and 7. She went to Philadelphia about 1840 or 1841, to the best of my recollection. My recollection of my birth is 1835. I think the visit of James Craig to Philadelphia, when he left the twenty dollars, was in the fall of 1843 or 1844. I did not derive the information about his leaving the twenty dollars from my mother, but from my uncle Robert. I don't think my mother knew that my father was in Philadelphia and left this twenty dollars. She did not say so. I got the information from my uncle. I told my mother afterwards that I got the money from my father—at least, that is what my uncle Robert said; but I did not see my father. I heard, then, that my father was in St. Louis. I had an idea that he was there, but I was not just certain of it. The way I knew it, when I went to see him, was I heard it from a cousin of mine. I think the marriage between my mother and Wilson took place along about 1843 or 1844. I told my mother, when I returned from St. Louis, that I had seen him. The impression that I got about the divorce was that such a thing must have been when they got the second marriage. I wrote my father one or two letters after I arrived to manhood. Did not write to him before I went to St. Louis. I don't know whether his sister, Mrs. McMullen, corresponded with him. I was not present at the marriage of my mother with Wilson. I was then living at Kreidersville. I lived with her from 1847 to 1850, after her second marriage. Don't remember to whom my father introduced me in St. Louis. He asked me about my mother's marriage. There was nothing said between my father and me about a divorce. I cannot say whether he was there before the marriage of my mother with Wilson. I was quite young. It was along there in these years, 1844 and 1845, and it may have been 1843. I have no means of fixing the date. I cannot exactly fix it. I think my mother was making her home with Mr. Bacon about that time, sewing there. She sewed some for Mr. Bacon after she was married. I think it was before her marriage that I received this money. That is my best recollection."

Redirect examination: "She spoke of her marriage to her first husband frequently. She would say different things. She was sorry the thing happened so. When I received that money, it must have been along from 1841 to 1845. They did not know exactly where he was when I was in Ireland. After he settled in St. Louis, he did not keep up in his connection with his family. Family all treated me as a relative. My mother sewed and slept at Mr. Bacon's sometimes. I heard Mr. Gilmore, a cousin in St.

Louis, was killed in the Rebellion in St. Louis. Yes; my daughter, Mrs. Prescott, was visiting in Ireland. I know Miss Anna Smith and Miss Kate Smith. My first recollection of them was in Mauch Chunk, Pennsylvania. I was then about five or six years old."

Recross-examination: "I think that my best recollection is that my father was in Philadelphia and left the money before my mother married Wilson."

Margaret Ann Lathrop (depositions filed October 18, 1897) testified:

Direct examination: "I am a sister of Sarah Craig. My father was Robert Craig. He had brothers—James, John, and William. James lived in St. Louis as long as I can remember, ever since he left Philadelphia. He came to my father's house at the homestead down on the river front. From there he went to St. Louis, and lived there up to the time of his death, so far as I know. I kept up a correspondence with him, I guess, about two years after he left. That continued until 1858. My age is now 63. I got married and went to live at Mauch Chunk, and that is when the correspondence stopped. I have none of the letters. Had a letter from him about the time he was married. He wanted me to come to St. Louis on my wedding trip. I addressed my letters to St. Louis. I don't remember the street. I remember his coming here from St. Louis after he had gone there. I cannot just remember the occasion of his coming. I cannot make up my mind whether it was the time he came out to take the money—some man had come to draw money—whether that was the first time, or whether it was the second time. I guess he was just here once. It was on a Sunday that I remember seeing him the most. I saw him here at the homestead. There was a man here that wanted to draw his money out of the bank, and my father said it was not his brother. He came on after that to draw the money. I did not see him at the time. He stopped at my father's house. Mrs. Wilson was not then married. That is my recollection about it—that she was not married. I cannot remember whether Mrs. Wilson, his first wife, saw him. He gave me a token of remembrance—\$25 and a gold pencil [the gold pencil being attached to the deposition and marked as an exhibit]. I do not remember that my father kept up any correspondence with his brother James. When my father and mother lived at Summit Hill is my first remembrance of James Craig's first wife, Margaret. I knew her son, William John, one of the parties to this suit, and he was there with her at the time. My father got her, and brought her to the house, when she came to this country. She was never divorced from James Craig. I remember William John Craig going to St. Louis to see his father. I heard the history of the marriage with Mrs. Wilson talked of either by her or the family. He did not do anything for her, and she was alone working.

Uncle Thomas, Mr. Wilson, boarded at my mother's and father's at the time. That is all I know about it. William John went out to see his father way back in 1855."

Cross-examination: "Mrs. Wilson lived in my father's family up to the time of her marriage. I was not receiving letters from James Craig at that time. I was too young. It was known that he lived in St. Louis at the time of Mrs. Wilson's residence with my father. (Plaintiff admits that James Craig always lived in St. Louis, from the time he left Philadelphia to the day of his death, and never left the place.) I was a little girl at the time James Craig visited Philadelphia and gave me the \$25 and the gold pencil; about 10 or 12 years old, I should say. All who were at the house at that time have passed away. The pencil was given to me just before I was married, in 1858. The \$25 was given to me the first time, when I was a little girl. I don't think Thomas Wilson was married to Margaret at that time. According to my best recollection, Margaret was not married to Thomas Wilson at the time he gave me the \$25. I cannot remember whether I was present at the marriage of Margaret with Thomas Wilson. They continued to reside with my father after they were married for some time. I cannot remember how long they resided there. She never said anything about her marrying Wilson because James Craig did not do anything for her. Never heard her give any reason. You will have to excuse me, for I have been all through this myself. I had a husband who sued me for divorce, and took me through the courts, and I gained the victory. I am his wife while he lives, but this confuses my mind, and I cannot answer correctly. Kind of bothers me. I think, after the marriage, Aunt Margaret and Wilson went right into their own home. I think they went right into their own home. I don't remember ever having any conversation with her about the reasons she married Thomas Wilson."

Sarah Craig, a daughter of Robert Craig, with whom plaintiff lived from the time she came to America up to the time of her marriage with Wilson, testifies, in answer to Mr. Ottoby: "Q. Do you know what business he has been in out at St. Louis? A. The furniture business. Q. Was his residence ever known as any other place than St. Louis? A. Not to my knowledge; no, sir." Again: "Q. Do you know Anthony MacAlister? A. Yes, sir; he was my uncle. Q. Did you ever hear him speak of Mr. James Craig? A. I have heard him here say, when he came to see mother, that he stopped in to see him when in St. Louis."

Plaintiff offered in evidence the will of James Craig, duly admitted to probate in the probate court for the city of St. Louis, Mo., April 5, 1897, in words and figures as follows:

"In the name of God, Amen: I, the under-

signed, James Craig, widower, of the city of St. Louis, do make, publish, and declare the following to be my last will and testament, hereby revoking and annulling all former wills and codicils by me made. Subject to the payment of my just debts and the expenses of my funeral, I dispose of my entire estate in the following manner, to wit: I give and bequeath the sum of one dollar, and no more, to my son, William John Craig. I give and bequeath my personal estate, share and share alike, to my two daughters, Mary Louise and Emma Craig. I give and devise my real estate, wherever situated, in equal shares to my said two daughters, Mary Louise and Emma Craig, for and during their natural life. On the death of any one of them, I devise half of my said real estate absolutely to the child or children left by her. Should, however, such daughter of mine die without leaving issue, then all of my said real estate shall go to my surviving daughter for and during her natural life, and, upon the death of such surviving daughter of mine, to her child and children absolutely. Should, further, such surviving daughter of mine also die without leaving issue, then all my aforesaid real estate shall go in equal shares to my brothers and sisters, or their legal representatives. The foregoing devise to my daughters shall be conditioned that they or the survivor shall annually expend \$20 for keeping in order my burial lot in Calvary Cemetery, St. Louis, Missouri. Finally, I appoint my said daughters executors of this my last will and testament, without being required to give bond for the administration of my estate. In witness whereof I have hereinto set my hand at the city of St. Louis, Missouri, this 11th day of December, 1893. James Craig."

Plaintiff's counsel next offered in evidence the election of Margaret Wilson, alias Craig, widow of said James Craig, to take a child's part in lieu of dower, which was shown to be duly recorded in the recorder's office of the city of St. Louis, Mo., May 14, 1897, and in probate court of the city of St. Louis, May 26, 1897, and which is as follows:

"In the Probate Court of the City of St. Louis, State of Missouri. In the Matter of James Craig, Deceased. No. 22,951.

"State of Missouri, City of St. Louis—*sa.*: Know all men by these presents, that I, Margaret Wilson, alias Craig, of the city of Catasauqua, county of Lehigh, state of Pennsylvania, the lawful widow of James Craig, deceased, late of the city of St. Louis, Missouri, by whom I have but one child living, namely, William John Craig, do, in lieu of dower of the one-third part of all lands whereof my said husband died seised of an estate of inheritance, hereby elect to be endowed absolutely in a share of such lands equal to the share of said child of my said deceased husband, pursuant to sections 4523 and 4524 of the Revised Statutes of the State of Missouri, hereby intending to elect

to be endowed absolutely in both the lands and personal estate of said deceased in a share equal to the share of a child of said deceased, namely, net one-half of all of said estate.

"[Signed] Margaret Wilson, alias Craig.

"State of Pennsylvania, County of Lehigh—*ss.*: On this 8th day of May, 1897, before me personally appeared Margaret Wilson, alias Craig, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that she executed the same as her free act and deed. In testimony whereof I have hereunto set my hand and seal, at my office in Lehigh county, Pennsylvania, the day and year first above written.

"[Signed]

A. M. Ulrich,

"Justice of the Peace."

It is admitted between the parties that James Craig died seised of an estate of inheritance in fee simple in the property described in the petition and that it is worth the sum of \$22,000. It is also admitted that there is a deed of trust on a part of this real estate as described in the petition.

This was substantially the testimony upon which this cause was submitted to the court. At least, it is a sufficient recitation of the testimony upon the only controverted question in this cause to intelligently discuss the errors complained of by the appellant. The court made its finding upon the issues for the defendants, and dismissed plaintiff's petition; and from this judgment the cause is by appeal presented to this court for determination.

This is an action on the part of plaintiff for partition, and there is but one question to be determined in this controversy: Was the testimony introduced in this cause sufficient to bar the recovery by plaintiff, Mrs. Wilson, of her alleged interests in the lands of the deceased, James Craig? The defense to her right of action in this cause is fully set forth in the answer of respondents, and is based upon the provisions of section 4532, Rev. St. 1889, which provides: "If a wife voluntarily leave her husband and go away and continue with an adulterer, or, after being ravished, consent to the ravisher, she will be forever barred from having her jointure or dower, unless her husband be voluntarily reconciled to her, and suffer her to dwell with him." It will be observed that this statute was enacted for a wise and wholesome purpose. It was intended to announce a principle of sound morality and public policy. The court, in the case of Hoyt v. Davis, 21 Mo. App. 235, very appropriately announces the purpose and object of this statute. It said: "That principle is that the wife, who wholly repudiates her marital obligation by abandoning her husband and living with an adulterer, and who is not subsequently received back by him, forfeits thereby all right and interest in his estate after death, of whatever description,

which the law vests in her in her character of wife. She cannot repudiate, while her husband lives, all the obligations of the marital relations, and take all the benefits which remain after he dies." The question, and the only question, with which we have to deal in this case, is the application of the facts to the true spirit and meaning of this statute. As to the construction of this statute, and the facts to be shown in order to fall within its provisions, we are of the opinion that the American courts are practically harmonious.

The terms of this statute, "If a wife voluntarily leave her husband and go away," has been the subject of much discussion by the courts of this state, as well as other jurisdictions. We deduce the true rule from the best considered cases upon this subject to be that it is not necessary that there should be any special form adopted in the leaving and separation; but any separation, which is demonstrated by her acts and conduct to be voluntary, and which is not brought about by the acts of the husband, or by any restraint upon her person, fully meets the provision that she must voluntarily leave her husband. The leading case in this state, discussing the application of this statute in respect to the bar of the interest of the wife in the lands of her deceased husband, is the case of *McAllister v. Novenger et al.*, 54 Mo. 252. It reviews all the authorities on the subject, and finally announces this doctrine, which we think is in perfect harmony with the moral principle sought to be preserved by the statute. The court says: "Adultery is the main offense which causes the forfeiture. From motives of policy, the law has deemed it wise to restrict the forfeiture to cases where the wife lived separate and apart from her husband. It is manifestly wise, if the husband and wife continue to live together till the death of the husband, to let the scene close with his death, and to preclude the heir from making inquiry as to the conduct of the wife when the ancestor had not complained. But when a separation takes place by mutual consent, or the wife willingly and voluntarily lives apart from her husband, and afterwards lives in adultery, and no subsequent reconciliation takes place, both reason and authority concur in holding that she is barred from claiming dower in her deceased husband's estate."

The case of *Payne v. Dotson*, 81 Mo. 145, 51 Am. Rep. 225, cited and earnestly relied upon by appellant, does not in any way conflict with the *McAllister* Case, supra. It quotes approvingly that case. It simply uses the terms of the statute, and announces that the separation and leaving of the wife must be her voluntary act. This is true, but these requirements of the statute need not necessarily be shown by any particular form of voluntarily taking leave of her husband; but if such requirements do not concur in form, but do in substance, it is within the

spirit and meaning of that statute. This principle is clearly announced and conceded by one of the ablest jurists this nation ever produced. Chief Justice Marshall, in the case of *Stegall v. Stegall*, 2 Brock. 257, Fed. Cas. No. 13,351, in speaking upon practically the same provisions as appear in our statute, says: "The words of the act of assembly are: 'But, if a wife willingly leave her husband, and go away and continue with her adulterer, she shall be barred forever of action to demand her dower, that she ought to have of her husband's lands, if she be convicted thereupon, except,' etc. 1 Rev. Code 1819, p. 404, c. 107, § 10. So far as respects that part of the provision which relates to the wife's willingly leaving her husband, I think it is satisfied by any separation which is voluntary on her part; and I think any separation voluntary which is not brought about by his act or by any restraint on her person. In this case, it does not appear that her person was restrained, and the authority of her parents ceased on her marriage. Her husband wished her to accompany him, and she refused. The separation must therefore be considered as voluntary on her part. The report that he was married with another woman does not justify her refusal to accompany him, because it was not true in fact, and she ought not to have acted upon it. But, if his real situation was such as to justify separation, it could not justify her subsequent conduct. That was incompatible with the continuance of her claims on him as a husband."

We take it that the rule is well and correctly settled in this state as to the construction of the statute under discussion. It only remains to apply the facts as indicated by the testimony introduced in this cause. The only controverted issue in this case is one of fact. It is needless to cite authorities upon the well-settled practice of this court that, in reviewing the action of the trial court upon its findings upon pure questions of fact, this court will defer to the result of the findings of the trial court. *Taylor v. Crockett*, 123 Mo. 300, 27 S. W. 620. We shall not undertake to discuss in detail the evidence as applicable to the only issue in this cause. We have quoted, substantially, the evidence pertinent to this issue, as furnished by the statements of counsel for both appellants and respondents, and will say in respect to such testimony, after a careful consideration of it, that it is sufficient to support the finding of the trial court. It appears that James Craig and the present plaintiff, Mrs. Wilson, were married in Ireland more than 70 years ago. He desired to come to America. Nothing is disclosed that up to the time of his leaving Ireland there was any trouble between them as man and wife. He tried to have her accompany him. She declined on account of ill health. His leaving Ireland, as disclosed by the evidence, was not an abandonment. This is made evident by

his writing her very kindly, after reaching this country. He wrote her two letters. These letters are not in evidence; but Mrs. Wilson admits that, so far as they related to her, they were kind and appropriate from a husband to a wife. The second letter made some rude reference to her parents. This letter was discussed. She never responded to it. James Craig finally took up his abode in St. Louis. In 1836 Mrs. Wilson, then the wife of James Craig, reached this country, and for a number of years her principal stopping place was at the home of Robert Craig, in Pennsylvania. The testimony of Mrs. Wilson indicates clearly that after the receipt of that second letter she never intended to live with James Craig as her husband. This clearly appears from her testimony in chief, and is emphasized by her testimony upon cross-examination. No one can read the testimony in this case, and reach any other conclusion than that Mrs. Wilson Craig knew the residence of her husband James Craig; and, while we do not fully commend the conduct of James Craig, had she sincerely wanted to resume her relations with him as husband and wife, she could easily have done so, and in all probability would have been living with him at the time of his death.

The testimony of her son, William John Craig, as to the \$20 in money he obtained from his father, through his uncle, Robert Craig, the incident of James Craig visiting Philadelphia, and giving the daughter of Robert Craig a gold pencil and \$25 in money, together with the correspondence between the family of Robert Craig and James Craig, with the other facts indicated by the testimony, very well support the theory that plaintiff, Mrs. Wilson Craig, knew that her husband was alive and residing in St. Louis. She says that her marriage to Wilson (which was adulterous by reason of having a legal husband living) was occasioned by Robert Craig telling her that James was dead; and then follows that unreasonable statement that Robert afterwards told her he meant that James was dead as to her. The court was not bound to believe this statement, in view of all the other testimony indicating that she never expected to become reconciled to her lawful husband. From the time of the receipt of the second letter from her husband, it is apparent that she was then determined never to live with him, and was simply waiting for the happening of the conditions which her advisers had impressed her would release her before God and man. We are unable to reach any other conclusion than, if she had been possessed of that high conception of the marital relations all good wives should have, she would have been living with James Craig at the time of his death.

It must be remembered that the domicile of the husband should be the domicile of the wife. James Craig had requested her to

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accompany him to America. After her arrival, conceding that James Craig's conduct was not in every respect proper, yet she knew his residence, and, if she expected to share in his accumulations, his residence should have been made hers. In the case of *Messenger v. Messenger*, 56 Mo. 329, the court very appropriately refers to the duty of the wife. Judge Napton, speaking for the court, says: "We have supposed it was the duty of the wife to live with her husband, and abide by his fortunes, in sickness and health, in poverty and riches, to make his will her law, where it is not in conflict with the law of God. * * * The question is one of desertion, and we hold that the wife is bound to follow the fortunes of her husband, and to live where he chooses to live, and in the style and manner which he may adopt; and such will be the determination of a wife who is devoted to her husband, and who does not assume to be wiser than he is."

The trial court had the right to analyze the testimony submitted to it in this cause. It was the trier of the facts, and, in determining the weight to be attached to such testimony, took into consideration the reasonable probability of its truth. The findings of the court were for the defendants, and, if the testimony reasonably supports those findings, it would not be in harmony with the purposes of the statute herein discussed to permit plaintiff, Mrs. Wilson Craig, after a voluntary separation from James Craig for more than 60 years, and part of the time living in adultery with Thomas Wilson, having nothing to do with the accumulation of the property sought to be partitioned, to recover an interest in such property.

Entertaining the views as herein expressed, the judgment of the trial court will be affirmed. All concur.

PETER et al. v. BYRNE et al.

(Supreme Court of Missouri, Division No. 2.
June 9, 1903.)

HUSBAND AND WIFE—CONVEYANCE OF WIFE'S LAND—JOINT DEED.

1. A deed of a married woman's land was signed and acknowledged by both herself and her husband, and throughout the same the grantors were referred to as "parties" of the first part and in the plural number. The husband acknowledged that he signed the same as his "free act and deed," and after the conveyance, and during the life of both husband and wife, they made no claim to the property, or that the deed was invalid. *Held*, that such deed was the joint deed of both husband and wife, under Rev. St. 1879, § 669, providing that a husband and wife may convey the real estate of the wife by their joint deed, etc., though the husband's name did not explicitly appear in the introductory clause thereof.

Appeal from Circuit Court, Buchanan County; A. M. Woodson, Judge.

Action by Robert N. Peter and another against Cecelia Byrne and others. From a

¶ 1. See *Husband and Wife*, vol. 26, Cent. Dig. §§ 716, 729.

judgment in favor of defendants, plaintiffs appeal. Affirmed.

Vories & Vories and S. P. Reynolds, for appellants. Haynes & Corby and B. R. Vineyard, for respondents.

Statement.

FOX, J. On the 31st day of August, 1900, plaintiffs filed their petition in the Buchanan county circuit court, which is as follows: "Plaintiffs state that on the 1st day of August, 1899, they were and still are the owners in fee and entitled to the possession of the north fifty-six (56) feet of lots six and seven (6 and 7), in block thirty (30), in St. Joseph Improvement Company's addition, an addition to the city of St. Joseph, in Buchanan county, Missouri; that, being so entitled to the possession of said real estate, defendants on the 2d day of August, 1899, entered into possession of the premises and unlawfully withhold from plaintiffs the possession thereof, to their damage in the sum of one hundred dollars (\$100.00); that the monthly rents and profits of said real estate are five (\$5.00) dollars per month. Plaintiffs further state that defendants George A. Byrne and Mark L. Byrne are minors, and that defendant Cecelia C. Byrne is their guardian and curator, duly appointed by the probate court of Buchanan county. Plaintiffs therefore pray that judgment be rendered for one hundred (\$100.00) dollars damages, and for monthly rents and profits in the sum of five (\$5.00) dollars per month, and for all other and proper relief." On September 18, 1900, and during the regular September term, 1900, of said circuit court, defendants, and each of them, filed their answer, which is a general denial.

It is admitted in this cause that Sarah M. Peter is the common source of title; also, that Sarah M. Peter, the mother of plaintiffs, was married to Armenius Peter at the time she acquired this property by a general warranty deed, and continued to be his wife until her death. It was shown by the testimony that appellants were the only children and heirs at law of Sarah M. Peter, the common source of title.

Defendants introduced in evidence the following deed to Annie Oatman:

"This deed, made and entered into this fifteenth day of October, in the year of our Lord eighteen hundred and eighty-three, by and between Sarah M. Peter, wife of Armenius Peter, of the county of Buchanan and state of Missouri, of the first part, and Annie Oatman, wife of John A. Oatman, of the county of Buchanan and state of Missouri, of the second part, witnesseth: That the said parties of the first part, for and in consideration of the sum of five hundred dollars to them in hand paid by the said parties of the second part, the receipt whereof is hereby confessed and acknowledged, have given, granted, bargained, and sold, and by these

presents do give, grant, bargain, sell, and convey, and confirm unto the said parties of the second part, and to their heirs and assigns, forever, the certain tracts, pieces, or parcels of land lying and being in the county of Buchanan and state of Missouri, to wit, fifty-six feet of the north end of lots six and seven in block thirty (30), in the St. Joseph Improvement Company's addition to the city of St. Joseph, to have and to hold the said tract, piece, or parcel of land, with all the privileges and appurtenances thereunto belonging or in any wise appertaining, unto them, the said parties of the second part, and to their heirs and assigns, forever; and the said parties of the first part, for them, their heirs, executors, and administrators, do covenant and agree that they will warrant and forever defend the title to the said tract, piece, or parcel of land, and every part thereof, unto them, and the said parties of the second part, their heirs and assigns, against the lawful claim or claims of all persons whomsoever. In testimony whereof the said parties of the first part have hereunto set their hands and seals the day and year first herein written.

"Sarah M. Peter. [Seal.]

"Armenius Peter. [Seal.]

"State of Missouri, County of Buchanan—ss.: On this sixteenth day of October, 1893, before me, a notary public within and for said county, personally appeared Sarah M. Peter and Armenius Peter, her husband, to me known to be the persons described in and who executed the within and foregoing instrument or deed, and acknowledged that they executed the same as their free act and deed. In witness whereof I have hereunto signed my name and affixed my official seal at my office in said county the day and year last aforesaid.

"My term of office expires January 24, A. D. 1897.

"[Seal.]

John F. Tyler,

"Notary Public of Buchanan County in the State of Missouri."

To the introduction of which deed in evidence plaintiffs objected, because this is a deed of a married woman, and her husband is not joined with her as grantor in this deed, and the same is void, because at that time a married woman could not convey her legal estate without her husband joining her as such in the deed. The court overruled plaintiffs' objection and admitted said deed in evidence, to which action and ruling of the court in admitting said deed in evidence and overruling plaintiffs' objections thereto plaintiffs then and there excepted.

Defendants offered in evidence a general warranty deed, duly executed by Annie Oatman and John A. Oatman, her husband, dated the 10th day of September, 1894, conveying the property herein sued for to all of the defendants herein, which said deed was in due form and properly acknowledged, on said 10th day of September, 1894, filed for record

October 15, 1884, at 8 o'clock and — minutes p. m., and recorded in Book 130, page 231. To the introduction of said deed in evidence the plaintiffs objected. The court overruled plaintiffs' objections, and admitted said deed in evidence, to which action of the court in overruling plaintiffs' objections to said deed and admitting the same in evidence the plaintiffs then and there excepted.

This was substantially the evidence upon which this cause was submitted to the court. At the May term, 1901, of the Buchanan county circuit court, the court rendered judgment for the defendants, and plaintiffs prosecute their appeal to this court, and this cause is now before us for review.

Opinion.

It will be observed that this is a suit in ejectment for the possession of the north 56 feet of lots 6 and 7 in block 30, St. Joseph Improvement Company's addition in St. Joseph, Mo. At the trial it was admitted that Sarah M. Peter was the common source of title; also, that Sarah M. Peter, the mother of plaintiffs, was married to Armenius Peter at the time she acquired this property by a general warranty deed, and continued to be his wife until her death. The evidence showed that Sarah M. Peter departed this life on the 29th day of November, 1889; that plaintiffs Robert N. Peter and Turah Duncan were her only children and heirs at law; that said Armenius Peter departed this life on the 27th day of July, 1899. It was contended by the plaintiffs at the trial that the Peter deed was void and of no effect, because it purported to be a deed of a married woman conveying her real estate without her husband joining her as a grantor in the deed; the name of her husband, Armenius Peter, not appearing in said deed as a grantor. The defendants also introduced a deed in evidence from Annie Oatman and her husband, purporting to convey this property to defendants. The evidence also showed that defendants had had possession of this property 16 years. There is only one question for decision in this cause, viz.: Is this instrument of writing purporting to be the deed of Sarah M. Peter to Annie Oatman void? If said deed is void, then plaintiffs are entitled to recover; if the deed is valid, they are not.

At the close of the evidence in this cause plaintiffs requested the court to declare the law as follows: "The court declares the law to be that the deed introduced in evidence by defendants from Sarah M. Peter to Annie Oatman, recorded in Book 130, at page 244, is void and of no legal effect, and the finding and judgment must be for the plaintiffs." The court refused this declaration of law, and plaintiffs duly preserved their exceptions to the action of the court. This instruction very sharply presents the only question involved in this suit. It will be noted that the deed before us for construction recites that

"Sarah M. Peter, wife of Armenius Peter, of the first part." Then follows the granting clause: "Witnesseth, that the said parties of the first part, in consideration," etc., "have given, granted, bargained, and sold," etc. The concluding clause of this deed recites: "In testimony whereof, the said parties of the first part have hereunto set their hands and seals the day and year first herein written." In addition to this, the covenants of warranty in this deed use this language: "The said parties of the first part do covenant," etc.

Appellants earnestly insist that this deed was inoperative, and did not convey the title vested in Sarah M. Peter, for the reason that she was a married woman, and that the deed upon its face does not show that her husband joined with her as grantor in said deed. Sarah M. Peter was the owner of the legal title to the land in controversy in this suit. In 1883, at the time of the execution of this deed by Sarah M. Peter, she was the wife of Armenius Peter. This leads to the inquiry as to the provisions of the statute then in force in respect to a conveyance of the real estate of the wife during coverture. Section 669, Rev. St. 1879, the law in force at the time of the execution of this deed, provides: "A husband and wife may convey the real estate of the wife, and the wife may relinquish her dower in the real estate of her husband, by their joint deed, acknowledged and certified as herein provided; but no covenant, expressed or implied, in such deed, shall bind the wife or the heirs, except so far as may be necessary effectually to convey, from her and her heirs, all her right, title and interest expressed to be conveyed therein." The provisions of this statute are plain and unambiguous. The proposition must be conceded that, to convey the real estate of the wife, it must be accomplished by the joint deed of the husband and wife. This has been so ruled in numerous cases decided by this court. *Huff v. Price*, 50 Mo. 228; *City of Marshall v. Anderson*, 78 Mo. 87; *Brown v. Dressler*, 125 Mo. 589, 29 S. W. 13. It will be observed that the defect in the deed before us for construction, if it can be called a defect, appears in the introductory clause. The husband signed and acknowledged this deed. The granting clause, the covenant of warranty, and the testimonium clause of the deed use terms in the plural: "Parties of the first part." We have now confronting us the one vital proposition: Did the acts of the husband in respect to this deed constitute such a joining in the deed as to make the conveyance operative?

It must be remembered that from the earliest history of the marriage relation husband and wife have been regarded as one. The wife at all times has labored under very strong disabilities in respect to her property rights. As civilization advanced, wisdom has kept pace with it; hence we have some of the ancient shackles removed from married wo-

men, whose very life and existence was heretofore merged into that of the husband. At the time of the execution of this deed the statute quoted was in force, and it is not deemed an unwise provision; for it had in view many noble purposes other than the mere imposition of a disability. One of the objects was to harmonize the interests of husband and wife, that they both might jointly enjoy the property owned by one or the other. Another was that this enjoyment of interest might not be severed without the knowledge and acquiescence of both. Another was the protection thrown around the wife, in respect to her property, that in the alienation of it she should consult the husband, and have, at least, his concurrence in the sale, by joining her in the conveyance of it. Another was the protection of the marital interest of the husband in the property of the wife. We have carefully examined the deed involved in this suit, and have reached the conclusion that it substantially complies with the spirit of the statute, which requires the husband to join in the deed in order to convey the real estate of the wife. They both signed and acknowledged this deed, and surrendered possession to their grantees, who held and enjoyed the undisturbed possession as long as the grantors lived. Their acts in this respect add additional force to the words of the deed. Their acts gave a practical construction to this deed that it was a joint instrument, and recognized that it conveyed the estate intended to be conveyed. We take it that the construction given this deed by the parties joining in it is not only supported by sound reason, but by the weight of authority wherever this precise question has been before the courts. It must be noted that this statute is dealing with the real estate of the wife; simply making a provision as to how it may be conveyed. It is true that the husband has a marital interest, which, when he joins in the deed, it is supposed to convey; but it must be remembered that the husband is not laboring under any disabilities, and, as to his acts in the execution of a deed, they will be construed most strongly against him. In his acknowledgment of this deed, he says it is his "free act and deed." He was presumed to know the contents of it, and was presumed to know the purposes for which it was executed.

We start out in the discussion of this proposition, supported by the elementary principle "that every deed must, if possible, be made operative." In the case of *Elliot v. Sleeper*, 2 N. H. 525, one of the earliest cases on this subject, the doctrine is very clearly announced. It was said by the court in that case: "And for the purpose of our present inquiry it may be admitted that the usage, however diversified in its forms, always requires the husband and wife so far to join as to convey at the same time, on the same paper, and both in language suitable to pass the title of real estate. Whether this req-

uisition has here been fulfilled is a question of some difficulty, on both authority and principle. It cannot be doubted that the signature, sealing, and acknowledgment of this deed by the husband, being on the same paper with those of the wife, and in the usual form, are in themselves sufficient. But it is objected that he is not named in the deed as a grantor, and that, without being so named, the deed is not his deed, and in respect to him is altogether inoperative. But it seems well settled that whoever signs and delivers an unsealed writing is bound by the promises contained in it, though his name may not appear on the paper, except in his signature. *Little v. Weston*, 1 Mass. 156; *Fisher v. Leslie*, 1 Es. Cases, 426. This seems founded on the obvious and reasonable principle that such acts amount to an adoption of all which precedes the signature, and that no other legitimate cause for these acts can be assigned than a design to make all the promises to which the signature is affixed the promises of the subscriber. * * * In sealed instruments, such as bonds and wills, the same principle applies, and appears to be supported by numerous authorities."

To the same effect is *Woodward v. Seaver*, 38 N. H. 29. It will be noted that the case of *Elliot v. Sleeper*, supra, is reaffirmed. The court said: "In this case *Hannah I. Woodward* owned the land, and in order to convey her right it was necessary that her husband should join with her in the conveyance. Her separate deed would be void, and convey no title. The husband's name does not appear in the body of the deed, but there is a clause purporting to release *Hannah I. Woodward's* right of dower, and all her other rights in the premises, in which she is described as wife of the grantor. It therefore appears on the face of the deed that she was a married woman, and consequently that to give her conveyance effect it was necessary her husband should join in the deed. Her husband signed and sealed the deed. This would seem to bring the present case very distinctly within the authority of *Elliot v. Sleeper*, 2 N. H. 525. In that case, as in this, the land belonged to the wife; the deed purported to be her sole conveyance, but was signed and sealed by her and her husband; and she is described as being the wife of *Nathaniel Brown*, who signed and sealed the deed. From this the court say it appears that it was necessary he should join with her in the conveyance. So it appears, from the deed in the present case, that *Hannah I. Woodward* was a married woman, and that to make her deed operative it was necessary her husband should join in the conveyance."

In Connecticut the Supreme Court made application of a statute very similar to ours upon this subject. In discussing this question it said: "The petitioner insists that the absence of the names of the two husbands from the body of the deed invalidates the conveyance so far as the interest of their respective

wives is concerned, and asks for the removal of the cloud thereby placed upon his title. But this claim is without foundation. Except in cases where there is a statutory requirement of some other or further formality, the act of signing a written contract is, as a matter of law, the adoption of all that is contained therein—the assumption of all the obligations which its language expresses. No other intent can be legitimately imputed to the signer, and whenever it is permissible the law will give effect to such intent. Our statute provides that ‘all conveyances of the real estate of married women executed by them jointly with their husbands, and duly acknowledged and recorded, shall be valid and effectual to transfer such estate.’ The land was the property of the wife. Power to convey is given to her, to be effectually exercised, it is true, only when the husband joins in the execution—when he signs her deed of conveyance and duly acknowledges the act. By signing, he gives proof that he has had an opportunity to protect her from an improvident contract, and that he surrenders to her grantee all the right, title, and interest which he as husband has in the land.” *Pease v. Bridge*, 49 Conn. 58.

The statute referred to in this case is substantially ours. Its terms vary somewhat. It provides that “all conveyances of the real estate of married women executed by them jointly with their husbands, and duly acknowledged and recorded, shall * * * transfer the estate.” Our statute uses the term, “by their joint deed acknowledged and certified as herein provided.” Both statutes require a conveyance, and it must be executed and acknowledged. This case, construing the effect of a conveyance similar to the one before us, with a statute so nearly like ours, is very strong support to the conclusion we have reached in this cause.

In the case of *Schley v. Pullman Car Co.* (C. C.) 25 Fed. 800, the language is so appropriate to the facts in this case that we quote it. The court said: “It is insisted by counsel for the plaintiff that the statute required the husband to be a joint grantor with his wife; that his mere signing, sealing, and acknowledging the deed was not sufficient, when his name did not appear in the granting clause or body of the instrument; and that it was therefore inoperative and void. It was only in substantial compliance with this statute that the wife could convey the title to her lands. The husband was required to join her in the execution of a deed. Did the husband so join in the execution of this deed? That he intended to do so, and thought he had, admits of no doubt; and it is equally clear that both the wife and husband undertook in good faith to convey their entire interest and estate in the premises to the grantees. The husband signed, sealed, and acknowledged the deed, to enable his wife to convey her title, and to convey any claim or right, present or contingent, that he had in

the land. The wife and her husband rested, and no doubt died, in the belief that they had joined in the execution of a deed in compliance with the statute; and it remained for some one, after the lapse of 29 years, to discover, as he supposed, that they had utterly failed to accomplish what they undertook to do, and what they supposed they had done. Courts should uphold deeds and other contracts when the intention of the parties is clear. Although the husband’s name does not appear in the body of the deed, he signed, sealed, and delivered it, and thus joined his wife in its execution.”

The views of courts in modern times upon the construction of instruments conveying real estate are very appropriately expressed in the case of *Roberts v. McIntire*, 84 Me. 362, 24 Atl. 867. In discussing this subject, it is said: “There are certain elementary principles applicable to the construction of written contracts which are matters of such common knowledge and universal acceptance as to render the citation of authorities a profitless task. There are pregnant legal maxims which are the deductions of reason and the conclusions of common sense, approved by the wisdom of ages. But their practical application must, in some instances, be qualified or restricted by technical rules, which ascribe definite meanings to particular expressions, in order to secure uniformity and to enable parties to understand the effect of the language employed in contracts made or accepted by them. All agree, however, that it is the constant desire of the law to uphold a contract, rather than destroy it; to effectuate the intention of the parties, and not to defeat it. * * * But, with respect to conveyances of real estate, courts in modern times have shown more consideration for the substance of the contract than for the shadow, for the passing of the estate according to the intention of the parties than for the manner of passing it; and, whenever the rules of language and of law will permit, that construction will be adopted which will make the contract legal and operative in preference to that which would have an opposite effect.”

The Supreme Court of Florida, in the case of *Evans v. Summerlin*, 19 Fla. 358, construing a deed like the one before us, and under a statute nearly identical with ours, held that the signing and acknowledging of the deed by the husband was, in contemplation of the statute, a joining with his wife in such conveyance.

To the same effect is the case of *Stone v. Montgomery*, 35 Miss., loc. cit. 107. The court very clearly interprets the deed in that case. It said: “The last objection urged against the deed is that the husband is not a party grantor, and named as such in the body of it, and, therefore, that it is not the joint deed of husband and wife, and is insufficient, under our statute, to convey her separate property. It would be a sufficient

answer to this objection that it was not set up either in the original or amended bill. On the contrary, the deed is treated in the pleadings as the joint deed of the husband and wife. But, if the objection had been made in the pleadings, it would be untenable. The property is admitted to belong to the wife, to her sole and separate use; and, of course, the husband had merely a secondary interest in it. It was her act which was essential to the conveyance. But he signed the deed, and acknowledged it as his act and deed, for the purposes stated in it. That was sufficient to show his consent and co-operation in the conveyance in the most certain form; and the reason of the statute, in requiring the conveyance to be made by the joint deed of the husband and wife, is that it may be made with his aid and consent. His signing, delivery, and acknowledgment of the deed would estop him from setting up any claim to the property against the grantee, and show that the title of the wife was conveyed by his co-operation. Under such circumstances, the deed is sufficient under the statute to convey the wife's estate."

Numerous other cases maintain the same position. With few exceptions, the expressions of all the courts upon the question directly involved in the construction of this deed are harmonious. *Ingoldsby v. Juan*, 12 Cal. 564; *Dentzel v. Waldie et al.*, 30 Cal. 138; *Mardes v. Meyers et al.* (Tex. Civ. App.) 28 S. W. 693; *Miller v. Shaw*, 103 Ill., loc. cit. 202. There is a clear distinction between the cases where the husband undertakes to convey the real estate of the wife and the deed fails to disclose the wife as one of the grantors. As before stated, the wife labors under certain disabilities, and the courts, with the view of protecting her rights, insist that the instrument shall disclose the performance of every act on her part necessary to convey her estate. In the case of *Hrouska v. Janke*, 66 Wis. 252, 28 N. W. 166, the principal cases relied upon by appellants in this case are reviewed, and the court announces that they are distinguishable from the cases of the character before us for determination.

This deed should be construed in accord with the clear intention of the parties who executed it. Judge Burgess very appropriately said, in case of *Walton v. Drumtra*, 152 Mo., loc. cit. 497, 54 S. W. 233: "The rigid rules of construction applied to deeds and wills in former years have in modern times been somewhat modified, so that deeds are now construed so as to carry into effect the intention of the parties thereto, and wills the intention of the persons executing them." See, also, *Mills v. Catlin*, 22 Vt. 98. After 16 years of undisturbed possession of this property, under an instrument executed by the husband and wife, acknowledged by them to be their free act and deed, to hold that, because the husband's name does not explicitly appear in the introductory clause of the deed, it was invalid, because not jointly made,

would, in our opinion, be doing violence to the spirit of the statute, as well as an absolute abandonment of substance and a complete surrender to form.

The judgment in this cause should be affirmed, and it is so ordered. All concur.

MCDONNELL et al. v. DE SOTO SAV. & BLDG. ASS'N et al.

(Supreme Court of Missouri, Division No. 2
June 9, 1903.)

BUILDING ASSOCIATIONS — LOANS — BY-LAW FIXING MINIMUM PREMIUM — USURY — TRUSTEE — COMPETENCY — ESTOPPEL — FAILURE TO PLEAD — MORTGAGE SALE — INADEQUACY OF CONSIDERATION — SETTING ASIDE.

1. Statement by the secretary of a building association that plaintiff could get a certain loan, but he would have to "pay pretty high for it," about 15 per cent., in consequence of which he bid the amount of premium suggested, could not be construed into an agreement between the association and plaintiff by which he was to receive the loan at the premiums bid by him.

2. Rev. St. 1899, § 1362, relative to building associations, provides that loans shall be made "to shareholders who shall bid the highest premium." The statute relative to interest fixes the legal rate at 6 per cent., but provides that 8 per cent. may be contracted for. *Held*, that where a building association had a by-law which fixed a minimum premium of 10 per cent., thereby destroying competitive bidding below that amount, and there was no written application for a loan, and the only agreement in writing to pay interest was found in the bonds, which called for 6 per cent., given by the borrower, any premium paid by him was usurious.

3. Where the premiums paid to a building association are to be treated as interest, because of the fact that they were fixed arbitrarily, instead of by free competition, the total rate per year of interest charged cannot be calculated, without evidence as to the time when the stock will probably mature.

4. A director of a building association is not incompetent to discharge the duties of trustee in a deed of trust given the association on a loan.

5. Mere inadequacy of price, in the absence of other considerations, is no ground for setting aside a mortgage sale, unless it be so unconscionable as to shock the moral senses.

6. While, as a general rule, an estoppel must be pleaded, failure to plead it may be waived by plaintiff by proceeding with the trial of the case, without objection, as if the defense relied on had been pleaded.

Appeal from St. Louis Circuit Court; Jas. E. Withrow, Judge.

Suit by John McDonnell and wife against the De Soto Savings & Building Association and others. From a judgment dismissing the bill, plaintiffs appeal, pending which, on death of John McDonnell, suit was revived in the name of his heirs and administrator. Reversed as to defendant savings association, and affirmed as to the others.

James J. O'Donohoe, for appellants. Campbell & Thompson, for respondent DeSoto Ass'n. Thomas E. Ralston for respondent Anderson.

¶ 5. See *Mortgages*, vol. 25, Cent. Dig. § 1540.

BURGESS, J. This suit was instituted by John McDonnell and Catharine McDonnell, his wife. Since the suit has been pending in this court John McDonnell died, and the suit was duly revived in the name of his heirs and the administrator of his estate. The purpose of the suit is to have canceled and set aside two certain bonds and two deeds of trust securing the same, executed by McDonnell and wife to defendant Hartnett, as trustee of the De Soto Savings & Building Association, as well as the sale of the property described in the deeds of trusts by said trustee and the deed by him to the defendant Anderson.

The petition is in two counts. In the first count it is alleged, in effect, that on the 10th day of April, 1895, plaintiffs, McDonnell and his wife, borrowed of defendant De Soto Savings & Building Association the sum of \$3,000, at the stipulated rate of 15 per cent.; that the premium for said sum was deducted, and the balance of \$2,550 was paid to plaintiffs; that this loan of \$3,000 was on the 27th of August, 1897, secured by a bond and deed of trust on certain property on Bremen avenue, in the city of St. Louis, Mo.; that on the 14th day of May, 1896, McDonnell and wife borrowed of the defendant association the sum of \$13,000, at the stipulated rate of interest of 6 per cent. per annum; that from this sum 15½ per cent. premium was deducted, and the balance of \$10,985 was paid to McDonnell; that to secure the payment of said \$13,000 loan McDonnell executed his bond and deed of trust on the same property on Bremen avenue. The petition then recites that from the 10th day of April, 1895, when the first payment on stock and interest was made, until the 19th of May, 1899, when the last payment on stock and interest was made, McDonnell paid to the association the sum of \$5,795; that since the 10th of April, 1895, McDonnell has been the owner of 80 shares of the stock of said defendant association, which stock, together with the earnings, profits, and dividends, "aggregate a sum the exact amount of which is unknown to plaintiffs, but which should have been applied by said association to the payment of the loans aforesaid"; that in said deed of trust Joseph P. Hartnett was made trustee, and that in said capacity he offered the property described in said deeds of trust for sale on the 18th day of July, 1899, and sold it to Lorenzo E. Anderson for the sum of \$13,100, and executed to him his deed as trustee therefor; that said property was of the value of \$55,000 on the day of sale; and that plaintiffs had made all legal payments to the association that could be demanded, and were not delinquent at the time of the foreclosure under said deeds of trust. The petition then closes with a prayer for relief, which is as follows: "Wherefore plaintiffs pray that the bonds aforesaid be delivered up to plaintiffs to be canceled; that said deeds of trust be ordered canceled on the records; that a gen-

eral accounting be taken between plaintiffs and defendants, and the amount due defendants, if any, be judicially ascertained and determined; that defendants be ordered to pay to plaintiffs the difference between the actual value of said property and the amount that plaintiffs owe defendants, if any be so found to be due them, and for their costs in this behalf expended; and for such other orders, decrees, and judgments as may be proper in view of the premises." The second count alleges that plaintiffs borrowed from the association the amount stated in the first count, executed the bonds and deeds of trust mentioned in the first count; that the payments were deducted as alleged in the first count; and that plaintiffs had paid to the association the amounts stated in the first count. This count alleges that Joseph P. Hartnett, trustee in said deeds of trust, "confederating with his codefendants, De Soto Savings & Building Association and Lorenzo E. Anderson, to obtain said property for their own use, and to defraud plaintiffs of said property, and in pursuance of this fraudulent design, claimed that plaintiffs were delinquent in payments under said deeds of trust, and caused the real estate described in said deeds of trust to be advertised and sold under both deeds of trust; the same being purchased by defendant Lorenzo E. Anderson colorably, and not for value, but for a pretended consideration of \$13,100, in order that he might make such purchase, not for himself, but in reality for all of said defendants." The petition then alleges that the property was sold for a pretended consideration of \$13,100, while the property was at the time of the sale and now is worth \$55,000; that said sale was made on the 18th day of July, 1899, and the trustee's deed made, executed, and delivered by the trustee to said Anderson; that at the time of the foreclosure sale plaintiffs had made all payments that could be lawfully demanded; and that they were not delinquent. Then follows the prayer for relief: "Wherefore plaintiffs pray that the bonds aforesaid be delivered up to plaintiffs for cancellation; that said deeds of trust be canceled; that said sale be set aside and for naught held, and that the trustee's deed be canceled, and the title to said property be divested out of the said defendants and vested in plaintiffs; that an accounting be had between the plaintiffs and defendants, and the amount found to be due, if any, by plaintiffs to defendants, be ordered to be paid, which plaintiffs are ready, willing, and able, and hereby offer and agree to do; and for such further orders, decrees, and judgments as may seem proper in view of the premises."

The De Soto Building & Loan Association and Lorenzo E. Anderson filed separate answers, but they are in all respects the same, except that the answer of Lorenzo E. Anderson differs from that of the association in this: He alleges that he bought said proper-

ty, not for himself or defendant association, but for the Wiggins Ferry Company. Their answers allege that in April, 1895, plaintiff John McDonnell was, and for a long time theretofore had been, and that he continued to be until about July, 1898, a stockholder in the defendant association, and that until March, 1896, he was a director of said association. They then set out a number of the by-laws of the association; the sections quoted having particular reference to the making of loans and the foreclosure of securities. They then recite that in April, 1895, John McDonnell was owner of 80 shares of stock of the association; that he made application for a loan of \$3,000, and having bid 15 per cent. therefor at auction, and being the highest bidder, said sum was knocked down to him by the defendant association, and was, less the premium, paid to said McDonnell; that to secure the payment of said sum McDonnell gave a deed of trust on property on Prairie avenue, in the city of St. Louis, Mo.; that in September, 1897, upon McDonnell's application, said loan of \$3,000 was transferred from the property on Prairie avenue to the property described in the petition, on Bremen avenue, and that said bond and deed of trust on the Prairie avenue property were canceled and released, and the association took from McDonnell a bond and deed of trust to secure said loan of \$3,000 on the said Bremen avenue property; that said \$3,000 deed of trust has not been paid, and that there still remained due to the association on said loan the sum of \$2,415.56, which was paid out of the proceeds of the foreclosure sale hereafter mentioned; that on May 13, 1896, McDonnell applied for a loan of \$13,000 on his remaining 65 shares of stock, and at a meeting of the association held on that date bid 15½ per cent. therefor as premium at auction, and said sum was knocked down to him as the highest bidder; that the premium of 15½ per cent. was deducted, and the remainder paid to plaintiffs, and to secure the payment of said loan of \$13,000 plaintiffs executed a bond and deed of trust upon the Bremen avenue property; that thereafter plaintiff McDonnell continued to pay monthly dues and interest upon the two loans of \$3,000 and \$13,000 until he became delinquent; that, commencing with August 11, 1896, McDonnell began to be delinquent in his payments upon account of his 80 shares of stock pledged as aforesaid, said payment being \$80 per month dues and \$80 per month interest; that the association was lenient with him with respect to its right to foreclose, and allowed him a reasonable chance to pay up before finally proceeding to sell his property; that under the terms of section 9 of its by-laws, if the borrower "failed totally in his payments during the space of six months, or if the balance due by the borrower has been allowed to accumulate until it equals the sum of six months' dues and interest, then the board may, in

its discretion, proceed at any time to advertise for sale, under said deed of trust, the property pledged to the association by such borrower"; that McDonnell had for the period of six consecutive months prior to the date of the sale thereafter mentioned failed to pay the dues, interest, fines, and other charges required of him by the by-laws, and had become indebted to the association in a sum equal to the gross amount of the dues, interest, fines, and other charges for the period of six months upon both said deeds of trust; that thereupon, in pursuance of law and by-laws of said association, the board of directors of the said association requested the trustee named in said deeds of trust to proceed to advertise and sell said property described in said deeds of trust; that the sale was duly and legally advertised in accordance with the terms of said deeds of trust for a period of 20 days in the St. Louis Star. and on the 18th of July, 1899, the property was by said trustee sold, pursuant to the terms of said deeds of trust, to Lorenzo E. Anderson, the highest and best bidder, for \$13,100, which sum was thereafter received by the trustee from Anderson, and the trustee executed and delivered to him his deed to the said Bremen avenue property; that the trustee paid out of the proceeds of said sale the charges, costs, and expenses connected with the execution of his trust, the amount due the association under the said \$13,000 deed of trust and under the said \$3,000 deed of trust, leaving a balance in his hands of \$15.57. The second count, after generally denying the allegations of the petition, sets up the same state of facts as alleged in the first count, heretofore recited, and concludes as follows: "Defendant says that said Anderson bought in good faith and for the actual consideration named, to wit, \$13,100, and neither this defendant nor the said trustee had any interest directly or indirectly in said purchase. This defendant says that the said trustee paid out of the proceeds of the sale the charges, costs, and expenses connected with the execution of his trust, and the amount due this defendant under said \$13,000 deed of trust, and the amount due to it under said \$3,000 deed of trust, leaving a balance in his hands of \$15.57."

Joseph P. Hartnett filed a separate answer, and after a general denial pleaded as new matter that he was named as trustee in the deeds of trust mentioned in plaintiff's petition, and that, there having been default made by McDonnell under the \$13,000 deed of trust, he was requested by the association, the holder of the bond secured by said deed of trust, to advertise and sell the property described therein; that on the 23d day of June, 1899, he proceeded to advertise said property for sale in the St. Louis Star; that said advertisement was continued in said paper for 20 days, and upon the day advertised to be the day of sale, which was July 18, 1899, he sold, in accordance with

the requirements of said deed of trust and said advertisement, the property therein described, at public vendue, to the highest bidder, at the east front door of the courthouse in the city of St. Louis, and, Lorenzo E. Anderson being the highest bidder, the property was knocked down to him at the sum of \$13,100 cash, which price Anderson paid to Hartnett on the same day, and Hartnett, as trustee, applied the same to the payment of the costs and expenses of the sale, to the amounts due, as he was informed, to the defendant association under the \$13,000 and \$3,000 deeds of trust, leaving a balance in his hands of \$15.57, which he was, and has always been, ready and willing to pay plaintiffs; that the sale was made by him in good faith, and in strict accordance with his powers and duties as trustee; that he paid out the proceeds of said sale as he was required legally and equitably to do; that said Anderson was a bona fide purchaser, and that defendants were not interested directly or indirectly in said purchase, "nor in any wise in said sale except as trustee as aforesaid." His answer to the second count is the same as his answer to the first count.

The replication to the answer of the association pleads that the amounts charged plaintiffs by the defendant association as dues, interest, fines, premiums, and other charges, were illegal and usurious; that the sections of the by-laws set up in the association's answer, as well as section 2814, Rev. St. Mo. 1889, concerning premiums, on which said by-laws are alleged to be based, are in conflict with and contravene section 53, art. 4, of the Constitution of the state of Missouri, and also that they violate sections 5973, 5975, pp. 1428, 1429, Rev. St. Mo. 1889, and are also in violation of Sess. Acts 1891, pp. 169, 170.

The replication to the answer of Lorenzo E. Anderson states that the by-laws concerning interest, dues, and other charges were illegal because of the facts stated in the replication to the answer of the De Soto Savings & Building Association, and that said Anderson and the Wiggins Ferry Company knew this fact; that Anderson did not purchase said realty in good faith; and that he and the Wiggins Ferry Company "had full knowledge and notice of the wrongful and unlawful acts of said Anderson's codefendants." The remainder of this replication sets up the illegality and unconstitutionality of the by-laws and statutes in the same manner in which they are pleaded in the replication to the answer of the association.

The replication to the answer of Joseph P. Hartnett sets up the illegality of the by-laws and the unconstitutionality of the by-laws, alleging that they contravene section 53, art. 4, of the Constitution of the state of Missouri, and states that Hartnett has been since April, 1895, a shareholder in the defendant association, a member of its directory, president thereof, and knew that the by-laws were illegal, and that he also knew that plaintiffs

were not in default at the time he advertised said property for sale.

The trial resulted in favor of defendants, dismissing plaintiffs' bill, and judgment against them for costs. They appeal.

The facts are briefly stated by counsel for the defendants association and Hartnett as follows: On the 10th day of April, 1895, John McDonnell, since deceased, was the owner of 80 shares of stock in the defendant association. He was also at that time a director in the association, and continued to be such until the year 1898. On that day he borrowed from the association, on 15 shares of his stock, the sum of \$3,000, from which was deducted \$450, the premium bid at auction by McDonnell for the preference, and the balance of \$2,550 was paid by the association to him. To secure the payment of said \$3,000 McDonnell executed his bond in favor of the association in that amount, bearing 6 per cent. interest, and a deed of trust on property on Prairie avenue, in the city of St. Louis, Mo. On the 14th day of March, 1896, he again made application for a loan of \$13,000 on his remaining 65 shares of stock, and said sum, being put up at auction, at which he was highest bidder, was awarded him on his bid of 15½ per cent. The premium of \$2,015 was deducted, and the balance of \$10,985, was either given to him or paid out at his direction. To secure the payment of this sum McDonnell executed in favor of the association his bond for \$13,000, bearing interest at 6 per cent. per annum, and deed of trust on property of McDonnell situated on Bremen avenue, in the city of St. Louis, Mo. About August 24, 1897, at the request of McDonnell, the association canceled the first bond and deed of trust, and accepted in lieu thereof a new bond for the same amount and a second deed of trust to secure the payment of the same, upon the Bremen avenue property also. The first bond and deed of trust were canceled, and McDonnell executed a new bond for \$3,000, bearing 6 per cent. interest, and a deed of trust on the Bremen avenue property. Said bonds were alike in form, and each provided as follows: "And that they will faithfully pay all dues and fines on said stock, and also the interest aforesaid, and perform any other obligation required of them by the by-laws, rules, and regulations required, or may be, by said association or the board of directors, and keep the association free from all losses and damages by reason of said loans. Now, therefore, the condition of this obligation is such that, if the above-bound obligors, their heirs, etc., shall and do well and truly pay or cause to be paid unto the above-named association, its attorney, successors, or assigns, the sum of [\$13,000 in one case, and \$3,000 in the other], on account of the stock in said association, and the interest on said loan when due (monthly dues and interest being payable on the second Wednesday of each and every month from the date of these presents until the dissolution of the association)," etc., "then the above obligation to be void; provided, however, that it

is expressly agreed that if at any time default shall be made in the payment of said monthly dues, interest, or fines, and the same shall remain unpaid for the space of six months after any payment thereof shall fall due, then the whole principal debt, with interest thereon from the date of these presents to the date of sale at the rate of 6 per cent. per annum, shall, at the option of the association, its successors, and assigns, immediately become due and recoverable, and the payment of said principal sum and all interest thereon, as well as dues and fines then due and payable, may be enforced and recovered at once by sale under said deed of trust of the property described therein, according to the terms and provisions of said deed of trust." In each deed of trust it was provided as follows: "That if at any time default should be made in the payment of monthly dues, interest, or fines, and the same shall remain unpaid for the space of six months after any payment thereof shall fall due, then the whole principal debt shall, at the option of said association, its successors, and assigns, immediately thereupon become due and recoverable, and payment of said principal sum, and all interest thereon, as well as monthly dues and fines then due, may be enforced and recovered at once by sale, under the deed of trust, of the property herein described, according to the terms and provisions of this deed of trust. * * * But if the said parties of the first part, or their legal representatives, shall fail to pay or cause to be paid unto the said association, its attorneys, successors, or assigns, the monthly installments of dues, interest, and fines * * * as above provided, and according to terms, tenor, and effect of the said bond, then this deed shall remain in force, and the said party of the second part may proceed to sell," etc. The only difference in the bonds is the amounts agreed to be paid, viz.: In the one case McDonnell agreed to pay on the 65 shares of stock the sum of \$130 a month, \$65 being payment of \$1 a month on each share of stock, and \$65 being interest at 6 per cent. on \$13,000; and in the other case, viz., the \$3,000 loan, McDonnell promised in the bond to pay \$15 a month on his 15 shares, and \$15 a month interest, being 6 per cent. of \$3,000. Accordingly McDonnell was under obligation to pay to the association monthly the sum of \$80 on dues and \$80 interest, or the aggregate sum of \$160 per month. From the month of April, 1897, to the month of December, 1897, a period of 8 months, McDonnell paid no dues, interest, or fines. He then began his payments of \$160 a month, and continued to make them monthly until May, 1898, but failed to pay his dues, interest, and fines for the 8 months from April to December, 1897, though often requested by the association to do so. The association decided in June, 1898, to sell the security, viz., the Bremen avenue property, and requested Hartnett, the trustee, to do so. He gave the required 20 days' public advertisement through the St. Louis Star, and on July

18, 1898, sold the property at the east front door of the courthouse in the city of St. Louis, Mo., to Lorenzo E. Anderson, the highest bidder, for \$13,100. At this time McDonnell owed to the association, after allowing him all just credits, the sum of \$12,900 and some odd dollars. He was present at the sale, and offered no objection to the sale of the property or the manner in which it was being sold. He was a director of the association when both advancements were made.

Section 1 of the by-laws of the association provides that no loan shall be made at a less premium than 10 per cent. It is argued by plaintiffs that, because the by-laws of the association provide that "no loan shall be made at a less premium than 10 per cent., there is thereby fixed an arbitrary rule, which in effect told McDonnell that he could not procure a loan from the association at less than 10 per cent. premium, and, although McDonnell bid 15 per cent. premium on the \$3,000 borrowed, and 15½ per cent. upon the \$13,000, the premiums paid by him were usurious. In support of this contention plaintiffs rely upon the case of Price v. Empire L. Association, 75 Mo. App. 551, in which it is held that as the loan was not sold at an open meeting of the directors, but the premium or costs of preference were fixed by the arbitrary demand of the corporation, the premium paid was usurious. But in the case at bar the evidence clearly shows that the loans to McDonnell were made at public meetings of the board held for that purpose, and that he was present in person upon each occasion, and was the highest and only bidder of the \$3,000 loan, upon which he bid a premium of 15 per cent., and for the \$13,000 loan a premium of 15½ per cent. While McDonnell testified, with respect to the first-named loan, that Brady, the secretary of the association, told him that he could get it, but that he would have to pay pretty high for it, "about 15 per cent.," and, with respect to the \$13,000, that Brady told him he would have to pay 15½ per cent. premium upon it, and in consequence of these statements he bid the amounts suggested by Brady, this cannot be construed into an agreement between the association and McDonnell by which he was to have the loans at the premiums bid by him, but was merely the expression of opinion by Brady as to the amount of premium he (McDonnell) would have to pay if he secured the loans. There is nothing disclosed by the record to justify the conclusion or inference that McDonnell was constrained by any arbitrary action of the defendant association or its officers in bidding for the loans, or either of them, unless it was by the ordinance fixing the minimum rate of premium at 10 per cent.

It has been held by the Courts of Appeals, in numerous cases arising under the act of 1887, that, if the loan was made in the manner provided by that statute, it was a valid loan, though the premium, interest,

etc., aggregated more than a lawful rate of interest, but, if the statute was disregarded, it would not protect the loan from the charge of usury, and that, where the association had a fixed minimum premium at which they made loans, that was an act in disregard of the statute and the loan usurious. *Brown v. Archer*, 62 Mo. App. 277; *Moore v. Building & Loan Ass'n*, 74 Mo. App. 468; *Barnes v. Building & L. Ass'n*, 83 Mo. App. 466; *Clark v. Mo. Guar. Ass'n*, 85 Mo. App. 388; *Fry v. Savings Ass'n*, 88 Mo. App. 289; *Cover v. Building & L. Ass'n*, 93 Mo. App. 302; *Arbuthnot v. Brookfield Loan & Building Ass'n* (Mo. Sup.) 72 S. W. 132. But the loans in the case at bar were made under the present statute, and are governed by section 1362, Rev. St. 1899, which does not require bids for money offered to be loaned to be made at competitive bidding in open meeting called by the directors, but provides that loans shall be let to "shareholders who shall bid the highest premium." That McDonnell, as a stockholder, was entitled to bid for the loans, and, if the highest or the only bidder, entitled to the loans, we think clear. *Ruppel v. Mo. Guar. S. & B. Ass'n*, 158 Mo. 613, 59 S. W. 1000. But the question is whether the by-law fixing a minimum premium at 10 per cent., which defendant association admits in its answer was in force at the time of the loans voted, made them subject to the defense of usury, though the premium actually received was in one instance only 5, and in the other only 5½, per cent. in excess of the minimum rate prescribed by the by-law. The authorities upon this feature of the case are not in harmony; but in this state the rule seems to be that such a by-law is inconsistent with the statute, which requires free and open competition. Under this by-law the bidder was compelled to pay more than 10 per cent., while there could have been none under that rate, because of the arbitrary minimum rate fixed by the by-law.

While the case of *Arbuthnot v. Brookfield Loan & Building Ass'n*, supra, was under the law of 1889, what was said with respect to a by-law of the association fixing the minimum rate of premium at 16 per cent. is directly in point in this case. It is as follows: "Defendant had a by-law declaring that the premium to be received for preference of loans should not be less than 16 per cent.; but, when this loan was let to plaintiff, the secretary of the association, who cried the bids, opened the auction by announcing that no bid would be received under 16 per cent., and thereupon bids were made over that rate until the loan was sold to plaintiff at 25½ per cent. In our view, that manner of letting the loan gave effect to the objectionable by-laws, and was in the face of the statute directing free and open competition. The by-law was enforced by the opening declaration of the secretary. The bidders were compelled to bid more than 16 per cent.,

and, while there was competition above that rate, there could be none under that rate. It is manifest that there can be no fair and free letting of a loan, when a certain rate is determined upon beforehand, under which no loan would be made. The by-law arbitrarily fixed upon 16 per cent. as the rate, unless the association could get more. The by-law itself fixed a usurious rate, and, being fixed, it was not protected by the statute. When the association adopted the by-law, and enforced it through the act of its secretary, it was demanding usury in a manner unauthorized, and therefore it placed itself outside the protection of the statute; and the fact that it got more usury than it demanded in the by-law does not relieve the transaction of its illegality. We are cited to *Endlich on Building & Loan Associations*, § 411, but the citation does not support defendant. The author says that if the premium exacted was the result of fair competition, without reference to the illegal by-laws, 'no bid being refused because below the established minimum, nor raised for the sole purpose of covering it,' the borrower has no cause of complaint. But in this case, while no bid was refused for the reason that it was below the rate named in the by-law, yet the bidders were advised at the outset that they would not be permitted to bid below that rate."

Defendants contend that, even if the premiums were arbitrarily fixed, and charged arbitrarily with reference to the minimum premium by-law, yet the record does not disclose that the premium, together with the interest, could exceed the rate which McDonnell and defendant association could agree upon. But we are unable to concur in this view. The bonds in the case in hand drew, according to their provisions, 6 per cent. interest per annum, which in this state is the legal rate, but may be made 8 per cent. by contract. And so the former is generally termed the "legal rate," and the latter the "contract rate." The statute (section 3709, Rev. St. 1899) provides that usury may be pleaded as a defense in civil actions in the courts of this state, and, upon proof that usurious interest has been paid, the same, in excess of the legal rate of interest, shall be deemed payment, shall be credited upon the principal debt, and all costs of the action shall be taxed against the party guilty of exacting usurious interest, who shall in no case recover judgment for more than the amount found due upon the principal debt, with legal interest, after deducting therefrom all payments of usurious interest made by the debtor, whether paid as commissions or brokerage, or as payment upon the principal, or as interest on said indebtedness. Defendant claimed, at the argument that, as 8 per cent. may be legally contracted for, the statute, when using the expression "with legal interest," meant the interest stipulated in the contract, provided it was within the

rate which could be legally contracted for. We think not. The statute, in using the expressions "legal rate of interest," meant the statutory rate which obtains in the absence of contract. Usury avoids the contract as to interest, and the statute disposes of it by giving the creditor the statutory rate, and applying the overplus toward the payment of the principal debt. *Arbuthrot v. Association*, supra. In this case, as we have said, there was an illegal by-law fixing a minimum premium of 10 per cent. There was no written application for either of the loans, and the only agreement in writing to pay interest is to be found in the bonds. So that any premium paid by McDonnell, however small, was usurious under the facts disclosed by the record. The question, then, presents itself as to how these matters are to be adjusted. As was said in *Laidley v. Cram* (Mo. App.) 70 S. W. 912: "If the premiums are treated as interest, on the assumption that they were fixed arbitrarily, instead of by free competition, the total rate per year of interest charged cannot be calculated on the facts before us; for, to do that exactly, the loans would have to run until the stock matured, while, to do it approximately, testimony is needed as to the time when it will probably mature." *Robertson v. Association*, 10 Md. 397, 69 Am. Dec. 145; *Association v. Flach*, 1 Cin. Super. Ct. Rep'r, 468; *Hagerman v. Association*, 25 Ohio St. 186.

Plaintiffs challenge the constitutionality of the building and loan association statute upon the ground that said act, and particularly that section which provides that the premiums bid in accordance with the requirements of the statute shall not be considered as interest or render the loan usurious, violates that provision of the Constitution which prohibits the Legislature from passing "any local or special law fixing the rate of interest." But as we have indicated that the premiums bid were not in accordance with the requirements of the statute, and therefore illegal, it is unnecessary to pass upon the question presented upon this feature of the case, and we must decline to do so.

Plaintiffs complain in their brief that the trustee in the deeds of trust was an incompetent person to discharge the duties of those positions, because an officer in the association; but there is no merit in this contention. Nor is the assertion that he was not present at the time of the sale of the property under the deeds of trust sustained by the record.

There is no merit in the contention of plaintiffs that the sale of the property should be set aside upon the ground of inadequacy of price. It is a well-established rule in equity that mere inadequacy of price, in the absence of other considerations, is no ground for setting a sale aside, unless it be so great and unconscionable as to shock the moral senses. *Bispham on Equity Jurisprudence*, § 219, says: "Ordinarily inadequacy of con-

sideration will be insufficient to set a bargain aside or to justify a refusal to enforce its specific performance. Where, however, the inadequacy is so great as to shock the conscience (which is the phrase usually applied), contracts may be rescinded. * * * A case, therefore, of fraud from inadequacy of consideration, pure and simple, and mixed with no other kind of fraud, is of rare occurrence. Nevertheless the rule must be considered as well settled, although rather by dicta than by decisions, that a transaction will be set aside if there is an inequality so strong, gross, and manifest that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it. The relief, however, in such cases, is granted (it is said) not on the ground of inadequacy of consideration, but on the ground of fraud as evidenced thereby." *Holmes v. Fresh*, 9 Mo. 201. The doctrine thus announced is the well settled law of this state.

Defendants contend that as McDonnell was present at the trustee's sale, and interposed no objection thereto or to the manner in which the property was being sold, he and his heirs are estopped, in equity, morals, and conscience, from questioning the validity thereof. Upon the other hand, plaintiffs insist that no such defense is pleaded, and, in order to be available as such, this should have been done. While the general rule is in accordance with plaintiffs' contention, it is not under all circumstances absolutely necessary that estoppel should be pleaded, in order to be available as a defense; but, like many other defenses, it may be waived by the plaintiff in the case, by proceeding with the trial of the case, without objection, as if the defense relied upon had been pleaded. This precise question was before this court in *Price v. Hallett*, 138 Mo. 561, 88 S. W. 451, in which Gantt, P. J., speaking for the court, said: "It has often been decided by this court that estoppel in pais must be pleaded. *Bray v. Marshall*, 75 Mo. 327; *Noble v. Blount*, 77 Mo. 235; *Avery v. Railroad*, 113 Mo. 561 [21 S. W. 90]. It was so held on an objection to testimony in *Bray v. Marshall*, supra. In *Noble v. Blount* it was said there was neither a pleading nor evidence to justify such an instruction. It seems to us this doctrine has peculiar weight, when invoked against the admissibility of evidence, when no issue of estoppel has been tendered in the pleadings, or when an estoppel in pais is urged for the first time in this court; but where parties have permitted an issue of this kind to be raised by the evidence without objection, and have had full opportunity to try the issue, we are unable to draw a distinction between such a case and those cases in this state in which parties have neglected to file replies, and this court has held that it was too late, after trying the case as if a reply had been filed, to claim that the answer was admitted. Had a timely objection

been made when this evidence tending to show an estoppel was offered as against Bencke, it would have been excluded, or the court would have permitted an amendment pleading such estoppel; but no such objection appears to have been made at that time, and, now that the evidence has been heard and the instruction given upon it, we think it is too late to raise the question of pleading on that point."

The same rule applies alike in law and equity cases. *Guffey v. O'Reiley*, 88 Mo. 418, 57 Am. Rep. 424. In that case, in discussing the doctrine of equitable estoppel, *Sherwood, J.*, in speaking for the court, said: "The same principle is forcibly asserted in *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344, where no statements were made, no active inducements held out, nor encouragement given by defendant, who was grantee in the deed under which he claimed, but the grantor remained in possession, and from time to time sold portions of the land, and improvements thereon were made in full view of the defendant's residence, some of the purchasers being known to the defendant; and Chancellor Kent, when commenting on this state of facts and the acts of the defendant, said: 'He preserved a studied silence, and gave no notice to those purchasers, or to the world, of his title. After this, he cannot be permitted to start up with a secret deed, * * * and take the land from bona fide purchasers under the testator' [i. e., Phillip Wendell, who had made the deed to the defendant]. If the plaintiff had been present the next day, when the defendant's verbal contract with Hughes was consummated by purchase and deed, and had remained silent, there is no conflict in the authorities that this would have estopped him, as against the title of the defendant then and thus acquired. And his standing by and saying nothing would have been regarded in such circumstances as holding out tacit inducements or encouragement to the defendant to purchase, or else as being so culpably negligent that it would amount to the same thing. * * * For 'the estoppel may arise, as we have intimated, from misleading silence, or passive conduct joined with a duty to speak.' *Bigelow on Estoppel*, 492. * * * This doctrine of equitable estoppel lies at the foundation of morals especially concerns conscience and equity. Under its benign rule, entitled, as it is, like other equitable doctrines, to a fair and liberal application, fraud is suppressed and honesty and fair dealing promoted, conduct becomes equivalent to representations, and acts to direct statements. Such estoppels may be given in evidence, and operate as effectually as technical estoppels. They cannot, in the nature of things, be subjected to fixed and settled rules of universal application, like legal estoppels, nor hampered by the narrow confines of a technical formula."

McDonnell was a director in the present De Soto Savings & Building Association

from March, 1895, to 1898. He knew defendant Hartnett, and that he was president of said "association" and trustee in both these deeds of trust, at the time they were executed. He knew Mr. Brady, the secretary of said "association," and that he acted as auctioneer at the sale. He complained of neither of these matters in the amended petition. He knew that his property was to be sold under the deed of trust before the sale, and he solicited Zelle Bros., who held a third deed of trust for \$3,000 on the property, to be present and bid. He and the officers of said "association" alone knew the facts making these loans usurious, if any such usury be held to exist. He was present at the sale, and knew (so he testifies) that, in addition to Mr. Ryan, who was present and bid at said sale for said "association," there were two other bidders. Yet, in view of all this knowledge, John McDonnell stood by at the sale of his property, under his own deed of trust, and made on account of his default in payments, and made no protest against the same, or objection thereto.

Our conclusion is that the judgment should be affirmed as to the defendants Hartnett and Anderson, and reversed and remanded as to the defendant De Soto Savings & Building Association, to be tried in accordance with the views herein expressed. It is so ordered. All of this Division concur.

ROSENCRANZ v. SWOFFORD BROS. DRY GOODS CO.

(Supreme Court of Missouri, Division No. 2.
June 9, 1903.)

~~WRONGFUL ATTACHMENT — JURISDICTION —
TROVER — RIGHT OF POSSESSOR — SEIZURE —
TRESPASS — CARRIERS — LIEN FOR FREIGHT —
ESTOPPEL.~~

1. Where plaintiff had possession of goods, and delivered them to a railroad for shipment to herself as consignee, and they were attached by defendant in a suit against another, plaintiff's possession gave her a prima facie right to recover in conversion.

2. Defendant, in a suit against his debtor, attached goods in the possession of a railroad company, delivered to it by plaintiff, who had acquired them from the debtor. Subsequently defendant dismissed the attachment suit, and the sheriff delivered the goods to defendant's agents, who removed them to Kansas, where they were levied on under an attachment sued out by defendant in that state. *Held*, that the acts were fraudulent in law and the Kansas court acquired no jurisdiction.

3. A second attachment, sued out of another Kansas court and levied by the sheriff on the goods while they were in his hands by virtue of the first attachment, was pervaded with the same vice as the first.

4. Defendant, having no title to the goods and no lien thereon, could not be heard to justify its seizure thereof by asserting that the transfer from the debtor to plaintiff was fraudulent toward creditors.

5. The lien of a railroad for freight on goods shipped ceased when the company attempted to assign said lien to one who seized the goods for the debt of a stranger, and therefore the assigned lien was no defense to an action for conversion by the consignor against the attaching creditor.

6. The purchaser of goods, in stating his financial standing, said that he was indebted to plaintiff in a certain sum, but that plaintiff was willing to carry the indebtedness, and not allow it to bother the purchaser, or interfere with his paying other creditors. About two months after selling the goods the seller made inquiry of plaintiff as to the purchaser's statement, and was told that it was correct. Subsequently plaintiff received goods of the purchaser, which the seller attached. *Held*, in an action of conversion by plaintiff against the seller, that plaintiff was not estopped by his statement.

Appeal from Circuit Court, Jackson County; Edw. P. Gates, Judge.

Action by Bertha Rosencranz against Swofford Bros. Dry Goods Company. From a judgment for defendant, plaintiff appeals. Reversed.

Wollman, Solomon & Cooper, for appellant. Ellis, Cook & Ellis, for respondent.

GANTT, P. J. This is an action of trover and conversion to recover the value of 13 cases and 7 bales of dry goods, clothing, etc., and was brought and tried in the Jackson circuit court, and resulted in a verdict for defendant. Plaintiff appeals.

On November 4, 1895, one Herman Goldberg, a merchant of Raton, N. M., sold and delivered these goods to the plaintiff, Bertha Rosencranz. Swofford Bros. Dry Goods Company was and is a wholesale clothing house of Kansas City, Mo. Mrs. Bertha Rosencranz, the plaintiff, is a citizen of Chicago, Ill., and her husband a brother-in-law of Goldberg. Goldberg had been dealing with Swofford Bros. for some time prior to August 24, 1895, and that company had sold him goods on credit, but not in large quantities. On the last-mentioned date Goldberg came to Kansas City to buy a bill of goods of Swofford Bros. and others. On that day he made a statement of his financial standing to Swofford Bros., in which it appears his total assets were \$7,550, and his liabilities \$2,621. Among his liabilities he scheduled a debt for borrowed money to J. B. Rosencranz for \$2,100, and gave as reference J. Rosencranz, 215 Halstead street, Chicago. At the same time he stated that J. Rosencranz was his brother-in-law, and the debt of \$2,100 was the balance of purchase price of original stock bought by Goldberg of Rosencranz, and the latter was willing to carry said indebtedness, and not allow it to bother him in paying his other creditors, and thereupon Swofford Bros. sold him goods to the amount of \$1,374.98.

On the 2d day of October, 1895, after the shipment of the goods, the creditman of Swofford Bros., in the name of said firm, wrote J. Rosencranz the following letter: "Kansas City, Mo., 10/2/95. J. Rosencranz, 215 Van Buren St., Chicago, Ills.—Dear Sir: In a statement rendered us in August last by Mr. Herman Goldberg, of Raton, N. M., he gave us among his liabilities an indebtedness to you of \$2,100.00. He explains to us that you are his brother-in-law, and that this is

a balance on the purchase price of the original stock bought from you. He also says that you are willing to carry this indebtedness for him, and not allow it to bother him or interfere with his paying his other creditors. His account with us has so far been satisfactory, and, if his indebtedness to you does not bother him, he offers a fair risk. We would like to hear from you direct as to the correctness of his statement. We inclose stamped envelope for your reply. Yours truly, Swofford Bros. Dry Goods Co. (Dic. W. N. M.)" And on October 6, 1895, received the following reply: "Chicago, Ill., 10/5/95. Messrs. Swofford Bros., Kansas City, Mo.—Gentlemen: Yours of recent date was received by me. Replying to same, I will say that the statement made to you in August last by Herman Goldberg, of Raton, N. M., regarding the indebtedness to me of \$2,100.00, was correct. Yours respectfully, B. Rosencranz."

The plaintiff offered evidence that afterwards, on the 3d day of November, 1895, the plaintiff, through her husband, J. Rosencranz, acting as her agent, delivered the goods for whose conversion this action was commenced to the Atchison, Topeka & Santa Fé Railroad Company, a common carrier engaged in transporting merchandise from Raton, N. M., to Chicago, Ill., and received a bill of lading in her favor in due form, whereby said company agreed to deliver said goods to her in Chicago, Ill.; that Kansas City, Mo., is on the line of said railroad between Raton and Chicago; that the defendant, Swofford Bros., on the 7th day of November, 1895, sued out an attachment for \$1,385.80 in the circuit court of Jackson county, Mo., at Kansas City, in favor of said Swofford Bros. Dry Goods Company, and against H. Goldberg, on the ground of nonresidence, and under said writ the said defendant directed the sheriff of Jackson county, Mo., to attach and take from the possession of the said railroad company all of the goods described in the petition, and said sheriff, on the 8th of November, 1895, attached and took said goods out of the possession of said railroad company in Kansas City, Mo.; that afterwards, on the 9th day of November, 1895, said Swofford Bros. Dry Goods Company dismissed its said attachment suit, and on the 11th of November, 1895, said sheriff released said goods. No other proceedings were had against said goods in Jackson county, Mo. By direction of the defendant the sheriff turned the goods over to H. Leftwitch, an employé of defendant, and Joseph H. Roy, an employé of defendant's attorneys.

Prior to the commencement of the suit in Jackson county, Mo., the Swofford Bros. Company, having learned of their shipment from Raton, brought an action by attachment in Johnson county, Kan., and summoned the railroad company as garnishee. The sheriff of Johnson county, Kan., did not succeed in seizing the goods, and it was learned they

had gone into Kansas City, Mo., where, as already said, they were levied on by the sheriff of Jackson county, Mo., and removed from the cars. It seems this seizure aroused the railroad company, and Swofford Bros., anxious to avoid controversy with the railroad, which had a lien for its freight charges, stipulated that the railroad should receive its earned freight. Thereupon Joseph H. Roy took an assignment from the railroad company of its claim for freight lien on the goods, and the goods were then delivered to Mr. Leftwitch, an employé of defendant, Swofford Bros., under the direction of their attorneys. After that the suit in Jackson county, Mo., was dismissed. Thereupon, by direction of Swofford Bros., or their attorneys, the goods were then placed in wagons and driven across the state line into Kansas. The money which was paid by Roy to satisfy the freight bill was paid by Swofford Bros. When they reached Kansas, Cummins, the deputy sheriff of Wyandotte county, Kan., under the direction of Swofford Bros., levied upon the goods. They were marked "B. Rosencranz, Chicago, Ill." This levy was made under a writ of attachment issued by the clerk of Johnson county, Kan., in the suit commenced there as already noted. It seems no publication was made in this suit within the 40 days required by the laws of Kansas, and subsequently this suit, like the one in Jackson county, Mo., was also dismissed, and no further steps taken in it; but prior to its dismissal, and while the goods were still in the hands of the sheriff of Wyandotte county, Kan., Swofford Bros. Dry Goods Company, the defendant herein, brought still another action in attachment in the common pleas court of Wyandotte county, Kan., against Goldberg, and by its direction the sheriff of that county levied upon the same goods then in his hands. Constructive service by publication was then obtained in this last-mentioned case, and judgment taken, and the goods sold and bought in by defendant. There was no appearance by Goldberg or Mrs. Rosencranz in any of the cases.

Thereupon, on January 28, 1896, plaintiff brought this her action against Swofford Bros. for conversion. The defendant in its answer pleaded, first, a general denial; second, an estoppel on the part of plaintiff by reason of her agreement not to enforce her debt in preference to Goldberg's other creditors; third, a lien for the amount of the freight paid by defendant; fourth, that the transfer by Goldberg to plaintiff in New Mexico was by the laws of that territory a general assignment for creditors; fifth, want of capacity in plaintiff to maintain this suit; sixth, because the transfer of the goods by Goldberg to plaintiff was fraudulent and with intent to hinder and delay creditors. The reply denied all new matter and again prayed judgment.

Among other instructions, plaintiff prayed

the court for the following: "No. 9. The jury are instructed that if the plaintiff delivered the goods in controversy to the Atchison, Topeka & Santa Fé Railroad Company, to be transported to Chicago, Ill., and while en route to Chicago the same were taken from said company under a writ of attachment issued at the instance and served under the direction of defendant, and that said attachment suit was dismissed, and that the attorney for said railroad company assigned the lien of said railroad company on said goods for freight, and made said assignment to one Roy, if the jury find that said Roy was acting for the said defendant in taking said assignment, and that the said defendant, in the name of said Roy, took possession of said goods at Kansas City, Mo., then they must find for plaintiff, notwithstanding that said Swofford Bros. Dry Goods Company subsequently caused said goods to be attached. No. 10. The jury are instructed that if said Swofford Bros. attached the said goods at Kansas City, Mo., and thereafter released their attachment, and then sent said goods over into the state of Kansas, of which state the said Goldberg was a nonresident, for the purpose of having the same attached there, the courts of the state of Kansas acquired no jurisdiction over the said goods, and that said attachments so issued in the state of Kansas are void, and the jury will entirely disregard them."

1. Prima facie plaintiff was and is entitled to the possession of the goods, which she shipped from Raton, N. M., to Chicago, or their value. Whether bona fide, or with intent to hinder, defeat, or delay creditors, the evidence unquestionably shows possession in Mrs. Rosencranz at Raton, N. M., and the receipt for her of the goods by the Santa Fé Railroad to transport to Chicago, and to be redelivered there to her. By virtue of her possession she had the right to recover the goods or their value from every person except the right owner. This has been the common law since the decision in *Armory v. Delamarie*, 1 Strange, 505, wherein it was held that the finder of a jewel was entitled to bring trover against one who, having taken the jewel for examination, refused to return it. In the language of Lord Campbell: "The law is that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him having no title in himself is a wrongdoer, and cannot defend himself by showing that there was title in some third person; for against a wrongdoer possession is title. The law is so stated by the very learned annotator in note to *Wilbraham v. Snow*, 2 Wm. Saunders, 47b, and I think it most reasonable law, and essential for the interests of society that peaceable possession should not be disturbed by wrongdoers. It is not disputed that the jus tertii cannot be set up as a defense to an action of trespass for disturbing the possession. In

this respect I see no difference between trespass and trover; for in truth the presumption of law is that the person who has the possession has the property. Can that presumption be rebutted by evidence that the property was in a third person, when offered as a defense by one who admits that he himself had no title and was a wrongdoer when he converted the goods? I am of opinion that this cannot be done." *Jeffries v. G. W. Railway Co.*, 5 El. & Bl. 802, 85 Eng. Com. L. 802. Judge Cooley in his work on Torts (2d Ed., p. 520, marg. p. 445), after reviewing various cases, says: "When, therefore, it is said that the plaintiff must have had, at the time of the conversion, the right to the property, and also a right of possession, nothing more can be intended than this: That the right of which he complains he has been deprived must have been either a right actually in possession or a right immediately to take possession." *Cobbey on Replevin*, § 786; *Vanzant v. Hunter*, 1 Mo. 71; *Stowell v. Otis*, 71 N. Y. 36; *Knapp v. Winchester*, 11 Vt. 351; *Bartlett v. Hoyt*, 29 N. H. 317; *Guttner v. Pac. Steam W. Co.* (D. C.) 96 Fed. 619. Plaintiff having possession of the goods, the law is that one who has wrongfully obtained the goods from her cannot defeat her action by showing title in another without connecting himself with the right of such other person.

How has defendant rebutted or attempted to show title out of plaintiff? It is clear that neither by the attachment suit commenced in the circuit court of Johnson county, Kan., nor by the attachment sued out in the circuit court of Jackson county, Mo., was the title of plaintiff in any manner affected, because neither was prosecuted to judgment. The only question, then, is as to the effect of defendant's judgment in the Wyandotte county common pleas court. This leads us to inquire what jurisdiction the common pleas court acquired over this property as between defendant and plaintiff. Plaintiff, being the shipper and consignee, also, of the goods, was *prima facie* the owner thereof, but defendant had the right to attach them, if it could establish that the sale and transfer to plaintiff by Goldberg was fraudulent as against defendant; and when the action of defendant was commenced in Kansas City, Mo., and the goods seized under the writ, the circuit court of Jackson county unquestionably acquired jurisdiction over them, but when defendant by means of attachment had brought the goods within the jurisdiction of the circuit court of Jackson county, and then induced the sheriff of Jackson county to turn them over to its agent, it is absolutely clear it had no legal possession. The sheriff had no right to turn them to defendant. He held them by virtue of a writ, and subject to the lawful orders and judgments of the circuit court of Jackson county, and not as defendant might direct. But, as if to remove the

last semblance of authority for holding the goods, defendant dismissed its attachment, under and by virtue of which the possession was acquired from plaintiff's carrier, and thus, prior to the removal of the goods to Kansas, defendant was in possession of plaintiff's goods without the slightest justification in law. It was, as to plaintiff, a naked trespasser, in possession by virtue of an abuse of the state's writ of attachment. Having obtained the possession and dismissed its writ, it had neither title nor color of right to retain the possession, and if plaintiff had brought replevin or sued in conversion before the removal of the goods to Kansas, and after the dismissal of the attachment suit brought in Jackson county, it is too plain for discussion that defendant would have had no defense whatever to the action. Whatever efficacy there might have been in the writ was dismissed, and the officer who had levied it, instead of restoring them to the party from whom he took them, had turned them over to defendant who had no right to them. *Prima facie*, the officer himself, having a writ directed against Goldberg alone, which he levied on property in plaintiff's possession, was a trespasser. *State ex rel. Robertson v. Hope*, 88 Mo. 430. And when, at the instance of defendant, he turned the goods over to defendant, the latter also was a trespasser. Conceding that defendant was a creditor of Goldberg, it would have had no right, merely because it was his creditor and he was attempting to defraud it, to seize his property and hold it without any lawful process. How much less could it justify its seizure of property of which Goldberg had no possession, and which was in the possession of plaintiff. As said in *Mississippi Mills v. Meyer & Co.*, 83 Tex. 438, 18 S. W. 749: "The fact that a naked trespasser is the creditor of the owner of the goods, or that the plaintiff's title may be founded in fraud, will not justify a trespass." *Hudson v. Willis*, 73 Tex. 258, 11 S. W. 273.

Such was the condition of affairs when defendant removed the property out of this state, into Kansas, in order that the Kansas writ of attachment could be levied upon it. As already said, it seems the Johnson county attachment was levied on the goods in Wyandotte county. For two reasons defendant cannot avail itself of that attachment by way of defense: First, because this attachment was, like the Missouri attachment, dismissed without having even gone to judgment, and without service on Goldberg; second, for the reason that, defendant being in possession of the goods in Missouri purely and simply as a trespasser, and having taken them into Kansas in order that the writ of attachment in that state could be levied on them, the levy conferred no jurisdiction, because it was a fraud in law, whatever the intention of defendant was, and this defendant cannot avail itself of its wrongful

act to confer jurisdiction on the courts of Kansas, and then plead their process as a defense to plaintiff's action for their original and continuing trespass and wrongful conversion. However honest and valid its claim against Goldberg, and this we do not for a moment question, no valid legal sequestration could follow its illegal act in thus taking the property out of this state and having it attached for its benefit in Kansas. The courts cannot and will not countenance such a method of acquiring jurisdiction, and the plaintiff is not estopped to question the jurisdiction of a court of a foreign state, obtained in such a manner and by such means.

But, as we have said, the levy in the Johnson county case was abandoned, and it constitutes no defense. This leaves but the Wyandotte attachment as a defense. This last attachment is pervaded with the same vice as that which preceded it. The property was within the local jurisdiction of the Wyandotte common pleas court solely and wholly as the result of the original trespass of defendant, and this subsequent attachment did not and could not purge it of the original wrong in unlawfully taking the goods out of this state to Kansas, in order to confer a jurisdiction which that court otherwise would not have had over it. The proceeding was conducted at the instance of defendant, and we think that it is open to plaintiff's attack on it for the same reasons that must govern the Johnson county attachment. The stream cannot rise higher than its source. *Hoes v. N. Y. & H. R. R. (N. Y.)* 66 N. E. 119. It is apparent, then, if we are right in holding that the Kansas courts did not and could not acquire jurisdiction over plaintiff's goods, in favor of defendant, by illegally taking them out of this state into Kansas, in order that defendant's attachment in that state might be levied upon them, defendant had no defense to plaintiff's action by reason of any attachment or judgment liens. Having no title in itself, and no lien, can it be heard to justify its seizure and possession of plaintiff's goods by asserting or showing that the sale from Goldberg to plaintiff was fraudulent as to Goldberg's creditors, or, in other words, in such case can defendant show title in a third person as a defense? We think the great weight of authority is that it cannot. *Cobbe on Replevin*, § 786, lays down the rule that "a defendant who has wrongfully taken possession of the property cannot set up as a defense that other persons who are not defendants have a lien on the property which entitles them to its possession." And it was held in *Mississippi Mills v. Meyer*, 83 Tex. 433, 18 S. W. 748, that "the fact that a naked trespasser is a creditor of the owner of the goods, or that the plaintiff's title may be founded in fraud, will not justify the trespass." This was the rule announced by Lord Campbell in *Jeffries v. G. W. Ry.*

Co., 5 El. & Bl. 802; 85 Eng. Com. Law, 802; *Hudson v. Willis & Bro.*, 73 Tex. 256, 11 S. W. 273. Defendant was in no position to avail itself of the fraud of Goldberg, if any, in attempting to defeat his creditors, as it had not acquired Goldberg's title in any lawful manner, but was a naked trespasser in the circumstances, and has not connected itself with Goldberg's possession or title in any lawful manner.

2. Was it open to defendant to avail itself of the lien of the Santa Fé Railway Company for its freight charges? It is too clear for discussion that the assignment to Roy was for defendant's benefit. He was acting for defendant's counsel in taking the assignment, and it paid the money to procure the assignment, and this was only one other step in the general scheme to get the goods out of Missouri into Kansas. If the sheriff of Jackson county had paid the freight bill, and the attachment in Missouri had been followed up to judgment and sale, it may be the sheriff would have been allowed this amount; but, as this was not done, it is obvious that it was his duty, when the attachment in Jackson county, Mo., was dismissed, to have returned the goods either to plaintiff or her bailee, the railroad company. In 5 *American and Eng. Encyclopedia of Law* (2d Ed.) p. 420, it is said: "The lien of a railroad company for freight is neither property nor a debt, but a mere right to have a debt satisfied out of certain specified property, and is a personal right, which cannot be sold or assigned." In *Ames v. Palmer*, 42 Me. 197, 66 Am. Dec. 271, the Supreme Court of Maine said: "It has been repeatedly decided both in England and in this country that the lien of a factor is a personal privilege, which is not transferable, and that no question upon it can arise, except between the principal and factor. *Daubigny v. Duval*, 5 D. & E. 604; *McCombie v. Davies*, 7 East, 5; *Jones v. Sinclair*, 2 N. H. 319, 9 Am. Dec. 75; *Holly v. Huggefard*, 8 Pick. 73, 19 Am. Dec. 303; *Pearsons v. Tinker*, 36 Me. 384. No reason is apparent why the same consequences should not attach to the lien of a common carrier as to that of a factor. In both cases the nature of the lien is the same. Both are common law liens. The object of these liens being the same, their effect must be the same." In *Holly v. Huggefard*, 8 Pick. 73, *Parker, C. J.*, said: "The lien of a factor does not dispossess the owner until the right is exerted by the factor. It continues only while the factor himself has the possession, and therefore, if he pledges the goods for his own debt, or suffers them to be attached, or otherwise parts with them voluntarily, the lien is lost, and the owner may trace and recover them, or he may sue in trespass if they are forcibly taken from his constructive possession, continued notwithstanding the lien. *Lempriere v. Pasley*, 2 T. R. 485; *Everett v. Saltus*, 15 Wend. 478." The lien of the Santa Fé Rail-

way Company was no defense to plaintiff's right of action in this case. It ceased when the company assigned or attempted to assign it to defendant.

3. But the defendant invokes the doctrine of estoppel against the plaintiff. This it predicates on the statement of Goldberg to defendant, when he bought the goods, August 24, 1895, to the effect that he was indebted to Rosencranz in the sum of \$2,100, but that Rosencranz was his brother-in-law, and that Rosencranz was willing to carry said indebtedness, and not allow it to bother or interfere with his paying his other creditors, and subsequently, in November, 1895, and after defendant had sold the goods to Goldberg, defendant wrote to J. Rosencranz, advising him of Goldberg's statement to it, and received a letter from plaintiff, in which she says: "Replying to same, I will say that the statement made to you in August last by Herman Goldberg, of Raton, N. M., regarding the indebtedness to me of \$2,100.00, was correct." Plaintiff requested the court to instruct the jury that, if Swofford Bros. Dry Goods Company sold no goods to Goldberg after receiving the letter from plaintiff, there was no binding agreement between plaintiff and Swofford Bros. Dry Goods Company, not to enforce said indebtedness against the interests of said Swofford Bros. Dry Goods Company, which instruction the court refused, and plaintiff excepted. The court modified several similar instructions by adding thereto these words: "Unless you further believe there was between the plaintiff and said Goldberg an agreement, and that the same was communicated to the defendant by said Goldberg, that plaintiff would not allow his indebtedness to her to bother him, or interfere in any way with his paying for goods purchased of wholesale houses, and that defendant, relying on and induced by such agreement, extended credit to Goldberg." To this modification plaintiff duly excepted at the time.

The question is, was plaintiff, by reason of this representation by Goldberg and her subsequent letter, estopped to purchase goods of Goldberg to save her debt? It is plain that defendant was notified that Rosencranz was a creditor of Goldberg, to the amount of \$2,100. There was no concealment of this indebtedness. Without some valid contract, binding her to other creditors not to enforce this debt, neither law nor justice would prevent the enforcement of this debt, any more than any other obligation owing by Goldberg. Advised of this indebtedness before it sold to Goldberg, defendant took no steps to obtain such an agreement in its favor. It sold him its goods, and had no communication with Mrs. Rosencranz for more than two months afterwards. It then wrote her, and stated that Goldberg had assured it that she was willing to carry the indebtedness, and not allow it to interfere with his paying his other creditors. Her debt was due. She had

voluntarily agreed to indulge her debtor, but there was, so far as this record discloses, no consideration for this promise. As between her and Goldberg, it would not have prevented her suing him at any time, and would have constituted no defense to her action. She had made no agreement with his creditors not to collect her debt or to give them a preference. It may be that if, to induce defendant to sell him goods, she had agreed her debt should be made subordinate to any debt he contracted with it for goods on the strength of her agreement, she might have been estopped to claim her rights along with it; but it is apparent it did not act on any such an understanding, but sold him goods without obtaining any agreement or having any understanding with her.

We are cited by defendant to *Bank v. Buck*, 123 Mo. 141, 27 S. W. 341; but that case is easily distinguished from this, in that there the debt and the absolute deeds given to secure it were kept secret, and *Buck & McCrosky* permitted to obtain credit from others, who extended credit on the faith of their ownership of the property. Here the debt was announced before the goods were sold. No mortgage or other lien had been taken which would give Mrs. Rosencranz any advantage over any other creditor. All that was represented was by the debtor, and that was that she was willing to indulge him, and not prevent his paying others he owed. The element of secrecy and the taking of a deed which might operate to give her a superior lien is wholly wanting. *Rice v. Bunce*, 49 Mo. 231, 8 Am. Rep. 129, is also relied on; but in that case one having an equitable interest in land was present when it was put up for sale as the property of the person in whom the record showed title. He not only gave no notice of his title, but entered the list of bidders, and by his silence and acts induced another to expend his money, whereas in this case Goldberg gave notice of the Rosencranz debt, and Mrs. Rosencranz did no act to induce defendant to extend him credit on the assumption that she would not enforce it. At most, she was represented as a creditor who was willing to be indulgent and not to crowd Goldberg.

Conceding the full force of the doctrine of estoppel, that one who neglects to speak shall not be heard to do so when his silence or acts have lead another to act to his injury, we are unable to find any evidence upon which to estop plaintiff in this case. Her debt was not kept secret. She made no representation to defendant to induce it to sell its goods to Goldberg, and, conceding she was willing to indulge her debtor, she was in no manner bound to forego the collection of her debt. The cases all agree that there can be no estoppel unless the party who alleges it relied upon the representation, was induced to act by it, and, thus relying and induced, did take some action. Giving, now, full scope to everything represented by Goldberg, it must

have been apparent to any reasonable man, contemplating extending him credit, that, if he desired to estop Mrs. Rosencranz, something more than her mere gratuitous agreement with Goldberg was required to tie her hands, so that she would not be at liberty to enforce her debt like his other creditors. Defendant was notified. It cannot be heard to say, in view of the evidence adduced by itself, that the truth was unknown to it at the time it sold Goldberg and at the time it credited him. Mrs. Rosencranz asserted the debt which defendant was advised she held, and it knew the full extent to which she was bound not to enforce it, and that was a gratuitous agreement founded upon no consideration. It sought no greater security before it sold to him, and obtained no more later.

We do not think defendant established its estoppel, even if it had been in position to do so. But if it had any equities, or could invoke estoppel in a proper case, it cannot do so here, for the reason that it stands in this record as a trespasser, with no right or title to the property. It acquired no lien or title by its attachment proceedings in Kansas. Plaintiff was in the peaceable possession, and, if it desired to rely on its estoppel, it should have proceeded, not by trespass or force, but by invoking its claim in a court of justice. This defense is no more open to it than was the claim that Goldberg had sold and delivered the property to plaintiff to defraud his creditors. So far as this action is affected, these two defenses stand in the same class. Whatever the "confusion" which defendant pleads as an extenuation of the methods resorted to for the purpose of giving the Kansas courts jurisdiction, it must be said that plaintiff in no way contributed to it. While we are satisfied defendant was only attempting to secure an honest debt, and that there was no wicked purpose in the various steps taken by it, still the courts cannot countenance the extreme methods used in this case to confer jurisdiction on the Kansas courts over plaintiff's goods. However honest the debt, it can only be enforced in the courts by obtaining jurisdiction in the manner prescribed by the law of the land. The fact of jurisdiction may be inquired into, and, when obtained by fraud in fact or fraud in law, the judgment may be impeached collaterally. This principle is well established in *Parsons v. Dickinson*, 11 Pick. 352; *Wood v. Wood*, 78 Ky. 624; *Dunlap v. Cody*, 31 Iowa, 260, 7 Am. Rep. 129; *Duringer v. Moschino*, 93 Ind. 495; *Deyo v. Jenkinson*, 10 Allen, 410; *Drake on Attachment*, § 193; *Byler v. Jones*, 79 Mo. 263; *Capital Bank v. Knox*, 47 Mo. 333.

It results that the court erred in refusing plaintiff's instructions invoking the views we have expressed, and in giving those for defendant. The judgment is reversed, and the cause remanded, to be proceeded with in accordance with this opinion. All concur.

UNDERWOOD et al. v. CAVE.

(Supreme Court of Missouri, Division No. 2.
June 9, 1903.)

WILLS—CONSTRUCTION—ESTATE DEVISED—LIFE TENANT—POWER OF DISPOSITION—DEED—RELATION TO POWER—MISTAKEN DESCRIPTION—CORRECTION—SUFFICIENCY OF EVIDENCE—FORM OF DECREE.

1. A will read: "I give and bequeath unto my wife * * * the residue of my lands, or so much thereof as may remain undisposed of at the time of my death." In a subsequent clause it was provided that the property bequeathed to the wife should "be hers absolutely during her natural life, to use and enjoy as she may see proper, and at her death, if there should be anything left, my will is that it be vested and applied to the use of the B. Church." *Held*, that the wife took only a life estate, and not an estate in fee.

2. Under a will devising testator's real estate to his wife, and providing that it should "be hers absolutely during her natural life, to use and enjoy as she may see proper," the wife has the power of disposing of the land in fee.

3. Where a deed, by a devisee of a life estate with power of disposition in fee, discloses that it is for a valuable consideration, and undertakes to convey in fee, it will be ascribed to the power, and not to the life estate.

4. The mere fact that a deed includes property not owned by the grantor, with the testimony of two witnesses, in a general way, as to the lands sold, is insufficient to warrant a correction in the description; more definite evidence of mistake in the instrument itself being required.

5. In a suit to correct a description in a deed, a finding that the grantee is "entitled to a decree for the property omitted to be conveyed or misdescribed," and a decree adjudging that the prayer of his pleading be granted, "and he is decreed to be the owner and legal holder of the title to all the property herein," followed by a corrected description, are erroneous, as omitting all reference to the correction of the mistake in the instrument, and referring the reader to the pleadings to ascertain the relief prayed for.

Appeal from Circuit Court, Jackson County; El. P. Gates, Judge.

Action by J. W. Underwood and others against Jesse M. Cave. Judgment for defendant, and plaintiffs appeal. Modified.

John N. Southern and John A. Sea, for appellants. Johnson & Lucas, for respondent.

FOX, J. This is an action in ejectment for the recovery of certain lands in Jackson county. The answer tenders the general issue, invokes the statute of limitations, and prays for a reformation of the description as to a part of the land and a decree in accordance therewith. The reply denies the new matter in the answer. On the issues thus joined trial was had, and the finding and decree was for defendant as prayed in the answer. In due time motion for new trial was filed and overruled, and the case brought here by appeal. The whole issue is embraced in the construction of the will of James F. Underwood, deceased, the common source of title.

† 3. See Powers, vol. 40, Cent. Dig. §§ 110, 111, 114, 119, 120.

The following stipulation was introduced in evidence on the part of the plaintiffs.

"Come the parties hereto and file stipulations as follows: (1) That the plaintiffs are heirs of James F. Underwood. (2) That James F. Underwood is the common source of title to the property in controversy. (3) That the said James F. Underwood died testate in the year 1871, and Noah Hunt and his widow, Malinda Underwood, qualified and were duly appointed executors of his last will and testament. (4) That said last will and testament was admitted to probate in the probate court of Jackson County, Mo., at Independence, on the — day of July, 1871, and was re-probated on the — day of —, 1899, in same court. (5) That said last will and testament may be admitted as testimony in this cause. (6) That Malinda Underwood lived in and occupied the residence where her husband died until her decease in 1897. (7) That Malinda Underwood received from herself and her coexecutor Noah Hunt, the balance found to be due the estate at the final settlement thereof, to wit, the sum of \$1,040.28. (8) That said Malinda Underwood claimed the real estate in controversy under and by virtue of the said last will and testament of the said James F. Underwood; but, if she had any other title thereto, defendants are not debarred by this stipulation from asserting the same."

Following this there was testimony introduced by plaintiffs as to the rental value. This was all the testimony on the part of the plaintiffs.

Defendant introduced certified copy of the will of James F. Underwood, deceased. As the vital questions involved in this controversy are in respect to the proper construction of this will, we here quote it:

"Know all men by these presents, that I, James F. Underwood, of the county of Jackson, and state of Missouri, being in feeble health, but of a sound and disposing mind, and not knowing the day of my death, do make and publish this my last will and testament in manner and form following, to wit:

"First. I give and bequeath and donate to the Underwood family one acre of ground as a cemetery or burying ground, the said one acre being what is now known, and which I wish to be known, as the 'Underwood Cemetery or Burying Ground,' to hold and belong to the said family, forever, with this understanding: that Johnson Stults and James Sanders, with their families, may and shall have the privilege of burying any of their dead in said burying ground.

"Second. I give and bequeath unto my wife, Malinda Underwood, the residue of my lands, or so much thereof as may remain undisposed of at the time of my death, to wit: The southeast $\frac{1}{4}$ of the southeast $\frac{1}{4}$ of section seven; the southwest $\frac{1}{4}$ of the southeast $\frac{1}{4}$ of section 21, except the one acre already mentioned; the south half of the

northwest $\frac{1}{4}$ of the southeast $\frac{1}{4}$ of the same section; the south half of the southwest quarter of the same section; the northwest $\frac{1}{4}$ of the northeast $\frac{1}{4}$ of same section; and the northeast $\frac{1}{4}$ of the northwest $\frac{1}{4}$ of section 28—all in township 47, in range 29, containing in all 259 acres, more or less. I also give and bequeath to my wife, said Malinda, all my personal estate of every kind remaining undisposed of at my death, after my debts, funeral expenses, and other expenses required by this my will, or by the laws of the land, have been satisfied.

"Third. I give and bequeath, further, eight hundred dollars, to be applied as follows, that is to say: I desire that my executors pay the said eight hundred dollars into the hands of my nephew, James W. Underwood, to be by him held in trust, and the interest thereof to be used by him annually in repairing, keeping in order, taking care of, and ornamenting the burying ground mentioned in this will, and at his death the said fund to go into the hands of some other member of the Underwood family, to be used in the same way.

"Fourth. It is my will that the property, real and personal, hereby bequeathed to my wife, shall be hers absolutely during her natural life, to use and enjoy as she may see proper, and at her death, if there should be anything left, my will is that it be vested and applied to the use of the Lone Jack Baptist Church, used as may be thought most conducive to the advancement of the Christian religion.

"Fifth. I hereby appoint and name as executors of this my will my wife, Malinda Underwood, and Noah Hunt.

"In witness whereof I have hereunto set my hand and seal this 28th day of January in the year of our Lord eighteen hundred and sixty-nine.

"J. F. Underwood. [Seal.]

"Signed in presence of

"Martin Rice.

"Medford Rowland."

Deeds were introduced from Malinda Underwood, the widow of deceased, to part of the land in controversy; also, deed from Malinda Underwood to W. H. Cave, and from W. H. Cave and wife to defendant. W. H. Cave and J. J. Franks were introduced as witnesses, who testified generally as to the land sold by Malinda Underwood to defendant. This was substantially all the evidence in the cause.

The plaintiffs requested the court to declare the law as follows: "The court declares the law to be, as applied to the construction of the will of James F. Underwood, as follows: (1) That under and by virtue of the provisions of said will Malinda Underwood took only a life estate in the lands devised. (2) That by her deeds to defendant and to his grantor of the land in controversy Malinda Underwood conveyed to them only her life estate in said property. (3) That under the

stipulations and the facts in testimony Malinda Underwood elected to take under the will of James F. Underwood, and not under the provisions of the homestead law. And although the court, sitting as a jury, may find that Malinda Underwood was entitled in fee simple to part of all the lands set out in plaintiffs' petition, under and by virtue of the homestead law, yet if it further find that James F. Underwood devised all lands owned by him to said Malinda Underwood by his last will and testament, and she elected to take and hold such land under and by virtue of the will of said James F. Underwood, and not under the homestead law in force at the time of his death, then the court declares the law to be that defendant cannot have any interest in said lands under said homestead law, but must take under the provisions of the said will of James F. Underwood."

The court gave instruction or declaration of law numbered 3 as asked by plaintiffs, and refused to give instructions or declarations of law numbered 1 and 2 asked by plaintiffs. To which action and ruling of the court, in refusing to give instructions numbered 1 and 2, and each of them, plaintiffs by their counsel then and there duly excepted.

The court, at the request of defendant, gave the following instructions or declarations of law: "(1) On the pleadings and evidence the plaintiffs cannot recover. (2) Under the will of James F. Underwood, deceased, Malinda Underwood was authorized to sell and convey the property in controversy, and the deeds from her to the defendant conveyed the title to the defendant herein. (3) The court declares the law to be that the defendant is entitled to a decree for the property omitted to be conveyed or misdescribed in the deed from Malinda Underwood to himself, and a decree will be rendered therefor. (4) Under the will of James F. Underwood, deceased, Malinda Underwood took a fee-simple title to the premises in dispute, and the defendant is entitled to a decree herein as prayed in the cross-bill."

Upon the submission of the case the court found the issues for the defendant, and entered the following decree: "Now at this day, this cause coming on for hearing on the original petition of the above-named plaintiffs and on the cross-bill of the above-named defendant against the above-named plaintiffs and the unknown heirs of James F. Underwood, deceased, and all the parties having been duly served with process herein, both on the original petition and cross-bill, and all and singular the matters in controversy is submitted to the court, who, after hearing the evidence and argument of counsel, doth find: That at the time of the death of James F. Underwood, deceased, he was the owner of the following described lands in Jackson county, Missouri, to-wit: The southwest quarter of the southeast quarter, and the south half of the southwest quarter, and the south half of the northwest quarter of the southeast

quarter, of section twenty-one (21), township forty-seven (47), range twenty-nine (29), and is the equitable owner of said last described tract of land. That the plaintiffs and the unknown heirs of James F. Underwood, deceased, have no right, title, or interest to any part of the land in controversy, and the defendant is the owner of all the same, and entitled to a decree vesting the title to said premises in him free from any claim on the part of any of the parties above named, as prayed for in his answer and cross-bill herein. It is therefore ordered, adjudged, and decreed that plaintiffs take nothing by their petition filed herein, and that the prayer of the answer and cross-bill of the defendant be granted, and he is decreed to be the owner and the legal holder of the title to all the property herein, to-wit, the southwest quarter of the southeast quarter, and the south half of the southwest quarter, and the south half of the northwest quarter of the southeast quarter of section twenty-one (21), township forty-seven (47), range twenty-nine (29), Jackson county, Missouri, which is hereby vested fully and effectually in the said Jesse M. Cave, free from any claim, right, or title on the part of the other parties to this proceeding, and that the said Jesse M. Cave have and recover of the plaintiffs, J. W. Underwood, Bessie Lawrence, F. M. Lawrence, Elizabeth Henley, John A. Underwood, Thomas N. Underwood, James A. Yankee, Samuel Yankee, Permella McGlathery, Samuel C. McGlathery, Eliza D. Maxwell, and William N. Maxwell, his costs in this behalf laid out and expended, and that he have execution therefor."

The questions as presented by this record, that of construing the language of a last will, are difficulties which have frequently attracted the attention of this court. The propositions involved in the construction of this will are: First. Do the terms of the will create an estate in fee or simply a life estate? Second. If the will creates simply a life estate, does the language coupled with it create the power of disposal? These propositions must be determined by the application of the well-settled rules of construction.

Section 4650, Rev. St. 1899, very clearly announces the rule that should govern the courts in the construction of last wills. It provides: "All courts and others concerned in the execution of last wills shall have due regard to the directions of the will, and the true intent and meaning of the testator, in all matters brought before them." In the case of *McMillan v. Farrow*, 141 Mo. 55, 41 S. W. 890, Burgess, J., speaking for the court, says: "The cardinal rule in the interpretation of a will is that the intention of the testator, as gathered from the whole instrument, shall control; and in arriving at such intention the relation of the testator to the beneficiaries named in the will, and the circumstances surrounding him at the time of its execution, may be taken into consideration" —citing *Noe v. Kern*, 93 Mo. 367 [6 S. W.

239, 3 Am. St. Rep. 544]; *Long v. Timms*, 107 Mo. 512 [17 S. W. 898]; *Schorr v. Carter*, 120 Mo. 413 [25 S. W. 538]; *Drake v. Crane*, 127 Mo. 85 [29 S. W. 990], 27 L. R. A. 653; *Nichols v. Boswell*, 103 Mo. 151 [15 S. W. 343]. The very recent case of *Roth v. Rauschenbusch et al.* (decided by Gantt, J., at the October term, 1902, of this court, not yet officially reported) 73 S. W. 664, emphatically approves of the rule announced in the case of *McMillan v. Farrow*, supra, and then says: "Another canon for the construction of the words of a will is that, when the words of a will at the outset clearly indicate a disposition in the testator to give the entire interest, use, and benefit of the estate devised absolutely to the first donee, that estate will not be cut down to a less estate by subsequent or ambiguous words inferential in their intent." In *Chew v. Keller*, 100 Mo. 362, 13 S. W. 395, Black, J., speaking for the court, says: "We may here mention, as guides, some of the established rules of construction. The first, and to which the others are aids, is that effect should be given to the intention of the testator, and the words used are to be understood in the sense indicated by the whole instrument." In the last case cited there is another rule announced as to the force and effect of separate clauses in a will. The court says: "An estate in fee created by a will cannot be cut down or limited by a subsequent clause, unless it is as clear and decisive as the language of the clause which devises the real estate"—citing *Freeman v. Colt*, 98 N. Y. 63; *Byrnes v. Stilwell*, 103 N. Y. 453 [9 N. E. 241, 57 Am. Rep. 760]; *Landon v. Moore*, 45 Conn. 422. Judge Sherwood, in *Small v. Field*, 102 Mo. 127, 14 S. W. 820, in discussing section 4004, Rev. St. 1879, now section 4646, Rev. St. 1899, said: "Under this statute it is obvious that the absolute estate in fee granted to Mrs. Kate Greene could not be impaired, cut down, or qualified, except by words as affirmatively strong as those which conveyed the estate to her. Such has been the ruling upon similar statutes elsewhere." To the same effect is the case of *Yocum v. Siler*, 160 Mo. 281, 61 S. W. 208, and the recent case of *Roberts v. Crume*, 73 S. W. 662, not yet officially reported.

The foregoing cases clearly indicate the views of this court upon the rules to be applied to the construction of wills. The language of this will as to the nature and character of estate conveyed must be interpreted in accordance with the rules announced. To sum up the rules of construction as applicable to the will involved in this controversy, we find: First, that the intention of the testator must be ascertained from the whole instrument; second, the words used are to be understood in the sense indicated by the whole instrument; third, that the force and effect of terms devising an absolute estate will not be cut down to a less estate by ambiguous words, inferential in their intent; fourth, that, where an absolute estate is granted in one

clause of the will, such grant cannot be impaired, cut down, or qualified in a subsequent clause, except by words as affirmatively strong as those which conveyed the estate.

This leads us to the application of these rules to the terms of this will as written in the second and fourth clauses of said instrument. The second clause says: "I give and bequeath unto my wife, Malinda Underwood, the residue of my lands, or so much thereof as may remain undisposed of at the time of my death." Then follows a description of the land. This clause standing alone, there would be no difficulty in reaching a conclusion. It is clearly apparent that this language, without any modification, would grant an estate in fee; but, applying the rule heretofore referred to in ascertaining the intent of the testator, we must look to the whole instrument. We must, then, look to and determine the effect the language in clause 4 has upon the terms as contained in clause 2. In the latter clause it says: "It is my will that the property, real and personal, hereby bequeathed to my wife, shall be hers, absolutely during her natural life, to use and enjoy as she may see proper, and at her death, if there should be anything left, my will is that it be vested and applied to the use of the Lone Jack Baptist Church, used as may be thought most conducive to the advancement of the Christian religion."

We are now simply confronted with this proposition: Under the rules heretofore mentioned, are the terms as used in clause 4 so "ambiguous and inferential in their intent" as not to impair or qualify the grant in clause 2? We are unable to detect any ambiguity in the language used in clause 4 of this will. It is a clear and explicit limitation of the grant as contained in the second clause of the will. It simply states that the property bequeathed "shall be hers absolutely during her natural life, to use and enjoy as she may see proper." The term "absolutely" does not enlarge the estate. It must be construed as applying to the estate granted by the express words. In other words, it means that her life estate, and the use and enjoyment of the property, shall not be limited by any conditions. We are of the opinion that the language used in clause 4, which limits the estate to the term of "her natural life," is equally strong, in fact, stronger, than the language used in clause 2, containing the grant, and hence apply the rule as heretofore mentioned (that the language used, modifying or qualifying the absolute grant, must be of equal force as the terms making the grant); and we find that the terms used, limiting the grant to a life estate, are in harmony with this rule. That the testator only intended to create a life interest is manifest from the express words used, and, if additional support was needed to verify this intention, we would then point to the concluding paragraph of clause 4, which says: "If there should be anything left, my will is

that it be vested and applied to the use of the Lone Jack Baptist Church, used as may be thought most conducive to the advancement of the Christian religion."

In the case of *Evans v. Folks*, 135 Mo. 297, 37 S. W. 126, the language used in the will in that case was in some respects similar to that used in the will before us; and the court said in that case: "By the third clause of the will the testator gave to his wife, Mrs. Eliza J. Evans, all of his estate, both real and personal, absolutely to the use of her own interest during her natural life, and if, at her death, there should be any of either of the personal or real estate mentioned in the will, it was to be divided among his blood relations as specified therein. This clearly shows that the testator only intended to give to Mrs. Evans a life estate in his property. * * * This position finds support in the fact that it was provided by the will that, if there should be any of the property left at the death of Mrs. Evans, it should be divided among the blood relations of the testator, which is very persuasive evidence, at least, that he only intended to give to her a life estate in the property in question."

We have reached the conclusion that this will only created a life estate in Malinda Underwood. This brings us to the last proposition: Do the terms of this will creating a life estate couple with it the power of disposal?

The testator used this language in creating this life estate: "It is my will that the property, real and personal, hereby bequeathed to my wife, shall be hers absolutely during her natural life, to use and enjoy as she may see proper." This language is very strong. "Shall be hers absolutely during her natural life" is in effect saying during her natural life she possesses all the elements of ownership, which includes the power of disposal. As to the other terms, "to use and enjoy [the property] as she may see proper," while it may be said that these terms limited her power to the use and enjoyment of the property as it was, yet, when you consider the preceding words, that it was to be "hers absolutely, * * * to use and enjoy as she may see proper," we have the use of such emphatic terms, when we consider such terms as applicable to the sole object of his bounty, they meant something more than the simple use of the property as it stood. If it was "hers absolutely during her natural life," with the full right to enjoy it, as she might see proper, doubtless it was contemplated that she had all the powers in respect to such property that the language used, "hers absolutely," would imply. In the case of *Burford v. Aldridge*, 165 Mo. 419, 63 S. W. 109, 65 S. W. 720, the following language was used in the creation of the estate: "I will, devise, and bequeath to my beloved wife, Sarah, all of my property, personal, real, and mixed, that may be left after paying the above bequests,

to use and manage as she may deem best as long as she may live; and at her death I desire, and so will, that what may be left of my estate after her death shall be divided equally between my two brothers, Emsley Wharton and John G. Wharton, and my sister, Eliza Plummer, and my brother-in-law, D. W. Burford." In commenting on this language in the will, Judge Valliant says: "But under this will the widow was entitled to consume as much of the estate as she desired—the body as well as the product; and, on the other hand, if she had lived within the rents and interest, and left a surplus of that, there is at least room for contention that such surplus would not have gone to her administrator on her death, but to the remainderman under the will. Therefore, whilst she was in a sense a trustee of the property for the remaindermen, yet she had a very substantial interest in it, and the remaindermen could not call her to account or restrict her in amount in what she chose to expend for her own gratification, even though it consumed the whole estate, as long as good faith was preserved."

As to the case of *Bramell v. Cole*, 136 Mo. 201, 37 S. W. 924, 58 Am. St. Rep. 619, upon which appellants chiefly rely to maintain their contention that the language as contained in this will is not sufficient to confer the power of disposal in Mrs. Underwood, an examination of that case convinces us that it is not applicable to the broad and emphatic language used in the will before us. Again, it must be remembered, that it is rare that you find two wills using the same language and the testator surrounded by the same conditions. In the construction of the language of this will, as to its sufficiency in granting a power of disposal, we must look to the circumstances surrounding the testator at the time of the execution of the will. There were no children, his wife was the sole object of his bounty, and, as was said by Marshall, J., in the case of *Cross v. Hoch*, 149 Mo., loc. cit. 338, 339, 50 S. W. 789: "We must seek admittance into the family circle, and learn the relations and feelings of the testator towards each of the beneficiaries of his bounty." When we come to apply this rule as a test to the language used in the will before us, it is quite dissimilar to the facts and conditions disclosed by the record in the *Bramell-Cole Case*, supra. We have reached the conclusion that, in view of the relation and feeling of James F. Underwood to his wife Malinda Underwood, she being the sole object of his bounty, and the use of the broad and emphatic terms, "shall be hers absolutely during her natural life," the will in this case not only created a life estate, but coupled with it the power of disposal.

The deeds introduced in evidence disclose that they were for a valuable consideration and undertake to convey the estate in fee. We take it that this sufficiently indicates

that she was exercising the powers granted by the will, and we are of the opinion that defendant acquired title to so much of the land as is properly described in these deeds in such conveyances. In the case of *Owen v. Ellis et al.*, 64 Mo. 77, Judge Napton in a very able opinion reviews all the authorities upon this subject, and finally reaches the conclusion, in which he says: "We think it very doubtful if any reference to the power was necessary in this case, as the manifest intention was to convey a fee simple; but, without so determining, we have no hesitation in declaring that very slight circumstances would justify an application of the deed to the power, and not to the estate [for life] which the grantor had."

The defendant in his answer asks the court to correct a mistake in one of the deeds executed by Malinda Underwood. The averments in the answer upon that subject are as follows: "That by error in one of the deeds of conveyance from the said Malinda Underwood to the defendant, to wit, a deed of conveyance of the date of May 24, 1889, said Malinda Underwood undertook and intended to convey to this defendant the north half of the southeast quarter of the southwest quarter, and south half of the northwest quarter of the southeast quarter of section twenty-one (21), in township forty-seven (47), range twenty-nine (29); but by mistake in the draughtsman, or on the part of the draughtsman, of the said deed, the same was made to read the north half of the southeast quarter of the southeast quarter, and the south end of the northwest quarter of the southeast quarter, of said section, township, and range. That said Malinda Underwood did not own or have, at the time of making such deed or at any time prior thereto, any right, title, or interest in the land sold, described as the north half of the southeast quarter of the southeast quarter, but was the owner of the north half of the southeast quarter of the southwest quarter of said section, and by said deed intended to convey the same to the defendant. That said Malinda Underwood was the owner of the north half of the northwest quarter of the southeast quarter of said section, and by said deed intended to convey said land. * * * Wherefore defendant prays that, being remediless at law, the court may by order and decree adjudge that the said deed from the said Malinda Underwood to this defendant may be corrected so as to read: The north half of the southeast quarter of the southwest quarter of section twenty-one (21), township forty-seven (47), range twenty-nine (29), instead of the north half of the southeast quarter of the southeast quarter of said section, and south half of the northwest quarter of the southeast quarter of section twenty-one (21), township forty-seven (47), range twenty-nine (29), instead of the south end of the northwest quarter of the southeast quarter of said section."

The testimony offered in support of this issue was that of W. H. Cave and J. J. Franks, with the additional circumstance of embracing in the deed property she did not own, and leaving out a portion that she did own. While this testimony is very material, and entitled to careful consideration as tending to show a mistake in the deed executed by Mrs. Underwood, yet we are of the opinion, to warrant the decree correcting the mistake, there should be some testimony, supplementing that introduced, which points to the mistake in the deed. It must be noted that this affirmative relief, sought in the answer, is not for a specific performance of a contract of sale, but is asking the correction of the instrument which evidences a sale already consummated. There should be some testimony applicable to the instrument sought to be corrected. This usually consists of the testimony of the scrivener who prepared the deed, and declarations or requests of the grantor as to the property intended to be conveyed. In the absence of such testimony, other facts and circumstances should be introduced indicating to the reasonable satisfaction of the court that a mistake in fact was made in the preparation of the instrument. Upon the retrial of this issue, the testimony of William Cave and Franks should be supplemented with testimony that there was a mistake in the deed which was executed to consummate the sale that the witnesses refer to. Mere general declarations by witnesses that the property was sold and the purchaser took possession are not of themselves sufficient to authorize the court to correct a mistake in a deed. We repeat, it is not the sale that is sought to be enforced; but it is to supply the evidence of it. In the trial of this case, the term "mistake" is never used or referred to, except in the answer.

As this cause, so far as this particular issue is involved, is to be retried, we will say that the form of the decree in this cause is objectionable, for the reason its terms do not fully accomplish what is sought by the prayer for relief in the answer. This decree is absolutely silent as to the correction of any mistake. It should be responsive to the issue presented, and this decree, in the chain of title to this land, is to take the place of the erroneous deed; hence the decree should be full and specific as to the correction. It does not comply with the requirements of a proper decree to simply vest the title in the defendant, as prayed for in the answer and cross-bill. The decree should show upon its face what is done, without referring those who may be investigating the title to what was prayed for in the answer and cross-bill. The law as declared by the court, and its findings upon this particular issue, was erroneous.

It is unnecessary to discuss the statute of limitations as disclosed in this case. Malinda Underwood was holding under the will

of James F. Underwood, and not by virtue of the homestead law. She had only a life estate by virtue of the will, and she did not die until 1897; hence the statute of limitations is not applicable to the facts of this case.

It follows, from what has been said, that the judgment of the trial court, as to the land correctly described and contained in the deeds of Malinda Underwood, be affirmed, and that said judgment be reversed, and the cause remanded for a new trial, in accordance with the views as herein expressed, as to the land not embraced in those deeds and not correctly described. All concur.

STATE v. PRIVITT.

(Supreme Court of Missouri, Division No. 2.
June 9, 1903.)

HOMICIDE — INFORMATION — SUFFICIENCY —
OPINION EVIDENCE—HYPOTHETICAL QUESTIONS—INSANITY—EVIDENCE — ADMISSIBILITY—INSTRUCTIONS.

1. An information charging accused with murder, and averring that he then and there, with a loaded shotgun, feloniously, willfully, and deliberately, and of malice aforethought, did shoot and strike deceased, giving to him a mortal wound, of which deceased did then and there, in Sullivan county, instantly die, is not invalid because not stating when or where, or with what instrument, the mortal wound was given, or that the wounding was felonious.

2. A hypothetical question, propounded to an expert witness, calling for an opinion as to accused's insanity, need not be predicated on all the evidence bearing on the question of insanity, as the state, in putting a hypothetical question, may assume the facts in accordance with its theory, and need not state all the facts as they actually existed.

3. A hypothetical question is not improper because it includes only a part of the facts in evidence.

4. Where an expert witness has heard all the evidence in regard to accused's mental condition, except testimony which was stated to him, and there is no conflict in the evidence, he may express his opinion as to such mental condition at the time of a homicide, predicated on the evidence as he heard it and as stated to him; but the better practice, where the facts are controverted or are not entirely clear, is to put to the expert hypothetical questions based on the facts claimed to have been proven, that the jury may know the circumstances on which the opinion is based.

5. Where, in a homicide case, insanity is interposed as a defense, a trust deed executed by accused, four days after the homicide, to his attorney, is admissible as tending to show sanity at the time of the homicide.

6. Where accused waited for weeks after he had learned of the intimacy of deceased with his wife, and after he had entered into an armistice, and deceased had been assured by accused that he need not fear harm from him, before he killed deceased, an instruction was not erroneous because it eliminated from the jury's consideration any question of a less grade of homicide than murder in the first degree.

7. Where the court has properly instructed, under the evidence, that accused was either guilty of murder in the first degree or not guilty of any offense, an instruction stating under

what circumstances a person would be guilty of murder in the second degree or manslaughter, when there were no such issues in the case, is not reversible error.

8. Where it is not claimed a homicide was in self-defense, testimony that deceased had gone armed in the expectation of meeting accused, and had stated he might use the weapons on accused, is inadmissible.

Appeal from Circuit Court, Sullivan County; John P. Butler, Judge.

Newton J. Privitt was convicted of murder in the first degree, and he appeals. Affirmed.

A. W. Mullins and Wilson & Clapp, for appellant. Edward C. Crow, Atty. Gen., and C. D. Corum, for the State.

BURGESS, J. On the 6th day of January, 1902, there was lodged in the office of the clerk of the circuit court of Sullivan county, by the prosecuting attorney of said county, an information charging the defendant, Newton J. Privitt, with murder in the first degree in shooting and killing, with a double-barrel shotgun, at said county, on the 26th day of November, 1901, one John W. Wolf. Thereafter in April, 1902, defendant was put upon trial in said court, and convicted of murder in the first degree. He appeals.

There is no dispute as to the facts which led up to the homicide, which, briefly stated, are as follows: Newton Jasper Privitt, the defendant, is a married man and the father of several children. Some time during the latter part of June, 1901, the defendant received an anonymous communication suggesting that his wife was unfaithful to her marital vows, and that their nearest neighbor, one Page Weston, was her paramour. On receipt of this communication, the defendant confronted his wife with its contents, and she confessed that she had been guilty of criminal intimacy with John W. Wolf, the deceased, but denied that she was guilty of having committed this offense with Weston. She admitted that her liaison with Wolf had existed for about 10 years. The defendant began to consider and to discuss with his friends what course he should pursue as to Wolf, and whether he and his wife should thereafter live apart. He sent word by his quondam brother-in-law to Wolf that he must leave the country at once. Wolf acquiesced to this, and immediately began to prepare for his departure. It seems that Wolf was not able to so arrange his affairs as to be able to leave on the day fixed by defendant for his departure, and an extension of time was granted him. Wolf, after having completed his arrangements, left Sullivan county and went to Oklahoma. He had not been gone long until defendant learned from his wife that she had also committed adultery with another person, to wit, Page Weston; he being the person referred to in the anonymous communication. Prior to acquiring this information the defendant had made numerous threats against the life of Wolf; but, on learning of his wife's further degradation, he

¶ 2. See Criminal Law, vol. 14, Cent. Dig. § 1073; Evidence, vol. 20, Cent. Dig. § 2371.

stated that "he could not kill all the people in the neighborhood." He then arranged for a meeting with Wolf's wife, and requested her to send word to her husband that he might return home, and the defendant gave Mrs. Wolf his word of honor that no harm should come to her husband. Accordingly Wolf returned home, after having been absent in Oklahoma for a period of about two weeks. Soon after Wolf's return home, the defendant again armed himself, and began renewing his threats against the life of Wolf; but, being informed that Wolf was also armed, and prepared to meet any assault that defendant might make upon him, he then requested his informant to see Wolf, and to advise him that if he (Wolf) would never come to the defendant's home again, would never speak to defendant's wife or his minor children, and lay aside his arms, the defendant would also lay down his arms and their trouble would be settled. To this proposition Wolf assented, and the defendant, on being advised of Wolf's consent, said, "All right; that settles it." Thereupon another armistice was declared. This was during the month of July. The record does not disclose that either party failed to carry out this agreement, or that there was a renewal of hostilities in any manner, until the 26th day of November, 1901. On that day the deceased, accompanied by his wife and two children, was on his way to the town of Osgood. Their way ran past the farm which was owned by the defendant, and on which he was then building a new house. Immediately after the deceased and his family had passed the point where defendant and his men were engaged in digging a well, the defendant made inquiry of his son whether it was not deceased who had passed. At first his son was uncertain as to the identity of the persons passing; but he made a closer observation, and then assured his father that it was Wolf and his family who had passed. The son and the father then held a whispered conversation. The defendant immediately repaired to his home, which was about one-quarter of a mile distant from the well, and procured his shotgun and returned to the well. He ordered the removal of the man who was at the bottom of the well therefrom, and then ordered his men to unhitch the horse which was being used to draw dirt from the well, and said: "I will show him how he will break up my family." He then mounted the horse, which had been unharnessed by his direction, and rode rapidly in pursuit of the deceased, and overtook him about three-quarters of a mile from the well. He called on the deceased to halt, but, before the deceased had even time to turn his body, the defendant shot him in the back, inflicting a mortal wound. The deceased either attempted to get out of the wagon, or fell out, whereupon defendant dismounted, and walked to where deceased was, and emptied the other barrel of his gun into the

head of the deceased, tearing the whole cranium away. He then remounted his horse, returned to the well, and advised the persons there that he had accomplished his purpose, disappeared, and was gone for several days.

The defendant interposed the plea of insanity. The evidence on his part tended to show that, after he had been advised of his wife's shame, "he was melancholy in mind and depressed in spirit; that he was not given to the levity and jocosity that had been his wont."

The court, at the instance of the state, over the objection and exception of defendant, instructed the jury as follows:

"(1) The defendant in this case stands charged by information with murder in the first degree; that is to say, the defendant, Newton Jasper Privitt, stands charged with having feloniously, willfully, premeditatedly, deliberately, and of his malice aforethought shot and killed John Wolf, at the county of Sullivan, on the 26th day of November, 1901; and under the evidence in this case you will either convict the defendant of murder in the first degree, and so state in your verdict, or you will acquit him.

"(2) It is the duty of the court to instruct you on all questions of law arising in this case, and it is your duty to receive such instructions as the law of the case, and find the defendant guilty or not guilty, according to the law as declared by the court and the evidence as you have received it under the instructions of the court.

"(3) If the jury believe and find from the evidence in this cause that the defendant, Newton Jasper Privitt, in the county of Sullivan and state of Missouri, on or about the 26th day of November, 1901, did feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought make an assault upon John Wolf with a certain loaded gun, and then and there with said gun feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought did kill said John Wolf by shooting him upon the head and body, and thereby inflicting upon him a mortal wound, of which said wound he immediately died, at said county of Sullivan, during said month of November, 1901, and was thus killed by the shooting aforesaid, as charged in the information, then you will find the defendant guilty of murder in the first degree, and so state in your verdict. He who willfully—that is, intentionally—uses upon another at some vital part a deadly weapon, such as a loaded gun, must, in the absence of qualifying facts, be presumed to know that the effect is likely to be death, and, knowing this, must be presumed to intend death, which is the probable consequence of such an act. He who so uses such deadly weapon without just cause or provocation must be presumed to do it wickedly and from a bad heart. If, therefore, you find and believe from the evidence in this cause

that the defendant took the life of John Wolf by shooting him in a vital part with a gun, with the manifest design to use such weapon upon him, and with sufficient time to deliberate and fully form the conscious purpose to kill him, and without sufficient or just cause or provocation, then such killing is murder in the first degree; and while it devolves upon the state to prove willfulness, deliberation, premeditation, and malice aforethought, all of which are necessary to constitute murder in the first degree, yet this need not be proved by direct evidence, but may be deduced from all the facts and circumstances attending the killing; and if you can satisfactorily and reasonably infer their existence from all the evidence you will be warranted in finding the defendant guilty of murder in the first degree.

"(3a) As used in the information and in these instructions, 'feloniously' means wrongfully and wickedly, and also refers to the punishment imposed by law. 'Willfully' means intentionally, and not done by accident. 'Premeditatedly' means thought of beforehand for any length of time, however short. 'Deliberately' means done in the cool state of the blood, not in sudden passion, engendered by lawful or some just cause of provocation. And the court instructs the jury that in this case there is no evidence tending to show the existence of any such passion or provocation. 'Malice' means that condition of the mind which prompts one to do a wrongful act intentionally, without legal justification or excuse. It does not mean mere spite, hatred, or ill will, but signifies that state of disposition which shows a heart regardless of social duty and fatally bent on mischief; and 'malice aforethought' means that the act was done with malice and premeditation. 'Malice,' as used here, may be presumed from the intentional use of a deadly weapon in a manner likely to produce death.

"(4) To the charge made against the defendant of the taking the life of John Wolf the plea of insanity is interposed; in other words, under the plea of not guilty the defendant may, as he does, rely upon insanity as a defense to the charge made against him. And it is for you to determine, from all the evidence in this case, the validity of such or any defense interposed. Insanity, if satisfactorily shown by the evidence, is a valid defense; but before the defendant can be acquitted of the shooting, and taking the life of John Wolf in the manner he did, by reason of insanity, the jury must believe from all the evidence that at the time of the taking of the life of the said John Wolf he was not in possession of his faculties, and was incapable of appreciating the moral qualities of his act, and of distinguishing between right and wrong in respect to said act. In other words, in order to hold the defendant criminally responsible for taking the life of John Wolf, it is only necessary

that the jury be satisfied from all the evidence that he had sufficient mental capacity to distinguish between right and wrong as to the particular act with which he so stands charged. And if the defendant at the time of the said killing had sufficient mental capacity to distinguish between right and wrong as to said act, and knew that his act was criminal and wrong, and would deserve punishment, then in law he had a criminal intent, and was not so insane as to be exempt from the responsibilities of his act. And in this connection the court further says to the jury that excitement or frenzy arising from the passion of anger, hatred, or revenge, no matter how furious, if not the result of a diseased mind, is not legal insanity, and the jury should not confound excitement, anger, or wrath, or acts done or committed in either or both, or in revenge, with actual insanity—insanity recognized by law, because it is only legal insanity, a disease of the brain, rendering a person incapable of distinguishing between right and wrong, with respect to the offense charged, that excuses the commission of such act. The doing of such act in frenzy, hatred, or revenge, or by reason of some irresistible impulse to avenge some former wrong or grudge, does not excuse.

"(5) The jury will observe, from all the instructions given to them, either upon the part of the state or the defendant, that under the law the defendant had no right to kill John Wolf because of his knowledge or suspicion of deceased and defendant's wife having previously had illicit intercourse. The law is that where a man finds his wife in the act of adultery, and at the moment kills the adulterer, the law, while not justifying, even under these circumstances, the taking of life, will lessen the offense to manslaughter. And the law is, further, that if a husband, upon hearing of such adultery, immediately, before he has had time to reflect, and before having formed the conscious purpose or design to take life, pursues and kills such adulterer, such killing will be murder in the second degree; but the jury will bear in mind that under the law, to reduce the killing under the circumstances stated to manslaughter, the person killed and the wife of the slayer must by such husband be found in the act of adultery, and such killing then and there done. And, to reduce the taking of life to murder in the second degree by reason of hearing of adultery between the person slain and the wife of the slayer, such killing must be done immediately upon the hearing of such adultery, before time has been had to reflect and the conscious purpose formed to take such life. And in no event can a person, where they have been informed, suspected, and known for days, weeks, or even months, of the adultery of their wife with another, prior to taking the life of such other, be in any wise justified, excused, or their crime mitigated in the taking

of the life of such other under the circumstances and after the knowledge herein stated. And the so taking of life because of such knowledge or information, in order to avenge said acts, after having formed the conscious purpose to kill, renders the person so taking such life guilty of murder in the first degree. And in this case, under the law and facts, there is nothing to reduce the killing of John Wolf to either murder in the second degree or manslaughter, but the jury must find defendant guilty of murder in the first degree or acquit him upon the ground of insanity; and in this connection the court says to the jury that, if you find the defendant guilty of murder in the first degree, you will simply so state in your verdict.

"(6) The jury are further instructed that excitement, passions, and angered feeling, or revenge, produced by motives of anger, hatred, or revenge, is not insanity, and that the law holds the wrongdoer of an act under such conditions responsible for his acts, and the jury have no right to excuse or in any wise justify or mitigate defendant's act in the taking of John W. Wolf's life, except they can so do under and according to the law.

"(7) The jury will observe, from all the instructions given them, those upon the part of the state as well as defendant, that under the law the defendant had no right to kill John W. Wolf because of his knowledge or suspicion of deceased and defendant's wife having previously had illicit intercourse. And in this case, if the defendant, after having suspected or known for days, weeks, or even months of the intimacy of his wife and John W. Wolf, by reason thereof, and after having formed a conscious design and purpose to kill said Wolf, did kill said Wolf, the so killing of said Wolf was and is under the law murder in the first degree, and the jury should so find.

"(8) In determining as to the guilt or innocence of the defendant, you should take into account the testimony in relation to his character as a moral man, and you should give to such testimony such weight as you deem proper; but if, from all the evidence, you are satisfied beyond a reasonable doubt, as defined in these instructions, that the defendant is guilty, then his previous good character, if shown, cannot justify, excuse, palliate, or mitigate the offense, and you cannot acquit him merely because you believe he has been a person of good repute.

"(9) The 'reasonable doubt' mentioned and referred to in these instructions means a substantial doubt arising out of the evidence, and not a mere possibility of the defendant's innocence."

On the part of defendant the court instructed the jury as follows:

"(1) The information in this case is a mere formal charge against the defendant, and of itself is no evidence whatever of his guilt, and no juror should permit himself

to be in any degree or to any extent influenced by it.

"(2) If, after fully and deliberately weighing and considering all the evidence before them in this case, the jury entertain any reasonable doubt of the defendant's guilt, they must give him the benefit of such doubt, and acquit him. A juror is understood to entertain a reasonable doubt when he has not an abiding conviction of mind, founded on the evidence, to a moral certainty, that the defendant is guilty as charged.

"(3) The court instructs the jury that insanity is interposed by counsel for defendant as an excuse for the charge set forth in the information. This defense, when established, is one the law recognizes, and entitles the defendant to be acquitted altogether. Insanity is a physical disease located in the brain, and is either partial or general, and which disease so perverts and deranges one or more of the mental and moral faculties so far as to render the person suffering from the affliction incapable of distinguishing right from wrong in reference to the particular act charged against him, and incapable of understanding that the particular act in question was the violation of the law of God and of society. Wherefore the court instructs the jury that if they believe and find, from the evidence, that at the time he did the killing charged in the information the defendant was so perverted and deranged in one or more of his mental and moral faculties as to be incapable of understanding, at the moment he killed John W. Wolf, that such killing was wrong, and that he (the defendant) at the time was incapable of understanding that this act of killing was a violation of the law of God and of society, if the jury find he was so insane, they should find him not guilty.

"(4) If the jury believe and find, from the evidence, that the mind of the defendant, Newton Jasper Privitt, was unbalanced, diseased, and disordered at the time he shot and killed the deceased, John W. Wolf, and in such condition in regard to that particular act that he did not have sufficient intelligence, reason, and will to enable him to distinguish between right and wrong in respect to said act, and to know and understand that it would be wrong, and that he would deserve punishment by committing it, and at the time sufficient mental power to control the impulses of his own disordered mind, then the defendant is not guilty as charged in the information, because of his disordered mind, and upon that ground the jury should acquit him.

"(5) The court instructs the jury that, to establish the insanity of the defendant with respect to the act charged against him in the information, positive and direct proof of it is not required. To entitle him to an acquittal by reason of his insanity at the time of the killing of said John W. Wolf

by defendant, circumstantial evidence which reasonably satisfies the mind of its existence is sufficient. As the law presumes the defendant innocent, the burden of proving him guilty rests with the state; and before you should convict him his guilt must be established beyond all reasonable doubt.

"(6) The previous good character of the defendant, if proved to your satisfaction in the case, you ought to consider, together with all the other facts in evidence, in passing upon the question of his guilt or innocence of this charge; for the law presumes that a man whose character is good is less likely to commit a crime than one whose character is not good.

"(7) The testimony given by the physician and expert who testified in this case is to be taken and considered by the jury like the evidence of the other witnesses who testified in the cause; and the opinions on questions of insanity, which have been given by the medical expert, are subject to the same rule of credit or discredit as the testimony of the other witnesses, and are not conclusive on the jury. These opinions neither establish nor tend to establish the truth of the facts upon which they are based. Whether the matters testified to by the witness in the cause are facts, are true or false, is to be determined by the jury alone; and you must also determine whether the facts and matters stated and submitted to experts in the hypothetical questions are true in fact and have been proven in this case.

"(8) Under the law of this state the defendant is presumed to be innocent of the crime charged against him, and so strong is this presumption that it clings to him, surrounds, shields, and protects him, through the entire trial of this case, and until such presumption is overcome by evidence which proves his guilt beyond a reasonable doubt. Such evidence, in order to warrant a conviction, must be clear, satisfactory, and abiding, fully satisfying the mind and conscience of each and every juror. It is not sufficient in a criminal case, to justify a verdict of guilty, that there may be strong suspicion, or even strong probability, of guilt; but the law requires proof by legal and credible evidence of such a nature that, when it is all considered, it produces a clear, undoubting, and entirely satisfactory conviction of the defendant's guilt. The burden of proof is upon the state to make out and establish by the evidence, beyond a reasonable doubt and to the satisfaction of the jury, every fact and circumstance necessary to prove his guilt; and, unless his guilt is so established, the jury must find him not guilty."

The defendant also prayed the court to instruct the jury as to the law of murder in the second degree, but the court failed and refused to do so, to which failure and refusal of the court to so instruct the jury the defendant then and there excepted at the time. The defendant also objected and ex-

cepted to the failure of the court to instruct the jury upon all questions of law arising in the case and necessary for their guidance in the determination of their verdict, and saved his exceptions.

The information, leaving off the formal parts, is as follows:

"That one Jasper Privitt, on the 26th day of November, 1900, at the county of Sullivan, in the state of Missouri, then and there being, in and upon one John W. Wolf then and there feloniously, willfully, deliberately, premeditatedly, on purpose, and of his malice aforethought did make an assault, and with a dangerous and deadly weapon, to wit, a double-barrel shotgun, then and there loaded with gunpowder and leaden balls, which he, the said Jasper Privitt, in his hands then and there had and held, at and against him, the said John W. Wolf, then and there feloniously, willfully, deliberately, premeditatedly, on purpose, and of his malice aforethought, did shoot off and discharge, and with the double-barrel shotgun aforesaid then and there feloniously, willfully, deliberately, premeditatedly, on purpose, and of his malice aforethought, did shoot and strike him, the said John W. Wolf, on the body and head of him, the said John W. Wolf, then and there with the dangerous and deadly weapon, to wit, the double-barrel shotgun aforesaid, and the gunpowder and leaden balls aforesaid, in and upon the body and head of him, the said John W. Wolf, giving to him, the said John W. Wolf, a mortal wound, of which mortal wound the said John W. Wolf did then and there, in said county of Sullivan, instantly die. And the said James R. Page, the prosecuting attorney aforesaid, under his oath of office aforesaid, does say that the said Jasper Privitt him, the said John W. Wolf, in the manner and by the means aforesaid, feloniously, willfully, deliberately, premeditatedly, on purpose, and of his malice aforethought, did kill and murder, against the peace and dignity of the state."

It is said for defendant that the information is invalid, in that it does not state when or where or with what instrument the mortal wound was given, or that the wounding was felonious; but this seems to us to be a misinterpretation of the information. It does not omit the words "then and there" after the words "giving to him, the said John W. Wolf, a mortal wound," as contended by defendant, but expressly avers "giving to him, the said John W. Wolf, a mortal wound, of which mortal wound the said John W. Wolf did then and there, in said county of Sullivan, instantly die." It clearly appears from the information that the assault was committed with a shotgun loaded with gunpowder and leaden balls, and that the defendant then and there, with said shotgun, feloniously, willfully, deliberately, premeditatedly, on purpose and of his malice aforethought, did shoot and strike the deceased, giving to him a mortal wound, of which wound said de-

ceased, in Sullivan county, did instantly die. This seems to us to be a sufficient averment of the time and place of giving the wound and the cause of the death. The information is in all material respects like the indictment in the case of *State v. Jones*, 134 Mo. 259, 35 S. W. 607, which was held to be valid. So in *United States v. Ball*, 163 U. S. 663, 16 Sup. Ct. 1192, 41 L. Ed. 300, it was held that an indictment for murder, which alleges that Millard Fillmore Ball, John C. Ball, and Robert E. Boutwell, at a certain time and place, by shooting with a loaded gun, inflicted upon the body of William T. Box a mortal wound, of which mortal wound the said William T. Box did languish, and, languishing, did then and there instantly die, unequivocally alleges that William T. Box died of the mortal wound inflicted by the defendants, and that deceased died at the time and place at which the mortal wound was inflicted. While the better rule in preparing indictments and informations is to follow approved precedents when it can be done, they are not necessarily defective because they fail to do so; but if they contain all necessary averments, though couched in different language from approved forms and precedents, they will be held good. The information in this case we think sufficient.

The next question presented by this appeal is with respect to the admission of the expert evidence of Dr. C. R. Woodson, which defendant claims was erroneously admitted, not upon the grounds that he was not qualified; but upon the ground that the hypothetical question propounded to him leaves out nearly all the essential ingredients in the case. To another question of a similar character defendant objected upon the ground that the question is incompetent, because it does not state the law in that regard, but omits an essential ingredient to make it the law. We are not advised what essential ingredients in the case were omitted from the hypothetical questions propounded to the witness, and are therefore not able to appreciate the full force of the objections. It is, however, said that the first of said questions does not assume that the matters stated in the question were true, and, while it called for the opinion of the witness on the whole case with respect to the sanity or insanity of the defendant, it was not predicated, as it should have been, on all the evidence in the case bearing on the question of defendant's insanity. In putting hypothetical questions to the expert witness counsel for the state had the right to assume the facts in accordance with his theory of them. It was not essential that he should have stated the facts as they actually existed. *Cowley v. People*, 83 N. Y. 464, 38 Am. Rep. 464; *Lovelady v. State*, 14 Tex. App. 545; *Quinn v. Higgins*, 68 Wis. 664, 24 N. W. 482, 53 Am. Rep. 305; *Kerr v. Lunsford*, 31 W. Va. 660, 8 S. E. 498, 2 L. R. A. 608. Nor is such a question

improper simply because it includes only a part of the facts in evidence. *Rogers on Expert Testimony* (2d Ed.) 65.

With respect to the other question there was very little conflict in the evidence in regard to the facts and circumstances which led up to the homicide, and defendant's mental condition at that time and recently thereafter. The expert witness was present during most of the trial, and heard all the evidence in regard to the mental condition of defendant, except the testimony of one witness, which was stated to him by counsel for the state, and under such circumstances there was no reversible error in allowing him to express his opinion as to defendant's mental condition at the time of the homicide, predicated of the evidence as he heard it and as stated to him. *State v. Kilinger*, 46 Mo. 224. In *McNaghten's Case*, 10 Clark & F. 200, it was held that, where an accused person is supposed to be insane, a medical man, who has been present in court and heard the evidence, may be asked, as a matter of science, whether the facts stated by the witnesses, supposing them to be true, show a state of mind incapable of distinguishing between right and wrong. In the case of *Getchell v. Hill*, 21 Minn. 464, it was said that "the trial court may, in its discretion, as a matter of convenience, permit the hypothesis to be put to the witness, by referring to the testimony, if he has heard it, instead of requiring the counsel to recapitulate it." The rule seems to be that "when, in a proper case for expert testimony, the facts are admitted, or proved by evidence which is not conflicting, the opinion of an expert upon such facts is admissible as a scientific deduction." *Coyle v. Commonwealth*, 104 Pa. 117.

Defendant, however, contends that, as only the evidence of one witness was stated to the expert, Dr. Woodson, with respect to the evidence of all the other witnesses who testified as to the mental condition of the defendant, or such of them as Dr. Woodson may have heard testify, he, as the expert in the case, was thus called upon to give an opinion upon his memory of what the evidence was, and upon his conclusions as to what the evidence established as facts, thus being called upon to determine the facts for himself, thereby becoming the trier of the facts in place of the jury. There is much force in this contention. It has, however, been held that even where more than one witness has testified, if there is no conflict in the evidence, as in the case at bar, a court may in its discretion allow counsel to ask a hypothetical question upon the facts testified to by the witness as he remembers them, without any recapitulation of the evidence. *Rogers on Expert Testimony* (2d Ed.) 71. But the better practice in all cases, where the facts are controverted or are not entirely clear, is to put to the expert hypothetical questions, based upon the facts claimed to have been

proven by the evidence, in order that the jury may know the facts and circumstances upon which the expert's opinion may be based, and to determine for themselves, as is their province, whether proven or not; otherwise, the expert must depend upon his memory as to the facts, and predicate his opinion thereon, thus becoming the trier of the facts, instead of the jury.

In *Bennett v. State*, 57 Wis. 69, 14 N. W. 912, 46 Am. Rep. 26, it was said: "To permit an expert in such case to give an opinion upon his memory of what the evidence was, and upon his conclusions as to what the evidence established as facts, would seem to be trenching upon the province of the jury, and trying the case solely upon the opinions of the experts, founded upon their recollection and their opinion as to what the facts proved were. It does not help the case to say that the question is qualified by the statement made therein, 'taking the testimony as true,' because the expert must still trust to his memory of what the evidence was; and his inferences, deduced from facts sworn to by the witnesses, will necessarily control his judgment as to what in fact was the evidence in the case, and he will make up his mind from his understanding of what was sworn to by the witnesses. He may understand the evidence to be radically different from what the jurors or other persons hearing the testimony understand it. It is almost impossible that all the testimony given in such case, coming from many witnesses and elicited by a long examination, should be entirely uncontradictory, or should be so plain that different inferences would not be drawn by different men; and to permit an expert to give his opinion, which is to go to the jury as competent evidence, upon such a mass of testimony, without any explanation as to what state of facts such opinion is based upon, is in effect taking the case from the jury and deciding it upon the understanding of the witnesses as to what facts the evidence in the case established. We think the better rule is that the jury shall be clearly informed of the exact state of facts upon which the expert bases his opinion, and they certainly are not so informed when he gives his opinion upon his recollection and understanding of the whole evidence in the case; and this is especially so where the evidence is voluminous, is elicited from a large number of witnesses, and is not entirely harmonious and uncontradictory. The jury should in every case distinctly understand what are the exact facts upon which the expert bases his opinion. This is, perhaps, best accomplished by limiting him to answering hypothetical questions; and if it be proper in any case to permit an expert who has heard the testimony of a particular witness, or of all the witnesses, to give his opinion upon such evidence, and there be any conflict of evidence, or any doubt as to what the evidence is, he should be

required to state fully his understanding as to what facts are established by such testimony. In such case the jury will be able to determine whether his opinion is based upon the evidence in the case as they understand it, or otherwise. Any other rule, it seems to us, leaves the jury entirely in the dark as to the most important fact, viz., whether the opinion is based upon the evidence as they understand it, or upon some other construction of the evidence not in their opinion justified by the testimony in the case." The same rule is announced in 2 *Greenleaf on Evidence* (7th Ed.) § 373, note 1; *Gulterman v. Steamship Co.*, 83 N. Y. 358; *Reynolds v. Robinson*, 64 N. Y. 589; *Dexter v. Hall*, 15 Wall. 9, 21 L. Ed. 73; *McMechen v. McMechen*, 17 W. Va. 683-694, 41 Am. Rep. 682; *State v. Felter*, 25 Iowa, 67; *Reed v. State*, 62 Miss. 405, *State v. Bowman*, 78 N. C. 509; *Rogers on Expert Testimony*, p. 64, § 27, note 1.

Over the objection of defendant the state was permitted to read in evidence a deed of trust executed by defendant and wife on the 30th day of November, 1901, to secure the payment of a note for that sum executed by him on that day to John W. Clapp, one of defendant's attorneys, and this is claimed by defendant to be reversible error. The homicide was committed on the 26th of November, 1901, and we are inclined to the opinion that, the deed of trust having been executed so recently thereafter, it was admissible as tending to show that he was not insane at the time of the homicidal act. It is true that it could have had but little weight with the jury, even upon that question; but that was for their consideration.

It is said that the first instruction given on the part of the state is erroneous, in that it eliminates from the consideration of the jury the question of whether, under the evidence, the defendant could be guilty of a less grade of homicide than murder in the first degree. We are unable to agree to this contention. There was every element of murder in the first degree in the homicide. The evidence shows that the killing was done feloniously, willfully, deliberately, with premeditation, on purpose, and with malice aforethought, thus supplying every ingredient necessary in murder in the first degree, of which he was clearly guilty, unless excusable upon the ground of insanity. There was nothing whatever, not a single circumstance, to reduce the offense to a less grade of offense. The case of *State v. Grugin*, 147 Mo. 39, 47 S. W. 1058, 42 L. R. A. 774, 71 Am. St. Rep. 553, is not an authority for such contention. In that case the defendant shot and killed the deceased as soon as he could get to him after learning that he had wronged his daughter, and the deceased said to him that he would do it again, and started toward him as if to assault him. In the case at bar the defendant waited for weeks after he had learned of the intimacy of de-

ceased with his wife, after they had entered into an armistice, and deceased had been assured by defendant that he need not fear harm from him, and that too, without a word of any kind from deceased. There was, therefore, no error in giving this instruction.

The fifth instruction given on the part of the state is criticised upon the ground that it embraces abstract propositions of law, and tells the jury under what circumstances a man would be guilty of murder in the second degree or manslaughter for killing another guilty of adultery with his wife, when there were no such issues in the case. That this instruction presented mere abstract propositions of law to the jury and had no place in the case is indisputable, but it does not necessarily follow that it was prejudicial error. The court had already instructed that under the evidence defendant was either guilty of murder in the first degree or not guilty of any offense, which was manifestly correct under the evidence. It could not, therefore, in any possible way have detracted from the weight of the evidence adduced in support of the plea of insanity, or made stronger the state's case; for there could be, under the facts and the law as declared by the court, but one of two results—that is, a conviction of murder in the first degree, or an acquittal upon the ground of insanity. There was no probability that the jury were misled, or that they could in fact have been misled by the instruction, although it merely embodied abstract propositions of law. It was held by this court in *State v. Dunn*, 80 Mo. 681, that a defendant cannot complain of an instruction as to a grade of offense of which he was not convicted, even though the instruction was erroneous, and we are unable to see any material difference between such an instruction and the one under consideration, which correctly told the jury what the law is under circumstances therein set forth, though not authorized, for the want of evidence upon which to base it. The judgment should not be reversed upon this ground.

There was no error in refusing to permit the witnesses Hammond, Page, May, and Knowles to testify that the deceased had gone armed in the expectation of meeting the defendant, and that the deceased had said that he might use weapons which he carried on the person of the defendant. Threats of this character are only admissible when the plea of self-defense is interposed, and there is no pretense that the shooting in this case was done in self-defense. *State v. Reed*, 137 Mo. 137, 38 S. W. 574; *State v. Clum*, 90 Mo. 483, 3 S. W. 200; *State v. Brown*, 63 Mo. 439.

The crime was a most atrocious one, rarely equaled in its brutality among civilized people. After defendant learned that his wife and deceased had been criminally intimate for years, he notified him to leave the country, which he did as soon as possible, and went to Oklahoma, with the view of moving there with his family and making it

their future home. But after he had been gone a few days defendant learned from his wife that she had also been criminally intimate with another man. Whereupon defendant said that he "could not kill all the people in the neighborhood." He then saw the wife of deceased, and requested her to send word to her husband that he might return home, and defendant gave Mrs. Wolf his word of honor that no harm should come to her husband. With this assurance, communicated by Mrs. Wolf to her husband, he returned home, and thereafter, while deceased, his wife, and two young sons were en route with their wagon to market, they passed along the road in proximity to where defendant and others were engaged in digging a well, one of whom was his son. Defendant inquired of his son if that was Wolf in the wagon, and, being informed that it was, went some distance, procured a double-barreled shotgun, mounted a horse, followed deceased about three-fourths of a mile, halted them, and, while deceased was begging him not to shoot, he fired one load of shot into his back. Whereupon deceased managed to get out or fell out of the wagon, and was by the side of his horses, and while his wife was begging and screaming in the presence of her two little boys not to kill her husband, that she could not support her little family, he in utter disregard of her pleadings, or of the presence of her and her children, fired the remaining load of shot into the head of deceased, blowing off the whole front part of it, killing him instantly, without any effort upon the part of deceased to defend himself. It would be hard to find a more deliberate murder or one more cruel and inhuman.

Finding no reversible error in the record we can but affirm the judgment, and direct the sentence which the law imposes to be executed. All concur.

SEABOARD NAT. BANK OF NEW YORK v. WOESTEN.

(Supreme Court of Missouri. June 15, 1903.)

APPEAL—LAW OF THE CASE—SPECIAL OR LOCAL LAWS.

1. On the retrial of a case reversed on appeal, the opinion of the appellate court is the law of the case.

2. The charter of St. Louis, art. 6, § 25, permitting a recovery of 15 per cent. interest on a tax bill for street improvements, when not paid within six months after demand, is not in conflict with Const. art. 4, § 53, prohibiting the passing of local or special laws "fixing the rate of interest," and of special laws in general.

In Banc. Appeal from St. Louis Circuit Court; John W. McElhinney, Judge.

Action by the Seaboard National Bank of New York, assignee, against Frederick Woesten. Judgment for plaintiff, and defendant appeals. Pending appeal, defendant died, and the cause was revived against his executor and heirs at law. Affirmed.

Judson & Green, for appellant. Boyle, Priest & Lehmann and Geo. W. Easley, for respondent.

MARSHALL, J. For the purposes of this appeal, the full and accurate statement of the case made by counsel for the appellant is adopted. It is as follows:

"This is a suit upon a special tax bill issued by the city of St. Louis for the reconstruction of Grand avenue from St. Louis avenue to Montgomery street. Plaintiff sues as the assignee of the Barber Asphalt Paving Company, the original contractor to whom the tax bill was issued. In its petition, plaintiff sets out the ordinances and the contract under which the alleged work was done; alleges compliance by the contractor with all the terms of said contract and ordinances; that defendant, Frederick Woesten, was the owner of certain property abutting upon said reconstructed street; and that the tax bill which was filed with its petition had been regularly issued. This cause was tried upon the petition and an amended answer filed by defendant, Woesten, since the former appeal of the case, which is reported in 147 Mo. 467, 48 S. W. 939, 48 L. R. A. 279, which amended answer is: First. A general denial. Second. A cross-bill to plaintiff's petition, alleging that the ordinances of the city of St. Louis under which the alleged work was done, the contract for said work, and the special tax bill issued therefor, were all of them null and void, for the following reasons: (1) That said ordinance provides for the repair and maintenance of Grand avenue for a period of nine years, commencing one year after the work of reconstruction shall be completed, and said ordinance does not specify the materials to be used in such work of repair and maintenance, and was not indorsed with an estimate of the cost of such repair and maintenance, as required by the city charter, and that said ordinance does not contain a specific appropriation for the cost of said repair and maintenance from the proper revenue fund of the city of St. Louis, as required by the city charter. (2) That said ordinance provides for the payment of public money for the public work of repair and maintenance of part of said Grand avenue for nine years, but that the comptroller of the city never indorsed said ordinance, to the effect that sufficient unappropriated means stood to the credit of the fund set aside for street repairs to meet the requirements of said ordinance. (3) That the said ordinance requires that the work of reconstruction of said street, and the repair and maintenance thereof for nine years, should be advertised, bid for, let, and contracted for, in one and the same bidding, letting, and contract, and to and by the same contractor, and that it was unlawful to so confuse and combine the cost of reconstruction and the cost of repairs to said street. (4) That in recommending Ordinance No. 16,943, set out

75 S.W.—30

in plaintiff's petition, the board of public improvements of the city of St. Louis were acting under section 562 of the Revised Ordinances of 1887 and section 564 of the Revised Ordinances of 1893, and that said ordinances are null and void, because they are repugnant to sections 14, 15, 17, 18, 24, 27, and 28 of the charter of the city of St. Louis. (5) That the board of public improvements did arbitrarily fix the price and rate for said work of repair and maintenance, and did withdraw said work of repair and maintenance from public bidding, by adopting a uniform rule to the effect that no bid for the public work of reconstruction, repair, and maintenance should be accepted by them in which the bid for repair and maintenance to be paid by the city should exceed fifty cents per square of one hundred feet per annum. (6) That said price of fifty cents per square per annum, adopted by said board, for said work of maintenance and repair, was inadequate and insufficient to cover the cost thereof during the whole of said period, and that, by arbitrarily fixing the price of said maintenance and repair at said sum, said board invited and permitted plaintiff to bid an exorbitant price for the work of reconstruction, in order to make up what plaintiff would lose on said repairs and maintenance, and that the price bid by plaintiff for the work of reconstructing said street was and is exorbitant and unreasonable, and plaintiff is, by said rule and method of letting contracts, compelled to pay a portion of the cost of the repair and maintenance of said street. (7 and 8) That at the time of letting of said contract the board of public improvements well knew that the contractor, the Barber Asphalt Paving Company, owned and possessed the exclusive right to produce and use the materials specified therein, and that by selecting said monopolized materials the cost of said construction was greatly increased, and said contract was not let by competitive bidding, as required by the charter. (9 to 13) That the provisions of the charter and ordinances of the city of St. Louis in reference to special tax bills for work of the character done by plaintiff's assignor were and are unconstitutional and unreasonable, and, in effect, provide for taking defendant's property without due process of law, and that they are therefore null and void. And defendant alleges that said tax bill was and is a cloud upon his title to the real estate described in the petition, and he prays the court to declare said tax bill to be null and void and of no effect.

"Reply. Plaintiff, for reply to this amended answer, denied each and every allegation therein contained.

"Evidence. For plaintiff, the cause was submitted upon the pleadings, the tax bill, which was admitted to have been assigned to plaintiff and to have been regularly issued, and upon the admission of defendant that he knew that the work of reconstruction was being

done in front of his property and made no objection thereto at the time, and that the work so done has ministered to the benefit of defendant's property, and that payment of the tax bill sued upon was demanded September 23, 1893. Defendant offered in evidence Ordinance 16,943, as set out in plaintiff's petition, and in behalf of defendant it was admitted as follows: That at time of the recommendation of said ordinance by the board of public improvements of the city of St. Louis, and at the time of its transmission to and reception by the municipal assembly of the city of St. Louis, and during its pendency in said municipal assembly, prior to its final adoption and approval, said ordinance was not indorsed with the board's estimate, or any estimate, of the cost of maintenance or repair of the street for nine years, provided for therein. The said board of public improvements never did, from the time of recommending and transmitting said ordinance to the municipal assembly, nor during its pendency in said municipal assembly, nor at any time whatever, prepare and submit to said municipal assembly of the city of St. Louis any estimate of the cost of the work of maintenance or repair of the street for nine years, proposed and provided for in said ordinance; and said ordinance did not and does not contain a specific appropriation for the cost of said maintenance or repair, based upon an estimate of such, indorsed by the president of said board of public improvements on said ordinance, for the whole cost of the repair and maintenance of that portion of Grand avenue embraced in said ordinance. (2) In the municipal assembly of the city of St. Louis the said Ordinance No. 16,943 was, on its second reading, referred to the appropriate committee, but the said committee failed to obtain, and there was not placed on said ordinance at any time, the indorsement of the comptroller of the city of St. Louis, to the effect that sufficient appropriated means stood to the credit of the fund set aside for street repairs—reconstructed streets—to meet the requirements of said ordinance, and particularly the requirement thereof as to the payment of the cost of maintenance and repair of said street provided for in said ordinance, either for one year or nine years. While this is true, there were moneys in the city treasury at the time standing to the credit of the fund known as "Street repairs—Reconstructed streets," out of which the maintenance could be paid annually, and was paid every six months, commencing eighteen months after the completion of the work of reconstruction. This fund ('Street repairs—Reconstructed streets') is one provided every year by the annual appropriation bill, known as the 'General Appropriation Bill,' and is provided upon a recommendation and general estimate by the street commissioner, in view of the contracts outstanding, and the requirements of his department. (3) The work of

reconstruction and the maintenance of said street for nine years, beginning at the end of the first year after reconstruction, were advertised and bid for and were let and contracted for together, as shown by the advertisement, bidding, and letting, No. 3,884, and the record of the board of public improvements, at the same time, by the same contract, and each secured by a separate bond, and were, as a matter of fact, let to and contracted for to be done by the same contractor. Defendant then offered in evidence said advertisement, said bidding and letting, and said contract under which said work was done, with its maintenance and repair clauses. Defendant also offered in evidence section 542 of Revised Ordinances of 1887, and section 564, Revised Ordinances 1892, which were admitted by plaintiff to have been in force when said contract was let. It was also admitted by plaintiff that defendant had paid all taxes of the city and state assessed against the property in question.

"Defendant then offered the following declarations of law, all of which the court refused, to wit: (1) The court declares the law to be that, under the pleadings and evidence, plaintiff is not entitled to recover, or to have the tax bill sued upon declared a lien on defendant's property. (2) The court declares the law to be that, under the pleadings and the evidence, the tax bill herein sued upon is null and void, because the ordinances of the city of St. Louis under which the contract for this street improvement was let violate the provisions of the charter of the city of St. Louis, by imposing upon the abutting property owners the cost and burden of repairing and maintaining said street for a period of nine years after the completion of said work thereon. (3) The court declares the law to be that, under the pleadings and the evidence, the tax bill herein sued upon is null and void, because the contract in evidence, under which the work was done, imposes upon the abutting property owners the cost and burden of repairing and maintaining said street for a period of nine years after the completion of said work thereon. (4) The court declares the law to be that even if the tax bill sued upon herein is valid, and if plaintiff is entitled to recover upon the same, then the amount due plaintiff thereon is limited to the amount specified on the face of said tax bill, with interest on said sum at six per cent. per annum from the date on which payment thereof was demanded from defendant, because the provisions of the charter and ordinances of the city of St. Louis for the recovery of interest on all such bills at the rate of fifteen per cent. per annum are unconstitutional, unreasonable, and void."

"Thereupon the court found for plaintiff, and rendered a special judgment against defendant for the sum of \$2,563.35, decreeing the same to be a lien upon the defendant's land described in plaintiff's petition, and di-

recting a sale thereof to satisfy said judgment and costs, from which judgment defendant has appealed, after the overruling of his motion for a new trial. Defendant, Frederick Woesten, has died since the appeal herein, and the cause has been revived against his executor and heirs at law."

Upon this state of the record, counsel assign two errors, which are as follows: (1) That it was unlawful for the board of public improvements to advertise and let together, in one contract and to the same contractor, the contract for reconstruction, and also for maintenance for nine years; (2) that the penalty of 15 per cent. per annum is unconstitutional, because in conflict with section 53, art. 4, of the Constitution of Missouri, which provides that no local or special law fixing the rate of interest shall be passed, and because in conflict with section 53, art. 4, of the Constitution of Missouri, being special legislation.

1. The first error assigned is that the contract for the work required the contractor to maintain it for nine years. This identical objection was urged when the case was here on former appeal, and was held to be untenable. It was then said: "There would seem to be no doubt that under these general powers the municipality would have the same right, in order to secure good and durable work, to require of the contractor any guaranties that a private person might take in order to secure the perfection of work done for him. Municipal officers who, in contracting for such public work, should neglect to take from a contractor some kind of guaranty of the perfection of the work and materials, would be derelict in their duty, and unfitted for the trust with which they had been invested. The kind of guaranty should be left to their discretion and business sense. We think no wiser or more adequate provision for securing perfection in the completed work could be devised than that of requiring the contractor to maintain it for a reasonable time at such cost as would compensate for the repairs necessary to preserve good work and good material from becoming imperfect from natural and unavoidable causes." This was the law of the case upon a trial anew in the lower court. *May v. Crawford*, 150 Mo. 504, 51 S. W. 693. Since the former decision in this case, the same question has again come before the court, and the rule announced on former appeal hereof has been reaffirmed. *Barber Asphalt Paving Co. v. Hezel*, 155 Mo. 391, 56 S. W. 449, 48 L. R. A. 285; *Barber Asphalt Paving Co. v. French*, 158 Mo., loc. cit. 556, 58 S. W. 934, 54 L. R. A. 492. In the case last cited, *Gantt, C. J.*, in disposing of the same contention, referred to the decision in this case on former appeal (147 Mo. 467, 48 S. W. 939, 48 L. R. A. 279), and to the case of *Barber Asphalt Co. v. Ullman*, 137 Mo. 543, 38 S. W. 458, and said: "The question must be considered settled by the majority opinions in

those cases." It is only necessary to repeat that statement here.

2. The second error assigned is that the provision of section 25 of article 6 of the St. Louis charter, which allows a recovery of 15 per cent. interest per annum if the tax bill is not paid within six months after demand, is unconstitutional, in that it violates section 53 of article 4 of the Constitution, which prohibits the General Assembly to pass any local or special law "fixing the rate of interest," and also to pass any local or special law where a general law can be made applicable. The St. Louis charter inaptly calls the evidence of the assessment of benefits a "tax bill," and is equally inaccurate in calling the 15 per cent. "interest." The confusion arising from the use of the term "tax bill" caused much litigation, but that was finally settled when it was held that such assessments of benefits are in no true sense a tax. So, too, the misapprehension as to the character and nature of the 15 per cent. gave rise to litigation, until that question was set at rest by the decisions of this court in *Town of Tipton v. Norman*, 72 Mo. 380, and *Eyerman v. Blaksley*, 78 Mo. 145. In the first case cited it was said: "The power to require all able-bodied male inhabitants to work the streets in such manner as by ordinance the council might prescribe, implies the power of enforcing that ordinance by the imposition of penalties for a failure to discharge the duty imposed. An ordinance would be a dead letter if the corporation were left without the power to enforce its observance." In the *Eyerman Case*, it was said: "The provision of the charter allowing the holder of the tax bill fifteen per cent. per annum, if payment of the tax bill be not made within six months after payment is demanded and refused, is of the nature of a penalty. It is not interest. Interest at ten per cent. per annum had been previously provided for, and, although the fifteen per cent. allowed by the ordinance in a certain contingency is denominated 'interest,' it is in reality a penalty to secure prompt payment, interposed for neglect of duty; and municipal corporations have the power to prescribe reasonable penalties for the neglect or refusal to discharge any duty imposed upon a citizen by a valid ordinance. *Town of Tipton v. Norman*, 72 Mo. 380." These two cases illustrate the evolution of the law with respect to street improvements. At first, every man was subject to the duty of working so many days every year upon the public roads, and penalties were prescribed for those who failed to respond to an order to do such public work. Then, as a natural and inevitable development of the system of improving roads, the public was given authority to have the work done, and charge the cost thereof to the owners of the abutting property that was specially benefited by the improvement. And to insure the prompt payment of such assessment, a

penalty for delay in payment was imposed. In both cases the penalty is imposed for a failure to discharge a public duty. In the former instance it was a penalty for not working in person, and in the latter instance it is a penalty for not paying for the work done by another. The principle is the same, and therefore the power to impose a penalty is the same. Having thus reached the conclusion that the 15 per cent. is a penalty, and not interest, the constitutional contentions drop out of the case, for they depend upon the existence of the first postulate—that it is interest. If it is not interest, but a penalty, the prohibition of section 53 of article 4 of the Constitution against the power of the General Assembly to pass any local or special law "fixing the rate of interest" has no application. And the same is true as to the prohibition against the passage of a local or special law where a general law could be made applicable. The laws of this state (section 9225, Rev. St. 1899) prescribe that, if any one fails to pay his general taxes before the end of the year, "an additional tax, as penalty, of one per cent. per month," shall be added. The section then says that "said additional tax or penalty" shall apply to a fraction of a month, and then adds: "Provided, however, that said interest shall not be chargeable against persons who are absent from their homes," etc. It will be observed that the 1 per cent. a month is first called "an additional tax, as penalty," and then it is called "said additional tax or penalty," and finally it is called "said interest"; thus showing the looseness of expression that may be employed in the same section of the statute when referring to the same matter. But the term employed does not change the character of the imposition. It is not an "additional tax" at all, for, regarded as a tax, it would, or possibly might, be illegal, because the full amount of taxes that the Constitution permitted had already been levied. It is not "interest," in any proper sense, because it is a penalty imposed for a failure to discharge a duty that can be lawfully demanded. The same power that gives the state a right to impose a penalty of 1 per cent. a month for failure to pay general taxes gives the city of St. Louis the right, under its charter, to impose a penalty of 1½ per cent. a month for failure to pay a special assessment of benefits. As, therefore, the imposition is a penalty, and not interest, the foundation upon which the constitutional questions rested is wiped out; and that leaves this case in the same condition as the case of *Eyerman v. Blaksley*, 78 Mo. 145, wherein the same penalty, under the same charter provision, was adjudged to be valid. No good reason appears for doubting the correctness of the rule there laid down, and therefore the judgment of the circuit court in this case is affirmed. All concur.

STATE ex rel. KANSAS CITY LOAN
GUARANTEE CO. v. SMITH
et al., Judges.

(Supreme Court of Missouri. June 15, 1903.)
SUPREME COURT—JURISDICTION—CONSTITUTIONAL QUESTIONS—HOW RAISED—RECORD.

1. In order to bring an appeal within the jurisdiction of the Supreme Court on the ground of "constitutional construction involved," it must clearly appear from the record either that a constitutional construction was essential to the determination of the case, or that the protection of the Constitution was expressly invoked, was denied by the trial court, and its action in that behalf excepted to and saved for review in some appropriate manner by the losing party.

2. In mandamus to compel a city auditor to deliver to relator a city warrant of which it claimed to be the assignee, respondent set up that he was prohibited from so doing by a city ordinance. Relator, in answer, alleged that the ordinance was null and void, and of no binding effect on respondent, and objected to it in evidence on that ground. *Held* not to necessarily challenge the constitutionality of the ordinance.

3. Such a general allegation could not inject a constitutional question into the case.

In Banc. Mandamus by the state, on the relation of the Kansas City Loan Guarantee Company, against Jackson L. Smith and others, Judges of the Kansas City Court of Appeals. Alternative writ quashed, and a peremptory writ denied.

Henry L. Jost, for relator. R. J. Ingraham and L. E. Durham, for respondents.

BRACE, J. This is an original proceeding by mandamus to compel the respondents, as Judges of the Kansas City Court of Appeals, to transfer to this court the case of *The State of Missouri ex rel. Kansas City Loan Guarantee Company, Respondent, v. D. V. Kent, Auditor of Kansas City, Appellant*, on the ground that jurisdiction to hear and determine the appeal is in this, and not in that, court. The return of the respondents to the alternative writ asserts jurisdiction of the appeal in that court.

The facts of the case are as follows: The relator instituted in the circuit court of Jackson county a proceeding by mandamus to compel the said Kent, city auditor, to deliver to the relator a city warrant, drawn in favor of Dock Wilson, for the sum of \$8.75, of which it claimed to be the assignee. The auditor, in his return to the alternative writ, set up several defenses—among others, "that he is prohibited by the terms of Ordinance No. 11,125, approved February 10, 1899, from paying wages of city employes to any other persons than the said employes, and from delivering warrants to any other person than the said employe." The answer of the relator to the return was as follows: "(1) That Ordinance No. 11,125 of the city of Kansas City, pleaded by respondent (especially sections 2 and 3 of said ordinance), is void, and of no binding effect upon respondent, to prevent him from delivering said city warrants

to relator as directed by the alternative writ herein. (2) For answer to that part of respondent's return embraced in all paragraphs on page 3 of said return, relator denies each and every allegation therein contained." On the trial the respondent auditor offered said ordinance in evidence, to the introduction of which relator objected "for the reason that said ordinance was null and void, and of no binding effect on respondent, so as to prevent him from delivering the warrant in controversy to the relator." The objection was overruled, and relator excepted. After hearing the evidence, the court found the issues for the relator, and awarded a peremptory writ of mandamus; and the auditor, after unsuccessful motions for new trial and in arrest of judgment, appealed.

In due course the case came on for hearing in the Court of Appeals, was argued and submitted, the judgment of the circuit court reversed, and its peremptory writ quashed, in pursuance of an opinion by Ellison, J., in which the other judges concurred, reported in 71 S. W. 1066. Thereupon, in due time, relator filed motions for rehearing, and to transfer the cause to this court, which motions having been overruled, this proceeding was instituted, in which it is claimed that the appeal is within the jurisdiction of this court, because it is a case "involving the construction of the Constitutions of the United States and of this state." In support of this contention it is argued that said ordinance is in conflict with sections 4 and 30 of article 2, section 53 of article 4, and section 23 of article 9 of the Constitution of Missouri, with the fourteenth amendment of the Constitution of the United States, and with section 895, Rev. St. 1899.

If this ordinance is in fact thus obnoxious to the organic law, it is unfortunate for the relator in this proceeding that his counsel did not sooner discover its condition, and point the trial court, in the case now sought to be removed to this court, to some of these constitutional infirmities in the course of its progress through that court. For it is well-settled law that the court to which an appeal must go is determined solely by the record of the case made in the trial court, and, in order to bring the appeal within the jurisdiction of this court on the ground of "constitutional construction involved," it must clearly appear from that record either that a constitutional construction was essential to the determination of the case (*State ex rel. v. Smith*, 152 Mo. 444, 54 S. W. 218; *State ex rel. v. Smith*, 141 Mo. 1, 41 S. W. 906; *State ex rel. Curtice v. Smith et al.* [No. 11,639, not yet reported] 75 S. W. 625), or that the protection of the Constitution was expressly invoked, was denied by the trial court, and its action in that behalf excepted to, and saved for review in some appropriate manner by the losing party (*Bennett v. Mo. Pac. Ry. Co.*, 105 Mo. 642, 16 S. W. 947; *Baldwin v. Fries*, 103 Mo. 286, 15 S. W. 760; *Turley v. Barnes*, 131

Mo. 548, 33 S. W. 172; *Browning v. Powers*, 142 Mo. 322, 44 S. W. 224; *Hulett v. M., K. & T. Ry. Co.*, 145 Mo. 35, 46 S. W. 951; *Ash v. City of Independence*, 145 Mo. 120, 46 S. W. 749; *Palin Orendorff & Co. v. Hord*, 145 Mo. 117, 46 S. W. 753; *Vaughn v. Wabash R. Co.*, 145 Mo. 57, 46 S. W. 952; *Town of Kirkwood v. Johnson*, 148 Mo. 632, 50 S. W. 433; *Shewalter v. Mo. Pac. Ry. Co.*, 152 Mo. 544, 54 S. W. 224; *Vansandt v. Hobbs*, 153 Mo. 655, 55 S. W. 147; *Kirkwood v. Mera-mec Highlands Co.*, 160 Mo. 111, 60 S. W. 1072; *Ash v. City of Independence*, 169 Mo. 77, 68 S. W. 888; *Harding v. City of Carthage (Mo. Sup.)* 71 S. W. 673; *Brown v. M., Kan. & Tex. Ry. Co.* [No. 10,772, not yet officially reported] 74 S. W. 973). The general allegation in the relator's answer to the return, and in his objection to the introduction of the ordinance in evidence, that the same was null and void, did not necessarily challenge the constitutionality of the ordinance, since such a charge would as well include other grounds of invalidity, such as ultra vires, contrary to the statute, etc.; and, even if that were not so, such a general allegation could not inject a constitutional question into the case. *Hulett v. M., K. & T. Ry. Co.*, supra; *Ash v. City of Independence*, supra, and cases cited. Otherwise there is not the shadow of a constitutional question in the case, none was raised therein, none decided, and no constitutional construction was essential to the decision of the case, as is evident upon the face of the circuit court record, and of the excellent opinion delivered in the Court of Appeals. The alternative writ should be quashed, and a peremptory writ denied, and it is so ordered. All concur.

DOZIER et al. v. ARKADELPHIA COTTON MILLS et al.

(Supreme Court of Arkansas. June 6, 1903.)

CORPORATIONS—RIGHTS OF CREDITORS—SALE OF CORPORATE ASSETS—DISTRIBUTION—PAYMENT OF OUTLAWED CLAIMS.

1. Creditors of a corporation cannot object to an apportionment of the proceeds of a sale of the corporate property, on the ground that the claims of certain creditors to whom distributive shares were allowed were barred by limitations, where the corporation which was a party to the proceeding did not plead the statute against such claims, and there was no evidence that any of the creditors would fail to collect their shares.

Appeal from Circuit Court, Clark County; Joel D. Conway, Judge.

Action by M. B. Dozier, as administrator of J. S. Massey, deceased, and another, in behalf of themselves and all other creditors, against the Arkadelphia Cotton Mills and another. From a decree for plaintiffs for their pro rata share of proceeds of sale of the cor-

¶ 1. See *Limitation of Actions*, vol. 33, Cent. Dig. §§ 657, 658.

poration defendant's assets, they appeal. Affirmed.

McMillan & McMillan and Rose, Hemingway & Rose, for appellants. J. H. Crawford, for appellees.

BATTLE, J. On the 24th of November, 1892, the Arkadelphia Cotton Mills, a domestic corporation, by a resolution adopted by its stockholders, ordered its board of directors to sell its property, and appropriate the proceeds of the sale to the payment of its debts, so far as they would extend. The board did so, and appropriated the proceeds to the satisfaction of part of the debts. On the 19th of April, 1897, M. B. Dozier, as administrator of J. S. Massey, deceased, and C. K. Boswell, instituted a suit in behalf of themselves and all other creditors of the Arkadelphia Cotton Mills against the Arkadelphia Cotton Mills and S. R. McNutt, and stated that the defendant corporation was indebted to each of them, and asked that an accounting be had, to ascertain the amount of the debts of the corporation, and that the proceeds of the sale of its property be equally distributed among its creditors. The court below denied the relief they sought, and they appealed. This court held that the proceeds should have been distributed among the creditors pro rata, and reversed the decree of the court below and remanded the cause, with directions to the court to enter a decree in favor of appellants for such amounts as would be equal to their pro rata shares of the proceeds of the sale in a distribution thereof among the creditors according to the amounts due them from the corporation; appellants' claims being undisputed. *Dozier v. Arkadelphia Cotton Mills*, 67 Ark. 11, 53 S. W. 403.

Upon a remand of the cause the circuit court ascertained the amount of the indebtedness of the Arkadelphia Cotton Mills, and apportioned the proceeds of the sale among its creditors, and rendered judgment in favor of plaintiffs for their respective pro rata shares according to the directions of this court, and plaintiffs appealed.

Appellants now insist that the court erred in its apportionment, because the claims of many of the creditors to whom distributive shares were allowed were barred by the statute of limitations. Be this as it may, they were entitled to their proportion of the proceeds of the sale, provided the Arkadelphia Cotton Mills did not set up the statute of limitations in bar of their right. It was a party to this suit, and did not do so. It has the right to pay its just debts, so far as it can, and it is not within the power of appellants to take from it this right. But appellants seem to be apprehensive of a failure of some of its creditors to collect their shares. There is no evidence that they will, and courts cannot deprive them of their rights upon such apprehension.

Decree affirmed.

HOUPT et al. v. BOHL.

(Supreme Court of Arkansas. June 13, 1903.)

JUDGMENTS — CONSENT — ENTRY BY PLAINTIFF'S ATTORNEY.

1. A complaint was filed, stating a cause of action against defendants, who executed a power authorizing plaintiff's attorney to waive service of summons, enter appearance, and consent to judgment. The record recited that "defendants each confess judgment by their written agreement duly filed herein." *Held*, that the confession of judgment was not under the statute (Sand. & H. Dig. § 5872) providing that any person against whom a cause of action exists may "personally" appear and confess judgment, but was in the nature of a judgment by consent, after complaint and appearance filed, and, though done by plaintiff's attorney, was, in the absence of fraud or ignorance of facts by defendants, valid.

Battle, J., dissenting.

Appeal from Circuit Court, Garland County; Alexander M. Duffie, Judge.

Action by J. C. Bohl against Reb Houpt and others. From a judgment for plaintiff. Defendants appeal. Affirmed.

Wood & Henderson, for appellants. E. W. Rector, for appellee.

WOOD, J. The judgment on which the execution sought to be quashed was issued is not a judgment by confession, under the statute (section 5872, Sand. & H. Dig.), but, rather, a judgment by consent, after the filing of a complaint and the entry of appearance by the parties defendant. Taking the whole record together, we are of the opinion that this is the proper construction. There was a complaint filed, which stated a cause of action against the defendants, who were all named. These defendants all signed a power of attorney authorizing C. V. Teague, Esq., to waive all service of summons, enter their appearance, and consent to the rendition of judgment. The record of the judgment recites that "the defendants each confess judgment herein by their written agreement duly filed herein." This recital does not preclude the idea that the defendants in person filed their written agreement, and confessed in person the judgment in accordance therewith. But if it was filed by C. V. Teague, who confessed or consented to the judgment for them, such action on his part was expressly authorized by the written agreement or power of attorney, and, being in response to a regular complaint against the defendants, we think was tantamount to an entry of appearance for the defendants, and a consenting to judgment for them. This they could do by their attorney, as well as in person, in a proceeding instituted by the filing of complaint. True, Teague was the attorney for the plaintiff, and generally the attorney for the plaintiff could not consent to judgment for the defendants, and thus act as attorney for both parties. But where this is done by the consent of the defendants, who are cognizant

of all the facts, and there is no fraud or collusion charged, we can see no objection to it. Here the consent was in writing, and there is no claim of any fraud, or that the defendants were not fully cognizant of the fact that Teague was authorized also to represent the plaintiff. In *Wassell v. Reardon*, 11 Ark. 705, 44 Am. Dec. 245, it is held that, "as a general rule, agents cannot act so as to bind their principal where they have or represent interests adverse to the principals; but this rule does not prohibit an attorney at law, into whose hand a debt has been placed for collection, from acting as the attorney in fact of the debtor to confess judgment upon the debt, the debtor being advised of the extent of the attorney's agency for the creditor, and executing the power to avoid costs of suit." This was under the statute authorizing an attorney to confess judgment. But the case is authority that the attorney for the creditor by his consent may act as attorney for the debtor, also, and the principle announced is applicable here.

The judgment of the circuit court in sustaining the demurrer to the petition and in dismissing same is correct, and same is affirmed.

BATTLE, J., dissenting.

CARROLL v. STATE.

(Supreme Court of Arkansas. June 6, 1908.)
HOMICIDE — INDICTMENT — SUFFICIENCY — CONTINUANCE — ABSENT WITNESS — DILIGENCE — ARGUMENT — PREJUDICE.

1. An indictment charging that accused "did feloniously and with malice aforethought kill" deceased is not insufficient because not charging that the killing was either unlawfully or willfully done, as unlawfully and willfully are sufficiently implied.

2. Where accused, whose trial was set for August 20th, procured a subpoena on July 19th for a witness residing in another county, and, on its return without indorsement, secured an alias subpoena, directed as before, without giving any direction or information to the sheriff as to the particular locality of the witness, and without making any farther effort to secure the witness' attendance, a continuance for the absence of such witness was properly denied, for failure to exercise due diligence to procure his attendance.

3. On a prosecution for murder, a reference by the prosecution, in argument, to the crime, as "the most tragic crime ever perpetrated in this county," and to accused, "he is a murderer," is not cause for reversal, where accused was convicted of manslaughter.

Appeal from Circuit Court, Pike County; WILL P. FEASEL, Judge.

Lee Carroll was convicted of manslaughter, and he appeals. Affirmed.

KIRBY & CARTER, for appellant. Geo. W. MURPHY, Atty. Gen., for the State.

BUNN, C. J. This is an indictment in the Pike circuit court, for murder in the second degree, against Lee Carroll, the appellant.

¶ 1. See note at end of case.

The indictment, omitting mere formal parts, reads as follows, to wit: "The said Lee Carroll, in the county and state aforesaid, on the 2d day of November, A. D. 1901, did feloniously and with malice aforethought kill and murder W. B. Porterfield, by shooting him on the head and body of him, the said W. B. Porterfield, with a pistol loaded with gunpowder and leaden bullets, from the effect of which wounds he died on the 2d day of November, 1901, against the peace and dignity of the state of Arkansas." To this indictment defendant interposed a demurrer in short upon the record, which the trial court overruled. The grounds of the demurrer are not stated therein, but, in their argument and brief, counsel for defendant say that the grounds were that it is not stated in the indictment that the killing was either unlawfully or willfully done. It is sufficient to say that the word "feloniously" includes "unlawfully" in its meaning, for we cannot say that an act feloniously done is not also unlawfully done. When an act is charged to have been done with malice aforethought, it certainly follows that it was willfully done, for there can be no malice without an exercise of the will in the perpetration of the deed through malice.

On the call of the case for trial, the defendant announced "Not ready," on account of the absence of a witness (Velpole Loshly), and filed his motion for a continuance on account of the absence of said witness. The motion sets up that "the witness was then at Whittington, Garland county, Arkansas, where he had been residing for six months past, although he resided at Nathan, in Pike county, at the time of the killing, and was present and saw it, and that, if he were present at the trial, he would testify that he saw the difficulty between defendant and the deceased, Porterfield, in which the latter was killed: that deceased raised the row with defendant; that deceased told defendant that he did say that he intended to cut his liver out, and that he would do it if he could, and made for the defendant, shaking his fist in his face, and that when he got in reach he struck the defendant in the face with his right fist with all the power he had, and then caught him around the neck with (his) right hand and arm and jerked him off the gallery, and at that time Pierce Porterfield, son of the deceased, jumped off the gallery onto defendant's back, caught defendant by the back of the neck and hit him in the back, at which time deceased was holding defendant with his right hand, and trying to get his left hand in his left pocket, and, immediately after he saw deceased trying to get his hand in his pocket, he saw the defendant draw his pistol and commence shooting," etc. In most respects this was merely cumulative of what was in evidence on the trial. This indictment was found February 19, 1902, and the matter was postponed until the next term of court, at the instance and on the mo-

tion of the defendant, and set for trial on the 20th August, 1902, and defendant was permitted to stand on his present bond for his appearance. On the 19th July, 1902, at the instance of defendant, the clerk issued a subpoena for the said absent witness, directed to the sheriff of Garland county, and the same was returned in due time by the sheriff without indorsement, and at once, at the instance of defendant, an alias subpoena was issued by the clerk, directed to the sheriff of Garland county, as before; and this writ was returned by the sheriff in due time, indorsed to the effect that the witness could not be found in his county. There does not appear to have been the exercise of proper diligence on the part of the defendant to procure the attendance of this witness. The case had been continued at his request, and he was free to act, having been permitted to go at large on his existing bond. In his application for continuance, he stated that the absent witness lived at Whittington, Garland county, Ark., which is 10 or 12 miles from Hot Springs, the county seat, where he had resided for six months previously. It would seem that some directions or information to the sheriff as to the particular locality of the witness, in his county, might reasonably have been expected of the defendant; but, if such information was furnished to the sheriff, the court does not seem to have been apprised of it. It could hardly be expected of the sheriff to know the particular whereabouts of a witness so remote from the county seat, and who had taken up his residence there so recently. Besides, no showing is made that the defendant could not have had the subpoena issued earlier, so as to have ample time to seek for the true locality of the witness in case he could not be found at Whittington. Courts cannot be expected to grant continuances on the mere statement of defendants as to locality of absent witnesses, unless other efforts are made to discover and subpoena such witnesses. Continuances are largely in the discretion of the trial courts, and the exercise of their discretion will not be controlled by this court unless abused. There was therefore no error in refusing the continuance.

In the progress of the trial, while addressing the jury, the Honorable J. C. Pinnix, of counsel for the state, said, "On the morning of the 2d day of November, 1901, there was heralded to the world the news of the most tragic crime ever perpetrated in this county;" and the defendant objected to this language, and asked the court to withdraw it from the jury, which the court refused to do. And also, in his argument to the jury, the Honorable H. L. Norwood, of counsel for the state, used this language, pointing to the defendant: "He is a murderer." This was objected to by the defendant, and he asked the court to exclude it from the jury, which the court refused to do. It is difficult to determine how far an attorney may go, in

expressing his opinion and conclusions on the facts, as was the case in both these instances. The best the courts can do is to rule on questions of the kind very much as the circumstances of each case may determine. The jury in this case does not appear to have been improperly influenced by these questionable remarks, for, instead of finding the defendant guilty of the most tragic crime ever perpetrated in this county, and instead of finding the defendant to be a murderer, it found him guilty of the crime of manslaughter only. We cannot think, therefore, there was any reversible error in the action of the court in this matter.

The evidence in the case was not the strongest for conviction for the crime of which he was convicted, as appears from the written record, but it was ample to sustain the jury in its verdict, when we take into consideration that the actual surroundings at the trial may have been quite different from any written or record showing. At all events, the evidence was fairly put to the jury, there being no reversible error in the instructions, and they were the sole judges of its weight and the credibility of witnesses. In such case we are not at liberty to disturb their verdict.

Affirmed.

NOTE.

It is not necessary to use the word "willful" in an indictment for murder, as the mere charge of murder embraces it. *Ross v. Commonwealth (Ky.)* 9 S. W. 707.

An indictment alleging that defendant did feloniously kill and murder M. is not bad for omitting the term "willfully." *State v. Harris*, 27 La. Ann. 572.

The omission of the word "willfully" is fatal to an indictment under Rev. St. La. § 1048, which requires an allegation that defendant did feloniously, willfully, and with malice aforethought kill and murder. *State v. Williams*, 37 La. Ann. 776.

An indictment for murder is not defective because the wounding is not alleged to have been willfully done; the word "willfully" occurring a number of times in other connections. *State v. Eaton*, 75 Mo. 586.

The word "feloniously" or "unlawfully" is not indispensable to an indictment for murder in the first degree. *Williams v. State*, 50 Tenn. 37; *Riddle v. State*, Id. 401.

"Injuriously" and "wrongfully" is as good as "unlawfully" in an indictment. *State v. Vermont Central R. Co.*, 27 Vt. 103.

Under Rev. St. Me. 1871, c. 127, § 7, providing for the punishment of willfully and maliciously throwing down a gate, an indictment charging that the offense was committed unlawfully and maliciously is not sufficient. *State v. Hussey*, 60 Me. 410, 11 Am. Rep. 206.

An indictment is good which uses words of an equivalent meaning with those used by the statute in defining the offense, and where the word "feloniously" is employed, instead of the word "willfully," the indictment is sufficient to withstand a motion to quash. *Franklin v. State*, 108 Ind. 47, 8 N. E. 695.

If the intent with which an act was done is charged to have been felonious, it is not necessary to aver that the act itself was unlawful or felonious. *Fairlee v. People*, 11 Ill. 1.

An allegation charging the homicide to have been with malice aforethought is tantamount

to an allegation that the act was willful, deliberate, and premeditated. *State v. Hing*, 16 Nev. 307.

An indictment for murder, charging that accused did unlawfully, feloniously, deliberately, premeditatedly, and of malice aforethought assault with a deadly weapon, and did, with specific intent to kill and murder one W., unlawfully, feloniously, and with malice aforethought strike said W., etc., sufficiently charges that the killing was willfully done. *State v. Townsend*, 66 Iowa, 741, 24 N. W. 535.

An indictment for murder, alleging that defendant at a certain time and place feloniously, willfully, and of malice aforethought murdered deceased, is sufficient, without an averment that the killing was unlawful. *Davis v. People*, 151 U. S. 262, 14 Sup. Ct. 328, 38 L. Ed. 153.

Under Gen. St. Ky. c. 29, art. 6, § 2, making it a felony when one willfully and maliciously wounds another with intent to kill, an indictment accusing defendant of the crime of maliciously shooting at and wounding R. with intent to kill, committed as follows: "That defendant did on a certain day willfully, maliciously, and feloniously shoot at," etc.—is sufficient, though the word "willfully" is omitted from the accusatory part of the indictment. *Toler v. Commonwealth (Ky.)* 23 S. W. 347.

An indictment charging that defendant did unlawfully, voluntarily, and unjustly permit a prisoner to escape does not sufficiently charge an offense under Pen. Code Tex. 1895, art. 314, making it an offense to willfully permit an escape. *Barthelow v. State*, 26 Tex. 175.

An indictment charging a homicide, "intentional, but without malice," is bad, as the unlawfulness of the homicide is not a presumption of law, that need not be stated under Code Ala. 1858, § 3516. *Henry v. State*, 33 Ala. 389.

ST. LOUIS, I. M. & S. RY. CO. v. BOBACK.
(Supreme Court of Arkansas, June 13, 1903.)

RAILROADS—RUNAWAY AT CROSSING—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS—REMARKS OF COUNSEL—PREJUDICIAL ERROR.

1. In an action for injuries sustained in a runaway at a crossing, occasioned by the failure to give the statutory signals, an instruction that, to recover, plaintiff must show that the failure to give the signals caused the horse to take fright and run away was properly refused as misleading; the question being not whether the horse became frightened at the failure to give the signals, but whether the failure led plaintiff into a more dangerous position than she would otherwise have occupied.

2. Where plaintiff—occupying a vehicle with her child—on approaching a railroad crossing discovered a train, and, realizing the horse might take fright, jumped from the vehicle, and attempted to grasp the bridle and prevent the horse from running, her action was not contributory negligence per se.

3. Where plaintiff's injuries were severe and caused her much suffering, remarks by counsel in reference to the damages: "If she had been injured for life, has she asked for more money than she ought to have? She asks for ten thousand dollars. Now, I ask you, what does it mean to have your wife in her home in that condition? Take her when she is strong, healthy, and with physical force to serve those she loves; what is the difference between that and the prostrate form of this woman, who has been so inhumanly criticised here?"—are not cause for reversal, where the jury allowed her only \$1,000.

4. In an action for injuries sustained at a crossing, it is improper for counsel for plain-

tiff, in argument, to state, in reference to witnesses for the railway company, that, if they had not testified that the whistle was blown, they would have been discharged, in the absence of any evidence in reference thereto.

5. The comment of counsel was not reversible error, the preponderance of the evidence showing that no such signals were given.

6. Where plaintiff's horse became frightened at an approaching train near a crossing, the fact that he ran away is not sufficient to show contributory negligence in driving him.

Appeal from Circuit Court, Pope County; Wm. L. Morse, Judge.

Action by Mary Boback against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Dodge & Johnson, for appellant. A. S. McKinnon, for appellee.

RIDDICK, J. This is an action brought by Mary Boback against the defendant railway company to recover \$10,000 by way of damages for injuries which she claims to have sustained through the negligence of the employés of defendant while they were operating one of its trains. On the day of the accident the plaintiff, accompanied by a little girl only a few years of age, was traveling in a buggy drawn by one horse from her home to the village of Knoxville. The public highway along which she was traveling crossed the railway track between her home and Knoxville. As she got on the track at the crossing, a train, which, on account of a curve and a cut through a hill, could not be seen further than a hundred yards from the crossing, came up and frightened the horse. The horse and buggy passed over the track, and plaintiff, it seems, to prevent the frightened horse from running away, jumped out of the buggy and caught hold of the head of the horse. But she failed to restrain him. He threw her down and ran away. The wheels of the buggy passed over her, the child was thrown out, and the buggy overturned.

The negligence which plaintiff alleged, and to which she attributes her injuries, was the failure of the employés in charge of the train to give the statutory signals for the approach to the crossing by ringing a bell or sounding a whistle. Plaintiff testified on the trial that before going on the crossing she stopped and looked and listened for trains, but heard none; that when she got on the crossing she saw the train coming; that her horse became frightened, and she did her best to get it off the track, but was so badly frightened she did not remember how she did so. When she became conscious, she was lying on the ground badly injured, the buggy was overturned, and she did not even know how she got out of the buggy. There was also evidence to the effect that no whistle or other signal of the approach of the train for the crossing was given. Plaintiff further testified that, if she had heard the train or the signal, she would not have gone on the cross-

ing, but would have turned away, and got out of the buggy. Mrs. Boback was severely injured, and on the trial she recovered a judgment for \$1,000. The company appealed, and asks us to reverse the judgment, for reasons which we will now notice.

In the first place, counsel for the defendant contends that this is an effort to hold the railway company responsible for an injury that resulted by reason of the fright of a horse "at a whistle which was not sounded and a bell that was not rung." "In other words," says counsel, "the court is called upon to say in this case that the company must respond to the plaintiff in damages because her horse took fright at the very stillness of the engineer on his engine." Having adopted this as the basis upon which the action of the plaintiff rested, it is not surprising to find that counsel for the defendant asked the court on the trial to instruct the jury that, in order to recover, the plaintiff must show that "the failure of the defendant to ring the bell or sound the whistle at the public crossing caused the horse to take fright and run away." That is to say, as we understand the contention of counsel, a traveler who claims damages for an injury which he alleges resulted from a runaway at a railroad crossing caused by reason of the failure of the employees of the company to give the statutory signals must, in order to recover, show that the horse was frightened, not at the train, but at the failure to give the statutory signals. To comply with this rule, the traveler would have to show that his horse was acquainted with the fact that trains were required or accustomed to give such signals for crossings, and became alarmed on noticing that the train in question failed to give them. Horses are very intelligent animals, but we doubt if they are quite as intelligent as this instruction asked by counsel assumes them to be. A rule of that kind would put an undue burden on plaintiff, and, if adopted, would practically relieve railway companies from liability to damages in such cases. The signals for crossings are required not for the horse, but for the driver of the horse, in order that he may have notice that a train is approaching, and may be thus warned to keep off the crossing. Horses often become frightened at trains, even though the trains be operated with due care; and one object of the statute was to warn persons about to pass crossings with horses, so that they may make due preparation to guard against the consequences of such fright. The question, then, was not whether the horse became frightened at the failure to give the signals, but whether the failure to give the signals led plaintiff into a more dangerous position than she would otherwise have occupied, and thus caused the injury of which she complains. The instruction asked, we think, would have been altogether misleading, and was properly refused.

Another instruction which the defendant

asked, and which the court gave, was, we think, also incorrect and misleading. The objectionable part of this instruction was as follows, to wit: "If you find from the evidence that the plaintiff, while driving along the public highway, and near a public crossing over defendant's tracks, discovered the approach of one of defendant's trains, and, realizing that her horse might take fright at such train, got out of the buggy and went to the horse's head, and took hold of the bridle and attempted to hold the horse and prevent it from running away, and that, while so attempting to hold the horse, the horse did become frightened at such train, and broke away from the plaintiff, and threw her down, and dragged the buggy over her, and thereby injured her, then your verdict should be for the defendant, for it was the duty of the plaintiff to prefer her own personal safety to that of the horse and buggy, and she had no right to increase the liability of the defendant by involving her own life and limb in order to save the value of the horse and buggy." Now, it will be noticed that this instruction made it contributory negligence per se for the plaintiff to undertake to prevent the horse from running away by catching hold of the bridle near his head. Under this instruction, it would have been the duty of plaintiff to have remained in the buggy, or, having got out of it, to have abandoned any attempt to restrain the horse, or at least to have kept away from the front of the horse. Now, it is a well-known fact that a frightened horse can be more easily restrained by catching hold of the bridle near his mouth or head than by holding to the end of the reins. Prudent people, when they have opportunity to do so, often take this means of restraining frightened horses; and we have never heard before that it is, as a matter of law, negligence to attempt to do so. But if we should concede that the statement in this instruction that plaintiff was bound to prefer her own safety to that of the horse and buggy was correct in some cases, yet even then the fact that the infant daughter of plaintiff was in the buggy to which the frightened horse was hitched justified her in using every exertion, and even to endanger her own person, in order to restrain him and save the child from injury. But we are well satisfied that it cannot be said, as a matter of law, that plaintiff was guilty of contributory negligence in catching hold of the bridle at the head of the horse in the endeavor to restrain him. On the contrary, if she, after getting out of the buggy, had abandoned it, and made no attempt to restrain the frightened horse, and afterwards sued for the injury to her buggy and child, we feel very certain that she would have been met by the charge of contributory negligence, for failing to make any attempt to prevent the injury, and we are by no means sure that under such circumstances there would not be good grounds

for such a defense. The only excuse that we can see for giving that instruction is that the manner of the injury as alleged in the complaint is a little vague, so that the court may have been of the opinion that plaintiff alleged that she was injured by being thrown from the buggy, and for that reason held that she could not recover if she was already out of the buggy when the horse ran away. But the complaint does not allege that she was thrown from the buggy. It alleges that her horse "became frightened, ran away, overturning the buggy and throwing her violently to the ground, by which fall she was severely injured." So we do not think the instruction was correct, even if based on that theory, but the language of the instruction shows that it was based on the theory that plaintiff, if she went to the head of the horse and took hold of him, was, as a matter of law, guilty of contributory negligence; and, as before stated, we think that this position is untenable, and much more favorable to the defendant than the law warranted.

The other instructions given by the court, taken as a whole, are not prejudicial to the defendant. While those given at the request of the plaintiff are, it is true, not full enough, so that if they stood alone the charge of the court would be subject to some criticism, yet those given at the request of defendant cured these defects; some of them being, as before stated, much more favorable to defendant than the law warranted.

But counsel for the company contend that it was prejudiced by improper remarks of counsel for the plaintiff in his closing argument to the jury. The portions of the argument to which he objects are set out in the bill of exceptions. One of these extracts from the argument of counsel has reference to the question of damages, and is as follows, to wit: "If she had been injured for life, has she asked for more money than she ought to have? She asks for ten thousand dollars. Now, I ask you, what does it mean to have your wife in her home in that condition? Take her when she is strong, healthy, and with physical force to serve those she loves; what is the difference between that and the prostrate form of this woman who has been so inhumanly criticised here? What does it mean? It means everything that life is worth, and, put dollars and cents by it, would ten thousand dollars pay her? No! ten times ten thousand would not pay it. With this force she serves those whom God has given her, and all that that means; and when she sits down and considers the fact that all that is gone, why, then, she is overwhelmed with grief that she is so helpless in her home." Now, this language, being delivered near the climax of the closing argument, and under the excitement thereof, may be somewhat exaggerated, as well as a little mixed. The question propounded by counsel to the jury, "What does it mean to

have your wife in her home in that condition?" would indicate that counsel desired the jury to consider the injury to the family of plaintiff, as well as that suffered by herself, and to that extent the argument was improper; but we can see from the whole extract that counsel was asking damages for injuries to plaintiff only, and not for injuries to others of her household, and this would probably more clearly appear if the whole argument was set out. Counsel in this portion of his argument states no fact in evidence, and is only giving his opinion of the gravity of the injury proved. If there be some exaggeration, we must remember that it is within the province of counsel for plaintiff in an action for damages to take a sympathetic view of his client's injuries, and to indulge in oratorical flights in his endeavor to impress his views upon the minds of the jury. He should, of course, stick to the law and the evidence, and to the questions at issue, and should avoid improper appeals to the jury; but if counsel, in the remarks above set forth, overstepped the bounds of legitimate argument to any extent, we think it clearly appears that no injury resulted. The object of this appeal, as counsel for defendant say, was "to increase the quantum of damages." But counsel for defendant do not claim that the amount of damages assessed is excessive. In fact, if defendant is liable for the injuries to plaintiff, the damages assessed are quite moderate. A physician testified that the "right clavicle" of plaintiff was fractured by the accident, her shoulder dislocated, and three ribs broken. Besides these, he said she sustained serious internal injuries, involving the womb and bladder, and injuries to the spine, resulting in partial paralysis of the lower limbs for two months, from which she had not fully recovered at the time of the trial, some effects of which might be permanent. These injuries, he said, had at times affected her mind, and she had suffered greatly from them. But for all these injuries the eloquence of counsel to which defendant objects only induced the jury to allow \$1,000—a result which, in our opinion, shows that the argument did no harm, for the damages are clearly not excessive.

The other remarks of counsel to which he objected are more serious. In commenting upon the testimony of certain employes of defendant who were on the train at the time of the injury, counsel for plaintiff said, "Their bread and meat depends on the fact that they did blow the whistle, because the law required them to do it, and the rules of the company required them to do it, and if they did not do it their company was liable, and they would lose their job." In justification of this argument, counsel for plaintiff say that it was shown that these witnesses were employes of the defendant company, and that its rules and the law required them to ring the bell or sound the whistle at every

crossing. It was, therefore, they say, "certainly not improper for counsel to call attention to these facts, and to say that if these witnesses had admitted on the stand that they had failed to perform their duty, and by reason of such failure made the company liable for damages, they might be held accountable for it by the company, and might lose their jobs." If counsel had said no more than that, there would have been nothing in the objection. But counsel went farther than this. He did not stop at showing the connection between the witness and the defendant company, and calling attention to the reluctance which it might naturally be supposed a witness would have to testifying in such an action that he had been guilty of a breach of duty which would render his employer liable in damages, and might subject him to a discharge for his fault. Counsel had the undoubted right to call the attention of the jury to these matters, and the jury had the right to consider them. But counsel went further, and stated as a fact, though there was no evidence to show it, that the bread and meat of these witnesses depended on the fact that they did blow the whistle, and that if they did not do so they would lose their jobs. In other words, counsel stated, in effect, that, if these witnesses had not testified that the whistle was blown, they would have been discharged by the company, and that they therefore testified under a sort of compulsion. But there was no evidence that this was true, and the argument was improper and unfair. The court should have sustained the objection to it, and we think he erred in refusing to do so. *East Tenn. R. Co. v. Bayliss*, 75 Ala. 466; *German-Am. Ins. Co. v. Harper*, 70 Ark. 305, 67 S. W. 755; *Prescott Ry. Co. v. Smith*, 70 Ark. 179, 67 S. W. 865. It is difficult to lay down an exact rule as to when the court will reverse a case on account of an improper argument of counsel for the successful party. That must, of course, depend upon the nature of the argument, the circumstances under which it was made, the action of the trial court, and the probable effect of the argument upon the verdict of the jury. Now, we can see that, under the circumstances here, counsel, by this language, may have intended only in a sort of dramatic way to call the attention of the jury to the connection between the witness and the defendant company. The presiding judge, who must necessarily have some discretion in the matter of regulating arguments, probably so understood it, or he would have excluded the remarks. Though we think the argument was improper, yet we do not think that either the argument, or the ruling of the court thereon, was so obviously prejudicial as to compel us to reverse the case, under all circumstances. Notwithstanding that we disapprove the argument, yet we still have the discretion to affirm the judgment, if convinced that it is right and that no prejudice resulted. Now,

one phase of the evidence does, as it seems to us, show clearly that the employés in charge of the train were guilty of negligence contributing to the injury. There were two engineers on the engine. One was a new man, unacquainted with the road, and the other one was going over the road with him to point out the crossings and stopping places. These two engineers and a brakeman testified for the company. It appears from their testimony that as the train rounded the curve, and they came in sight of the crossing about 100 yards ahead, they saw the position of the woman and the horse. The woman, they say, was out of the buggy, and was holding to the bridle at the head of the horse, trying to restrain him. The horse seemed to be frightened, and was trying to get away. One of the employés testified that when he first saw the horse "he seemed to be scared, with his head up, and prancing." Another one said: "The first thing in my mind was, the horse was trying to run away. I was afraid the horse would run away." There was a slight up grade there, and at this time, to quote the language of these witnesses, the engine was "working steam, making a puffing noise," as it approached the woman and the frightened horse. But although these employés saw that the horse was frightened, and likely to run away and injure the woman and child, they made no attempt to stop the train by shutting off steam to lessen the noise, until after the horse broke and ran away. On this point the engineer who was showing the other over the road testified as follows: "There was a child in the rig, and when the horse started to run away I was afraid the child would get killed, and I hallooed at him to stop, and he shut off steam and applied the brakes; but before we could get stopped the woman was up, and had the child on her feet, and I told him to go ahead." On being asked whether he had made any attempt to stop the train before it passed the crossing, he answered: "Not until the horse started to run and knocked the woman down. The woman fell when the horse began to rear, and the wheels of the buggy went over her, and I thought that the child would be killed, and told the engineer to stop, and he shut off steam and applied the air." This testimony, as before stated, shows that these employés were guilty of negligence in not making some effort to stop the train, or at least in not shutting off steam, and thus lessening the noise, when they saw that the horse was frightened and likely to run away, and that the woman and child were in danger. As these facts were shown by the testimony of the employés of the company, if the verdict had been based on a finding that the injury was caused by this negligence, we should have felt no doubt about affirming the judgment, notwithstanding the improper argument of counsel. But an examination of the record shows that no such question as

this was presented to the jury. The plaintiff based her right to recover solely on the ground that the employes in charge of the train had failed to give the signals for the crossing required by the statute, and that in consequence thereof she was injured. This is the only ground of negligence alleged in the complaint, or presented to the jury by the instructions, and the only charge on which the defendant was tried. So we cannot, in support of the judgment, consider other grounds of negligence which defendant has not been called upon to answer.

On the question of whether signals were given, upon which plaintiff based her right to recover, there was some conflict in the evidence. The two engineers and the brakeman testified that the signals were given, but their testimony is not quite as satisfactory on that point. The brakeman's answer to the question in reference thereto was: "I cannot remember for sure. It seems that I remember that the whistle was sounded, but I cannot say for sure that it was." The answer of the engineer who was showing the engineer in charge over the road to this question was: "No; I am satisfied that he blew the whistle for the crossing. I was sitting in front of him, and it was my duty to learn him the road, and I would motion for him to pull the whistle, and he would whistle." The answer of the other engineer to that question was, "Yes; that is my best knowledge." Both of the engineers were examined at some length on this point, and both testified that the whistle was blown; but their testimony impresses us with the belief that their recollection on that point was not quite clear, and that their conviction that the whistle was sounded arose in part, at least, from their knowledge that it was their custom to blow whistles at crossings. On the other side, in addition to the plaintiff, five or six witnesses testified that the whistle was not blown for the crossing. The testimony of several of these witnesses, none of whom were interested, was that they noticed at the time that the whistle was not blown, and on that account they testified positively to that fact. One of these witnesses was put on the stand by the defendant. Taking the whole evidence, it seems reasonably certain to us that the preponderance of the evidence was in favor of the plaintiff on this point, and that the finding on that point was right. On the question of whether this failure to sound the whistle was the proximate cause of the injury there is room for doubt, but the decision of this question depended on the testimony of the plaintiff, and could not have been affected by the argument above noticed. Counsel for appellant has argued with much force on this point that the failure to ring the bell or sound the whistle was not the proximate cause of the injury. We have felt some doubt about it, but, after due consideration thereof, we think the evidence sufficient to sustain the ver-

dict. It justified the jury in finding that, by reason of the failure of the company to give the statutory signals, plaintiff attempted to pass a crossing while a train hidden from view by a hill was rapidly approaching; that she narrowly averted a collision—was taken so unexpectedly that she had barely time to get to the head of her horse in her effort to restrain him, when, frightened by the train, he broke and ran away, throwing her down and injuring her; that, had the signals been given, she could have made better preparation for the approach of the train, and probably avoided the injury. There is nothing in the evidence to show that this horse was vicious or easily frightened by trains, beyond the fact that he ran away on this occasion. But the circumstances under which he did so were exceptional, and such as might frighten even a gentle horse. So we do not think that is sufficient to show that plaintiff was guilty of contributory negligence in driving him on the day of the accident.

We are fully convinced from the evidence, and the reasonable amount of damages assessed, that counsel for defendant fully upheld his side of the controversy before the jury, and that no prejudice resulted to the defendant on account of any error of the court or improper argument of counsel.

The judgment, we think, is right, and should be affirmed. It is so ordered.

ST. LOUIS, I. M. & S. RY. CO. v. WALLIN.
(Supreme Court of Arkansas, June 13, 1903.)

MALICIOUS PROSECUTION — WHAT CONSTITUTES—ELEMENTS—INSTRUCTIONS OF PROSECUTING ATTORNEY.

1. It is not malicious prosecution for one to refer charges against a person to the prosecuting attorney, and follow his instructions in laying the matter before the grand jury.

2. In an action for malicious prosecution, plaintiff must prove by a preponderance of evidence that the prosecution was instituted or procured by defendant without probable cause, that defendant's motive was malicious, and that the prosecution terminated in his acquittal or discharge. It is not necessary for defendant to prove plaintiff's guilt.

Appeal from Circuit Court, Crittenden County; Felix G. Taylor, Judge.

Action by Lucian Wallin against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Dodge & Johnson, for appellant. H. G. Chambers and Wright, Peters & Wright, for appellee.

BATTLE, J. Lucian Wallin brought an action against St. Louis, Iron Mountain & Southern Railway Company, and alleged in his complaint that the defendant falsely and maliciously procured him to be indicted by

1. See Malicious Prosecution, vol. 33, Cent. Dig. § 47.

the grand jury of Crittenden county, in this state, for the crime of obtaining money under false pretenses, and that the indictment was, by leave of the court, dismissed by the prosecuting attorney, and he was discharged, and that by reason of such prosecution he had been damaged in the sum of \$45,350.

The defendant answered, and denied all the allegations in the complaint. The plaintiff recovered a judgment for \$8,000, and the defendant appealed.

The facts in the case are substantially as follows: Appellee, Wallin, was the foreman of an extra gang of section hands in the employment of the appellant, working upon its railroad near the town of Gavin, in the county of Crittenden, in this state. His duty was to keep a roll of the men in his gang, the time they worked, and report the same to the superintendent and division road master of appellant every night. He was permitted to board the men, and did so, and was allowed to furnish them with anything they needed, and charge for the same not exceeding 60 per cent. of their wages. At the end of each month he made out their respective accounts, and sent them to the proper officer, to be paid when the wages of the men were due. The pay roll made out according to his report showed 43 men working under him. His work was unsatisfactory, and he was discharged about the 29th of August, 1898. About the 15th of September following, at the usual time, the paymaster of appellant went to Gavin for the purpose of paying its employes. Only 6 out of the 43 men appeared and claimed their pay. Twenty-one of them never claimed wages. He charged each one of the 43 men with various sums, amounting in the aggregate to \$195, which he claimed was due him for board, and was afterward paid to him by appellant. The paymaster, thinking that these facts were suspicious, reported them to the general superintendent of the appellant, and he reported them to Division Superintendent Moore for investigation, and he directed his special agent, C. D. West, to investigate them, which he did, and reported to Moore, and he referred the report and accompanying papers to Dodge & Johnson, the general attorneys of appellant, for their opinion, which they received and examined. Shortly thereafter C. D. West reported to them for instructions. Mr. Johnson, whose instructions he asked, testified: "I told him I had no instructions; that under no circumstances would the railway company order a prosecution of Wallin; that under no circumstances, as far as the railway company was concerned, would anybody prosecute Wallin. But I said to him, 'Mr. West, from the examination of these papers, I believe that there is just ground for laying this matter before the prosecuting attorney of Crittenden county, and you can go there at next term of court and lay the matter before Mr. Killough, but under no circumstances do you

prosecute or swear out any warrant against Wallin.'"

West saw O. N. Killough, who was prosecuting attorney at that time, and commenced telling him the facts that he had discovered by his investigation, when Killough directed him to go before the grand jury, which he did. Shortly thereafter the grand jury of Crittenden county returned into the Crittenden circuit court an indictment against appellee, in which it accused him of the crime of obtaining money under false pretenses, committed as follows: "The said Lucian Wallin on the 20th day of August, 1898, in the county of Crittenden aforesaid, being then and there an employe of the St. Louis, Iron Mountain & Southern Railway Company, a corporation, falsely, fraudulently, feloniously, and designedly did pretend and represent to said St. Louis, Iron Mountain & Southern Railway Company, a corporation, that John Smith was an employe of the said St. Louis, Iron Mountain & Southern Railway Company, a corporation, and did feloniously, fraudulently, and designedly collect and obtain from the said St. Louis, Iron Mountain & Southern Railway Company the sum of eighty-four dollars as board for the said John Smith. Whereas, in truth and in fact, the said John Smith was not an employe of the St. Louis, Iron Mountain & Southern Railway Company."

At a term of the circuit court next thereafter held, the prosecuting attorney, with leave of the court, entered a nolle prosequi in the case, and the accusation against the appellee was submitted to the grand jury of that term, and it failed to indict, and appellee was discharged.

Among the instructions given to the jury by the court over the objections of the appellant were the following:

"(13) If you find from the evidence that the defendant company authorized and directed C. D. West to report the charges against Wallin to the prosecuting attorney, and that the prosecuting attorney, without investigation, referred them to the grand jury, and thereupon West went before the grand jury and procured the indictment against the plaintiff, then such acts of West were in the range of his employment, and the defendant would be responsible for the same, as its agent.

"(14) If you find that the defendant, through its proper officers and agents, referred the charges against the plaintiff to Col. B. S. Johnson, their attorney at Little Rock, and that West was directed to report to him and obey his instructions, and if you further find that Col. Johnson, as the attorney and agent of the defendant, sent C. D. West to the prosecuting attorney, under instructions to lay the facts before him, and that West did report to the prosecuting attorney, who directed him to go before the grand jury, which West accordingly did, and procured an indictment against the plaintiff, under these

findings of fact the defendant would be liable for all the acts of West in the matter as their agent."

In these instructions the court told the jury that appellant was responsible for the acts of West if they found certain facts mentioned therein. In what way was it responsible? From the instructions, the jury might reasonably have inferred that appellant was guilty of a malicious prosecution without probable cause, if such facts existed. That is not true. No one would have been made liable in any manner by West going before the grand jury and stating all the facts in relation to the charge under investigation, within his knowledge, and nothing more. In that case he would have done his duty. It was for the grand jury, under the advice of the prosecuting attorney or charge of the court, to determine from the evidence whether the appellee should be indicted. For the discharge of that duty the appellant or West was not responsible.

In these instructions the court virtually told the jury the appellant was liable if they found as therein stated, notwithstanding they found that its proper officers and agents referred the charges against the plaintiff to Col. B. S. Johnson, their attorney at Little Rock, and that West was directed to report to him and obey his instructions; and that Col. Johnson, as the attorney and agent of the defendant, sent C. D. West to the prosecuting attorney, under instructions to lay the facts before him, and West did so, and followed his directions. In this the court erred. If West laid the facts before the prosecuting attorney, and followed his instructions, neither he nor appellant would have been liable in damages to any one. He would have been justified in acting upon the advice or directions of the prosecuting attorney. *Kansas & Texas Coal Co. v. Galloway* (Ark.) 74 S. W. 521.

The court further instructed the jury as follows: "The legal presumption of innocence is to be regarded by the jury in every case as a matter of evidence, to the benefit of which the party is entitled." The object of this instruction is doubtful. The jury probably understood it to mean that appellee was presumed to be innocent of the crime for which he was indicted by the Crittenden grand jury until the contrary appeared (as he was the only party who was accused of a crime), and that it was necessary for appellant to prove that he was guilty of the crime in order to defeat his recovery in this action. That is clearly and unquestionably wrong. In every action for malicious prosecution for a crime, the plaintiff must prove, by a preponderance of evidence, before he can recover, (1) that the prosecution was instituted or procured by the defendant without any probable cause therefor; (2) that the motive in instituting or procuring it was malicious; and (3) that the prosecution was terminated in the acquittal or discharge of the accused.

The verdict of the jury was not sustained by sufficient evidence. West appeared before the grand jury, but there is no evidence that he testified falsely, that he misrepresented the facts, or that he withheld from the jury any material fact within his knowledge. It is the duty of every man to report to the proper grand jury facts within his knowledge tending to prove the commission of a felony. There is nothing to show that West or appellant did more than that in this case.

Reversed and remanded for a new trial.

RAMSEY & BRO. v. CAPSHAW.

(Supreme Court of Arkansas. June 6, 1903.)
 REPLEVIN—RECOURTMENT—DAMAGES—LOSS OF PROFITS—EVIDENCE—ALTERATION OF WRITTEN INSTRUMENT.

1. In replevin for sawmill machinery sold to defendant under a contract that he should pay for the same by the sawing of lumber which plaintiffs agreed to furnish, and which defendant was to saw at a specified price, which netted him \$2 per 1,000 feet, defendant could recoup damages which he had suffered by loss of profit resulting from plaintiffs' refusal to carry out their agreement.

2. Defendant purchased machinery, giving the seller his notes therefor. At the time of the purchase he entered into an agreement with plaintiffs whereby the latter were to furnish him timber, which he was to saw at a specified price, and plaintiffs were to deduct sufficient from the price to pay the seller for the machinery. The notes and lien of the seller on the property were subsequently assigned to plaintiffs, who thereupon refused to continue to carry out their part of the agreement. *Held*, in replevin by plaintiffs for the value of the machinery, that defendant could show the agreement between himself and plaintiffs as to the manner of payment for the machinery, though no mention of such agreement appeared on the face of the notes.

Appeal from Circuit Court, Monroe County; Geo. W. Chapline, Judge.

Action by J. J. Ramsey & Bro. against W. A. Capshaw. From a judgment for defendant, plaintiffs appeal. Affirmed.

J. J. Ramsey & Bro. commenced an action of replevin in the Monroe circuit court against W. A. Capshaw to recover the possession of certain sawmill machinery, of which they alleged he held unlawful possession.

The defendant answered and alleged:

"First. That the plaintiffs are not the owners of the property described in the complaint, or that the plaintiffs are entitled to the possession thereof, and denies any knowledge or information of such ownership sufficient to form a belief.

"Denies that he is in unlawful possession of said property, or any part thereof, and denies that he unlawfully detains property from the plaintiffs, as is alleged in the complaint.

"Second. For further defense, defendant alleges: That on or about the 1st day of January, 1900, he entered into a contract

with the plaintiffs to pay to them the sum of \$885.28, for the purchase money of the property described in the complaint (the same being a sawmill outfit), and other money advanced and to be advanced by the plaintiffs.

"That since that time, on different days, he has paid to plaintiffs upon said indebtedness the sum of \$542.45, by the sawing of lumber for the plaintiffs under a contract. That at the same time and date, and as a part of said contract, the plaintiffs entered into a contract with defendant to furnish defendant 1,000,000 feet of oak timber, to be sawed by the defendant for the plaintiffs at an agreed price of \$6.25 per thousand feet, as a means by which the defendant could pay for said sawmill. That the plaintiffs failed and refused to comply with their contract by furnishing to him said 1,000,000 feet of timber to be sawed at said price, except a portion thereof.

"The defendant alleges and will show that after plaintiffs had furnished a portion of the timber agreed upon to be sawed, to wit, about 500,000 feet, the plaintiffs, in violation of their contract with the defendant, refused thereafter to furnish the balance of said timber for defendant to saw for them, although defendant has been at all times ready and willing to perform his contract in reference thereto, and demanded of plaintiffs that said contract to furnish said timber be complied with. The defendant states that he is now, and has been at all times since entering into said contract, prepared to carry out contract with the plaintiffs in the sawing of said timber for them, which fact the plaintiffs well know; but the plaintiffs have willfully declined and refused to comply with their said contract, as hereinabove stated.

"The defendant states that there was a net profit to him under said contract with the plaintiffs in the sawing of said timber of the sum of \$2.00 per thousand feet, and he alleges that he is entitled to recover from the plaintiffs said sum of \$2 per thousand feet for such portion of the timber which the plaintiffs refused and declined to deliver to him under said contract, to wit, 500,000 feet.

"The defendant states that after allowing the plaintiffs the sum of \$342.83, the balance due plaintiffs from defendant at the time plaintiffs violated their contract with defendant as herein stated, when they refused to allow defendant to cut said timber, and refused to furnish him with said timber to be cut for them under said contract and agreement, there is due defendant from the plaintiffs the sum of \$657.17, wherefore defendant prays judgment for said sum and costs."

Plaintiffs replied, and denied the allegations of the answer, and demurred to the second paragraph of the same. The demurrer was overruled.

The jury impaneled to try the issues in the action returned a verdict in favor of the defendant. Judgment was rendered accordingly, and plaintiffs appealed.

On the 29th day of September, 1899, James A. Sain purchased of the Southern Engine & Boiler Works the property in controversy, on condition that the title to the same should remain in the vendor until the purchase money was paid. Three notes, in which the condition of the sale was recited, were executed by the purchaser to the vendor. Sain sold the property to the appellee on the same condition. On the 5th of June, 1900, appellants purchased two of the notes—the other having been paid—and the Southern Engine & Boiler Works transferred the same to them by an indorsement thereon as follows: "For value received we hereby transfer the within note to J. J. Ramsey & Brother together with all our right and title to this property, without recourse on us at law or in equity. This June 5th 1900. [Signed] Southern Engine & Boiler Works. E. Burkitt, Secy." By virtue of this purchase and transfer, appellants claim possession of the property in controversy; alleging that the notes are unpaid. The question in the case is, have the notes been paid?

Evidence was adduced in the trial tending to prove the following facts:

Appellants were the owners of 640 acres of timbered land in Monroe county, in this state. They were dealers in hardwood lumber, rough plow, wagon, and chair material, with their home office in Shelbyville, Ky. They were anxious to have the oak timber on their land sawed into such material as they handled. They established a branch office in Brinkley, in this state, with Thomas Jesse as their general agent and manager.

Jesse went to J. A. Sain about the 1st of September, 1899, and asked him to take a contract to saw 1,000,000 feet of oak timber for the plaintiffs. Sain told Jesse that he did not own a sawmill, and had no money to buy one. Jesse said to Sain that, if he would agree to cut that amount of timber for the appellants, they would pay him \$3.75 per thousand feet to saw it, and \$2.50 per thousand feet to haul it out of the woods to the mill. He further proposed to Sain, at the same time, to furnish him with money to pay his expenses to Jackson, Tenn., to get a sawmill from the Southern Engine & Boiler Works, and, if he would buy the mill, that the appellants would advance \$500 for Sain to the engine and boiler works people, and that if Sain did not buy the sawmill, and did not close the trade with them, Sain would not owe the appellants anything on account of his expenses in making the trip.

"Sain went to Jackson, Tenn., and bought the sawmill outfit pursuant to Jesse's request. Before going, Sain and Jesse made a contract covering the purchase of the mill, how it was to be paid for, and what the appellants were to do. They were to cut 1,000

000 feet of timber on their land in Monroe county. Sain was to haul it to the mill and saw it at the rate or price proposed; and appellants were to pay the amount due therefor, as the same was done, to the Southern Engine & Boiler Works, in part payment of the debt contracted by the purchase of the sawmill, until the same was paid. It was also agreed that all money loaned to Sain, or advanced to him, to defray the expenses of running the sawmill and hauling the timber, should not be collected or deducted out of the money due on the contract of sawing and hauling until after the sawmill debt was paid in full. Not only this, but it was expressly agreed that the appellants would advance such money to Sain as was necessary to pay the hands and running expenses of the sawmill, and, as stated above, this was not to be paid until after the debt due for the machinery and sawmill outfit was fully paid.

"Sain bought the sawmill outfit from the Southern Engine & Boiler Works after this agreement was made, on a credit, and on condition that the title to the same should remain in the vendor until the purchase money was paid, erected his sawmill plant, and went to work sawing and hauling the oak timber, and continued operating the mill under his contract until January, 1900.

"The representative of the Southern Engine & Boiler Works brought the notes for the purchase money to Brinkley, pursuant to Sain's request, to have Sain sign them. When he came to Brinkley with the notes for Sain to sign, Jesse, Sain, and the agent of the engine and boiler works talked about the contract of appellants and Sain. Jesse refused to reduce it to writing, and Sain did not sign the notes.

"About the 1st of January, 1900, Sain explained to appellee the terms of his contract with appellants, and informed him that Jesse, their agent, had neglected to reduce it to writing, and offered to sell the mill to him (appellee). They (appellee and Sain) then went to Jesse, and he explained the contract he and Sain had made, and told appellee that appellants would be glad to make the same contract with him. They agreed upon terms, and made the same contract that Sain made, except appellee assumed the indebtedness of Sain to appellants, which extended from about the 1st of October, 1899, to the 1st of January, 1900, and amounted, as they agreed, to \$385.28; and they stipulated that it should be paid in the same manner Sain undertook to pay it—that is to say, out of the amount earned by hauling and sawing under their contract, and after the full payment of the amount contracted to be paid for the machinery.

"Thereupon appellee purchased the machinery from Sain, and agreed to assume his indebtedness therefor, and thereafter, on the 10th day of January, 1900, he and Sain executed the notes to Southern Engine & Boiler

Works for the price of the machinery; dating them the 29th of September, 1899, the day of the purchase by Sain. The notes were indorsed as follows:

"We hereby release J. A. Sain from payment of the within note by W. A. Capshaw assuming same and taking the place of J. A. Sain, but in so doing it is fully understood and agreed that we do not release our title retained, or in any way damage our lien on the machinery and property for the purchase money, which is not to be released till the notes are paid up in full. This Jan'y 11th, 1900. Southern Engine & Boiler Works.

"I fully agree to above and assume payment. This Jan'y 11, 1900. W. A. Capshaw."

"Appellee took possession of the machinery and operated it until the 16th of August, 1900, when appellants refused to allow him to saw any more lumber for them, and ordered him to close the mill. He was compelled to discharge his employes and cease operating the machinery, because he had not the timber, and could not get it to saw, and he could not find a sale for lumber. He had up to this time sawed, under his contract, 579,726 feet, and 427,274 feet still remained to be hauled and sawed. He had earned \$2 per thousand feet, net profit, and would have continued to earn it, if he had been permitted to do so. The amount of profit earned and that he could have earned by the performance of his contract with appellants was more than sufficient to pay the notes for the purchase money. He offered to perform his contract, but appellants would not allow him to do so."

Other evidence tending to sustain appellants' claim was adduced, but it is unnecessary to say anything about it in this opinion.

The following, with other instructions, were given by the court to the jury over the objections of appellants:

"(2) If the jury believe from the evidence that the sum of money due the defendant under his contract with the plaintiffs was by agreement with Jesse to be used and applied to the payment, first, of the notes given for the machinery, and that such sum, at the commencement of the suit, or demand of delivery of the property, was sufficient to pay off the notes, your verdict will be for the defendant.

"(3) If the jury believe from the evidence that the plaintiff, through his agent, Jesse, entered into a contract with the defendant to furnish him one million feet of timber, to be hauled and sawed by the defendant, and that the defendant was carrying out his contract, and that the plaintiff, without fault on the part of the defendant, and over the objections of the defendant, ordered the defendant, through his agent, not to complete his contract, and that the plaintiffs at any time notified the defendant not to complete his contract in the sawing of the balance of said timber, the defendant would be

entitled to recover in this action from the plaintiffs such sum as he would have earned as a profit under the contract, provided the same exceeds the amount due the defendant to plaintiffs on notes and accounts."

C. F. Greenlee, for appellants. M. J. Manning, for appellee.

BATTLE, J. (after stating the facts). The loss of profits sustained by appellee on account of the failure of appellants to perform their contract with him was the direct result of such nonperformance, was reasonably within the contemplation of the parties, and was sufficient to defeat appellants' right to recover in this action, provided the same was equal to or exceeded the amount due on the notes given for the property in controversy. *Ames Ironworks v. Rea*, 56 Ark. 450, 19 S. W. 1063; *Gibney v. Turner*, 52 Ark. 117, 12 S. W. 201; *Railway Co. v. Beard*, 56 Ark. 309, 19 S. W. 923; and *Id.*, 60 Ark. 151, 29 S. W. 146.

Appellants say that "it was error to admit testimony to prove that the purchase money was to be paid in a different way from what is shown on the face of the notes." This testimony was not admitted for the purpose of varying or contradicting the contract evidenced by the notes, and did not do so. There were two contracts. One was made with the Southern Engine & Boiler Works and is evidenced by the notes. The other was with the appellants, and is not in writing. The testimony was admissible to prove what it was.

The evidence was sufficient to sustain the verdict of the jury.

We find no error in the proceedings of the circuit court prejudicial to appellants.

Judgment affirmed.

BOOZER v. TERRELL, Commissioner, et al.

(Supreme Court of Texas. June 26, 1903.)

SCHOOL LANDS—SALE—LAND COMMISSIONER—DUTIES—MANDAMUS.

1. Mandamus will not be granted against a land commissioner to compel him to sell to relator certain school lands previously sold to another on the ground that such prior purchaser was a minor, and that the sale to him was therefore void, where compliance with relator's demand would require the commissioner to determine the question of fact as to such minority.

Application by N. F. Boozer for permission to file a petition for mandamus against J. J. Terrell, land commissioner, and others. Application denied.

James & Yeiser, for relator.

WILLIAMS, J. The application in this case seeks a mandamus to compel the Commissioner of the General Land Office to sell to applicant certain school land, although it had been previously sold to one Almond, which sale is in good standing, on the ground

that Almond, when he purchased, was a minor, and the sale to him void. In order for the commissioner to have complied with applicant's demand, he would have had to investigate and determine the question of fact as to minority. The statute confers no such power and imposes no such duty, and consequently it cannot be held that the officer has refused to perform a duty, and is therefore subject to the writ. Applicant's remedy, if he has acquired a right, is not by mandamus in this court.

The motion for leave to file the application is therefore overruled.

WESTERN UNION TELEGRAPH CO. v. WILSON.

(Supreme Court of Texas. June 26, 1903.)

TELEGRAM—NEGLIGENT FAILURE TO DELIVER—SPECIAL DAMAGES—WHAT CONSTITUTES—NOTICE TO COMPANY.

1. There is no presumption that an uncle will suffer mental anguish from the failure to attend his niece's funeral, and hence, in the absence of notice to the company of such probable consequences, it is not liable to him for negligent delay in delivering a telegram announcing the death, whereby his attendance was prevented.

2. Mental anguish arising to the recipient of a telegram from negligent delay in its delivery, whereby he is prevented from comforting his sister on the occasion of the burial of her child, is not an element of damages recoverable from the company, in the absence of notice of its probable occurrence.

Certified Questions from Court of Civil Appeals of First Supreme Judicial District.

Action by L. W. Wilson against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appealed to the Court of Civil Appeals, First District, which certifies questions to the Supreme Court. Questions answered.

Geo. H. Fearons, Young & Stinchcomb, and N. L. Lindsley, for appellant.

WILLIAMS, J. Certified questions from the Court of Civil Appeals for the First District, as follows:

"On March 11, 1902, C. L. Wilson sent from Dallas, Texas, to L. W. Wilson at Troupe, Texas, a telegram reading as follows: 'Baby will die. Ethel very dangerous. Come at once. [Signed] C. L. Wilson.' The defendant telegraph company was paid therefor the full rate, and undertook to make prompt delivery thereof. The Ethel mentioned in the telegram was a sister of L. W. Wilson, and the baby therein mentioned was her female infant, less than three days old, which he had never seen. Both were dangerously ill. The telegraph company had no notice of the relationship existing between the parties, or what consequences would probably result from a failure to promptly deliver it, except what it was chargeable with by the terms of the message. On the day the message was sent the baby died, and

was buried in Dallas on the next day. The telegram, though sent from Dallas at 2:35 p. m., did not reach appellee until 9 o'clock on the morning of the next day, and, though he took the first train for Dallas, he did not arrive until after the burial of the baby. He could and would have gone in time had the message been delivered promptly. He brought this suit against the telegraph company to recover damages for mental anguish suffered by him as a result of his failure to be present at the burial of the child and by reason of his inability to be present and render consolation and aid to his sister at the burial and during her illness. The evidence shows that he suffered mental anguish both on account of his failure to attend the child's funeral and failure to be present and console his sister. Upon the trial he established the facts above set out. The evidence was conflicting on the issue of negligence of the company, but was sufficient to require the submission of the issue.

"Question 1. In the absence of all notice to the company, except such as was conveyed by the terms of the message, can the plaintiff, in any event, recover for mental anguish resulting from his failure to be present at the burial of his niece?"

"Question 2. Under the facts stated, is mental anguish suffered on account of failure to be present and console his sister an element of actionable damage?"

The reasoning of the opinion in the case of *Western Union Telegraph Company v. Coffin*, 88 Tex. 94, 30 S. W. 896, seems to apply and control the first question. In that case Coffin sought to recover damages for mental anguish for being deprived of the opportunity to attend the funeral of his sister's husband. This court held that no such ties of affection between brothers-in-law could be presumed to have existed as would give rise to mental anguish from such a cause as that alleged, and that, therefore, the telegraph company could not be held, in the absence of notice of the special relations existing in that case, to have had such character of damages in contemplation as a consequence of a breach of the contract. The same proposition is true here. It cannot be presumed as generally true of uncles that mere failure to attend the funeral of their nieces would cause mental anguish of the character for which damages are held by the decisions of this court to be recoverable. As pointed out in the *Coffin* Case, such damages have hitherto been allowed only in cases where closer relationship existed, in which the existence of such affection would be presumed as would give rise to the feelings for which recovery is sought.

The second question is virtually decided in *Western Union Telegraph Company v. Luck*, 91 Tex. 178, 41 S. W. 489, 66 Am. St. Rep. 869. In that case Mrs. Luck sent to her daughter, Bertha Wincker, a message that Luck, the husband of the sender and the step-

father of the sendee, was very sick, and summoning the sendee to come at once. One of the elements of damage claimed by Mrs. Luck arose from the fact that she had been deprived of the consolation which her daughter would have administered. The court held that the message afforded no notice of the probability of such a consequence of the nondelivery of the message. The character of damages referred to in the second question is the same, the only difference being that here it is claimed by the person to whom the message was sent. It is obvious that the message itself failed to give the requisite notice in the one case as well as in the other.

If damages, such as are mentioned in either question, can be recovered at all, the decisions would require that some notice must be given to the telegraph company of the probability of their being caused by failure to deliver the message.

Both questions are answered negatively.

CHICAGO, R. I. & T. RY. CO. v. LONG.

(Supreme Court of Texas. June 26, 1903.)

CONTINUANCE—DENIAL—WANT OF DILIGENCE —INTERMEDIATE APPEAL—HARM- LESS ERROR.

1. Where defendant applied for a continuance to obtain two absent witnesses, one of whom resided in another county, but the deposition of such witness had not been taken, and it did not appear that the testimony of the other witness was material, the application was properly denied.

2. Error, if any, in the action of the Court of Civil Appeals in refusing to consider an assignment of error relating to the refusal of a continuance, was harmless, where it appeared that the continuance was properly denied.

Application for Writ of Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by G. J. Long against the Chicago, Rock Island & Texas Railway Company. A judgment in favor of plaintiff was affirmed by the Court of Civil Appeals (74 S. W. 59), and defendant applies for a writ of error. Application denied.

Jas. A. Graham, Jno. M. Chambers, N. H. Lassiter, and Robert Harrison, for applicant.

GAINES, O. J. We are of opinion that the application for writ of error in this case should be refused, and it is accordingly so ordered. But, without further time for examination of the authorities, we are not prepared to concur in the action of the Court of Civil Appeals in refusing to consider the question of the correctness of the ruling of the trial court in refusing the application for continuance. We think the application was not sufficient. There was no diligence shown as to one of the witnesses. He lived in another county from that in which the trial

was had, and his deposition should have been taken. It does not appear to us that the testimony of the other witness was shown to be material. Therefore, if the Court of Civil Appeals was in error in refusing to consider the assignment which raised the question, the error was harmless.

HOUSTON & T. O. R. CO. v. BELL.

(Supreme Court of Texas. June 25, 1903.)

TRIAL—CONFLICTING EVIDENCE—CONSIDERATION—INSTRUCTIONS—HARMLESS ERROR.

1. Where there was an irreconcilable conflict in the evidence, it was error for the court to charge that if there was a conflict the jury must reconcile it if they could, and if they could not they might believe or disbelieve any witness or witnesses, according as they might think them entitled to credit.

2. Where there was an irreconcilable conflict in the evidence, error in an instruction requiring the jury to reconcile such conflict if possible was harmless, since it would be presumed that the jury could not reconcile such conflict, but decided the case on what they believed to be the more credible evidence.

Error to Court of Civil Appeals of Third Supreme Judicial District.

Action by George Bell against the Houston & Texas Central Railroad Company. From a judgment in favor of plaintiff, affirmed by the Court of Civil Appeals (73 S. W. 56), defendant brings error. Affirmed.

Andrews & Ball, for plaintiff in error. S. B. Kemp, Hart & Townes, and John C. Townes, for defendant in error.

WILLIAMS, J. Defendant in error brought this action to recover damages for an assault and battery alleged to have been committed upon him by McLeary and Robertson while acting as servants of plaintiff in error in discharge of their duty and within the scope of their authority as such. It was an undisputed fact that he was seriously injured in an encounter with Robertson and McLeary, and the principal questions at issue were whether or not their acts were justifiable on the ground of self-defense, and, if not, whether they were done in furtherance of the business of their employer, the plaintiff in error, in the scope of their authority, or were outside the line of their duty as servants, and purely personal. We agree with the Court of Civil Appeals that these questions were correctly and sufficiently submitted to the jury by the charge, and that there was no error in the refusal of requests for further instructions. The view of the evidence upon which the writ of error was granted was that it conclusively showed that, if there was an unlawful assault, it was committed either in resentment of personal affronts offered by plaintiff to defendant's employes, or as a punishment for conduct of plaintiff, already completed and ended, in roughly handling freight under the care of the

employes. Closer examination of the evidence has led to the conclusion that there is some which at least tends to show that what was done was with the purpose either of expelling plaintiff from the house in which the freight was kept, or to prevent further injury, which they believed to be impending, to the freight itself, and that, therefore, this court cannot interfere with the verdict and judgment upon this ground. In view of repeated discussions by this court of the principles of law applicable to this subject, and of the correct discussion and application of them in the opinion of the Court of Civil Appeals, elaboration would be unprofitable.

The other grounds for reversal were, we think, also properly disposed of by the Court of Civil Appeals. One of them will be briefly referred to in order to make clear the view upon which it is held not to present ground for reversal. There was an irreconcilable conflict in the evidence, and the court gave this instruction: "You are the exclusive judges of the weight of the evidence before you and of the credit to be given to the witnesses who have testified in the case. If there is a conflict in the testimony, you must reconcile it, if you can; if not, you may believe or disbelieve any witness or witnesses, according as you may or may not think them entitled to credit. In civil cases the jury is authorized to decide according as they may think the evidence preponderates in favor of one side or another." We think that trial courts should not instruct juries that they must reconcile conflicts in testimony. As was said in *Houston East & West Texas Railway Company v. Runnels*, 92 Tex. 307, 47 S. W. 971: "The law does not impose upon a jury the duty of reconciling a conflict in the testimony of witnesses; it is impossible to reconcile positive and unequivocal affirmative and negative evidence. Seeming conflicts may be shown not to exist, but a real conflict between witnesses can only be disposed of by discarding the testimony on one side of the issue." It was another feature of an instruction like this that was discussed in the case of *Insurance Company v. Ende*, 65 Tex. 124, and we cannot determine from the report of that case that objection was made to the part of it requiring the jury to reconcile conflicting evidence. While the charge was improper, it does not follow that the judgment must be reversed because it was given. Upon this point we agree with the Court of Civil Appeals where it is said: "It is true that the jury were instructed, if possible, to reconcile the conflict; but an examination of the evidence makes it apparent that it was impossible for them to do so, and the only thing they could possibly do, in view of the evidence, was to disregard this portion of the charge. There was an absolute irreconcilable conflict in the testimony, and we think it may be presumed that the jury could not and did not attempt to reconcile this conflict, but

that they decided the case upon what they believed to be the more credible evidence, and in doing this they were not hampered by any such charges upon the weight of the evidence as those discussed in the Runnels Case. For these reasons, we are unable to see how the charge could possibly have resulted to the prejudice of appellant."

It will be observed that in none of the cases where such an instruction was given was it held, of itself, to be cause for reversal. Cases might exist in which such a charge would be mischievous, and the most that can be said in its favor in any case is that it is a harmless generality.

Affirmed.

NESTING v. TERRELL, Com'r.

(Supreme Court of Texas. June 26, 1903.)

SCHOOL LANDS—ADDITIONAL PURCHASE—MISTAKE IN APPLICATION—RIGHT TO CORRECTION—FORFEITURE—SALE TO ONE NOT ACTUAL SETTLER—EFFECT—RIGHT TO SELL.

1. Batts' Ann. Civ. St. art. 4218fff, gives to the owner of land other than school lands the right to purchase school lands lying within a radius of five miles of the land owned by him, but does not provide the manner in which the commissioner is to be apprised of the fact of ownership, or of the situation of the lands proposed to be purchased with reference to the land already owned. *Held*, that a purchaser of additional school lands, who, in his application, has by mistake incorrectly described the land on which he bases his right to purchase, may have the application corrected at any time before the rights of third persons intervene.

2. Said Batts' Ann. Civ. St. art. 4218fff, further provides that "a failure to reside on either his other lands or on a part of the additional lands so purchased by him, so as to make his ownership and occupancy thereof continuous for three years shall work a forfeiture of such additional lands * * * unless he shall have sold his lands to another who may and does complete a three years continuous ownership and occupancy of and residence on his said lands, as above stated, and as is herein required of actual settlers." *Held*, that a sale by a purchaser, before the completion of the three-years occupancy, to one not an actual settler on the land sold, did not forfeit title thereto.

3. The purchaser had the right to sell to one who was not a settler.

Petition on the relation of C. O. Nesting for a writ of mandamus against J. J. Terrell, commissioner, etc. Writ granted.

C. C. Clamp, for relator. C. K. Bell, Atty. Gen., and T. S. Reese, Asst. Atty. Gen., for respondent.

GAINES, C. J. This is a petition for a writ of mandamus against the Commissioner of the General Land Office. Stripped of irrelevant matters, the facts alleged in the petition are as follows: One Robert Thompson, on September 15, 1898, became the owner of a pre-emption survey in the name of Weaver, and thereupon made his home, and continued to reside upon the tract until April 21, 1903. Section 6 of the John H. Gibson surveys was originally a part of the free school lands of the state, and the southeast

half thereof was on the 12th day of August, 1899, unsold, and was upon the market for sale under the law. The section is situate within a radius of five miles of Thompson's home tract. On the day last named he made application to purchase the southeast half of the section, and in all respects complied with the law, save that in his application he made affidavit that he resided upon the northwest half of the section, instead of saying that his home was upon the Weaver survey. The land applied for was awarded to him by the Commissioner of the General Land Office. As a matter of fact, Thompson did not reside upon the northwest half of section 6, but upon the Weaver tract; and the statement in his application to purchase that he resided upon the former tract was inadvertently made. On January 20, 1902, Thompson, for a valuable consideration, executed a deed to relator to the land in controversy, as well as to other lands not involved in this suit. For the purpose of perfecting the title to the half section in controversy, on the 15th day of August, 1902, Thompson made his proof of occupancy of three years of his home tract—the Weaver survey—and upon the objection of the commissioner that his application to purchase the southeast half of section 6 was based upon his occupancy and residence upon the northwest half of the same section he filed his affidavit showing that the northwest half of section 6 was inserted therein by mistake, and that at the time of his application he in fact resided upon the Weaver tract, and intended to state such as the fact. Nevertheless the commissioner canceled Thompson's purchase upon two grounds: (1) On that of the mistake in the application, and (2) because the relator did not become an actual settler upon the land when he bought from Thompson. The case is submitted to us upon a demurrer to the petition and an answer alleging merely, in effect, that the uniform practice in the land office had been in cases like this to hold that a sale by an original purchaser to one who does not become an actual settler upon the land so sold had the effect to forfeit the title to the land and to cancel the original purchase. Three questions suggest themselves by the case so made: (1) Can a purchaser of additional school lands, who, in naming his application his home section, has by mistake given the wrong designation, have the application corrected so as to show the true name? (2) Does a sale by a purchaser under article 4218fff of Batts' Ann. Civ. St., to one who is not an actual settler, forfeit the title to the land so sold? (3) If the original purchase be not forfeited, does the sale to the second purchaser pass the title? In the argument before us the second was the only question insisted upon, but all of them are necessarily in the case, and must be passed upon in determining whether the writ of mandamus should be awarded.

1. The statute gives to the owner of land other than school lands the right to purchase

school lands lying within a radius of five miles of the land owned by him: Batts' Ann. Civ. St. art. 4218fff. But it does not provide the manner in which the commissioner is to be apprised of the fact of ownership, or of the situation of the lands proposed to be purchased with reference to the land already owned by him. It would seem, however, that, in order to execute the law, the commissioner should be in some manner advised as to these facts. But, since the statute gives to the owner of the other lands the right to purchase school lands in proximity thereto, we think, when the owner does so purchase, he acquires the title, and that at any time before the right of any third party has intervened he ought in case the mistake in the description of the land upon which he bases his right to purchase has been inadvertently made, be permitted to show the fact, and to correct his application. Whether a third party might acquire a superior right by applying to purchase before the correction is made is a question not in this case, and it is one we do not decide.

2. Counsel for respondent concedes that the point raised by the second question has been ruled against him in the case of Robertson v. Sterrett, 73 S. W. 3, 6 Tex. Ct. Rep. 962, but asks us to reconsider that ruling. We have accordingly considered the matter for the third time, and see no good reason for changing our opinion. Article 4218fff expressly provides a condition for forfeiture which is different from that provided in article 4218ff, and by a well-established rule of construction we think that no additional grounds of forfeiture should be implied. The mere fact that to permit the second purchaser to buy without settling upon the land does not seem to accord with the general spirit and policy of our laws in relation to the sale of school lands is not sufficient to justify us in disregarding this rule of construction. We hold, therefore, that the title was not forfeited by the sale from Thompson to the relator, although the relator did not become an actual settler upon the land.

3. In regard to the third point, we have with much difficulty reached the conclusion that Thompson had the right to sell to one who was not a settler.

It follows that, in our opinion, the writ prayed for should be granted, and it is accordingly so ordered.

TEXAS & P. RY. CO. v. LYNCH.

(Supreme Court of Texas. June 26, 1903.)

CARRIERS—EJECTION OF PASSENGERS—CONNECTING LINES—LIABILITY—VENUE—PRIVILEGE PLEA.

1. In an action against several alleged connecting carriers for breach by the last carrier of the conditions of a contract of shipment requiring the carriers to furnish plaintiff, a shipper, return transportation, defendant filed a plea of privilege setting up that it was not a resident of the county where the suit was

brought; denying that any partnership existed between it and the other roads, or that it acted jointly with any other company in the transportation of the stock, and specifically averred that it undertook and contracted to transport the same from the connecting point to its destination, and nothing further. *Held* a practical denial that it acquiesced in or acted on the alleged contract, and that it was error to overrule the plea, and force defendant to trial.

2. Act May 20, 1899 (Laws 1899, p. 214, c. 125), provides that, whenever any freight or other property has been transported over two or more railroads operating any part of their roads in Texas, suit for loss or damage thereto, or other cause of action connected therewith or arising out of such transportation or contract in relation thereto, may be brought against any one or all of such railroads in any county in which either of such railroads extends or is operated. *Held* not to authorize a suit against two railroads not acting under a joint contract for the distinctly separate wrong of one merely because property had been transported over the connecting lines of the two.

3. Act March 27, 1901 (Laws 1901, p. 31, c. 27), provides (section 1): "That all suits against railroad corporations * * * for damages arising from personal injuries, resulting in death or otherwise, shall be brought either in the county in which the injury occurred or in the county in which the plaintiff resided at the time of the injury. * * *"
Held, that where plaintiff shipped stock over connecting lines, and was to receive return transportation, and defendant refused to honor his contract, and ejected him from its train, an action brought by him on account of such ejection was one for personal injuries within the meaning of the statute.

4. Defendant was sued in Baylor county, and in its plea of privilege averred that the ejection occurred in Bowie county, and under the statute plaintiff could have sued in the latter county. *Held*, that the plea complied with the rule requiring a plea in abatement to give plaintiff a better writ.

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by D. M. Lynch against the Texas & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Stanley, Spoonts & Thompson, for plaintiff in error. Montgomery & Hughes, for defendant in error.

GAINES, C. J. This suit was brought by the defendant in error against the Wichita Valley Railway Company, the Ft. Worth & Denver City Railway Company, the Texas & Pacific Railway Company, and W. E. Hunter to recover damages for the alleged wrongful ejection of the plaintiff from the cars of the Texas & Pacific Railway Company. Upon the trial the plaintiff dismissed as to all the defendants except the last-named corporation. A verdict was returned in plaintiff's favor against that company, and judgment was entered accordingly. On appeal the judgment was affirmed by the Court of Civil Appeals. 73 S. W. 65.

The defendant the Texas & Pacific Railway Company pleaded its privilege of being sued in some county other than that in which the suit was brought. Its plea was overruled by the court, and it was forced to go to trial. We think this was error. It was alleged, in

substance, in the petition, that the defendants the Wichita Valley Railway Company and the Ft. Worth & Denver City Railway Company entered into a contract with plaintiff by which they agreed to transport a car load of horses and mules from Seymour, a station on the line of the Wichita Valley road, to Texarkana, Tex., a station on the line of the Texas & Pacific road, and to furnish the plaintiff with return transportation from Texarkana and over the several lines of road; that the plaintiff shipped the car of horses, and accompanied them on the trip; that they were carried from Seymour to Wichita Falls over the Wichita Valley road; thence over the Ft. Worth & Denver City road to Ft. Worth, and thence over the Texas & Pacific to Texarkana, Tex. It was also alleged that the Texas & Pacific received the car at Ft. Worth, and transported it to its destination, under and by virtue of the contract entered into by plaintiff with the two other companies, and that by virtue of transporting the car under the contract each of the three companies ratified the contract, and made it its own, and thereby bound itself to furnish return transportation for the plaintiff over their respective lines from Texarkana to Seymour. It was further averred, in substance, that the car was carried to Texarkana in pursuance of the agreement; that the plaintiff accompanied it, and that at that point he presented to the agent of the Texas & Pacific Company his contract, with a request for return transportation; that thereupon the agent placed his stamp upon it, and told plaintiff it would be good for his return passage; that he thereupon boarded the train at Texarkana, and, when called upon by the conductor for a ticket, presented his contract, but that the conductor refused to receive it, and demanded his fare. It was further averred that thereupon the conductor ejected him from the cars, to his damage, etc.

In its plea of privilege the Texas & Pacific Railway Company averred among other matters not necessary to be set out: "That it is a resident of Dallas county, Texas, and was at the time of the occurrences set forth in plaintiff's petition and at the time of service of citation upon it, and has, and at those times had, its domicile and principal office in Dallas county, Texas, and that it is not, and never has been, a resident of Baylor county, Texas, nor had its domicile in said Baylor county, Texas. Second. That it has not, and never has had, an agent in Baylor county, Texas, but had at the time of the acts complained of, and ever since has had, an agent in the various counties through which its line runs, to wit, Tarrant county, Dallas county, and others; that it has not had, and has not now, any line of railway, or portion thereof, in or through Baylor county, Texas, but that it runs from Bowie county, Texas, to El Paso, Texas. Third. That it is not, and never has been, in partnership or

jointly interested with any of the defendants in this case, and that it was especially not in partnership with or jointly interested with any or all of defendants herein in any matters complained of herein, or in any matter out of which this suit arose. It avers that it received the plaintiff's cattle at Ft. Worth for shipment, and shipped same to Texarkana, and that plaintiff boarded its train at Texarkana to ride to Ft. Worth; and that in the transportation of said cattle it was not acting jointly or in partnership with any other person or company, but that it undertook and contracted to transport same from Ft. Worth to Texarkana, and undertook nothing further. Fourth. That it did not contract to perform any obligation in Baylor county. Fifth. That it did not commit any crime, offense, or trespass in Baylor county. Sixth. That this is not a suit for, or involving, or in any way concerning any of the exceptions set forth in article 1194 of the Revised Statutes of Texas, but is a suit for damages resulting from ejecting plaintiff from the train of this defendant in the county of Bowie, and state of Texas, and that plaintiff's cause of action, if any he has, arose in said Bowie county, and does not and did not arise, nor did any part thereof arise, in Baylor county, Texas. Seventh. That allegations of partnership made in the plaintiff's petition between the defendants herein were fraudulently made for the purpose of conferring jurisdiction on this court, and that all other allegations made therein for the purposes of conferring jurisdiction on this court were fraudulently made for that purpose." No exception to the plea was urged upon the trial, but the record shows that it was agreed in open court that the allegations thereof were true. If, as alleged in the petition, the written contract was for a through shipment from Seymour to Texarkana, and the Texas & Pacific Company ratified it, and thereby became a party to it, then all the companies would have been jointly liable for the wrongs alleged, and all would have been jointly suable in any county in which suit could have been separately brought against either. But here the defendant in its plea denies that any partnership existed between it and its codefendants, and that it acted jointly with any other person or company in the transportation of "the cattle" (evidently meaning the horses and mules), and specifically avers "that it undertook and contracted to transport the same from Ft. Worth to Texarkana, and undertook nothing further." If this be true, then there was no joint contract on part of the three railroads, and consequently could be no joint liability for the wrongs alleged in the petition. No exception having been urged to the plea for vagueness of allegation, under the rule every reasonable intendment should be indulged in its favor. The averments just adverted to are a practical denial that the alleged contract for a through shipment was "acquiesced in

or acted upon" by the Texas & Pacific Company, and therefore it is a denial of a state of facts to which article 331a of the Revised Statutes of 1895 applies.

We are further of the opinion that the act of May 20, 1899 (Laws 1899, p. 214, c. 125), has no application to the case as made by the defendant's plea of privilege. It may be doubted whether it was the purpose to make the act applicable to any case except to those of damage to property in course of transportation; but the words "or other cause of action connected therewith" are very broad, and it is difficult to say that they do not embrace injuries to the person of one accompanying a shipment of cattle, where the right of transportation is given in the contract of shipment. But we need not decide that question. Before the passage of the act it was a matter of not infrequent occurrence that live stock which had been shipped over two or more lines of railroad under separate and independent contracts arrived at their destination in a damaged condition and the shipper was at a loss to know how much of the damage was chargeable to the one line and how much to the other, or others in case there were more than two. The evident purpose of the act was to relieve shippers of this difficulty, and to provide a joint action against all the carriers where there was a reasonable probability that each was responsible for some part of the whole damage. But, in our opinion, it was not intended to authorize a suit against two railroad companies not acting under a joint contract for the distinctly separate wrong of one merely because property had been transported over the connecting lines of the two. It would, in our opinion, be difficult to justify such legislation upon any correct principle. If, for example, the cause of action was against the second carrier company for a total destruction of the property on its line by a railroad wreck, why sue the first, who did not contract to carry beyond its own line, and was in no manner responsible for the loss of the property? So, in this case, if it be true, as alleged in the plea and as admitted by the agreement, that there was no joint contract, there was no joint liability nor any question of apportionment of damages to be settled. We are, therefore, of the opinion that it was not intended that the statute should apply to such a case.

We also think that this was an action for personal injuries, within the meaning of the venue act of March 27, 1901 (Laws 1901, p. 31, c. 27). According to the case made by the petition, the right of the plaintiff and the duty of defendant grew out of the contract of carriage, but the mental and physical pain suffered by him by reason of his ejectment from the cars are personal injuries, such as are recoverable only in an action of tort. The plea avers that the ejectment occurred in Bowie county, and under the statute the plaintiff could have sued and may yet

sue in that county. Therefore the plea complies with that rule, which requires that a plea in abatement shall give the plaintiff a better writ. It does not deprive the plaintiff of his right to sue either in that county or in the county nearest "that in which the plaintiff resided at the time of his injury."

Accordingly, the judgment should be reversed, and judgment here rendered sustaining the plea of privilege and abating the suit, and it is accordingly so ordered.

BROWN et al. v. CITY OF GALVESTON.

(Supreme Court of Texas. June 26, 1903.)

MUNICIPAL CORPORATIONS—LOCAL SELF-GOVERNMENT—GOVERNING BODY—APPOINTMENT BY GOVERNOR—VALIDITY OF CHARTER—CONSTITUTIONALITY OF STATUTES—PRINCIPLES OF INTERPRETATION—LICENSE TAX—POLICE POWER—EFFECT OF REVENUE—PRESUMPTION.

1. Const. art. 2, distributes the powers of government to the legislative, executive, and judicial departments, and provides that no one belonging to one department shall exercise any power properly attached to another. Article 3, § 1, provides that the legislative power shall vest in a Senate and House of Representatives, which shall be held to be the Legislature of the state. Each legislator is required to take the official oath prescribed by the Constitution, which pledges him to discharge his duty in conformity with that instrument. *Held*, that in passing on the constitutionality of a statute the court must bear in mind that the legislative department may exercise all legislative power not expressly or by implication withheld by the Constitution of the state or of the United States, and, if there is any doubt as to the validity of the law, it is due that department that its action should be upheld and its decision on the question accepted by the court.

2. Const. art. 6, regulating the elective franchise, provides, in section 3, that all qualified voters, who shall have resided for six months within the limits of a city, etc., shall have the right to vote "for mayor and all other elective officers," but in elections to determine the expenditure of money, etc., only those shall vote who pay taxes. Article 11, dealing with the organization of municipal corporations, places no limit on the authority of the Legislature to create them in such manner and under such forms as it deems proper—section 4 providing that cities and towns of less than 10,000 may be chartered alone by general law, and section 5 declaring that cities of more than 10,000 may have their charters granted by special act; but the officers for counties, which are classed as municipal corporations, are specified, and their election provided for. Article 11, §§ 7, 10, and article 7, § 3, direct that propositions to levy school taxes in cities and towns shall be submitted to vote of the taxpayers. *Held* that, in view of the implications arising from the other provisions, article 6, § 3, was not violated by Galveston City Charter, approved April 18, 1901, by section 5 of which the Governor is empowered to appoint three members of a board of five commissioners, which shall constitute the governing body of the city, and, by section 6, be successors of the mayor and aldermen.

3. Const. art. 1, declares that the maintenance of our free institutions and the perpetuity of the Union depend upon the preservation of the right of local self-government unimpaired to all of the states. Section 2 declares that all political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. Article 2 distributes the power of government to the

legislative, executive, and judicial departments. Article 8, § 1, declares that the legislative power shall be vested in the Senate and House of Representatives, which shall be styled the Legislature of the state. *Held*, that no right of local self-government, based on history or tradition, exists in a city, whereby the Legislature is precluded from making the members of its governing body gubernatorial appointees.

4. Where a city is authorized to levy a license tax on particular property or business, and such tax has been imposed, it will be presumed that the levy was made for the purposes authorized by law.

5. Const. art. 8, § 1, provides that the occupation tax levied by a city for any year shall not exceed one-half of the tax levied by the state for the same period on the same profession or business. The state levied no occupation tax upon the keepers of vehicles. A city, having authority by its charter to levy license taxes on vehicles, passed an ordinance imposing a license of \$5, and the cost of numbering, not to exceed 25 cents, for each dray, etc., drawn by not more than one animal; for each milk or butcher wagon drawn by not more than one animal, \$2.50, and the cost of numbering, not to exceed 25 cents; for every truck or float drawn by two animals, \$12, and the cost of numbering, not to exceed 25 cents; for other four-wheeled vehicles drawn by two animals, \$8, and the cost of numbering, not to exceed 25 cents, etc. All dues were required to be paid to the city collector, who, after paying the expenses of issuing licenses and numbering, was to pay the remainder to the city treasurer, to be applied exclusively to improving the streets, etc. *Held*, that the taxes imposed were licenses, and not occupation taxes, notwithstanding the incidental feature of revenue, and hence the ordinance did not conflict with the Constitution.

Certified Questions from Court of Civil Appeals of First Supreme Judicial District.

Suit by A. A. Brown and others against the city of Galveston. From a judgment for defendant, plaintiffs appealed to the Court of Civil Appeals for the Second District, which certifies questions to the Supreme Court Questions answered.

Jas. B. and Chas. J. Stubbs, for appellants.
J. Z. H. Scott, for appellee.

BROWN, J. The Court of Civil Appeals for the First District certified to this court the questions hereinafter copied, with a statement from which we make the following extracts and condensed statement of facts alleged in the petition, which will be sufficient to understand the points discussed in this opinion:

"A. A. Brown and about 50 other citizens of Galveston brought this suit, for themselves and all others similarly situated, against the city of Galveston, a municipal corporation, for an injunction to restrain the enforcement of certain ordinances of the city requiring the payment of license dues or taxes upon vehicles kept for public or private use or hire, and for a judgment declaring the invalidity of the ordinances and the provisions of the charter on which they are based. A temporary injunction was granted. The defendant filed a motion to dissolve. The principal grounds of the motion were want of equity in the bill, an adequate legal remedy, and the denial of some of the averments

of the petition. The answer also contained a general demurrer, and admitted that the petition correctly set out the portions of the charter and ordinances under which defendant assumed to act, and that plaintiffs were pursuing the occupations and using the vehicles stated in the bill, upon which license dues were claimed by the defendant; also, that defendant had levied and intended to levy and collect ad valorem taxes upon property subject to taxation, including the vehicles upon or on account of which license dues were claimed, and that it also had levied and collected, or intended to levy and collect, city occupation taxes from all of the plaintiffs liable therefor; that is to say, one-half of the occupation taxes levied by the state upon the same pursuits, and that such ad valorem and occupation taxes are 'over and above and separate from' the license dues which are the subject of this controversy. After a hearing the defendant's motion to dissolve was sustained, and the plaintiffs declining to amend, the court dismissed their petition and rendered judgment for the defendant."

The plaintiffs allege that the city of Galveston is a municipal corporation, chartered by and organized under an act of the Legislature of the state of Texas, entitled: "An act to incorporate the city of Galveston and to grant it a new charter and to repeal all pre-existing charters," approved April 18, 1901, which took effect on the 8th day of July of that year. The first section of the charter declares "that all the inhabitants of the city of Galveston shall continue to be a body politic and corporate with perpetual succession by the name and style of the 'City of Galveston,' and as such they and their successors by that name shall have, exercise and enjoy all the rights, immunities, powers, privileges and franchises now possessed and enjoyed by the said city and herein granted and conferred, and shall be subject to all the duties and obligations now pertaining to and incumbent upon said city as a corporation not inconsistent with this act and may ordain and establish such acts, laws, regulations and ordinances not inconsistent with the Constitution and laws of this state as shall be needful for the government, interest, welfare and good order of the said body politic." The section authorizes the city to sue and be sued by that name; to purchase, lease, grant, and convey real property, etc. Section 2 defines the limits of the city of Galveston and its territorial jurisdiction, and section 3 divides the city into wards, defining their boundaries. Section 4 transfers to the new city all the waterworks, sewerage plants, fire engines, fire alarms, and all other kinds of property of every character which was possessed and owned by the old city. Section 5 is as follows: "There shall be appointed by the Governor of the state, as soon as possible after the passage of this act, three commissioners, one of whom he shall

select and designate as president of the board of commissioners provided for herein, and within ten days after the passage of this act it shall be the duty of the commissioners' court of Galveston county to order an election to be held in the city of Galveston, at which election the qualified voters of the city of Galveston shall select two other commissioners, who, together with the three commissioners appointed by the Governor, shall constitute the board of commissioners of the city of Galveston. In ordering such election, the commissioners' court shall determine the time and the places in the city of Galveston for holding such election, and the manner of holding the same shall be governed by the laws of the state regulating general elections. Each of said five commissioners shall be over the age of 25 years, citizens of the United States and for five years immediately preceding their appointment or election residents of the city of Galveston. Each of said five commissioners shall hold office for two years from and after the date of his qualification and until his successor shall have been duly appointed or elected, as the case may be, and duly qualified. Said board of commissioners shall constitute the municipal government of the city of Galveston." Section 6 declares that the president and other members of the board of commissioners shall be held and deemed in law the successors of the mayor and aldermen of the city of Galveston, and, upon qualification by the commissioners as required by the charter, all powers, rights, and duties of the mayor and board of aldermen of the city shall cease, and that the said board of commissioners shall represent the city of Galveston in all matters in which the board of aldermen and the mayor would have represented it under the old charter. Sections 7, 8, 9, 10, and 11 provide for the qualification of the commissioners by taking the oath and executing the bond prescribed, for their removal, and for filling all vacancies, with other provisions which do not affect the question before us. Section 12 provides that "said board of commissioners so constituted shall have control and supervision over all the departments of the said city and to that end shall have power to make all such rules and regulations as they may see fit and proper concerning the organization, management and operation of such departments, and shall have power under such rules and regulations as they shall make to appoint and for cause, which to the said board shall seem sufficient after an opportunity to be heard, to discharge all employees including the chiefs of the departments respectively." The charter invests the board of commissioners with full power for the government of the city, which is unnecessary for us to set out in detail; suffice to say, that they embrace every phase of city government, and confer upon the board ample power to enable it to perform the duties enjoined. The power to levy and

collect ad valorem occupation and license taxes is given to the city. Among other powers conferred is the following: "To authorize the proper officer of the said city to grant and issue licenses and direct the manner of issuing and registering thereof, and the fees and charges to be paid therefor, provided that no license shall be issued for a longer period than one year and shall not be assignable, except by permission of the board of commissioners." Section 51 of the charter reads as follows: "To license and tax the owners of all vehicles in the city of Galveston used or kept for private or public use, and to license, tax and regulate hackmen, draymen, omnibus drivers and drivers of baggage wagons, porters and all others pursuing like occupations, with or without vehicles, and prescribe their compensation, and provide for their protection, and make it a misdemeanor for any person to attempt to defraud them of any legal charge for services rendered, and to regulate, license and restrain runners for steamboats, railroads, stages and public houses; and enforce the collection of all such taxes by proper ordinances; and all revenues collected under the provisions of this section, or any ordinance passed in pursuance thereof, shall be used only for the improvement of the streets and alleys of said city." The power is also given to levy taxes upon different occupations, including merchants and all classes of dealers in merchandise, as well as all the occupations which are taxed by the state government. Section 94 provides that the act shall be taken and held as a public law by all courts and tribunals, which shall take judicial notice and knowledge of the contents and provisions thereof.

It is alleged that the board of commissioners of the city of Galveston, claiming to act in pursuance of and by the authority of the charter of the city, ordained and adopted ordinances, of which article 527 is in these words: "That it shall be unlawful for any person, firm or corporation, in said city to run or keep for public or private use or hire, any of the vehicles hereinafter mentioned, without having first obtained a license therefor, and given a bond, and paid the license dues prescribed by this ordinance." Article 528 prescribes the method by which the license may be obtained, and what shall be done by the citizens in order to obtain it, among which it is provided that applicants "shall pay the following license dues for each and every dray, furniture cart, or grocery or delivery wagon, drawn by not more than one animal, as license dues, the sum of five dollars, and the cost of numbering not to exceed twenty-five cents; for each and every milk or butcher wagon, or other vehicle used for such purpose, drawn by not more than one animal, as license dues, the sum of two dollars and fifty cents, and the cost of numbering not to exceed twenty-five cents; for every truck or float, drawn by two animals,

as license dues, the sum of twelve dollars, and the cost of numbering not to exceed twenty-five cents; for all other four wheeled vehicles used for transportation of merchandise, baggage, etc., and drawn by two animals, as license dues, the sum of eight dollars, and the cost of numbering not to exceed twenty-five cents; provided, that when any vehicle is drawn by a greater number of animals, than that specially set forth for such vehicle, an additional amount of one dollar shall be paid for each additional animal; for each and every hack and omnibus and for each and every street railway car, for the transportation of passengers for hire, or for the use and convenience of the guests of hotels, as license dues, the sum of eight dollars, and the cost of numbering not to exceed twenty-five cents; and for each and every buggy kept for hire, as license dues, the sum of two dollars and fifty cents, and the cost of numbering not to exceed twenty-five cents; for each and every private carriage drawn by more than one animal, as license dues, the sum of five dollars, and the cost of numbering not to exceed twenty-five cents; for each and every buggy, buckboard or other vehicle not heretofore mentioned, kept for private use, as license dues, the sum of two dollars and fifty cents, and the cost of numbering not to exceed twenty-five cents." Provision is made for regulating the numbering and licensing of the said vehicles. All license dues are required to be paid to the city collector, who, after paying the expenses of issuing licenses and numbering the vehicles, must pay the remainder to the city treasurer, to be applied exclusively to improving the streets, alleys, and avenues of the city.

The petition alleges that the plaintiffs were the owners of vehicles kept for public and private use or for hire, and that the city of Galveston had levied ad valorem taxes upon each and all of the said vehicles. The petition also alleges that the said petitioners had paid all of their occupation taxes levied upon any of the businesses in which they were engaged, which said occupation taxes are enumerated in the following provision of the ordinance adopted therefor: "From every livery or feed stable fifteen cents; for each stall, fifteen cents; for each hack, buggy or other vehicle, and from every hack, buggy, dray, wagon, or other vehicle, let for hire, not connected with the livery and feed and sale stable, one dollar; from every wagon yard used for profit two dollars and fifty cents." The petition attacks the license taxes charged against their vehicles as being without authority, and in violation of the Constitution of the state of Texas. They charge that the said license taxes are really laid for the purpose of revenue, and not for police purposes. It is also alleged that the said ordinances are void because the parts of the charter which authorize the Governor of the state to appoint three commissioners for the city of Galveston, and those provisions which invest

the board of commissioners with the powers of the city government, are contrary to the Constitution of the state. It is alleged that the city of Galveston is enforcing the said ordinances by arresting some of the plaintiffs, and threatening to arrest the others, for refusal to pay the said taxes. The allegations in the petition are explicit, setting out amply the grounds upon which the injunction is sought, but it is deemed unnecessary to make a more particular statement. The following questions are submitted to this court by the Court of Civil Appeals:

"(1) Did the city of Galveston have authority, under the act of the Legislature approved April 18, 1901, granting it a new charter and repealing all pre-existing charters, to enact and enforce the ordinances by virtue of which the right to collect the license tax was claimed?

"(2) Were the charter and ordinances authorizing the collection of the tax in conflict with the provisions of the Constitution of this state on taxation?

"(3) Did the court below err in sustaining the motion to dissolve the injunction and in dismissing the petition?"

The first question submitted to us involves the constitutionality of those sections and provisions of the charter of the city of Galveston which empower the Governor of the state to appoint three members of the governing board of commissioners for that city, and of those which invest that commission so constituted with the powers of mayor and board of aldermen. This question arose in the case of *Ex parte Lewis*, which was decided by the Court of Criminal Appeals of this State, reported in 73 S. W. 811. The majority opinion was delivered by the Honorable John N. Henderson, justice, and concurred in by the Honorable W. L. Davidson, presiding justice, of that court. Judge M. M. Brooks dissented from the opinion of the majority. In that case the majority held that the law which authorized the Governor to make the appointment of the three commissioners was contrary to the Constitution of the state of Texas. The majority and dissenting opinion each show extensive research into the authorities, and contain able and elaborate arguments and discussion of the principles involved. Recognizing the equal authority and dignity of that court, we approach the investigation of the question with much hesitancy, because of the delicacy of the duty to be performed. We shall accord to the opinion of the majority in that case equal weight as an authority with that of any other court of last resort, and, because it is a court of co-ordinate powers with this, acting under authority derived from the same Constitution, we feel constrained to conform our opinion to that, if we can properly do so in the discharge of our duty. The industry of the judges who wrote those opinions has relieved us of much labor that would have been necessary to obtain the same list of

authorities, and we are much aided in the solution of this important question by the arguments presented by each.

It is claimed by the appellant, and was so held by the Court of Criminal Appeals, that the provisions of the charter in question are in violation of the following section of the Constitution of Texas: "All qualified electors of the state, as herein described, who shall have resided for six months immediately preceding an election within the limits of any city or incorporated town, shall have the right to vote for mayor and all other elective officers; but in all elections to determine the expenditure of money or assumption of debt, only those shall be qualified to vote who pay taxes on property in said city or incorporated town." Article 6, § 3, Const.

Before proceeding to the examination of the question, we will state a few general principles of interpretation and construction which are applicable to this case. The Constitution of this state distributes the powers of government thus: "Those which are legislative to one, those which are executive to another, and those which are judicial to another; and no person or collection of persons being of one of these departments, shall exercise any power properly attached to either of the others, except in instances herein expressly permitted." Const. art. 2. Article 3, § 1, of the Constitution, is in this language: "The legislative power of this state shall be vested in a Senate and House of Representatives, which together shall be held to be the Legislature of the state of Texas." This language vests in the Legislature all legislative power which the people possessed, unless limited by some other provision of the Constitution.

Each legislator is required to take the official oath as prescribed by the Constitution, which pledges him to discharge his duty in conformity with that instrument. The enactment of the Legislature of the charter of Galveston involved the consideration by each member of both houses and the Governor of the question now before us; that is, each must have determined that the bill did not violate the Constitution of the state of Texas in any particular. A court has no power to review the action of the legislative department of the government, but when called upon to administer a law enacted by it, must, in the discharge of its duty, determine whether that law is in conflict with the Constitution, which is superior to any enactment that the Legislature may make; but in the examination of such a question we must bear in mind that, except in the particulars wherein it is restrained by the Constitution of the United States, the legislative department may exercise all legislative power which is not forbidden expressly or by implication by the provisions of the Constitution of the state of Texas. *Lytle v. Halff*, 75 Tex. 132, 12 S. W. 610; *Harris Co. v. Stewart*, 91 Tex. 143, 41 S. W. 650; *Cooley*, Const. Lim. 200, 201.

If there be doubt as to the validity of the law, it is due to the co-ordinate branch of the government that its action should be upheld and its decision accepted by the judicial department. In his work on Constitutional Limitations (page 218), Mr. Cooley says: "The question whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligation which that station imposes; but it is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

The honorable Court of Criminal Appeals expressed its conclusion, that the sections of the charter of the city of Galveston in question are in conflict with the Constitution, in the following language: "However, it is not necessary to rest this decision upon implication, as, in our opinion, the Constitution expressly prohibited the Legislature to either appoint directly, or through the Governor, the local municipal officers of cities and towns, inasmuch as the Constitution expressly confers the power on the citizen voters of the municipality to elect the mayor and other elective officers. * * * We hold that the mayor and the board of aldermen of said city were elective officers under and by virtue of our Constitution, and that the majority of these, in the face of our traditions and of the organic law itself, having been appointed by the Governor, any law or ordinance passed by them was without authority, inasmuch as they were not officers of the municipality, and could not, under our Constitution, be such." That court could arrive at its conclusion only by implication, for the language used in the section of the Constitution quoted does not declare that there shall be a mayor for each town and city. As we have seen, the power of the Legislature can be limited only by a prohibition contained in the Constitution, either in express terms or by fair implication arising from the instrument. If the purpose the convention had in adopting the section in question can be effected without the prohibition, none will be implied. *Lytle v. Halff & Bro.*, 75 Tex. 132, 12 S. W. 610. In the case cited, Judge Stayton said: "A prohibition of the exercise of a power cannot be said to be necessarily implied, unless, looking to the language and purpose of the Constitution, it is evident that without such implication the will of the people, as illustrated by a careful consideration of all its provisions, cannot be given effect. * * * An intention to restrict the power of a state Legislature, and especially in refer-

ence to such a matter, further than this is done by express limitations, is not to be presumed, and, when it is claimed that this is done by implication, those so claiming ought to be able to point out the provision or provisions of the Constitution which require such implication to give effect to the will of the people evidenced by the entire instrument." Regulation of the elective franchise is the subject of article 6, the first section of which declares what persons shall not be permitted to vote. Section 2 prescribes the qualifications for electors in the state, and the third section classifies the electors of the state who reside in cities or incorporated towns, securing to all qualified voters the right to vote in elections "for mayor and all other elective officers"; but, in elections to determine the expenditure of money or the assumption of a debt, only those who pay taxes on property in cities or incorporated towns are permitted to vote. The purpose of this section is to secure to all electors of the state residing in cities and towns the right to vote at all elections for elective officers of such corporations, and to secure to property taxpayers the right to determine questions of the expenditure of money and the assumption of debts, when submitted to a vote. In order to determine the meaning of this provision, we must look to all parts of the Constitution that will throw light upon the matter. Article 11 deals with the organization of municipal corporations, and contains limitations upon their authority to levy taxes and to incur debts, but we find none upon the authority of the Legislature to create municipal corporations in such manner and under such forms as it deems proper; on the contrary, sections 4 and 5 of that article are couched in such language that, standing alone, the Legislature would be left free, in the organization of cities and towns, in prescribing the form of government. It is not reasonable to conclude that the convention would have left so important a matter to be arrived at by implication from language used in reference to a different subject. The fact that the convention failed to express such limitation in article 11, where it would be most appropriate, or in any part of the Constitution, furnishes strong evidence that no intention existed in the minds of the members of the convention to require the Legislature to provide for a mayor in the organization of every city or town. Our Constitution is distinguished for the particularity of its provisions and the details into which it enters in reference to matters of government. Counties are classed as municipal corporations in article 11, yet the convention, in other parts of the Constitution, specify the officers for the counties—including justices of the peace—and provide for their election. It is significant that the Legislature was thus left free to choose the form of government for cities and towns in contrast with the particular provisions for counties. As the spe-

cific directions with regard to counties by implication deny to the Legislature authority to provide other methods, so the want of such directions as to towns and cities show the intention of the convention to leave it to legislative discretion. Section 3 of article 6 is self-executing to the extent that, when an election is ordered for either named purpose in a town or city, the right to vote in such election is secured by the Constitution, and no implication arises because not necessary to complete the purpose of that section of the Constitution. *Lytle v. Hall & Bro.*, above cited; *Cleburne v. Railway Co.*, 68 Tex. 461, 1 S. W. 342. In the latter case the court said: "A power will be implied only when without its exercise an expressed duty or authority would be nugatory." A requirement that every question involving the disbursement of funds be submitted to a vote of the property taxpayers of each town and city may as well be implied as that a mayor must be provided for to be elected by the voters, because the privilege to vote on such propositions is secured in the same sentence by language as definite as that which expresses the elector's right to vote for mayor. The phrase "shall have the right to vote for mayor and other elective officers" means that such electors shall have the right to vote at all elections for elective officers. If from this language it be implied that each town must have a mayor in order that the electors may exercise their constitutional right, the same implication would require that all propositions involving the expenditure of money should be submitted at an election to the property taxpaying voters in order that they may exercise their constitutional right to vote on the question. The fact that the Constitution directs that all propositions to levy taxes to support public free schools in cities and towns shall be submitted to a vote of the property tax payers (article 11, §§ 7 and 10; article 7, § 3) shows that the convention did not understand that section 3, art. 6, embodied such requirements, else the special provisions would be useless. The association of the two phrases, relating to the same general subject, indicates that they were used in the same sense as related to the different matters to be determined by the voters. *Suth. Stat. Const. § 262; Bear v. Marx*, 63 Tex. 301.

The majority opinion argues with much force the proposition that the charter of Galveston is in conflict with section 3 of article 6 of the Constitution, but we do not believe that it is so conclusive as to justify this court in overruling the decision of the legislative department. If there was doubt in our minds, our conclusion must be as expressed in the following quotation: "But if I could rest my opinion in favor of the constitutionality of the law on which the question arises on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of

it. It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt."

It is asserted by the appellant that the people of Galveston had the "inherent right" to select their own municipal officers, and that the Legislature had no power to authorize the Governor of the state to appoint municipal officers for that city. This proposition seems to be supported by the majority opinion in the case of *Ex parte Lewis*, 73 S. W. 811, from which we quote. After citing a number of cases, the Court of Criminal Appeals said: "But the reasoning in all of the cases—those referred to as well as all others—to which our attention has been called, except *State of Nevada v. Swift*, 11 Nev. 134, strongly supports the proposition that, even without some express constitutional provision, neither the Legislature nor the Governor has the power to appoint the permanent officers of a municipality. In the cases cited it occurs to us that the real effect of the decisions was to establish the doctrine that, in the absence of a grant of authority in the Constitution authorizing the appointment of such local officers by the Legislature or the Governor, this power was denied by implication arising from the history and traditions which time out of mind had conferred local self-government on municipalities." That honorable court drew its conclusion from the following cases: *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *Allor v. Wayne Co. Auditors*, 43 Mich. 76, 4 N. W. 492; *Davock v. Moore* (Mich.) 63 N. W. 424, 28 L. R. A. 783; *Geake v. Fox*, 63 N. E. 19; *State v. Denny*, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79. *People v. Hurlbut* is the cornerstone upon which this theory rests, and upon which all of the other decisions cited have been constructed. In that case three great jurists (Christiancy, Campbell, and Cooley) delivered separate opinions, and in the course of the discussion of the question which was before them each referred to the history and traditions of that state, in reference to municipal corporation, as throwing light upon and aiding in the construction of this provision of the Constitution of that state. "Judicial officers of cities and villages shall be elected, and all other officers shall be elected or appointed at such time and in such manner as the Legislature shall direct." The question before the court was whether the Legislature had the power to appoint officers for a city or village, or should it have provided for the election by the voters of such city or village, or for appointment of such officers by the municipal authorities. In discussing the question, the three eminent judges went elaborately into the history of municipal corporations in the state of Michigan, avowedly for the purpose of showing that the convention intended to preserve the rights, which

had previously existed under their charters, for the people of cities and villages to elect or appoint their own local officers, and they used the facts to show that the language of the Constitution was intended to express that the Legislature should provide for the appointments or election by the municipality, from which they implied a prohibition against the Legislature making appointments of water and light commissioners for the city of Detroit. Each of the distinguished jurists was careful to state the ground upon which his opinion rested, that is, upon the true intent and meaning of the Constitution, in proof of which we quote from the opinion of Judge Cooley, as follows: "In view of these historical facts and of these general principles, the question recurs whether our state Constitution can be so construed as to confer upon the Legislature the power to appoint, for municipalities, the officers who are to manage the property interest and rights in which their own people alone are concerned." The court in that case held that the Constitution forbade the Legislature to enact such a law, except that in the organization of a city or village it might make provisional appointments of officers to hold until the people could elect those which were provided by the charter. A misconception of those opinions, and the purposes for which those able jurists referred to the history of corporations in that state, has led some courts into the use of very extravagant and sensational language upon the subject of "the inherent right" of a people to control their own local affairs when organized into municipal corporations. An examination of cases cited fails to show a single authoritative decision which upholds the doctrine announced by the Court of Criminal Appeals in *Ex parte Lewis*. In every case that we have been able to find, no matter what the judge may have said, the judgment of the court was finally rested upon some provision of the Constitution of that state, except the case of *State v. Moores*, 55 Neb. 480, 76 N. W. 175, 41 L. R. A. 624, which has been overruled by the Supreme Court of that state.

We have examined many authorities upon this question, and find but one case which directly negatives the proposition that is asserted in the opinion of the Court of Criminal Appeals, but all of the cases cited by us sustain appointments of municipal officers made by the Governor. The case of *Redell v. Moores*, 83 N. W. 243, 55 L. R. A. 740, decided by the Supreme Court of Nebraska, directly overruled *State v. Moores*, before cited. Of the opinion delivered in the former case, the Supreme Court of Nebraska says: "The majority opinion, to our minds, introduces a new principle into our system of jurisprudence, and one pregnant with mischievous consequences. We have been taught to regard the state and federal Constitutions as the sole test by which the validity of acts of the Legislature are to be determined. If the

majority opinion in that case is to stand as the law of the state, then in addition to such test there is another—an illusive something, elastic and uncertain as an unwritten Constitution, which may be invoked to defeat the legislative will. We cannot believe that such a principle should receive the final sanction of this court." From the many authorities which support the position of the Nebraska court, we cite: *Newport v. Horton*, 22 R. I. 196, 47 Atl. 312, 50 L. R. A. 330; *Americus v. Perry*, 114 Ga. 871, 40 S. E. 1004, 57 L. R. A. 230; *Harriss v. Wright*, 121 N. C. 172, 28 S. E. 269; *Philadelphia v. Fox*, 64 Pa. 169; *State v. Hunter*, 38 Kan. 578, 17 Pac. 177; *Luehrman v. Taxing District*, 2 Lea, 425; *People v. Draper*, 15 N. Y. 532; *Nevada v. Swift*, 11 Nev. 128.

In our own state the doctrine is well settled that a municipal corporation can exist only by and through an act of the Legislature of the state, and that it has no power not granted by the charter, and can have no officer not provided for by law. *Blessing v. Galveston*, 42 Tex. 641; *Pye v. Peterson*, 45 Tex. 312, 23 Am. Rep. 608; *Vosburg v. McCrary*, 77 Tex. 568, 14 S. W. 195. But the doctrine of vested rights and powers, derived from "history and traditions," asserts a higher law than the Constitution; for if, in the absence of a prohibition, the Legislature cannot enact a law in contravention of "history and traditions," the convention could not by express provision have authorized it to be done. The Legislature of Texas may exercise any power that could be exercised by a constitutional convention, except wherein the Constitution contains a prohibition, expressed or implied. According to the theory advocated, an unorganized community has rights which cannot be enjoyed, and powers which cannot be used, until those rights are conferred and the powers are granted by the state in the form of a charter. Yet the dormant rights and powers are protected by "history and traditions," which are thus made superior to the creative power.

In the case of *State v. McAlister*, 88 Tex. 284, 31 S. W. 187, 28 L. R. A. 523, section 8 of article 6 of the Constitution of this state was under examination, but with a view to determine another question; and in the discussion of that question the court referred to the fact that, before the present Constitution was adopted, corporations existed with certain forms of government, which was considered by the court in reaching the conclusion that the convention did not intend to overturn the existing municipal corporations in the state; and, in view of the facts, the language of that section of the Constitution was construed so as to harmonize with conditions that existed at the time of its adoption. It was not said nor intimated that municipal corporations existed in this state before the organization of the state government or the government of the Republic. In fact, there were no such municipalities

within the territory constituting this state, and we have no such traditions nor history connected with the municipal corporations to influence the court in determining the meaning of any provision of the Constitution upon that subject.

The doctrine contended for is antagonistic to the fundamental principles of our state government, as we understand them. In article 1 of the Constitution of this state it is declared that "maintenance of our free institutions and the perpetuity of the Union depends upon the preservation of the right of local self-government unimpaired to all of the states." It will be observed that the declaration of the right of local self-government has reference to the people of the state, and not to the people of any portion of it. The doctrine contended for would produce as many kinds of local governments in a state as there might be different kinds of people in the municipalities. Again, in section 2, it is said that "all political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit." This is a true declaration of the principles of republican state governments. However, it does not mean that political power is inherent in a part of the people of a state, but in the body, who have the right to control, by proper legislation, the entire state and all of its parts.

Article 2 of the Constitution distributes the powers of government—the powers which reside in the people—into three departments: "Those which are legislative to one, those which are executive to another, and those which are judicial to another." By organizing into a state, with its different departments empowered to exercise the authority of the people in the administration of their affairs, the people did not part with their power; it remains with them, to be exercised by the departments according to the limitations and provisions which are expressed or implied in the Constitution for their government and direction. By section 1 of article 3, the Constitution declares: "The legislative power of this state shall be vested in a Senate and House of Representatives, which together shall be styled 'the Legislature of the state of Texas.'" "The legislative power of this state" means all of the power of the people which may properly be exercised in the formation of laws against which there is no inhibition expressed or implied in the fundamental law. Since a municipal corporation cannot exist except by legislative authority, can have no officer which is not provided by its charter, and can exercise no power which is not granted by the Legislature, it follows that the creation of such corporations, and every provision with regard to their organization, is the exercise of legislative power which inheres in the whole people, but by the Constitution is delegated to the Legislature; therefore it is within the power of the Legislature to de-

termine what form of government will be most beneficial to the public and to the people of a particular community. The doctrine is in conflict with the well-settled principle of constitutional construction that the power of the Legislature can be restrained only by a prohibition expressed or implied from some provision or provisions of the Constitution itself. *Lytle v. Halff & Bro.*, before cited; *Harris Co. v. Stewart*, 91 Tex. 143, 41 S. W. 650. The doctrine rests upon a basis, which is opposed to the well-settled rule of construction, that a law which is passed by the Legislature of a state cannot be set aside by the courts because it is in conflict with the principles of natural justice, nor because of its conflict with the spirit of the Constitution. *Cooley*, Const. Lim. 205. That author says: "Nor are the courts at liberty to declare an act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution, but not expressed in words." It contradicts the truth of the history of municipal corporations in Texas, for it is a matter of common knowledge that charters are formulated by the people of the towns, presented by their representatives to the Legislature, and, in case of opposition, committees attend upon the Legislature to secure the wish of the majority. The city of Galveston had two representatives in the House and one in the Senate that enacted this law, and the bill was introduced in the House by one of her representatives, and supported by all. To overthrow the charter of that city, upon the assumption of "a history and tradition" which have no real existence, would in fact deny to the people of Galveston the right to govern their affairs in their own way, and thereby to substitute a form of municipal government dictated by the courts. In fact, this theory is out of harmony with the practices of republican state governments in America, and opens up a broad field in which to search for grounds to declare laws of a Legislature void, without the shadow of authority in the well-established powers of the courts under our Constitution. As said by the court in *Redell v. Moores*, before cited, it is "an illusive something, elastic and uncertain as an unwritten constitution, which may be invoked to defeat the legislative will." "The doctrine" furnishes no standard or rule by which to determine the validity of any law framed by the Legislature, but leaves each judge to try it according to his own judgment of what constitutes the "history and traditions" of the state, and what rights have been vested in the people by reason of such "history and traditions." To this theory we cannot give our consent, but must adhere to the well-established rules of construction which confine the court to the Constitution as the standard by which it is to determine the validity of legislative enactments.

The ordinance adopted by the city of Gal-

veston, which levied a tax upon all vehicles owned and kept in the said city for public or private use or hire, is attacked as being invalid, because in conflict with the following proviso of section 1 of article 8 of the Constitution: "And provided further that the occupation tax levied by any county, city or town, for any year, on persons or corporations pursuing any profession or business shall not exceed one-half of the tax levied by the state for the same period on such profession or business." There being no occupation tax levied by the state upon the keepers of such carriages, it follows that, if the levy made by the city of Galveston is an occupation tax, the ordinance is void. *Hoefling v. San Antonio*, 85 Tex. 235, 20 S. W. 85, 16 L. R. A. 608. The statement certified to this court does not include the title or the preamble of the ordinance which levied the tax, and we have no means of determining the purposes for which the levy was made, except the terms of the ordinance itself, which contains nothing but the bare fact that it is denominated a "license tax," and that it authorizes licenses to be issued to the owners of such vehicles. It is well established by the authorities, and, as we understand the contention of appellants, is not denied by them, that the city of Galveston could, by virtue of the authority granted in its charter, levy license taxes on vehicles for the purpose of regulating their use. *Cooley on Taxation*, p. 600; 2 *Desty on Taxation*, p. 1398; *St. Louis v. Green*, 7 Mo. App. 468; *Ex parte Gregory*, 20 Tex. App. 210, 54 Am. Rep. 516. But it is insisted by the appellants that the fees charged under the ordinance were not levied for the purpose of regulation in the exercise of police power of the city, but were levied under the taxing power, and must be controlled by the limitations of the Constitution upon the exercise of that power. In support of this contention it is urged that the ordinance itself requires that, after paying the insignificant expense of issuing a license and placing upon the carriage the number (not to exceed 25 cents), the remainder of the fees charged shall be paid over to the city treasurer, to become a part of the fund for improvement of streets of the city; which determines the character of the assessment to be that of a tax levied for revenue. It is true the authorities hold that the police power cannot be used for the purpose alone of raising revenue, and, when exercised by a city for the purpose of raising revenue, it will be held to be by virtue of taxing power, and not of the police. But the fact that the assessment under the police power results in producing revenue, which may be paid into the treasury for the use of a particular fund, or as part of the general fund, does not deprive the assessment of the character of a police regulation. *Ex parte Gregory*, 20 Tex. App. 219, 220, 54 Am. Rep. 516. Discussing a like provision in an ordinance of the same city, the Court of Criminal Appeals said: "A reasonable in-

terpretation of this would be that, while the expense of enforcing the regulations in regard to vehicles must be paid, it should be paid out of some other fund instead of this particular one, and the appropriation of this particular fund to another purpose would in no way relieve the city from the expense, or any portion thereof, of enforcing the regulations. In other words, the expense of enforcing the regulations must be paid for by the city, and it matters not out of what fund the same is paid. This was a matter within the discretion of the council, and cannot in any way, we think, affect the validity of the ordinance as to the levy of the license tax. It by no means follows that, because this particular fund was not set apart exclusively for the payment of the expenses incurred by the police regulations, therefore there are no such expenses, and that therefore the purpose of the tax is for revenue alone, and not for the purpose of police regulation." The expense of issuing a license and placing a number upon the carriage is only the preparation for exercising the police power over the use of the vehicle, the cost of which could not be foreseen. When a city is authorized to levy a license tax upon particular property or business, and that tax has been imposed upon the property, it will be presumed that the levy was made for the purposes authorized by law. We conclude that the charges imposed upon the property of appellants were levied in the exercise of the police power conferred upon the city of Galveston by its charter, and that the revenue derived from it did not affect the validity of the ordinance.

To the first and second questions we answer that the city of Galveston had authority under its charter to enact and enforce the ordinances which are brought in question in this action, and that the said ordinances are not in conflict with the provisions of the Constitution of this state on taxation. To the third question we answer that the court did not err in sustaining the motion to dissolve the injunction and dismissing the petition.

MOORE v. STATE.

(Court of Criminal Appeals of Texas. June 23, 1903.)

CRIMINAL LAW—WITNESSES—HUSBAND AND WIFE—MARRIAGE OF WITNESS BEFORE TRIAL—SUPPRESSION OF TESTIMONY—EXAMINATION OF WIFE—PREJUDICIAL ERROR.

1. In a prosecution for homicide it was competent for the state to ask defendant as a witness whether he had married the prosecuting witness on day before the trial, for the purpose of showing that defendant married her for the purpose of suppressing her testimony.

2. In a prosecution for homicide, defendant, while on the stand, stated that he had married the prosecuting witness the day before the trial. The state then placed the sheriff on the stand, and asked if such witness was in attendance, and directed him to ascertain whether she was present. The sheriff, after going to the witness

room, returned with the prosecuting witness, whereupon the county attorney placed her on the witness stand. Defendant objected on the ground that she was his wife, etc., but the court did not rule on the objection, and the county attorney then proceeded to ask her questions which were objected to on the ground that the witness was defendant's wife, and incompetent to testify, which objection the court sustained. *Held*, that such proceeding was prejudicial error, in that it forced defendant to object to his wife testifying against him, and aided the theory of the prosecution that defendant married her for the purpose of suppressing her testimony.

Henderson, J., dissenting.

Appeal from District Court, Hill County; Wm. Poindexter, Judge.

A. J. Moore was convicted of murder, and he appeals. Reversed.

O. M. Smithdeal, for appellant. B. Y. Cummings, Asst. Co. Atty., C. F. Greenwood, Co. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is the second appeal from a conviction of murder. Moore v. State (Tex. Cr. App.) 72 S. W. 595. While testifying in his own behalf, appellant was permitted, over objections, to testify that he had married, on the day before his trial began, the state's witness Susie Jones. The bill is explained by the court as follows: "The court was then and is now of the opinion that the question and answer were proper, as the state had a right to show why Susie Jones, the only immediate eyewitness to the homicide, was not put on the stand; and this tended to show that fact." That appellant had married the main state's witness on the day before his trial began is a legitimate subject of inquiry, and it was not error to require defendant to state that fact while testifying in his own behalf, even though he married her, as insisted by the court, for the purpose of suppressing her testimony.

The state also placed Sheriff Satterfield upon the stand, and asked him if Susie Jones was then in attendance upon the court. He stated he did not know whether she was present or not, whereupon the county attorney required the witness to go out and ascertain whether she was present in attendance upon the trial. After going to the witness room, he returned with Susie Jones. After he had brought her in the courtroom, the county attorney placed her upon the witness stand. Objection was urged because it had already been shown that she was the wife of appellant, and the state had no right to call her to the witness stand; that it was done for no legitimate purpose, and only for the purpose of prejudicing defendant in the minds of the jury. The court failed to rule upon these objections, "and the county attorney proceeded to ask said Susie Jones certain questions with reference to this case; and the defendant was compelled to and did object to said Susie Jones testifying on the ground that she was his wife, and therefore

not a competent witness." The court finally sustained this objection. The court says that the reason he failed to rule upon the first objection was that there was nothing upon which to rule, "and the court could not know what state's counsel wanted to know what Susie Jones was present for, and did not feel authorized and required to prevent the county attorney from asking the sheriff, in the presence of the jury, whether Susie Jones was present and in attendance upon the court, nor from placing her on the witness stand. Defendant, while on the stand, had stated that he had married Susie the day before, but this was by no means conclusive; and when Susie was placed on the stand, and objection made to her testifying on the ground that she was the wife of defendant, the court then asked her if she had been married to defendant, and upon her answering that she had been and was his wife the court sustained the objection. The state certainly had the right to explain why the only immediate eyewitness to the shooting was not placed upon the stand by the state. Besides this, the state had the right to show by her that she was not the wife of defendant, and competent to testify; and, if she had answered that she had not been married to defendant and not his wife, she could have testified, notwithstanding defendant's statement, the question being one for the jury in case of an issue of the kind." The witness Satterfield could have been required to testify that Susie Jones was in attendance upon the trial and in the jury room, and the state could have shown by any witness other than appellant's wife the matters about which the inquiry was made. The fact that appellant had married Susie Jones the day prior to his trial was also the subject of legitimate inquiry from proper sources. But here the statute expressly prohibits the use of the wife as a witness against her husband; and this though he had married her for the express purpose of suppressing her testimony against him. *Miller v. State*, 37 Tex. Cr. R. 575, 40 S. W. 313; *U. S. v. White*, 4 Utah, 499, 11 Pac. 570. It makes no difference at what time the relation of husband and wife begins. The exclusion of their testimony under our statute, and to its fullest extent, operates wherever the interests of either are directly concerned (1 Greenleaf, §§ 334, 336), and this although he married the witness after she was placed under process (*Redley v. Wellesley*, 3 Car. & Pay. 558; *State v. Armstrong*, 4 Minn. 335 [Gil. 251]). And the question of public policy is not an argument to the contrary. Public policy must be in accord with our statutory enactment. When the marriage ceremony is performed, no matter what the motive was or may be, the witness thenceforward becomes the lawful wife of defendant, and is prohibited under our statute from testifying against her husband, except where the offense is by the husband against her

person. It will be observed in this case that the county attorney called the witness in behalf of the state, and asked her several questions in regard to the case, when, upon objection by appellant that she was his wife, the court then asked her the question if she was his wife, and, receiving an affirmative reply, excused her from the witness stand. This whole proceeding seems to have been a spectacular performance to force defendant to object to his wife testifying against him. In order to get the benefit of her testimony thus far in aid of the supposition and theory that appellant had married her to suppress her testimony. The point insisted upon by the state in regard to this whole matter of proving the recent marriage of appellant to Susie Jones was to convince the jury, first, that Susie Jones was the only eyewitness to the homicide for which appellant was being tried; second, that he had married her for the express purpose of suppressing her testimony; and, third, her evidence was of a damaging character to him. Any fact drawn from the wife proving or tending to prove that appellant had married her for the purpose of suppressing her testimony was directly against him. The county attorney had no right to call her as a witness against him. It is thoroughly demonstrated by the facts that appellant had married her; and, if the court and the county attorney were not satisfied with the statement of appellant that he had married the witness, it was a matter easily ascertained without calling the wife, and the good or bad faith of appellant in marrying her, and whether the court believed what the defendant testified in regard to it would make no difference. The fact that she was the wife of defendant put the seal upon her lips, and excluded her being called as a witness against him. The fact that appellant had married the witness, and the further fact that it was done for the purpose of suppressing her testimony, were so intimately blended under the peculiar facts that they could not be separated; and the fact that he had married her was one of the main facts relied upon by the state to show appellant's act in what the state contended was suppressing the testimony of the wife. It is well settled in cases of bigamy that the lawful wife cannot be called to prove her marriage with the accused, nor for the purpose of identifying him. *Boyd v. State*, 33 Tex. Cr. R. 470, 26 S. W. 1080, and authorities cited; *Law of Evidence*, by Burr W. Jones, vol. 3, § 752, authorities collated in note 1. See, also, section 753, note 18. There is no question of the injurious effect of this action of the county attorney as sustained by the court, because it tended to uphold with fearful effect the contention of the state that by reason of his marriage with the witness the day before his purpose was to suppress her testimony, and that her evidence was of a seriously damaging effect against him. It was admitted upon the the-

ory that it was a suppression of the testimony, and the wife was the most important witness in regard to the killing; and it would seem that the state placed the wife on the stand to get whatever of benefit there could arise from the objection urged by appellant that she was his wife in support of the theory of suppression of evidence. This is made patent by the reason it was the subject of a considerable portion of the argument of state's counsel before the jury. It was held in Brock's Case (Tex. Cr. App.) 71 S. W. 21, that the use of the wife against accused was reversible error, whether exception was reserved or not. Certainly it could not be held less an error where appellant was urging his objection from the time this matter became involved in the case until its final termination.

Because of this error the judgment is reversed, and the cause remanded.

HENDERSON, J. I do not agree to the reversal of this case, and because I believe the question is an important one I will express my views.

On the trial the state was permitted to prove by appellant on cross-examination that on the day before the trial he had married Susie Jones. The state was also permitted to prove by Sheriff Satterfield that Susie Jones was present in court. The state then called her to the witness stand, and proved by her that on the day preceding she had married appellant, and then proceeded to ask her certain questions concerning the case. Appellant objected to any interrogation of the witness by the state because she was his wife. This objection was sustained by the court, all of the other objections leading up to this having been overruled by the court. Appellant insists that when it was first disclosed that Susie Jones was the wife of appellant, the conduct of the state in bringing her to the witness stand, and again proving by her that she was appellant's wife, and then proceeding to ask her questions regarding the case, and compelling appellant to object to her testimony on the ground that she was his wife, was not in good faith, but was a spectacular performance on the part of the state, calculated to prejudice appellant before the jury, and was really the use of appellant's wife against him as a witness. I believe it was proper for the state to assure itself that Susie Jones was really the wife of appellant, and that she had married him only the day before; and it was not only competent to elicit this fact from appellant himself in cross-examination, but the state was authorized to show that Susie Jones was in attendance on the court, and to prove by her also that she had married appellant. And I cannot say that this conduct on the part of counsel for the state was not done in good faith. If she had not been presented to the jury, they would not have been apprised of the fact that she was then present,

and in a situation to testify for appellant, and her absence might have been accounted for on various pretexts. If any fact regarding the homicide had been elicited from her, of course a different question would be presented; but here we have in evidence, strongly, it is true, the fact of her intermarriage with appellant on the day before, and her presence then in court. This was not using her as a witness against appellant, but was affording the jury an insight into his conduct with reference to her, which they had a right to know. The circumstances here shown, to wit, the fact of appellant's intermarriage with the principal state's witness only the day before, would tend to show—at least it would bear that construction—that he had married her for the purpose of suppressing her testimony. I understand it is a rule of universal application that it can always be shown that a defendant has fabricated or suppressed testimony.

Appellant further maintains that the court committed an error in allowing state's counsel to animadvert on the failure of appellant to use his wife as a witness on his behalf, and in this connection he complains that the court refused to give certain requested special instructions on this subject. It has long been the doctrine in this state that argument could be made on the failure of a defendant to use his wife as a witness. *Mercer v. State*, 17 Tex. App. 452; *Armstrong v. State*, 34 Tex. Cr. R. 250, 80 S. W. 235; *Smith v. State* (Tex. Cr. App.) 65 S. W. 186; and *Locklin v. State* (decided at present term) 75 S. W. 305. *Boyd v. State*, 33 Tex. Cr. R. 470, 26 S. W. 1080, and authorities cited in that connection in the majority opinion, are not in point, because the question there was bigamy, and the former and subsequent marriages were the material issues in the case, and of course the first wife was not a competent witness against the husband to prove the marriage. *Graves v. U. S.*, 150 U. S. 118, 14 Sup. Ct. 40, 37 L. Ed. 1021, also cited by appellant's counsel, is not in point. There it was held by a majority of the court that, inasmuch as the wife could not be a witness for appellant, her absence from his side during the trial could not be argued before the jury to his prejudice. That is not the character of case here presented, for our statute authorizes the wife to be a witness for the husband, and his failure to produce her, where the record shows she was present at the homicide, is both upon principle and authority a legitimate subject for criticism on the part of the state. In this case she was present at the homicide, and had been used on a former trial as a witness on behalf of the state. Appellant was shown to have married her on the day before. Under the circumstances the state could not use her. *Miller v. State*, 37 Tex. Cr. R. 575, 40 S. W. 313. But it was entirely proper that the jury should be informed of the reason that prevented the state from placing her on

the stand, and this although it might suggest very strongly appellant had married her for the express purpose of suppressing her evidence. Any other view would overrule the line of cases already referred to in which it has been uniformly held by this court that it was competent for counsel in argument to refer to the failure of appellant to use his wife as a witness, where the facts show that she was present at the time of the alleged offense, and would be a material witness for him if his theory is true. If an argument of this character can be made on inferences merely, it would certainly indicate that so much of the facts can be proven from which the inferences or deductions can be drawn. In this particular case no fact was proven in regard to the case by appellant's wife. The facts developed by other witnesses showed that she was present at the time of the homicide, and was a witness for the state on the former trial, and it was merely shown by her that she had married defendant on the day previous to the trial. On objection being made to her testifying, the court declared her disqualified, and sustained the objection. I cannot regard this as using the wife as a witness against her husband. Only the disqualifying fact was shown by her, and no more. Therefore I do not believe the court is correct in holding this case should be reversed, inasmuch as the wife testified to no fact in the case in regard to the homicide, and consequently was not used as a witness against him, which is the language of the statute.

TORNO v. STATE.

(Court of Criminal Appeals of Texas. June 23, 1903.)

HIGHWAYS—OBSTRUCTION—CRIMINAL LIABILITY—CONTINUANCE—ABSENCE OF WITNESSES—EVIDENCE—INSTRUCTIONS.

1. In a prosecution for obstructing a public road, a first application for a continuance on the ground of the absence of witnesses, two of whom had formerly owned the land owned by defendant and were familiar with its boundaries, was improperly denied.

2. Where, in a prosecution for obstructing a public road, there was evidence that a triangular place alleged to have been obstructed had not been used as a public road prior to the early part of 1902, evidence that one H. was overseer of the road at the time defendant erected the obstruction was immaterial, it not being conceded that such overseer had authority to change the location of the road after defendant had erected such fence.

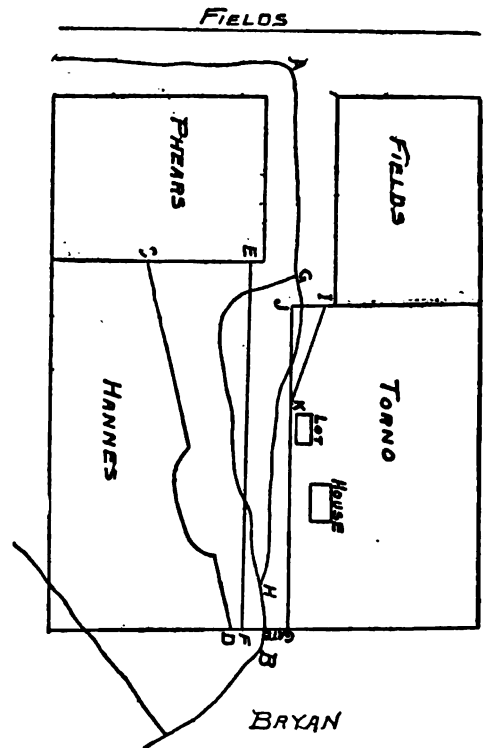
3. Where, in a prosecution for obstructing a public road, it was a controverted question whether the regularly traveled road crossed the land inclosed by defendant, the court, in addition to charging that a public road is one which the commissioners' court has assigned hands to work, and hands so assigned do work, and the public use as such, should have instructed that before defendant could be convicted the jury must believe that the traveled road was across the ground which was fenced by defendant, and that the overseer of highways had so regarded and worked such portion of the road.

Appeal from Lee County Court; John H. Tate, Judge.

C. J. Torno was convicted of obstructing a public road, and he appeals. Reversed.

W. L. Eason, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of obstructing a public road, and his punishment assessed at a fine of \$5. The portion of the road in dispute, and which it is claimed appellant obstructed, is at his northeast corner, and is a space about 100 yards long by from 1 to 10 feet wide; the contention of the state being that the road between Hannes and appellant (after Hannes set his fence out and straightened it) only left a space of 20 feet between this northeast corner of appellant's land and Hannes' new line of fence, this being a third-class road, and entitled to a space 20 feet wide; that appellant at this corner set his fence out into the road, and left only a space of some 10 feet. A map of the locus in quo is here set out, which shows the situation:



The line between A and B shows the old road as it formerly ran between Hannes and appellant, when the open space between them was from 50 to 100 feet. The line from C to D shows where Hannes' fence formerly ran. The line from E to F shows his new line of fence, after he set it out and straightened it. The line from G to H shows the line of the new road. I, J, and K show the triangle where it is claimed the obstruction was pla-

ced. I to K shows where the line of fence was before appellant set it out into the road. The state contends that the old road as used for over 20 years ran across this triangle and next to the appellant's old fence. Appellant contends that the road did not run there, but at that point ran over next to Hannes' place. It is further shown on the part of the state that after Hannes set his fence out the overseer of the road cut down some prickly pears and hackberry trees on the triangular space. Appellant claims that this was the line of his land, and that he did not move his fence beyond this; while the state claims this was not his line, but that his line ran along his fence before he moved it out from I to K, and that when he moved the fence out into the road it inclosed land that did not belong to him. This is a sufficient statement to present the assignments of error.

Appellant made a motion for continuance on account of the absence of R. P. Carson of Coleman county, E. E. Bryan of Lee county, and W. Ratcliff of McLennan county. This is the first application for continuance, and it appears the diligence was sufficient. Without going into the details of the testimony of said absent witnesses, it appears that two of them formerly owned the land now owned by appellant, and were familiar with the boundaries of said land, especially of the locus in quo, and would prove that the triangular space was part of appellant's tract, and that the fence was formerly at or near the place where appellant is alleged to have set his fence across the road. It appears to us that, inasmuch as it was a question in the case whether or not this space of land belonged to appellant or to Hannes, the testimony of these two witnesses was material. We also believe the application shows the testimony of Bryan was material on the same theory.

Appellant objected to the testimony of one Henson, to the effect that he was overseer of the Brown's Mill road at the time defendant erected the fence in question. This was objected to because the location of said Brown's Mill road had not been established; because it had not been shown that the fence was in the road over which witness was overseer; further, that the testimony was immaterial because the witness stated that he did not know the exact location of the Brown's Mill road, and could not say that said fence was in said road; that the traveled road did not run where said fence was erected prior to April, 1902, when Hannes moved his fence out over the traveled road, and within 20 feet of defendant's fence, after having cleared the prickly pears from the place where defendant erected his fence, so the people could pass; and because the appointment of Henson was a matter of record, which was the best evidence. The bill itself shows that the triangular space was cleared of obstructions, consisting of prickly pears and hackberry trees, by the same overseer in 1902, and it

states that the traveled road did not run where said fence was erected prior to April, 1902. So that it occurs to us, if it be true, as the bill makes this witness state, that the space had only been used as a public road during the early part of 1902, the fact that Henson was overseer of the Brown's Mill road was an immaterial issue, unless it be conceded that it was competent for the overseer, after Hannes had moved out his fence, to change the locus of the road at this point.

The court instructed the jury as to what constituted a public road, as follows: "That a public road or highway is one which the commissioners' court has assigned hands to work, and the hands so assigned do work it, and the public use it as such." Under the decisions of this court, to which the writer did not agree, this now seems to be a correct definition of a public road. *Ward v. State*, 42 Tex. Cr. R. 435, 60 S. W. 757; *Race v. State*, 66 S. W. 560. But all of the authorities agree that the locus of such road, including the boundaries thereof, must be established either in the order of the commissioners' court condemning the particular locality as a public road or designating the particular locality as a public road, and it is not competent, where a road runs over an open space of country promiscuously along different routes, for the road overseer to select some route and himself designate it as a public road. *Hatfield v. State* (Tex. Cr. App.) 67 S. W. 110; *Dyerle v. State*, 68 S. W. 174, 5 Tex. Ct. Rep. 380. In this case, as we understand the record, prior to 1902 the space here open between the lands of appellant and Hannes was 50 to 60 feet wide, and the public were accustomed to travel at times all over the space. And it is a controverted question whether at this point the regularly traveled road was next to Hannes' old inclosure or next to appellant's inclosure. When Hannes set his fence out, according to some of the witnesses, he fenced up a portion of the road that had been traveled, but left an open space between him and appellant 20 feet wide. Then appellant set his fence out, and left a space only 10 feet wide. Inasmuch as it was a controverted question as to where the public road ran at the particular point, we believe, in addition to the charge given; the court should have given some of the special instructions on the subject as to what it took to constitute the particular locality a public road. Or, if the charges requested were not adequate, the court should have instructed the jury in some manner that, before they could convict defendant for obstructing the public road, they must believe that the traveled road—that is, where the public were accustomed to travel—was through or across this triangular piece of ground which had been fenced by appellant, and that the overseer so regarded it, and worked that portion of the road with the hands. This, as we understand it, is in accordance with the doctrine laid down by a majority of the court in

the cases referred to, and accordingly, under the decisions, the court was not required to give a charge as to prescription, as appellant requested.

Appellant has filed an able brief, in which he thoroughly discussed the cases on the subject of public roads, and what it takes to constitute a public road; but this question appears to have been settled by the decisions above referred to, and we do not deem it necessary to go into a further discussion of the subject.

For the errors pointed out the judgment is reversed, and the cause remanded.

NELSON v. STATE.

(Court of Criminal Appeals of Texas. Dec. 11, 1902.)

INTOXICATING LIQUORS—LOCAL OPTION—ORDER FOR ELECTION—PRECINCTS—CHANGE OF BOUNDARIES—EFFECT—MOTION FOR CONTINUANCE—NOTICES—POSTING—EVIDENCE—QUESTIONS FOR JURY—INSTRUCTIONS.

1. It is not necessary that the order of the commissioner's court ordering a local option election should show who was appointed to hold the election, where the presiding officers of the general election theretofore appointed acted in the premises.

2. In a prosecution for violating the local option law, the return and poll list showed that the election was held for election precinct No. 1, whereas the commissioner's court had ordered an election for justice precinct No. 1, but the return of the officer was thoroughly identified as the election held in and for the latter precinct. *Held* competent in evidence.

3. Evidence that in writing out the return an old blank was used, and that by mistake the words "election precinct" were not erased and "justice precinct" substituted, was competent.

4. In a prosecution for violating the local option law, where the county judge's certificate of the result of the local option election has been properly entered of record, it makes a prima facie case of the fact of publication, and the court may instruct, in the absence of evidence to the contrary, that the law was in force at the date of the alleged violation.

5. The fact that the boundaries of a justice precinct were changed subsequent to the holding of a local option election therein did not invalidate such election.

6. Where application was made by accused for a continuance for absent witnesses, and on the ground that he was misled as to when the trial would be had, which was controverted by the district attorney in counter affidavits, the court had a right to pass on the affidavits, and it was not error to refuse to hear evidence on the controversy.

On Rehearing.

7. In a prosecution for violating the local option law, where the evidence is conflicting as to whether the notices of election were properly posted, it is incumbent on the court to submit the question as one of fact for the jury.

8. By "posting as required by law" is meant that the notices must be actually posted the requisite number of days before the election is held.

9. The fact that the notices may have been subsequently torn or blown down would not affect the validity of the election.

10. Where the proof conclusively shows that the posting did occur, the court is authorized to tell the jury, as a question of law, that the local option law is valid.

Appeal from District Court, Polk County; L. B. Hightower, Judge.

W. L. Nelson was convicted of violating the local option law, and appeals. Reversed.

F. Campbell, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of violating the local option law in justice precinct No. 1 of Polk county, and his punishment assessed at a fine of \$25, and 20 days' confinement in the county jail.

The record is very voluminous, covering 150 pages, but we have with patience investigated it, and carefully reviewed appellant's various assignments of error.

Appellant insists that the evidence shows that the clerk did not post the five notices authorizing the election prior thereto at all, and that the same were not posted for the requisite length of time, and that if said notices were posted they were posted along the railroad leading from the town of Livingstone, the county seat, in one direction for 10 or 12 miles, and that they were not posted in various parts of the county, as the law authorizes and contemplates. The statute does not require the notices to be posted at any particular place in the precinct, where the election is for the precinct, or the county, as the case may be. All the law requires is that the notices must be posted in a public place. *Ex parte Kennedy v. State*, 23 Tex. Cr. App. 77, 3 S. W. 114. We find from an inspection of the record that the notices were posted as indicated, and along said road, and that same were in public places. The mere fact that the witness Young states that the notices he read indicated the place where the election should take place, and the notice as actually issued did not indicate the place, would not discredit the fact that the notices were posted. The clerk testified that the notices as issued were certified copies of the order, and that there were five of them, and that those notices did not indicate the place where the election was to take place. If the evidence had indicated an issue as to whether or not the notices were posted, then, as appellant insists, it would have been the duty of the court to have left this as an issue of fact to the jury, to be determined by them; but the evidence clearly indicates that they were posted. *Frickie v. State*, 39 Tex. Cr. R. 254, 45 S. W. 810.

Appellant also insists that the order of the commissioner's court ordering the election did not designate the officers to hold the election. The record shows that A. B. Green had been designated as the presiding officer of election precinct No. 1 of Polk county prior to the time that this local option election was ordered; that said voting box presided over by the said Green was the only voting box in justice precinct No. 1, for which this election was ordered. There is no question but what a commission was issued to Green as presiding officer of the election pre-

inct. It is true he states that his commission was lost, but the clerk certifies to having issued the commission, and he states that he went to the town of Livingstone to hold the election under the usual forms of law—and the records bear him out in this statement—and there was within about 100 votes polled at said election to what there was at a previous general election in said precinct. The evidence further shows that the election was in all respects fair. It is not necessary that the order of the commissioner's court should show who was appointed to hold the election, where the presiding officers of the general election theretofore appointed acted in the premises. *James v. State*, 21 Tex. Cr. App. 353, 17 S. W. 422.

Appellant also insists that the court erred in admitting the returns of the presiding officer and the poll list of said election in evidence. Appellant objected to the same on the ground that the return and poll list shows the election was held for election precinct No. 1, whereas the commissioners' court had ordered an election for justice precinct No. 1. However, the court permitted the witnesses to testify that this was a clerical mistake; that in writing out the returns of the election the witnesses testified that they used an old blank form for the general election, and, where said blank form showed "election precinct number one," through inadvertence and oversight they failed to erase "election precinct" and write "justice precinct." Appellant also objects to this evidence. There was no error in the ruling of the court in either instance. The return of the officer was thoroughly identified as the election held in justice precinct No. 1, and for said precinct, and it was clearly permissible to permit the witness to explain a clerical mistake in the return. We have heretofore held that the misdescription in the petition for the local option election does not vitiate the same. *Jordan v. State*, 37 Tex. Cr. R. 222, 38 S. W. 780, 39 S. W. 110. Certainly a misdescription of the election which was actually held by the presiding officers could be explained by them.

The record shows that the order for the election, the order declaring the result thereof, the publication of the same, and the certificate of the county judge certifying to said publication as required by the statute, were all complied with; and the orders thereon were entirely in accord with the precedents heretofore approved by this court. *Williams v. State*, 35 Tex. Cr. R. 75, 81 S. W. 653; *Morton v. State*, 87 Tex. Cr. R. 131, 88 S. W. 1019; *Ex parte Schilling*, 38 Tex. Cr. R. 290, 42 S. W. 553. The last-cited cases discuss many of the various questions raised by appellant, and we do not deem it necessary to review them here seriatim.

Appellant insists that the court erred in charging the jury peremptorily that the local option law was in force in justice precinct No. 1 of Polk county. We have here-

tofore held that, where the county judge's certificate of the result of the local option election has been properly entered of record, it makes a prima facie case of the fact of publication, and in such state of case the court would have the right to instruct the jury, in the absence of evidence to the contrary, that the law was in force. *Crockett v. State*, 40 Tex. Cr. R. 175, 49 S. W. 392; *Jones v. State*, 38 Tex. Cr. R. 533, 43 S. W. 981.

Appellant also insists that the boundaries of justice precinct No. 1, where this election was held, were changed subsequent to the order of the election for said justice precinct. It is conceded this statement is correct. However, we cannot see how it could have injured the rights of appellant. There is no controversy in the record, or in the brief, that the election was held in justice precinct No. 1 as the same existed at the time the election was held. If the boundaries thereof were changed subsequent to said election, it would not invalidate the election. The proof shows that no one was allowed to vote who did not live in the boundaries of the precinct as it existed at the time of the election. Hence there was nothing in reference to this tending to invalidate the election.

Exception was reserved to the overruling of appellant's application for continuance on account of the absence of a great number of witnesses, and on the ground that he was misled as to when the trial would be had. This was controverted by the district attorney in counter affidavits, and the court did not err in refusing to hear evidence on said controversy, but had a right, under the law, to pass on the affidavits therein filed. The application shows no merit, and the court did not err in overruling it.

The evidence is sufficient to support the verdict of the jury. No error appearing in the record, the judgment is affirmed.

On Rehearing.

(June 24, 1903.)

The judgment was affirmed at a former term of this court, and is now before us on rehearing. In the original opinion we held that the evidence conclusively showed that the five notices of the election were properly posted. A review of the facts, however, upon appellant's motion for rehearing, indicates to our minds that we were wrong in holding that the posting was conclusively proven; but, as appellant insists, it was a question of fact controverted by the evidence. This being true, as indicated in the original opinion, citing *Frickie v. State*, 39 Tex. Cr. R. 254, 45 S. W. 810, would make it incumbent on the court to submit the question as one of fact for the jury to pass upon. See also, the recent case of *Ex parte Frank Conley* (decided at the present term) 75 S. W. 301. Whatever may be the opinion of the writer on this question, it has become, and is now, the settled law of this state. The

evidence indicating an issue that the court failed to charge upon, error is manifest, for it was the duty of the court to submit said fact to the jury, and instruct them that, if said notices were not posted as required by law, then the jury should find that the law was invalid. By "posting as required by law" is meant that the notices must be actually posted the requisite number of days before the election is held. The fact that the notices may have been subsequently torn or blown down would not affect the validity of the election. Where the statute requires the notices to be posted 12 days before the election, if the proof conclusively shows that said posting did occur, then the court, as indicated in the original opinion, is authorized to tell the jury, as a question of law, that the local option law is valid. For the error pointed out, the motion for rehearing is granted, and the judgment is reversed and the cause remanded.

WILSON v. STATE.

(Court of Criminal Appeals of Texas. June 24, 1903.)

FORGERY — INDICTMENT — ALLEGATIONS — FRAUD—INNUENDO—PECUNIARY OBLIGATION.

1. An indictment for forgery alleged that defendant fraudulently passed as true to E. a forged instrument, as follows: "Mr. E please wait on W's debt tell this fall i stand for it tell September. * * * S"—which instrument would, if true, have created the pecuniary obligation of S. Held, that the indictment was insufficient, in that the expression, "i stand for it tell September," should have been made clearer by some innuendo indicating what "stand for it" meant.

2. The indictment was insufficient, in that it did not show in what manner it affected S. as a pecuniary obligation.

Appeal from District Court, Fayette County; L. W. Moore, Judge.

Nace Wilson was convicted of forgery, and he appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of forgery, and his punishment assessed at confinement in the penitentiary for a term of two years.

The only question is as to the validity of the indictment. The first count appears to have been quashed, evidently because the district attorney, who drew the indictment, sought to subject our old legal friend Richard Roe, who has done duty time immemorial as a kind of scapegoat in forms of indictment, to all the pains and penalties of forgery. Doubtless the court was of opinion that this was an imposition on Richard Roe, inasmuch as in criminal proceedings every tub should stand on its own bottom, and Rich-

ard Roe should not be held to answer for the crime of Nace Wilson. The first count having passed out, we are only concerned as to whether the second count is good. Here the charging part of the count is as follows: "That Nace Wilson * * * did then and there willfully, knowingly, and fraudulently pass as true to Charles Ehlinger a false and forged instrument in writing, which had theretofore been made, without lawful authority, and with intent to defraud, and was then of the tenor following. 'Feb the 28, 1901. Frelsburgh, Texas. Mr. Chas. W. Ehlinger please wait on Nace Wils' (meaning Wilson) 'debt tell this fall i stand for it tell September just make yorself easy tell September. Justin Stine' (meaning Stein)—which said instrument would, if true, have created the pecuniary obligation of Justin Stein, and which said instrument the said Nace Wilson, then and there well knowing to be false and forged, did pass the same as true, with intent to injure and defraud." The contention here is that said indictment did not contain innuendo averments to explain its meaning, nor explanatory averments to show that said instrument was or could be a legal obligation, which, if true, would have affected in any wise any money or property. We believe both contentions are correct. The expression, "i stand for it tell September," should have been made clear by some innuendo averment indicating what "stand for it" meant. In addition to this, inasmuch as the paper in question was not a note or check or contract which showed on its face some obligation, it should have been stated how or in what manner it affected Justin Stein as a pecuniary obligation. If it is true, as may be surmised, that Nace Wilson owed Chas. Ehlinger any debt, that should have been set out, inasmuch as proof was required on this point. In *Cagle v. State*, 39 Tex. Cr. R. 109, 44 S. W. 1097, is a case involving similar questions. Where the instrument does not show on its face a complete obligation, if there are facts and circumstances outside the instrument itself which makes it an obligation, this should be shown by proper averments. Accordingly we hold that the indictment here was defective.

The judgment is reversed and the prosecution ordered dismissed.

DAVIDSON, P. J., and BROOKS, J. We agree the indictment is not sufficient. The instrument alleged to be forged is indefinite, and the indictment should have so explained it as to make apparent that it was written for the purpose of securing the party to whom addressed in a debt due him by appellant, and for the purpose of inducing the debtor to wait on appellant till September 1st for his debt, and the writer's responsibility for said indebtedness. The indictment should be at least as explicit as pleadings in a civil cause in such cases.

RICHARDSON v. STATE.

(Court of Criminal Appeals of Texas. June 17, 1903.)

CRIMINAL LAW—FORMER ACQUITTAL—DISPOSAL OF PLEA—JUDGMENT—RECEIVING STOLEN GOODS—TESTIMONY OF THIEF.

1. While it was error for the court not to enter a record judgment disposing of a plea of former acquittal, such error was harmless where the plea on its face offered no legal defense to the prosecution.

2. In a prosecution for receiving stolen property, it was error to admit in evidence declarations of the thief, made in defendant's absence, that he was to steal the seed and carry it to defendant's home, and defendant was to sell the same.

Appeal from Falls County Court; W. E. Hunnicutt, Judge.

Ike Richardson was convicted of receiving and selling stolen property under the value of \$50, and appeals. Reversed.

Wm. Shelton and Wiley C. Jones, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of receiving and concealing stolen property under the value of \$50, and his punishment assessed by the jury at "nine months in jail or county roads."

Appellant introduced in defense of this prosecution a plea of former acquittal, in proper form, predicated on the fact that prior to this conviction he had been prosecuted in the district court of Falls county under an indictment charging burglary with intent to commit theft, and that the jury acquitted him; that the receiving and concealing of the cotton seed, for which he is now being prosecuted, was the same property taken in the burglary—that is, the burglary indictment charged appellant with breaking and entering a certain car with intent to steal, and the offense for which he is now being prosecuted, for concealing the cotton seed taken, is one and the same transaction, and that defendant in this case was the defendant in the burglary case. Appellant introduced evidence fully supporting this plea. The transcript before us fails to disclose that the court made any disposition of the plea. In *Rust v. State*, 31 Tex. Cr. 75, 19 S. W. 763, appellant presented a similar plea to the one now under consideration, and the transcript there did not contain an order or judgment of the court showing the disposition of the plea. It was there sought to perpetuate the ruling of the court by bill of exceptions. We held that the court, being a court of record, must perpetuate its proceedings by judgments. It follows, therefore, that there should have been a judgment disposing of appellant's plea. In the *Rust* case we held that a bill of exceptions would not properly present this matter, and further said that: "Concede this position to be wrong, and we would indulge the presump-

tion that such judgment was entered, but omitted from the transcript, or, if it be granted that the point is sufficiently presented by the bill of exceptions found in the record, then we are of opinion that the ruling of the court is correct. Our statute provides, 'If a house be entered in such manner as that the entry comes within the definition of burglary, and the person guilty of such burglary shall, after so entering, commit theft or any other offense, he shall be punished for burglary, and also for whatever other offense is so committed.' In other words, the plea shows upon its face that it could not possibly have offered any legal defense to this prosecution, even conceding a record judgment was entered, which we cannot presume, in the absence thereof. This matter was thoroughly discussed in *Loakman v. State*, 32 Tex. Cr. 563, 25 S. W. 22. While we think the court erred in not properly disposing of the matter by judgment of some character, yet the plea, upon its face, offers no legal defense, and would not authorize a reversal of this case.

Bill No. 1. complains that the state was permitted to prove by Leonard Thomas, over the objections of appellant, that he met Essex Johnson somewhere near the old river bed, where his (Thomas) wagon was broken down, and the following conversation was had: "That he [Johnson] was to steal the seed and carry them to Ike Richardson's house, and that said Richardson was to haul them to town and sell the same." Appellant objected on the ground that the same was the mere declaration of Essex Johnson, made when defendant was not present, and could not criminate defendant; was hearsay, irrelevant, and immaterial. In this case defendant was on trial for receiving stolen property. The declarations of Essex Johnson, and the fact that he stole cotton seed in question, would be admissible, going to show the guilt of Johnson. *Tucker v. State*, 23 Tex. Cr. App. 512, 5 S. W. 180. But Johnson's statement to Thomas as to what appellant intended to do and agreed to do is clearly hearsay and inadmissible for any purpose, appellant not being present. It was material error for the court to admit the latter phase of this testimony. It is proving the guilt of appellant by hearsay testimony, which is never permissible.

For the error discussed, the judgment is reversed and the cause remanded.

FREEMAN v. STATE.

(Court of Criminal Appeals of Texas. June 17, 1903.)

CRIMINAL LAW—NEW TRIAL—TESTIMONY OF ABSENT WITNESS—PROBABLE TRUTH.

1. Where the affidavit of an absent witness is produced on a motion for a new trial, showing absolutely that he would have testified to the facts set up in the application for continu-

ance, said facts being material, and diligence sufficient, it is error to deny the motion on the ground that the testimony is probably not true.

Appeal from District Court, Jack County; J. W. Patterson, Judge.

G. A. Freeman was convicted of crime, and appeals. Reversed.

Sil Stark, R. S. Blair, and Nicholson & Fitzgerald, for appellant. F. S. Groner and Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of 35 years.

Before announcing "Ready for trial," appellant presented an application to continue the case for want of the testimony of his wife, Mrs. F. P. Freeman; stating she resided in Jack county. The application shows defendant was indicted on March 5, 1903; that on the same day he had subpoena issued for said witness, which was legally served on March 7th; and that said witness is sick in bed, and is physically unable to be present and attend at the present term of the court—which is supported by affidavits attached to the application. The application further says: That the state will undertake to show that the killing of deceased was without cause or provocation on the part of defendant. That the evidence will show that, up to and within a few minutes of the killing of deceased, defendant and deceased were on good and friendly terms. That deceased was the son-in-law of defendant, and resided within about 70 yards of defendant's residence. That defendant left deceased about dusk of the same evening, and when they separated they did so on good and friendly terms; defendant starting towards his home. When within a short distance of his house, he met his wife (the absent witness) in the road, coming from their home and towards defendant. That defendant's wife then told him that "Bessie was gone." The evidence will show that Bessie was a daughter of defendant, and of young and tender years—under the age of 18; that prior to this time little Tom Sallee, who was the nephew of deceased, and who had been living with deceased for some two or three months prior to this time, had procured a marriage license, which was unknown to defendant, to marry said Bessie Freeman, by making affidavit in writing before the county clerk of Jack county stating that said Bessie Freeman was 18 years of age, which affidavit was and is untrue. Defendant further alleges that the evidence will show, and he expects to prove by said absent witness, that said little Tom Sallee and defendant's said daughter Bessie Freeman had never kept company with each other at defendant's home or elsewhere; that neither the absent witness, who is the mother of Bessie Freeman, nor defendant, knew that said little Tom Sallee and Bessie Free-

man intended to marry, nor had the least shadow of a cause to believe that they were going to marry, or that they were in love with each other, or that they had ever gone together, except on one occasion, when he, Bessie, Josie, and Charley Patterson all walked together from the house of deceased to defendant's residence. Defendant further expects to prove by said absent witness: That, when she first told defendant that Bessie was gone, he immediately started in search of her. In a few minutes he returned to his residence, having failed to find her. That, when coming back, defendant met his wife at the gate of their home. That the wife said to defendant, "Papa, old Tom Sallee has ruined Bessie, and got her to run off with little Tom." That, by the use of the name old Tom Sallee, witness meant deceased, and defendant understood that she meant deceased. That defendant immediately took his Winchester rifle, and went to the house occupied by deceased, at which time and place the killing occurred. Defendant further says that he relied on the said statement made to him by his wife, and believed the same to be true, at the time he killed deceased. Then follows the usual statutory requisites of an application for continuance, which was sworn to on March 16, 1903. R. F. Freeman and B. M. Freeman, two sons of the absent mother, swore to the fact that she was sick in bed. The county attorney filed counter affidavits of witnesses Laird, Ellis, Bagwell, and Mrs. Estell Franklin. Laird, by his affidavit, states that the absent witness was seen by him on March 12, 1903, walking around in the town of Vineyard, near which town the proof shows that the killing occurred, and which was about 12 miles from Jacksboro, the county seat, and that he saw said absent witness at Franklin's store, in said town; that she was then able to be up, and walked around said town. The affidavits of the other witnesses are to the same effect. On motion for new trial, appellant attaches the affidavit of the wife, swearing to the facts as set up in his application for continuance. The state controverted the motion for new trial, filing the affidavit of Inez Bowman, who stated that she knew the absent witness, Mrs. Freeman, and that on the afternoon of Saturday, March 21, 1903, the day on which the jury returned their verdict, she saw Mrs. Freeman ironing at her home, in Vineyard, and she was up and going about her place. Castleberry stated in his affidavit that on March 16th (the day on which the application for continuance was filed) he saw the absent witness, and she was with affiant on Bean creek, fishing, and was there something like two hours, and was able to be up and walking around. Elbert Bagwell, in his affidavit, states that on March 16th he saw the absent witness on Bean creek, and that she was perfectly able to be up and walking around, and appeared to be in her usual health. M. C. Duncan

stated that on Sunday, March 15th, she was at the absent witness' house, and that she was able to be up and at her housework, and appeared to be in her usual health. Cope made affidavit that he knew Bertie Freeman, son of defendant, and that he saw him in the town of Jacksboro where the trial occurred, on March 16th, when the case was called for trial, and also stated that he saw Josie Freeman, daughter of defendant, at the town of Jacksboro during the progress of the trial. Appended to the bill of exceptions reserved to the overruling of the motion for continuance is the following explanation by the court: "That the witnesses Bertie and Josie Freeman, mentioned by defendant in his cross-examination as being in the yard near by or present when he testified his wife gave him the information set out in his application for continuance, were both subpoenaed by defendant, as appears from the record herein. The witness Bertie Freeman was present in court when defendant's motion for a continuance was overruled. And the witness Josie Freeman was sworn as a witness for defendant, and placed under the rule, with the other witnesses. That neither of said witnesses were offered by defendant, nor did either of said witnesses testify in the case."

The testimony on the part of the state tends to show that defendant killed deceased, his son-in-law, because he had assisted little Tom Sallee in running away with his daughter Bessie, and that defendant did not kill deceased for seducing his daughter, as his wife would have testified. The testimony of defendant was to the effect that he killed deceased because of the statement made to him by his wife. It appears from the application for continuance that diligence is shown. It also appears that the testimony is material. Then the only matter remaining for decision is the question of its probable truth. In *Baines v. State*, 42 Tex. Cr. R. 510, 61 S. W. 119, the majority of the court held, "Where the affidavit of an absent witness has been produced on the motion for new trial, showing absolutely that he would testify to the facts set up in the application for continuance, said facts being material, and diligence sufficient, the court on appeal will not assume the prerogative of saying that the testimony was not probably true, and thus usurp the functions of the jury." The writer did not agree to this opinion, and expressed his views in a dissenting opinion. But in deference to the opinion of the majority of the court in the *Baines* Case, the case now before us must be reversed, because attached to the motion for new trial is the affidavit of the absent witness, and the record shows it is material, and also shows diligence. In the case cited, the court used the following language: "Where an affidavit of the absent witness has been produced on motion for new trial, showing absolutely that he would testify to the facts set

up in the application, we do not think any case can be found where we have assumed the prerogative of saying that the testimony was not probably true. To so hold, it seems to us, would be not only to usurp the functions of the jury, but to announce in advance that the absent witness had committed perjury. In our opinion, on the showing made, the judge should have granted the motion for new trial." As stated, the writer did not agree thereto, but believes it is the statutory and constitutional right of this court not only to pass on the question of diligence and materiality, but also upon the probable truth of the application in the light of the record. But under the *Baines* Case, supra, the judgment is reversed, and the cause remanded.

BROOKS v. STATE.

(Court of Criminal Appeals of Texas. June 10, 1903.)

FORGERY—PASSING FORGED INSTRUMENT—TEACHER'S CERTIFICATE—STATUTE—APPEAL—REVIEW—BILL OF EXCEPTIONS.

1. Pen. Code 1895, art. 540a, makes it an offense to unlawfully change or alter any teacher's certificate. Article 542 provides that, if any person knowingly passes or attempts to pass any forged instrument such as is mentioned in preceding articles, he shall be punished, etc. *Held*, that it is an offense to attempt to pass as true a forged teacher's certificate.

2. On appeal, action of trial court in excluding certain testimony cannot be reviewed in the absence of a bill of exceptions verifying the matter.

3. On appeal, action of the trial court in submitting and failing to submit certain issues cannot be reviewed in the absence of the evidence adduced.

4. On appeal, complaint that the trial court erred in failing to require the state to elect on which count it would seek a conviction cannot be reviewed in the absence of a bill of exceptions presenting the matter complained of.

Appeal from District Court, Bell County; Jno. M. Furman, Judge.

Amy E. Brooks was convicted of passing a forged instrument, and she appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of knowingly passing as true a forged instrument in writing, and her punishment assessed at confinement in the penitentiary for a term of two years. There are four counts in the indictment—one for forgery and three for passing the forged instrument. The court, in his charge, merely submitted to the jury the issue of passing a forged instrument.

The second count of the indictment is as follows: "On or about the 20th day of January, A. D. 1903, Amy E. Brooks did willfully, knowingly, and fraudulently attempt to pass as true to one Henry K. Orgain an

¶ 1. See Forgery, vol. 22, Cent. Dig. § 18.

altered and changed instrument in writing, to wit, a teacher's certificate, which had theretofore been altered and changed without lawful authority, and with intent to defraud, and which had theretofore been issued by authority of E. L. Blackshear, principal, and M. H. Broyles, secretary of faculty, and F. A. Reichardt, vice president of board, and Jefferson Johnson and P. H. Tobin and Wm. Malone, board of directors of Prairie View State Normal and Industrial College, to Susie A. Brooks, and which said certificate, before it was changed and altered, was of the tenor following: 'Second Grade. State of Texas. Prairie View State Normal and Industrial College. Prairie View, Waller County, Texas. Be it known that Susie A. Brooks, having completed the course prescribed by this college has, by good behavior, diligence, and attainments, won the approbation of the teachers and board of directors of said school. Therefore they admit Susie A. Brooks to the honor licentiate of instruction in the state of Texas. This certificate is valid without further examination for a period of two years from date hereof. In testimony whereof, the principal of the school, the secretary of the faculty, and the board of directors hereunto subscribe their names this 4th day of June, 1901. E. L. Blackshear, Principal. M. H. Broyles, Secretary of Faculty. F. A. Reichardt, Vice Pres. of Board. Jefferson Johnson, P. H. Tobin, Wm. Malone, Board of Directors. [Seal.] And which said certificate had theretofore been changed and altered, without lawful authority, in the following manner, to wit: That said certificate as above set out was issued as aforesaid to Susie A. Brooks, and that the word and name 'Susie,' where the same occurred in said certificate, was theretofore erased, obliterated, and blotted out, and the word and name 'Amy' had theretofore been substituted, written over and in the place of the name and word 'Susie,' so that the said certificate then and there so attempted to be passed as true by the said Amy E. Brooks was of the tenor following." Here the certificate is set out as above copied, with the exception that the name "Amy E. Brooks" appears in place of "Susie A. Brooks." And the count further continues: "And which said altered and changed instrument in writing the said Amy E. Brooks then and there well knowing to be so altered and changed, she, the said Amy E. Brooks, did attempt to pass the same as true, with intent to injure and defraud. The said H. K. Orgain was then and there the superintendent of public instruction for said Bell county, then and there well known as such to the said Amy E. Brooks, and, as such superintendent of public instruction, it was the duty of the said H. K. Orgain to register the certificates of teachers and to approve contracts made and entered into by and between teachers and trustees of schools in said county, and all of which was then and there well known to said Amy E. Brooks,

who then and there attempted to pass said altered and changed teacher's certificate for the purpose of securing its registration by the said H. K. Orgain, and for the purpose of securing his approval of a certain contract theretofore presented to him by the said Amy E. Brooks, and by which contract the said Amy E. Brooks was to become the teacher of St. Phillip School, colored, in White School District Number Sixty-Seven of said county, through its trustees, George Busby, Thad White, and William Brown, and which said contract was without force and of no effect until said certificate was registered as aforesaid, and until said contract was approved by said H. K. Orgain as aforesaid, all of which was known to the said Amy E. Brooks, and knowing which she did attempt to pass said altered and changed instrument as true, with intent to injure and defraud." The third count of the indictment charges the appellant with knowingly attempting to pass as true the alleged forged instrument to "Henry K. Orgain, superintendent of public instruction for Bell county, Texas, through George Busby, Thad White, and William Brown, trustees of Colored School Number Four, the same being St. Phillip School, colored, in White District Number Sixty-Seven." The fourth count charges the passing of the forged instrument to "George Busby and Thad White and William Brown, trustees of St. Phillip School, Number Four, colored, in White District Number Sixty-Seven, in said county and state," etc.

Appellant filed a motion in arrest of judgment, insisting that the second, third, and fourth counts of the indictment nowhere alleged that the instrument was unlawfully and willfully erased, changed, or obliterated, and, in order to make the instrument the subject of forgery, it must have been erased, changed, or obliterated, and that if the instrument itself is not the subject of forgery, or if forgery has not been alleged in the indictment, it cannot form the basis of a charge of attempting to pass a forged instrument; further, it is not a violation of law to attempt to pass a teacher's certificate, and the offense attempted to be charged in the indictment is not denounced by the statute; and further complains that the verdict is too general and indefinite to support a valid judgment, in that it cannot be determined from said verdict upon what count in the indictment defendant has been adjudged guilty, and of what offense she has been adjudged guilty. The verdict of the jury is as follows: "We, the jury, find the defendant guilty as charged in the indictment, and assess her punishment two years' confinement in the penitentiary."

Under this verdict the court rendered judgment against appellant for "knowingly attempting to pass as true a forged instrument in writing, as found by the jury." In view of the fact that the court only submitted the passing of the forged instrument in the different counts above recited, and the verdict

of the jury being general, we do not think appellant's objection to the form of the verdict is well taken.

Article 540a, Pen. Code 1895, makes it an offense to unlawfully or willfully erase, change, or alter any teacher's certificate or diploma, or other instrument having the force of a teacher's certificate. In previous articles, under title 14, c. 1, of the Penal Code of 1895, we find various other characters of forgery defined. And following these articles, article 542 provides: "If any person shall knowingly pass as true or attempt to pass as true any such forged instrument in writing as is mentioned and defined in the preceding articles of this chapter, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years." In our opinion, this article of the Code clearly makes it an offense to attempt to pass as true a forged diploma or teacher's certificate, and appellant's contention to the contrary is incorrect.

The record is before us without statement of facts. The first ground of the motion for new trial complains that the court erred in excluding certain testimony. But there is no bill of exceptions verifying this matter, and it cannot be reviewed. The second, third, fourth, and fifth grounds of the motion complain of the action of the court in submitting and failing to submit certain issues. These matters cannot be reviewed in the absence of the evidence adduced.

The sixth ground of the motion contends that the court erred in failing to require the state to elect upon which count in the indictment it would seek a conviction, "as will more fully appear by reference to bill of exceptions number two." The second bill is reserved to the refusal of the court to give certain requested charges, and there is no bill in the record presenting the matter referred to in this ground of the motion. There are various assignments of error with reference to the indictment. In our opinion, the indictment is sufficient, and is well and properly drawn.

No reversible error appearing in the record, the judgment is affirmed.

WILLIAMS v. STATE.

(Court of Criminal Appeals of Texas. June 23, 1903.)

RECEIVING STOLEN PROPERTY—EVIDENCE—DECLARATIONS—FOUNDATION—MISCONDUCT OF JURY.

1. While the jury in a criminal case were considering their verdict a discussion arose as to the credibility of certain witnesses, and various jurors detailed facts not in evidence relating to their credibility. There were affidavits that one juror had stated just prior to the calling of the case that he and another juror might as well go home, as they would not be received on the jury because defendant and his counsel knew they would convict defendant, and that another juror had stated before being selected that if they let him sit on the case he

would "hang them darn horse thieves." None of these facts were in the possession of the defendant or his counsel before trial. *Held* to show misconduct requiring reversal.

2. In a prosecution for receiving stolen horses, a witness, who had been employed by defendant to drive the horses from one place to another, testified that he was accompanied by defendant and other persons, and that a sham trade was entered into, by which a bill of sale was to be executed by witness in favor of one of defendant's companions. After this was done defendant took possession of part of the horses. The bill of sale and a note executed by the buyer, together with defendant and another, were admitted in evidence. *Held* a sufficient predicate for the admission of declarations of defendant's companions, tending to show that the alleged sale was a conspiracy between the parties.

Appeal from District Court, Somervell County; W. J. Oxford, Judge.

Pete Williams was convicted of receiving stolen property, and appeals. Reversed.

Hiner & Wilson and J. E. Pearce, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged by indictment with theft as well as receiving stolen property. The court submitted the case alone upon the counts for receiving, and the penalty assessed by the jury was two years' confinement in the penitentiary.

Among other things, reversal is sought on account of the misconduct of the jury. In support of this is filed the affidavits of W. L. Stewart and B. L. Denio. Upon the trial of the motion, Sullivan testified that he was a juror who tried appellant; that after the retirement of the jury, and while deliberating upon the case, some one stated that he would not believe the evidence of John Hankins. Hankins was the principal state's witness and a particeps criminis. This juror stated that Hankins was just as credible and worthy of belief as Bradford Mitchell, who had been recently acquitted by a jury for participation in this offense. This juror stated that Mitchell had sworn that Tom Russell sold the gray mare or filly to a man named Exome. Tom Russell was also connected with this transaction as a guilty participant. Witness further stated that he informed the jury that Exome told him and his family that he bought the gray mare or filly from Bradford Mitchell, and paid him \$6 or \$8 for it; that Exome started to leave the country with said animal, having also in possession the saddle of the son of the juror; that at Walnut Springs he (Exome) tried to sell the horse and saddle, and referred the party to the juror to ascertain if the title was good; that a phone message came while this juror was acting as grand juror. As the phone messenger came to the courthouse, the juror met his son Will, and got him to answer the phone; that his son told the party at Walnut Springs that Exome had not paid for the mare, and the saddle belonged to him—that is, witness' son. At the time these statements were made the jury were dis-

cussing the credibility of the witnesses, especially Hankins and Bradford Mitchell, and at said time they had not agreed upon a verdict, but subsequently did agree to a conviction. This discussion occurred about midnight. They agreed upon the verdict about 9 or 10 o'clock the following morning. When the jury first went out they stood nine for conviction and three for acquittal, and before retiring for the night all had agreed to conviction but George Edmoston, who agreed the following morning, about 9 or 10 o'clock. This witness favored giving appellant five years. Watterson was also one of the jurors who convicted appellant. Stewart's affidavit states that, while he was talking to Glass on the public square in Glen Rose, juror Watterson approached affiant and Glass, who was also a juror in attendance upon the court, and just prior to the calling of appellant's case stated to Glass, in affiant's presence, "that we [meaning himself and Glass] had just as well go home, as they [meaning appellant and his counsel] would not take either of them upon the jury [meaning appellant's jury], as they knew too much about us [the jurors]; that they knew he and Glass would convict Pete Williams, and that by God we would send them up [meaning Pete Williams and the other parties indicted for the theft of the same horses for which Williams was indicted]." But this information was not communicated to appellant nor his counsel nor to any of his friends until after Watterson had been impaneled, etc. Watterson was used as a witness on the hearing of the motion for new trial, and admitted making the statements imputed to him, but said he was joking, and that he knew nothing about the facts and had no prejudice against defendant. The affidavit of Denio attacks the juror Bryan, to the effect that Bryan stated that, "If they let me sit on that case I will hang them darn horse thieves;" and said to affiant, "Wouldn't you?" And affiant said, "No, they would have to prove the boys guilty [meaning Tom Russell, Bradford Mitchell, and Pete Williams] before I would convict them, as I would go according to law and evidence." Mr. Bryan said that he did not have any use for the horse thieves. I said, "I didn't care if a man was a horse thief, I would not convict him unless he was proven guilty." Mr. Bryan then said that, of course, he would try to go according to the law and the evidence." That these matters were not communicated to defendant or his counsel, etc. This conversation was denied by Bryan. However, Bryan corroborated that portion of the motion for new trial in regard to the statements of Sullivan. There is some other evidence in regard to the juror Thompson. We have stated enough to demonstrate the misconduct of the jury, and for which this judgment must be reversed.

There are several bills of exception with reference to the rulings of the court in the

admission of testimony involving the statements of the different parties who were shown by the witness Hankins to be particeps criminis in the transaction detailed by his testimony. Hankins states that he was employed by appellant, Mitchell, and Sullivan to go to Black Stump Valley, in Erath county, and drive from that point to Somervell county the five horses claimed by them; that he undertook to drive them, and made a failure; that he secured the services of his brother Jim to assist him; that the horses were finally driven as far as the pasture of the witness Ham, and placed in that pasture for a few days; that the parties mentioned by him, including defendant, accompanied by himself, went to this point, drove the horses, and put them in the pen of one Davis, where there was a trade entered into, which Hankins says was a sham, by which a bill of sale was to be executed by him in favor of Tom Russell, one of the parties to the original employment; that he (Hankins) was to get one-half of the horses for driving them from Black Stump Valley; that the horses were then driven away from Davis' pen, and put into appellant's pasture, at least some of them were, Hankins receiving one of the animals, which he traded to his brother, and a note for \$40 executed by Tom Russell, appellant, and Bradford Mitchell. The bill of sale was executed in favor of Tom Russell, as agreed upon. The note and bill of sale were read in evidence, and are incorporated in the record. Appellant introduced both instruments. The trade spoken of is testified by several of appellant's witnesses as having occurred, among others by appellant himself as well as Bradford Mitchell. They denied, however, any complicity in the criminal part of the transaction, claiming innocence in their connection with it. Without going into detail as to the statements admitted over objection by the different witnesses, it is sufficient to say that, in our opinion, a proper predicate was laid; that is, sufficient evidence was introduced to justify the court in admitting these declarations on the theory of conspiracy between the parties. It is necessary to make this statement because appellant denied hearing some of said statements, though the state shows that most of them were made in such juxtaposition to appellant that he could have heard them, as he was present with the parties at the time they were made, and much of it was directly in connection with handling the horses at the pen of the witness Davis and subsequently. These statements were somewhat of a criminative nature and character. We think these bills, explained by the court, rendered the testimony admissible.

Will Williams, while testifying in behalf of appellant, states that on the 11th or 12th of August he prepared the bill of sale executed by Hankins, conveying to Russell the horses in question; that he remembered the circumstances of Bradford Mitchell, Tom

Russell, and appellant bringing the horses in controversy to their homes about that time; that he saw defendant for the first time after he brought the horses to his home, about a day or two after he had gotten them; and that he then asked defendant about said horses, and from whom and where he had gotten them. The witness was then asked by appellant's counsel to detail the statements of defendant to him about his possession of the horses, and from whom and where he had gotten them. State's counsel objected to this testimony because it would be self-serving and hearsay, and said counsel, in response to an inquiry from the court, stated that his purpose in offering the testimony was to show defendant's explanation of his possession of the horses. The court sustained the objection, and the witness was not permitted to detail said statements of appellant. The witness would have testified that the first time he saw defendant, which was a day or two after he (appellant), Bradford Mitchell, and Tom Russell brought the horses in controversy to appellant's home, and on the day the witness prepared the bill of sale from Hankins to Russell, which was the 11th or 12th of August, 1902, that defendant told him, in answer to his (witness') question as to how, where, and from whom he came into possession of the horses, that John Hankins told him in Glen Rose on Saturday, August 9, 1902, that he had some horses in old man Ham's pasture, and wanted to trade them to him (appellant) for a buggy; that defendant, Bradford Mitchell, and Tom Russell went to Ham's place on Sunday, August 10, 1902, by agreement with witness Hankins, to look at the horses, and if the same suited appellant he would trade his buggy for them; that after he got there and saw said horses he refused to trade for the same, and that subsequently Tom Russell bought three head of horses that were in Williams' pasture, and the one that had already been placed in this pasture, from said Hankins, for the sum of \$40; that Russell agreed to give Hankins his note therefor for \$40, with defendant and Bradford Mitchell as sureties; that Hankins said he was willing to take Russell's note for said horses, provided he would make it secure so that he could trade it for the buggy; and that appellant and Bradford Mitchell agreed to sign said note for the purpose of making the same secure so that Hankins could trade it for the buggy. The court signs this bill with the explanation that the bill of sale was exhibited to the witness, and he stated that he wrote it on said occasion, and it recited the sale of horses from Hankins to Russell; and it was further admitted in evidence that the note given was also admitted in evidence, and Hankins admitted signing the bill of sale and accepting the note. And he further qualifies the bill by stating that the evidence of the witness Davis shows that defendant's possession of horses was first questioned at his (Davis') house in Somervell

county before they got them to Hood county, and two or three days before this conversation should have occurred. Under the explanation of the court, the ruling was correct. If appellant was called upon at Davis' house to explain possession of the horses, this preceded the conversation sought to be introduced through Will Williams; but, whether this is true or not, it was a fact not denied by the state and proved by appellant that the matters occurred as sought to be testified by Williams. Why the state should have objected to this testimony is not easily explained, because it was the theory of the state in regard to this phase of the case that the sale was a sham and a fraud, and the bill of sale and note were executed to carry out this idea, and to cover up, as best they could by this means, the fraudulent transaction with a glamour of innocence. While we do not see any particular injury that could accrue to appellant, yet upon another trial it might be well enough to let this testimony go to the jury for what it would be worth.

The judgment is reversed, and the cause remanded.

STILES v. STATE.*

(Court of Criminal Appeals of Texas. June 3, 1903.)

HOMICIDE — EVIDENCE — ACCOMPLICE — CORROBORATION—CRIMINAL LAW—CUSTODY OF JURY.

1. A defendant on trial for crime was not prejudiced by the fact that, after five or six jurymen had been accepted and sworn, a salesman not sworn in entered the jury box, and had a conversation with one of the jurymen, who told him that the box was the jurymen's, that they had been accepted, and that thereupon the salesman left the box as quickly as he could.

2. Where, on a prosecution for murder, the testimony of decedent's wife as an accomplice was corroborated by circumstances clearly showing that defendant and no one else committed the murder, the evidence was sufficient to support a verdict of guilty.

Appeal from District Court, De Witt County; James C. Wilson, Judge.

Sam Stiles was convicted of murder, and appeals. Affirmed.

O. S. York and Guy Mitchell, for appellant. A. B. Davidson, Jno. H. Bailey, and Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the first degree, and his punishment assessed at death.

Bill of exceptions No. 1 shows that after six or seven jurors had been impaneled and sworn, and taken their seats in the jury box on the inside of the railing in the courtroom, and while the court was engaged in completing the panel, one W. J. Simpson, over the objections of the defendant, and without securing the permission of the court or counsel for either side, went into the jury box,

*Rehearing denied June 24, 1903.

and among the said six or seven jurors, and when noticed by counsel for defendant was busily engaged in conversation with one of the jurors theretofore impaneled and sworn. When this fact was discovered appellant objected to said Simpson entering the jury box, and holding conversation with the jurors theretofore sworn, because the same was and is unlawful and was likely to prejudice the rights of appellant. The court appends the following explanation to the bill: "I was at the time busily engaged with some duty, and failed to observe said Simpson sitting with or talking to the jurors selected to try the case, and when defendant's counsel made his objection to me and saved his exception in the matter the said Simpson was gone, and I saw no one sitting with or talking to the jurors or any of them; and I immediately had an officer placed with the jurors selected to prevent any one speaking to the jurors, and from the affidavit of W. J. Simpson, and the juror Rackley, with whom he conversed, which is attached, it does not appear that such conversation had any reference to any facts or anything about the case on trial that could prejudice the rights of defendant." Guy Mitchell, Esq., attorney for appellant, makes affidavit to the facts as detailed in the bill. The affidavit of Simpson is substantially as follows: "On last Thursday, during the selection of the jury in the Sam Stiles case, I was summoned as talesman therein; that upon coming into the courthouse before the talesmen were sworn in, and not knowing that any portion of the jury had been selected or sworn, I saw F. M. Rackley sitting in the jury box, walked over to him, and sat down, and shook hands, and said, 'Howd'y do?' Rackley laughed, and said, 'This is our box;' and I replied, 'Yes.' He said, 'But you are not taken.' I replied, 'Neither are you yet.' He said, 'Yes, I am.' I then got out of there as quick as I could. The case on trial was not mentioned nor any facts connected with it, nor was any other or further conversation had than that above stated." The juror Rackley states in his affidavit that, "after I and five others had been sworn as jurors, W. J. Simpson came into the court room, walked to the jury box, and shook hands with me. I remarked to him, 'This is the jury box.' He replied, 'Yes.' I saw that he did not understand what I meant, and then I said to him, 'We are on this case.' He then immediately got up and left. This was all that took place between us. The case was not mentioned otherwise than as above stated, and the above statement of what was said between us is substantially correct."

Appellant in his argument and brief strenuously insists that this is a separation of the jury, and cites the case of *McC Campbell v. State*, 37 Tex. Cr. R. 607, 40 S. W. 496, in support of his contention. Without discussing that case, in our opinion it is not applicable to the facts here, inasmuch as in that

case there was a total separation of the jury. Here five or six jurors were sworn and impaneled, and were seated in the box in the presence of the court. By accident the talesman Simpson entered the jury box, and the conversation detailed occurred. There is no possible injury resulting to appellant by reason of this. In *Woodson v. State* (Tex. Cr. App.) 51 S. W. 918, it was shown that after defendant had selected a part of the jury, and while the sheriff was summoning talesmen, the juror Gay asked permission of the court, and was permitted to leave the jury box for a short time. This was before the jurors were sworn, and before the panel had been completed. The court held this was not error. In this case it appears that the jurors had been sworn, but the panel had not been completed. Clearly, there was no separation, nor was there any injury or probable injury to the rights of appellant. However, we would suggest, although there appears to be no statute regulating the management of the jury prior to the completion of the panel, that the same rules should be observed in reference to their separation and in reference to preventing conversations with outside parties as has been laid down by this court in a long line of authorities with reference to the jury after the impanelment is completed.

Without reviewing the charge of the court in detail, we hold that it is correct.

The only other insistence that we deem necessary to notice is the alleged insufficiency of the evidence, appellant insisting that the accomplice is not corroborated. Concede, as appellant says, that the wife of deceased was an accomplice, aiding, advising, and assisting defendant in the perpetration of the crime, still her evidence is abundantly corroborated by circumstances clearly showing that defendant and no one else committed this crime. The jury have seen fit to inflict the death penalty upon appellant. The evidence shows a cruel lying-in-wait assassination, and the punishment inflicted by the jury is commensurate with the dastardly crime committed.

The judgment is affirmed.

CONNELL v. STATE.

(Court of Criminal Appeals of Texas. May 20, 1903.)

MURDER — CONTINUANCE — ABSENT WITNESS — MATERIALITY OF TESTIMONY — IMPANELING OF JURY — DEFENDANT'S EXHAUSTION OF PEREMPTORY CHALLENGES — VIOLENT CHARACTER OF DECEDENT — SPECIFIC ACTS — CONFESSION — ARREST — WHAT CONSTITUTES IMPEACHMENT OF WITNESS — RELATIONS BETWEEN PARTIES — COLLATERAL ISSUE — INSTRUCTION — MANSLAUGHTER — ADEQUATE CAUSE.

1. In a prosecution for patricide the state proved that immediately after the fatal assault accused said, on some one starting to give decedent whisky, "God damn it, give it to him straight; he is used to it." Accused desired the testimony of an absent witness that he and decedent were in the habit of using rough language in ordinary conversation between each other,

which did not show animus. This witness was not present at the assault. *Held*, that a continuance was properly refused.

2. On a motion for a change of venue of a murder prosecution witnesses from every section of the county were examined, 27 of whom testified for accused that prejudice existed against him, and 22 for the state that he could have a fair trial. *Held*, that a refusal of the motion was not an abuse of discretion.

3. On the impaneling of a jury on a murder prosecution the state accepted the twelfth juror, and defendant's counsel said, "Defendant takes the juror." *Held*, that error in overruling a challenge for cause to a previous juror, compelling defendant to exhaust his peremptory challenges on him, was not ground for reversal, it not appearing that a juror in any degree disqualified was forced on the defendant.

4. In a prosecution for patricide, evidence of specific violent assaults by decedent on members of his family, which were not connected with the homicide, are inadmissible to prove his dangerous character.

5. The doctrine of the admissibility of evidence of decedent's character as a vicious man, to show who was the aggressor, does not apply where the evidence concerning the homicide is of a positive character, and there is a mere conflict of witnesses as to the particulars of the difficulty.

6. In a prosecution for homicide, evidence that decedent in his altercations with other persons would never admit that he was wrong is inadmissible.

7. In a prosecution for patricide accused proved that the decedent, the day before the homicide, cursed his mother, and threw a lamp at her. He then offered to prove by the mother that this was no unusual conduct, the purpose being to show that this incident did not occasion the killing. *Held*, that the evidence was inadmissible.

8. In a prosecution for patricide a witness is properly allowed to refresh his memory by a copy transcribed from his stenographic notes taken on a former hearing.

9. On learning of a patricide, two deputy sheriffs, known to accused to be such, went to the residence of the parties to investigate, and make an arrest if the facts justified it. One went to the front of the house and the other to the rear, where he found accused, and asked him what the trouble was about. Accused replied that it was not anything much; that he was sorry they had heard of it, and that he supposed "they wanted a little bond." He then said, "Let us go to the front gate, where Mr. S. [the other deputy] is." When they reached the front gate, where they found S., the first deputy asked accused several times to tell him how the difficulty occurred, and elicited a statement. Accused was not told that he was under arrest, but he would not have been allowed to depart. He was not formally arrested until after the statement. *Held*, that it did not appear that accused was conscious of being under restraint, so as to render his statement inadmissible as a confession.

10. In a prosecution for patricide accused's witness testified that the feelings between accused and decedent had always been kind. On cross-examination she testified that she had never heard accused make any threats against his father, and that she had never heard him say, "If the old man curses me again, I will cut his guts out." She was then asked whether she did not have a conversation with W., in which, in response to an inquiry as to how the trouble arose, she replied that accused made the above threat. She answered, "No." *Held*, that a predicate for impeachment was sufficiently laid.

11. The witness having testified that the feelings between the parties had always been kind,

the impeachment was not objectionable as on a collateral issue.

12. An instruction that the impeaching testimony was not admitted as going to accused's guilt, but solely as affecting the credibility of his witness, sufficiently guarded its admission.

13. In a prosecution for patricide, an instruction that, because accused may have killed his father, he was not deprived of his legal rights in regard to self-defense, in connection with the presumption of innocence and reasonable doubt, is sufficient, and it is not necessary to add that it deprives accused of none of his legal rights as between manslaughter and murder in the second degree.

14. In a prosecution for patricide the state's evidence showed that decedent drove to the fence in front of his house, and called his younger son to get mail he had brought from town. Accused replied that the younger son was sick, and that he would come and get it. He went to the gate, and asked decedent why he had stayed out the night before, and, on the latter replying that he had stayed with Y., called him a "damned liar." Decedent then struck at him, and accused cut decedent with a knife, inflicting a mortal injury. Accused's evidence showed that decedent refused to reply to accused's question, saying it was none of his "damned business." Accused replied that he thought it was. Decedent said, "You are a damned lying son of a bitch," and started toward the accused, who was stooping down to pick up the mail. As accused rose up, decedent grabbed him, and struck at him with a knife. Accused then drew his knife, and struck a blow in order to release himself, inflicting the injury. *Held*, that the facts did not require an instruction that accused must have exerted every other means besides retreating before he was authorized to kill in self-defense.

15. In view of accused's evidence, an instruction that he was not bound to retreat did not impinge upon his right of self-defense.

On Rehearing.

1. In a prosecution for homicide, an instruction on manslaughter that an assault and battery causing pain "would or might" constitute adequate cause, and that, if decedent made an assault on accused, producing pain, which alone or in connection with the other circumstances in evidence was capable of creating in the mind of a person of ordinary temper such a degree of anger, etc., as would render the mind incapable of cool reflection, and if such a state of mind was created in accused the same "might constitute adequate cause in the opinion of the jury," is erroneous, the statute providing that such facts shall constitute adequate cause.

2. The jury having by a verdict of guilty shown a disbelief in accused's theory of self-defense, and his only remaining reply to state's accusation of murder being a plea of manslaughter, the instruction was prejudicial.

Brooks, J., dissenting in part.

Appeal from District Court, Bell County; Jno. M. Furman, Judge.

John Connell was convicted of murder in the second degree, and appeals. Reversed.

J. B. McMahon, Winbourn Pearce, and Henderson & Freeman, for appellant. Howard Martin, Asst. Atty. Gen., J. B. Durrett, and W. W. Hair, Dist. Atty., for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of 25 years; hence this appeal.

The evidence shows that deceased was the

father of appellant, the family consisting of deceased, his wife, two grown daughters, a minor son, and appellant. Their home was situated in the suburbs of Belton. Appellant was an unmarried man, about 30 years of age, and had lived with his father all of his life. Deceased left his home on Thursday morning, and did not return until Friday evening, when the homicide occurred. The evidence shows that deceased drove home in a buggy, and called his younger son, Darling, to get the mail he had brought from town. Appellant replied that Darling was sick, and that he would come and get the mail. He went out to the gate for the mail. The altercation occurred which resulted in the homicide, deceased being on the outside of the wire fence and appellant on the inside. During the altercation appellant stabbed deceased in the left arm with a dirk knife, the knife also cutting through the vein and striking a rib. The knife penetrated an artery, and deceased died from the loss of blood. The theory of the state was that appellant bore some grudge against his father, and was angry because deceased had stayed away from home over night; that when he drove up home, and appellant came out, he asked him why he had stayed out the night before, and deceased said he had stayed all night with his friend Yarbrough. Appellant called him a damn liar, and deceased then hit at or struck him, and appellant then cut deceased with his knife. Appellant's theory was that he went out to where deceased was to get the mail, and as he walked up to the fence he asked deceased where in the hell he had stayed last night. Deceased replied it was none of his damn business. Appellant replied that he thought it was, and to this deceased said, "You are a damn lying son of a bitch," and then started towards appellant, who was in the meantime stooping down picking up the papers which deceased had thrown over in the yard. Just as appellant raised up, deceased grabbed at him with his left hand, caught him in the collar, and struck at appellant with a knife; and appellant then drew his knife, which he had in a leather strap buckled at his belt, and struck deceased a single blow, in order to get loose from him; that he cut deceased in order to prevent him from cutting himself. This is a sufficient statement of the facts in order to discuss the assignments of error.

Appellant made a motion for continuance on account of the absence of Mrs. McDonald, who had been subpoenaed, but at the time of the trial she was shown to be sick, and unable to attend court. Appellant alleged that he could prove by said witness that she was well acquainted with the family of deceased, and the conduct and general bearing of deceased and his son (appellant) toward each other, and that they were in the habit of using rough language in ordinary conversation between each other, which did not show any animus. This testimony was par-

ticularly desired on the part of defendant in order to qualify and explain the meaning and animus of appellant toward his father immediately after the difficulty, when the expression was proven on the part of the state to the effect that when some one started to give deceased some whisky and appellant said, "God damn it, give it to him straight; he is used to it." "That the witness was present, and heard this statement. That said witness, knowing the habits and conduct of appellant and deceased toward each other, would testify that this had no particular meaning indicating malice or ill will of appellant toward his father." We do not believe that said testimony was material, even if it be conceded that it was admissible. It is not pretended that said witness had ever been present on any previous occasion when deceased and appellant had a difficulty, and the testimony here offered was in connection with a difficulty. The parties had just had a fight, and deceased had been stabbed with a knife by appellant, and a number of witnesses were present on the occasion when the expression was used, and any witness who was present on the occasion when the expression was used would have been qualified to state the tone of voice that accompanied the expression, and the circumstances attending it. It does not occur to us that a witness who may have known how appellant and his deceased father ordinarily treated each other would have been qualified to testify as to how this expression was used, whether angry or not, any more than another witness who was not so familiar.

Appellant made a motion to change the venue on the ground that so great a prejudice existed in Bell county against appellant as that he could not expect a fair and impartial trial. This was controverted on the part of the state. Some 50 witnesses were examined, the witnesses covering almost every section of Bell county. On the part of appellant some 27 witnesses testified that the matter had been talked of in the county, and it was generally known that appellant had killed his father, and that prejudice existed against him on that account to such an extent as that he could not expect a fair trial in said county. Some of the witnesses stated that the people said he ought to be hanged for the offense, and others that he ought to be punished severely. On the part of the state some 22 witnesses rebutted appellant's testimony, and stated that there was no prejudice in the county against appellant, and that he could get a fair and impartial trial. On this testimony the court overruled appellant's application to change the venue, and proceeded with the trial, which resulted in a verdict of murder in the second degree, the penalty assessed being confinement in the penitentiary for a term of 25 years. We take it that the matter of change of venue was within the sound discretion of the court, and the court was justified in finding against

appellant on that issue. *Renfro v. State*, 42 Tex. Cr. R. 393, 56 S. W. 1013. The writer of this opinion believes that this discretion can be tested by the result reached in the trial of the case, and, looking at that result, it was demonstrated appellant could get a fair and impartial trial in said county.

Appellant contends that this cause should be reversed on account of the action of the court in the impanelment of the trial jury. The bill of exceptions shows that the juror Bailey (who was one of the veniremen) on his voir dire stated that he had heard appellant had killed his father, and that he was indicted for said offense, and that the burden of proof would be on defendant to show his innocence of said offense. This juror, on his further examination by the state and by the court, qualified this statement, and said, in effect, that he did not mean to say appellant would have to prove his innocence before he would acquit him, and that he could try him fairly and impartially on the evidence, and give him the benefit of the reasonable doubt, as he would any other person. This juror was challenged for cause by appellant, and the challenge overruled, when appellant peremptorily challenged him. As to the juror Kuschke—who stated, in effect, as did the juror Bailey, except that he did not qualify his statement to the same extent as did Bailey—the court held him to be a competent juror when challenged by appellant for cause, and appellant then exercised on him a peremptory challenge. At the time this challenge was exercised some eight jurors had been impaneled, and appellant did not exhaust his peremptory challenges. Subsequently, when the tenth juror was impaneled, appellant had exhausted his peremptory challenges, when the court reconsidered his ruling with reference to the juror Kuschke, holding he was disqualified, and gave appellant another challenge. This additional challenge appellant exercised, and the jury was afterwards completed, appellant having exhausted his peremptory challenges before it was completed. The bill does not show that any objectionable juror was afterwards placed on the jury. The court certifies that when the state had accepted the twelfth juror “defendant’s counsel simply said, ‘Defendant takes the juror.’” The rule being that, before an appellant can avail himself of the action of the court holding a juror was qualified when he was not, and thus forcing appellant to challenge said juror, the bill must show some objectionable juror was forced on appellant. We do not understand by this that the jurors forced on appellant must be subject to a peremptory challenge, but their examination must show some degree of disqualification, as, to wit, the formation of some sort of opinion as to the guilt or innocence of appellant, though not a disqualifying opinion. See *Hudson v. State*, 28 Tex. Cr. App. 323, 13 S. W. 383; *Holland v. State*, 31 Tex. Cr. R. 345, 20 S. W. 750.

For other authorities see *White’s Ann. Code Cr. Proc.*, art. 873, § 750.

By bills of exception Nos. 6 and 8 appellant proposed to prove by Susie Connell and Mrs. Connell specific acts of violence and ill treatment on the part of deceased toward other members of the family than appellant. Among other things, it was proposed to prove by Susie Connell that deceased had assaulted her with a knife on one occasion, and appellant never offered to interfere; and by Mrs. Connell that on one occasion deceased drew a knife on her, and threw it at her, and hit her on the head, and frequently assaulted her and her daughters. Unless these specific acts of violence were directly involved in the alleged homicide, and grew out of it, they were not provable. This was not like the case of *Childers v. State*, 30 Tex. Cr. App. 160, 16 S. W. 908, 28 Am. St. Rep. 899, invoked by appellant. In that case the parties were strangers to each other, and appellant was not acquainted with the general character and reputation of deceased; but he did know the specific act or declaration of deceased with regard to himself, which was provable. In this case the parties were well acquainted with each other, and if deceased bore the reputation of being a dangerous man, and if that fact had any bearing on the case, it could be proved by evidence of general reputation; the general doctrine being that specific acts of violence, and the details thereof, are not admissible in evidence. *Hefington v. State*, 41 Tex. Cr. R. 315, 54 S. W. 755. Besides this, as shown by the court, all testimony offered was admitted as to the state of feeling between deceased and defendant and their conduct toward each other; and it was further admitted that, in the opinion of the witness, deceased when at home, and in his spells of anger, was a man of violent and dangerous character among the members of his family. Certainly this character of testimony was more valuable to appellant than testimony of specific acts, for, as we understand from the bills, no evidence of any specific act resulting in injury to any member of the family was offered. It is a little remarkable that a man could have a dangerous character in his family, who had lived with his family for from 20 to 30 years, and had never inflicted any serious injury upon any member of the family. The most, perhaps, to be shown, was that he once threw a knife at his wife, and hit her on the head, and no particular injury was sought to be shown. Aside from this, we fail to see what part of the difficulty in which the homicide was committed this character of testimony would serve to illustrate. No threats had been proven by deceased against appellant. We do not understand the doctrine of being a dangerous man to apply, in a conflict of testimony, in order to show who was the aggressor. Here the testimony was of a positive character, and a mere conflict of witnesses as to the particulars of the difficulty;

the state's testimony showing that deceased, when abused and cursed by appellant, struck him with his fist, whereas appellant's testimony indicates that he caught him by the collar with one hand, and assaulted him with a knife in the other. We fail to see how the specific acts that appellant proposed to show—at most only indicating a turbulent, quarrelsome, and overbearing disposition—were calculated to shed any light on this difficulty.

Appellant proposed to prove that in all of deceased's disputes and altercations with other persons he would never admit that he was in the wrong, but would always claim that he was in the right. We believe that this characteristic attends most people, but it is no reason why the same should be admitted in evidence.

Appellant, after showing by Mrs. Connell that deceased cursed her on Wednesday night (or, more particularly, on Thursday morning after midnight), and threatened to throw a lamp at her, and that this was in the hearing of appellant, who was in the next room, offered to prove by Mrs. Connell that this was no unusual conduct on the part of deceased. This testimony was offered to show that this incident did not cause the difficulty in which deceased was slain; that is, appellant had introduced this specific act of ill treatment of deceased towards appellant's mother, and then proposed to eliminate it by showing it was not the cause of the difficulty, and had no bearing on it. If appellant was not satisfied with the proof of this specific act he might have made a motion to have the court eliminate and strike it out. But we do not concur in the view that he could introduce this act, and then undertake to show that it had no bearing on the case. Besides, the court permitted appellant to prove any words or conduct between defendant and deceased, and he was also permitted to prove by two members of his family that deceased, when at home among his family, and in one of his spells, was a violent and dangerous man. As stated before, we do not find in the testimony regarding this homicide any particular phase of case in which the disposition of deceased toward other members of his family would shed any light. The only essential difference between the testimony of the state and defendant as to what happened during the difficulty is whether deceased assaulted appellant with his hands and fists, merely, in the first instance, or drew a knife on him. We fail to see how the fact that deceased threw a lamp at his wife a few nights before the homicide, and that this was not unusual conduct on his part as to members of his family, would serve to illustrate the evidence in this case, or strengthen appellant's testimony that deceased assaulted him with his knife instead of his fist.

What is said with reference to this bill also applies to appellant's thirteenth bill of exceptions. In this bill it was shown by Mrs.

Connell that deceased frequently became enraged at defendant, and would attack him with knives, axes, or anything else at hand. Appellant then proposed to prove deceased's conduct was the same towards other members of the family. It will be seen from this bill that the fullest latitude was given appellant to show specific acts of violence by deceased towards defendant during 30 years in which he lived with his father and under his own roof. While the admission of this testimony was certainly liberal towards defendant, it afforded no reason why the record should be incumbered with other matters having no legitimate bearing upon any question in the case. If defendant was in any danger at all from an attack being made by deceased, it was an actual danger, and not apparent. But, if the testimony would serve any purpose, it occurs to us that it would tend to show that, even if deceased had a knife at the time, appellant must have realized that he stood in no danger from it, for if, during all the years, deceased had so frequently assaulted appellant with knives and axes without any injurious results, it would indicate that on this occasion there were no reasonable grounds for any apprehension of danger.

It is contended that the court committed an error in permitting a state's witness to refresh his memory by a copy transcribed from his stenographic notes taken on a former hearing. The nature of the testimony is not given; but, if it were, there would be no error in this action of the court.

Appellant strenuously urges that the court committed an error in allowing the state's witness Ike Grubbs to testify as to an alleged confession of appellant, on the ground that appellant had been arrested at the time, and had not been cautioned. The bill shows, in effect, as follows: That said Grubbs was deputy sheriff, and that, after he learned of the difficulty, he, in company with Sparks, another deputy sheriff, both known by appellant to be such, went to the house of deceased for the purpose of making an investigation, and an arrest if the facts justified it. They reached the premises after night, and after deceased had been removed from the place where he had been cut into the house. That he and Sparks went in to find defendant. That he went around the house the back way, Sparks going the front way. That he found defendant somewhere about the back gallery, and asked him what the trouble was about. Defendant replied that it was not anything much; that he was sorry they had heard of it; and stated that he supposed they wanted a little bond. After this he stated to defendant, "Let's go to the front gate, where Mr. Sparks is." When they reached the front gate, where they found Sparks, witness asked defendant several times to tell him how the difficulty occurred. Defendant at first refused, saying it did not amount to anything, but finally made the following statement: "His father came home

that evening, and drove up on the north side of the house, and called to his little brother to come and get the papers. Defendant said that he answered deceased that his little brother was sick, and that he would come and get them. That he walked out and went up to the fence, and asked his father, 'Why the devil did you lie out last night?' or, 'Why the devil didn't you come home last night?' or something like that. And deceased said, 'It is none of your business, you damn son of a bitch,' and struck him (defendant). Deceased drew his knife, and started over the fence at defendant, and while deceased was upon the fence defendant cut him, but that it did not amount to anything; just the scratch of a penknife." In this connection the witness stated he did not tell defendant he was under arrest, but would not have allowed him to depart; that he did not arrest him until Sparks had gone into the house and made inquiries as to the condition of deceased; that the reason they went around the house when they first went there was that they saw some one leaving, and did not know but that it might be defendant, and they did not want him to leave until they had investigated, as they might want to arrest him. Appellant objected to this testimony on the ground that defendant was under arrest at the time, and had not been warned that any statement he might make could be used against him. It has been held that a statement or confession of an accused cannot be used against him, although he has not been formally arrested by the officer, if he believes himself under arrest at the time he makes the statement. On the contrary, although the officer would not permit a person to depart, yet, if a party does not reasonably believe himself to be under arrest, his confession can be used against him, though he has not been warned; the doctrine being that, if the testimony indicates the party reasonably believes or is conscious that he is under arrest, a confession made while under arrest, unless he has been warned, under the statute cannot be used against him. *Nolen v. State*, 9 Tex. App. 419; *Craig v. State*, 30 Tex. Cr. App. 619, 18 S. W. 297; *Jones v. State*, 71 S. W. 962, 6 Tex. Ct. Rep. 691. The court below held that the circumstances narrated in this bill did not indicate that appellant at the time he made the statement believed he was under arrest. In *Jones v. State*, supra, the facts were much stronger than in this case. There defendant went to the sheriff for the purpose of surrendering, and had given his pistol to the sheriff before he made the statement. In *Craig v. State* the statement of the circumstances, as found in the opinion, shows that the officers, three in number, on horseback, one of them armed with a gun, were on their way to appellant's house for the purpose of arresting him. When within 200 yards of the house they

saw him coming along the road leading to Smith's place. They rode up and spoke to him. Defendant stopped. They did not make any arrest or tell defendant he was under arrest, but they stated that they would not have permitted him to leave if he had attempted to do so. At this point appellant made a confession. How it came about is not stated. The court holds that the circumstances did not show that appellant was conscious of an arrest. In *Nolen's Case*, supra, the officers Walk, Tomlinson, and Caruthers, being in pursuit of Nolen, reached Camp's house between daylight and sunrise. Nolen was on the gallery, dressed, and putting on his boots. One of the officers passed to the rear of the house and the other two stopped on the gallery where Nolen was. It seems that the officer who passed to the rear got the saddle bags of Nolen, which contained his pistol and a sack of money, securing the same. It does not appear that Nolen knew they had secured his pistol and money. At this juncture one of the officers accosted Nolen, telling him that they were in pursuit of stolen horses, and wished to examine his caballada, to which he made no objection. The officers made no formal arrest, but stated that they would not have allowed Nolen to go away; that they regarded him as a prisoner, but did not think he so regarded himself. The officers were armed and Nolen was unarmed. While there, a young man came by, and asked Nolen to come and look at some mules, to which he replied that he did not have time to go that trip, as he had to go with the parties to his caballada. Under this state of facts the lower court held that Nolen did not believe himself under arrest. However, the Court of Appeals took a different view of the question, holding that it was not important that defendant should have been informed in so many words that he was under arrest; that the facts disclosed by the evidence showed very clearly that the pursuing party at the time they came upon Nolen showed that they had secured him, and would not have permitted him to escape if he had attempted; and that his confession subsequently was not admissible against him, as he was unwarned. We do not believe the facts in this case are as strong as in the *Nolen Case*. True, the officers were known by defendant to be such, and as soon as he met Grubbs he told him he supposed he wanted him (defendant) to give a little bond. However, the officer stated that they had come to investigate, and merely asked him to accompany them to the front gate where Sparks was. After going there in company with the officer, and after being asked two or three times about the difficulty, he at length made the statement. We believe the judge below was authorized to find, as he did, that appellant was not conscious of being under restraint. See *Holmes v. State*, 32 Tex. Cr. R. 361, 23 S. W. 687;

Gay v. State (Tex. Cr. App.) 49 S. W. 612; Stayton v. State, 32 Tex. Cr. R. 33, 22 S. W. 38.

Appellant questions the action of the court permitting the witness J. C. Yarbrough to contradict and impeach Mrs. Jane Connell. In order to present this matter, we copy the bill of exceptions in full, as follows: "After the witness Mrs. Jane Connell had testified in chief on behalf of defendant, she testified as follows, in answer to the following questions propounded to her on cross-examination by the district attorney (the defendant having made no inquiry, and the witness having given no testimony concerning the matters mentioned herein below as a part of her direct examination, except witness on direct examination had testified that the feelings between defendant and deceased had always been kind): 'I never heard John (defendant) make any threats against his father. I know J. C. Yarbrough. He stayed with my husband, after he was sent for, until the next morning; sat up all night, and went home the next morning; and he came back, and was there the next night, and was there when he died, I think. There is a little back hall in our house, used as a dining room.' Questions by the state: 'I will ask you if you did not have a conversation with Mr. Yarbrough about this matter, about 10 or 11 o'clock the night your husband was cut, in that place there? Didn't he call you to one side, and ask you how this trouble came up, and what caused the trouble, and didn't you reply, 'John said if the old man cursed him again, I will cut his guts out?'" To which the witness answered: 'No, sir; Mr. Yarbrough and I sat there.' Witness further testified that she had never heard John make any such remark or any such statement. And afterwards the state introduced Mr. Yarbrough, and asked him the following questions: 'State to the jury whether or not, on the first night after Mr. Connell was cut, about 10 or 11 o'clock, in the back hall or dining room at Mrs. Connell's home, you and she were there together, and whether or not in substance you asked her, "What caused this trouble Jane?" or, "What is this trouble about?" and whether or not she, in substance, replied, "John said, 'If the old man curses me again I will cut his guts out.'" Defendant objected to the admission of said testimony, because (1) no sufficient predicate had been laid for the admission of the testimony as impeaching evidence; (2) no predicate can be laid for the introduction of such testimony as impeaching evidence, for the reason that it is upon a collateral and immaterial issue; (3) the testimony offered is hearsay; (4) the said testimony is of a nature reasonably calculated to injuriously and unduly prejudice defendant in this case before the jury; (5) because said testimony is offered to contradict an original inquiry which the state made of the witness Jane Connell, and the witness with respect

to said inquiry was a witness for the state, and the state, having made such inquiry, will not be permitted to contradict the witness' answer. Each and all of defendant's objections were overruled, and said evidence was admitted, and said witness was permitted to testify over defendant's objections, as aforesaid, that the said witness Jane Connell said to him, in the conversation at the time and place before mentioned, as follows: 'John (meaning defendant) said to me (meaning Mrs. Jane Connell), "If the old man (meaning deceased) curses me again, I will cut his guts out."' And defendant at the time excepted in open court to the overruling of his objections to the admission of said testimony, and this, his bill of exceptions, is now allowed. * * * Approved with this qualification: At the time the evidence was admitted, I stated to the jury that this testimony was not admitted as going to the guilt of the defendant, but solely as going to the credibility of Mrs. Connell as a witness, and further so charged the jury in the general charge."

It will be perceived from this bill that Mrs. Jane Connell was an important witness for appellant, and, among other things, she had testified on behalf of appellant that the feelings existing between deceased and defendant had always been kind. Mrs. Connell on her cross-examination testified that she had never heard John (defendant) make any threats against his father, and she also testified that she had never heard John say, "If the old man curses me again, I will cut his guts out." She was then asked to state to the jury whether or not on the first night after Connell was cut, about 10 or 11 o'clock, in the little back hall of the house, used as a dining room, she did not have a conversation with Yarbrough, in which he asked her how the difficulty came up, or what caused the trouble, and she was asked to state if she did not reply that "John said, 'If the old man curses me again, I will cut his guts out.'" To which witness answered "No." Yarbrough was then called, and testified that Mrs. Connell did make the statement inquired about to him; that is, that John said, "If the old man curses me again, I will cut his guts out." The question as presented is, was this legitimate testimony to impeach the witness? for, if the witness could be impeached upon this character of evidence, we think the predicate was sufficiently laid. Was it upon a collateral and immaterial issue? Observe that the witness Mrs. Connell had testified for the defendant that the feeling between deceased and defendant was of a kindly character. In contravention of this, it was permissible for the state to prove by her, if it could, that she had stated to some one else that the feeling between them was of an unfriendly character. Could the state, instead of proving the fact in this general way, show by her that she had stated some incident between them in contravention of her testi-

mony; that is, some occurrence indicating an unfriendly feeling? We think so, though some of the authorities hold that the impeachment must be direct, and not of an inferential character. *People v. Collum*, 122 Cal. 186, 54 Pac. 589. But the further question arises, if she denies the imputed statement, can she be contradicted upon it? This involves the question whether or not the impeachment is upon a collateral issue. Observe the witness has testified for the appellant to a material fact, to wit, the state of good feeling between defendant and deceased; that is, that he bore no malice against deceased. Now, she is asked if she had ever stated a fact in contradiction of her testimony. This she denies. Now, could the state put a witness on, and show that she did make such statement? Evidently this can be done. Why? Because the effect of the contradiction is to dispute her testimony upon a material fact; that is, the state of feeling between appellant and deceased had always been kind. Appellant has cited us to the cases of *Drake v. State*, 29 Tex. Cr. App. 270, 15 S. W. 725; *Gill v. State*, 36 Tex. Cr. R. 596, 38 S. W. 190; *Williford v. State*, 36 Tex. Cr. R. 415, 37 S. W. 761; *Brittain v. State*, 36 Tex. Cr. R. 410, 37 S. W. 758; *Wilson v. State*, 37 Tex. Cr. R. 68, 38 S. W. 610; *Wells v. State* (Tex. Cr. App.) 67 S. W. 1021. The general principle announced by those cases is correct, and in accord with the doctrine here announced; but, in our opinion, none of those cases are applicable to the question here presented. In the *Drake Case* it does not appear that the cross-examination of young Drake was even germane to any matter about which he had testified in chief. He was merely asked on the cross-examination if he had made a statement to a certain party that he knew his father was going to kill Guinn (deceased) before he (witness) left home that morning. This was held by the court to be simply a matter of opinion or belief, not legitimate even in cross-examination, much less as affording the subject for impeachment. If Drake had testified in chief that his father had used on the morning of the homicide some expression to the effect that he felt kindly towards deceased, then on cross-examination he could have been asked if on that very morning his father did not make use of some expression to the contrary as a threat; and on his denial of this, with the proper predicate of person, time, and place, he could have been impeached, and this would have been a parallel case. In *Wells v. State* (Tex. Cr. App.) 67 S. W. 1021, the opinion does not show the character of the examination of the witness Cummings. For aught that appears, he was merely put on the stand by the state in order to lay a predicate for his impeachment. It is said he denied having stated to Pafford that defendant told him the night before the alleged rape that he was going back down to the wagon yard and have carnal intercourse with that woman,

and thereupon Pafford was placed on the stand by the state, and he testified that Cummings did make the statement to him, appellant not being present. Of course, this was simply hearsay, and hearsay upon a collateral matter about which the witness could not be impeached. If the bill had shown that Cummings testified for the defendant, and he gave evidence of some conversation with appellant in regard to the prosecutrix beneficial to appellant, then he could have been cross-examined as to a different version of the matter given by him to some named person, and, if he had denied this, he could have been impeached; and thus we would have had a parallel case to the one at bar. It is not necessary to discuss the other cases, as the principle announced by them is conceded. The cases discussed are those claimed by appellant to have a peculiar bearing upon this question in his case. As heretofore stated, we believe the impeaching testimony was admissible, and that the court sufficiently guarded and limited it in the charge.

Exception was reserved to certain remarks of the district attorney pending the trial, and while the special venire was being impaneled, and during the argument of the case. We are inclined to doubt the propriety of some of these remarks, but, as to those which the court was not requested to instruct the jury, they were not of the character, without such exception, to authorize a reversal. The other remarks, we think, were sufficiently limited by the court's charge. In this connection the twenty-seventh paragraph of the court's charge, in regard to the impeachment of Mrs. Connell by the witness Yarbrough, we think was a proper enunciation of the law.

We do not think the criticism of the court's charge on manslaughter is well taken. It also occurs to us that the court's instructions as to how the jury were to regard the relationship existing between deceased and appellant was correct. They were charged that, because appellant may have killed his father, that deprived him of none of his legal rights in regard to self-defense, in connection with the presumption of innocence and reasonable doubt. It was not necessary that the court should go further, and tell the jury that it deprived appellant of none of his legal rights as between manslaughter and murder in the second degree.

We do not think the facts of this case required of the court a charge to the effect that appellant must have resorted to every other means besides retreating before he was authorized to act in his self-defense. Nor did the charge given by the court that he was not bound to retreat impinge upon his right of self-defense. If appellant's testimony is true, the only means he could have resorted to, except those adopted, was to retreat; and this the court expressly told the jury he was not required to do. Nor do we believe it was incumbent on the court to instruct the jury as to how they were to regard the alleged

dying declarations of deceased; that is, to determine whether or not the same were made in view of approaching death. We do not think the testimony raises this issue. Indeed, the alleged declarations were admissible both as such and as a part of the *res gestæ*.

We have examined the requested charges, and believe all of those which were required to be given were embodied in the court's general charge; and, as to the others, they were not called for.

There being no errors in the record, the judgment is affirmed.

On Rehearing.

(June 24, 1903.)

This case was affirmed at a former day of this term, and now comes before us on motion for rehearing. In the original opinion, in passing on the court's charge on manslaughter, we merely said that it was not subject to the criticism of appellant's counsel. But since that time, on his motion for rehearing, appellant has called our attention directly to his bill of exceptions on that subject, and in the argument he has strongly urged that the case should be reversed because of a misdirection to the jury in the court's charge on manslaughter. We quote from the charge as follows (subdivision 4, defining adequate cause): "An assault and battery causing pain would or might constitute adequate cause." And again, in the latter portion of section 21: "You are further instructed that, if you find from the evidence that at the time of the alleged difficulty the deceased, John Connell, had made an assault upon defendant producing pain, and that such assault, either alone or considered in connection with all the other facts and circumstances in evidence, were capable of creating in the mind of a person of ordinary temper such a degree of anger, rage, sudden resentment, or terror as would render the mind incapable of cool reflection, and if you find the same created in the mind of defendant such condition at the time of the killing, the same might constitute adequate cause in the opinion of the jury." The contention of appellant is that the law makes an assault and battery causing pain adequate cause, and that said charge failed to tell the jury as a matter of law that same was adequate cause, but informed them that such might be adequate cause, at their option. We understand it to be the settled law in this state that wherever the evidence raises an issue it is the duty of the court to instruct the jury upon that issue, and, if the court had any doubt as to whether a charge on manslaughter should be given in the particular case, the doubt should be resolved in favor of the accused, and the charge be given. *Halbert v. State*, 3 Tex. App. 656; *Hill v. State*, 5 Tex. App. 2; *Robles v. State*, Id. 346; *Williams v. State*, 7 Tex. App. 396.

When the court is required to give a charge on manslaughter, of course the same should be given fully and fairly; that is, it must be an affirmative, direct, and pertinent application of the law of manslaughter to the facts of the particular case. *McLaughlin v. State*, 10 Tex. App. 340; *Neyland v. State*, 13 Tex. App. 550. Where the adequate cause proven is one of the statutory causes—as assault and battery by deceased causing pain or bloodshed—it is incumbent on the court to present this issue directly to the jury, and to inform them that it is adequate cause, because the statute makes it so. *Hill v. State*, 8 Tex. App. 142; *Foster v. State*, Id. 249; *Warthan v. State* (Tex. Cr. App.) 55 S. W. 55. In *Foster's Case*, supra, it was held that, if the court coupled pain and bloodshed the charge would be reversible error because either one was sufficient, and it increased the burden on defendant when a charge was given in the conjunctive instead of in the disjunctive. In the *Hill* and *Warthan Cases*, supra, it was distinctly held that, where appellant's defense of manslaughter was based on an assault causing pain or bloodshed, it was the duty of the court to charge directly upon that issue, and to instruct the jury that such an assault was, as a matter of law, adequate cause. In this case there was evidence of a blow struck appellant by deceased before he made the attack on deceased which caused his death; and under this view the learned judge who tried this case evidently felt the necessity of instructing the jury on that subject. He told them, as indicated above, not that an assault causing pain was or would be adequate cause, but he told them that it might be. And again, in applying the law to the facts he emphasized this view by telling them if they found from the evidence that deceased made an assault upon defendant which produced pain, and that such assault, in connection with all the other facts and circumstances in evidence, was capable of creating in the mind of a person of ordinary temper such a degree of anger, etc., as would render the mind incapable of cool reflection, and that same did create in the mind of defendant such condition, that the same might constitute adequate cause in the opinion of the jury; thus leaving it optional with the jury, after they had found all of the other conditions to exist in the mind of defendant, if they found that a blow was inflicted on him by deceased which caused pain, to find, as they might see fit, whether or not the blow so inflicted was adequate cause. This, as we understand it, is directly in the face of the statute, which does not leave it optional with the jury when they find that a blow was inflicted which caused pain, and in that connection finding all the other elements, to then determine whether or not, in their opinion, such assault was adequate cause. If appellant was entitled to a charge on manslaughter at all, he was entitled to an affirmative

charge on that subject fully and fairly presenting his defense. The charge, in question, however, in our judgment, was calculated to cut him off from his defense of manslaughter altogether, inasmuch as it left it to the jury to decide whether or not a cause denominated as adequate cause by the statute was in fact adequate cause. The jury that tried this case evidently did not believe in appellant's theory of self-defense, and his only other defense to the state's accusation was manslaughter; and this charge cited above, which was nowhere else corrected, even if it be conceded that such a flagrant error could be corrected, had the effect to destroy that defense. We have given this question a good deal of thought, and we cannot let this charge stand as a precedent. Nor can we say that it was not calculated to injure his rights. On the contrary, as shown above, we believe that it deprived him of the defense of manslaughter altogether. Accordingly we hold that for this error the rehearing must be granted, and the judgment is reversed, and the cause remanded.

BROOKS, J. I cannot agree with the opinion of the majority of the court on rehearing. The following is the charge of the court on manslaughter:

"Sec. 19. The next lower grade of culpable homicide is manslaughter. Manslaughter is voluntary homicide, committed under the immediate influence of sudden passion, arising from an adequate cause, but neither justified nor excused by law. By the expression 'under the immediate influence of sudden passion' is meant: (1) The provocation must arise at the time of the commission of the offense, and that the passion is not the result of a former provocation. (2) The act must be directly caused by the passion arising out of the provocation. It is not enough that the mind is merely agitated by the passion arising from some other provocation, or a provocation given by some other person than the party killed. (3) The passion intended is either of the emotions of the mind known as anger, rage, sudden resentment, or terror, rendering it incapable of cool reflection. (4) By the expression 'adequate cause' is meant such as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection. An assault and battery causing pain would or might constitute adequate cause, or the existence of any other circumstance or condition which is capable of creating and does create sudden passion, such as anger, rage, sudden resentment, or terror, rendering the mind incapable of cool reflection, is adequate cause. And where several of such circumstances might be found to exist, though no one of them might be sufficient, yet all taken and considered together might, in the opinion of the jury, be sufficient to create in the mind of the party killing the

above condition of sudden anger, rage, or terror, rendering it incapable of cool reflection.

"Sec. 20. In order to reduce a voluntary homicide to the grade of manslaughter, it is necessary not only that adequate cause existed to produce the state of mind referred to—that is of anger, rage, sudden resentment, or terror, sufficient to render it incapable of cool reflection—but also that such state of mind did actually exist at the time of the commission of the offense.

"Sec. 21. Although the law provides that the provocation causing the sudden passion must arise at the time of the killing, it is your duty, in determining that adequacy of the provocation (if any), to consider in connection therewith all the facts and circumstances in evidence in the case; and if you find that by reason thereof the defendant's mind at the time of the killing was incapable of cool reflection, and that said facts and circumstances were sufficient to produce such state of mind in a person of ordinary temper, then the proof as to the sufficiency of the provocation satisfies the requirements of the law; and so in this case you will consider all the facts and circumstances in evidence in determining the condition of defendant's mind at the time of the alleged killing and the adequacy of the cause (if any) producing such condition. And in this connection, you are further charged that, if you find from the evidence that at the time of the alleged difficulty the deceased, John Connell, had made an assault upon defendant producing pain, and that such assault, either alone or considered in connection with all the other facts and circumstances in evidence, were capable of creating in the mind of a person of ordinary temper such a degree of anger, rage, sudden resentment, or terror as would render the mind incapable of cool reflection, and if you find the same created in the mind of defendant such condition at the time of the killing, the same might constitute adequate cause in the opinion of the jury.

"Sec. 22. Now, if you believe from the evidence beyond a reasonable doubt that defendant, with a deadly weapon, or instrument reasonably calculated and likely to produce death, by the mode and manner of its use, in a sudden transport of passion aroused by adequate cause, as the same is herein explained, and not in defense of himself against an unlawful attack reasonably producing a rational fear or expectation of death or serious bodily injury, did cut with a knife and thereby kill John Connell, deceased, as charged in the indictment, you will find defendant guilty of manslaughter, and assess his punishment," etc.

The only criticism of the charge, and the point upon which the case is reversed, is that portion which reads as follows: "An assault and battery causing pain would or might constitute adequate cause." It is true

that the statute makes an assault and battery causing pain or bloodshed an adequate cause; but does it necessarily follow that because the court, through inadvertence put the words "or might" in the long explicit and accurate charge, require a reversal of the case by this court? If so, article 723, Code Cr. Proc., upon which previous errors of trial courts have been held harmless, becomes, under the present ruling, a nullity. I deem it unnecessary to cite various cases where more glaring errors were committed in the charge than here suggested, in which the majority of this court have held the errors harmless in the light of article 723. It will be seen from a casual inspection of the charge above copied that the learned judge authorized the jury to consider the blow in connection with all the other circumstances in passing upon whether defendant's mind was laboring under such a degree of anger, rage, or terror as to render it incapable of cool reflection, and that while so laboring he slew deceased. I think the construction placed upon the charge is hypercritical. This court, in the original opinion, held such error harmless and no reason is suggested why the original opinion should not still prevail. All of the authorities cited by the majority to support the present position on rehearing were rendered prior to the passage of article 723, Code Cr. Proc., with the exception of *Warthan v. State* (Tex. Cr. App.) 55 S. W. 55. In that case appellant's only reliance to reduce the homicide to manslaughter was the blow, and the court refused to charge the statute. We held under that state of fact that we could not say it was not injurious. But here the court charges the statute, adding the words "or might." Can it be seriously insisted that this mere inadvertence should cause a reversal under article 723, Code Cr. Proc.? I think not. The original opinion affirmed the judgment on the proposition that appellant was guilty of murder in the second degree. The evidence amply warrants that verdict, and does not, to my mind, suggest manslaughter at all, since the evidence clearly indicates a conspiracy on the part of appellant to kill his father. If this be true, any error in the charge on manslaughter would be harmless. So believing, I cannot agree with the opinion of the majority.

McLEOD v. STATE.

(Court of Criminal Appeals of Texas. March 18, 1903.)

PERJURY—MATERIALITY OF TESTIMONY—CONTINUANCE—ADMISSIBILITY OF EVIDENCE—PROOF—ELECTION BETWEEN ASSIGNMENTS—INSTRUCTIONS—APPEAL.

1. Where one of the witnesses for whose absence a continuance was sought testified at the trial, and others were present, and would have testified to the same facts as some of the other absent witnesses, and the testimony of still

other absent witnesses would have been merely cumulative, the court did not err in refusing the continuance.

2. Defendant was prosecuted for perjury predicated on his testimony, in a civil suit on a liquor dealer's bond, that while he had procured a license, and given the bond for the use of another in carrying on the business, the license had at a certain date been transferred to another town, and that if the business had since that date been resumed at the original place it had been without his knowledge and consent, and the license had been taken clandestinely. *Held*, that the application, license, and bond, all being in defendant's name, were admissible to show his connection with the civil litigation.

3. It was not necessary to show that the parties running the business were defendant's agents, as the main contention in the civil suit was whether the business had been resumed with defendant's knowledge and consent.

4. It was not necessary to prove that the parties resuming the business were the agents of the one for whose use defendant had procured the license.

5. Where the bill of exceptions fails to show how or wherein the court erred in refusing an instruction not to consider certain argument of the state's counsel, and it is not certified that he made such argument, the ruling will not be reviewed.

6. Under an indictment assigning various statements as perjury, the court is not compelled to elect between the different assignments, where they are based on the same testimony.

7. In a prosecution for perjury predicated on defendant's testimony in a civil suit on a liquor dealer's bond that while he had procured a license, and given the bond for the use of another in carrying on the business, the license had at a certain date been transferred to another town, and that if the business had since that date been resumed at the original place it had been without his knowledge and consent, and the license had been taken clandestinely, it was shown that a witness had made a written lease for the premises in defendant's name and with his approval, that he had obtained the first cask of beer from a saloon owned by defendant and managed by another, and that he had turned over one-half of the profits to defendant and his manager. *Held*, that this rendered admissible the testimony of the witness that he had gotten his beer from defendant's saloon.

8. It was further shown that the license issued to defendant was tacked up in the saloon, and that defendant had the lease to the premises in his possession at the time the business was carried on by various persons. *Held*, that this rendered admissible testimony as to the conduct of these persons, and that the beer they sold was procured from defendant's saloon.

9. An affidavit by defendant that he had lost the license was admissible, as tending to show that the saloon was operated by his authority.

10. The affidavit of defendant that he had lost the license, and the evidence as to the sales and defendant's connection therewith prior to the alleged transfer of the license and after the time covered by the testimony on which the prosecution was based, could only be considered as tending to show the falsity of defendant's statements that he had no knowledge of the resumption of business and had not consented thereto.

11. In a prosecution for perjury, the court did not err in permitting the prosecution to ask a witness for the defense, who was a gambler, what his occupation was.

12. Error in styling the cause as "2,275" instead of "2,475" in the charge is harmless.

13. Where defendant admitted on cross-examination that he had written certain letters which had his card on the envelope and bore the regular postmarks, the court did not err in permitting the witness who had received the letters

to identify them, even though he was not familiar with defendant's signature.

On Rehearing.

14. The main defense to an action on a liquor dealer's bond was that, while defendant had procured a license and given the bond for the use of another in carrying on the business, the license had at a certain date been transferred to another town, and that if the business had since that date been resumed at the original place it had been without his knowledge and consent, and the license had been taken clandestinely. *Held*, that this defense made it material to show that the business had been resumed with defendant's knowledge and consent, and that he was in fact interested in it, and hence a prosecution for perjury was properly predicated on the false statements by defendant to the effect that he had no knowledge of the business.

Appeal from District Court, Erath County; W. J. Oxford, Judge.

J. I. McLeod was convicted of perjury, and appeals. Affirmed.

Nugent & Pannill, Moroney, Love & Simpson, and W. M. Walton, for appellant. Lee Riddle, Dist. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of perjury, and his punishment assessed at confinement in the penitentiary for a term of two years.

Appellant filed a motion to quash the indictment, urging various objections. We have carefully reviewed all of the objections, and, in our opinion, none of them are well taken. The indictment is good.

Appellant filed an application for continuance for want of the testimony of Will Tucker, Tom Holman, Henry Thornton, Alf Percy, and John Davis, alleged to reside in Erath county; Tom Faucett, a resident of Bastrop county; and also Buck Parker and John Morgan, residents of Comanche county. The court attaches the following explanation to the bill: "That the process was attached to the application as stated, and showed the facts as stated, except as to Percy, who had not been subpoenaed; and, further, Tom Holman was present and testified and Jim White also testified to same facts, and the witness John Davis' testimony would have been cumulative merely; the witness Gallagher testified to the facts defendant expected to prove by Faucett; the witnesses Thornton, Buck Parker, and Tucker were all present at the trial, and were not put on the stand by defendant." We think this explanation disposes of the matter, and the court did not err in refusing to grant the application for continuance. In addition, Parker, Tucker, and Thornton would have testified to same facts as absent witnesses, but were not introduced, though present.

Bill No. 5 complains that the court erred in refusing the following requested charge: "You are instructed to find a verdict for defendant—first, the issue as shown from the evidence in the cause in which the perjury was assigned is purely a question of law;

second, that defendant's statements under all of the issues involved in cause No 2,475 became immaterial; third, the evidence is insufficient to support a verdict of guilty." Believing the evidence is sufficient to support the verdict, and that the charge of the court presented the law applicable to the facts, the court did not err in refusing the special charge.

Bill No. 6 complains of the court's refusal to give the following special charge: "You are instructed that you cannot consider affidavit of defendant, except in passing on the credibility of defendant as a witness." In this there was no error.

The seventh bill complains of the refusal of the following charge: "You cannot consider the bond, license, or application for license in determining whether or not Tom Blasengame or Charlie Arthur were the agents: in fact of defendant, and in passing upon defendant's guilt or innocence you cannot consider the same." The license and application for license and bond were admissible in evidence to show the connection of appellant with the civil litigation. We do not think the court was required to instruct the jury that the same would not prove agency on the part of Blasengame and Arthur.

He also requested this charge, which was refused: "The agent cannot delegate authority to another person without the consent of his principal, and that the fact of the agency of Tom Blasengame and Charlie Arthur being the agents of J. I. McLeod must be proven by two credible witnesses, or one credible witness strongly corroborated by other testimony outside of acts and declarations of parties not authorized by defendant to act, and the corroboration necessary is such as goes back to the gist of the contract of agency as to each agent, and unless you so find beyond a reasonable doubt you cannot convict defendant." This special charge, so far as applicable, was given in the main charge of the court.

Appellant also requested the following charge: "You are further instructed that, although you believe beyond a reasonable doubt that George Boucher was the agent of McLeod, you cannot convict defendant, because George Boucher, as a matter of law, had no right to delegate his authority to Tom Blasengame without the express consent of J. I. McLeod." The evidence shows that appellant was sued on a liquor dealer's bond, which he had signed with others as sureties. He pleaded and testified that at the time beer was being sold he was not in fact interested in the business; that he merely loaned to George Boucher his name; that the business was run in his name, but as a matter of fact he had no interest in it. This could not be any defense in law to that suit, even conceding its truthfulness, since one cannot sign an obligation to the state or a private party, and then shift liability by claiming that he loaned his name to another party as an ac-

commodation. We do not think the evidence raised the issue, or that the law authorized the giving of the charge requested.

Appellant also requested the following charge: "You are instructed not to consider the following argument of the state's counsel Riddle that he took out license on the 1st of April, 1901, and took a receipt from Jno. Frey for his tax receipt, and that they run without license until the Dublin Reunion." The court refused this instruction. There is nothing in the bill showing how or wherein this was error. It is not certified that the attorney made such argument, and, if he did not, certainly it was not error to refuse the charge requested. The thirteenth bill refers to similar matter, and no error is made to appear.

The fourteenth bill complains that the court should have elected between the different assignments of perjury alleged, because each separate assignment constitutes a distinct substantive offense under law, upon either of which defendant might be tried and convicted under the holding of this court. There was no error in this. An indictment can allege various statements as perjury, and the proof meeting either, provided the same would be a proper predicate for perjury, would be sufficient. The court is not compelled to elect, where matter upon which perjury is assigned grows out of the same testimony.

Bill No. 15 covers several pages of the transcript, and complains that the court permitted the introduction of the testimony of Tom Blasengame, to which bill the court appends the following explanation: "This witness also testified that he made a rent contract for a house to do the malt-liquor business in at Victor, in writing, and in the name of J. I. McLeod, before he opened this business, and that he thereafter showed it to McLeod and McLeod said it was all right. And in this connection said rent contract, which is in the statement of facts, was exhibited in evidence, which was signed J. I. McLeod, by W. T. Blasengame. He also testified that he got his first cask of beer at the Corner Saloon in Dublin. He started the Victor business with that, and that thereafter he continually got it at said place, and sent the empty bottles back to said house, and sent one-half of profits in money to said house, and that McLeod and Boucher both worked in said house, and that the sign over said house was, 'Corner Saloon. J. I. McLeod, Proprietor; G. W. Boucher, Manager.' It was also shown by Ed Galloway that he carried said bottles and profits for Blasengame to said Corner Saloon, and delivered them sometimes to Boucher and sometimes to McLeod, and that McLeod always said it was all right." This explanation renders the testimony of Blasengame admissible, who, according to the long statement contained in the bill, testified about getting beer at said place.

Bill No. 16 complains that the witness Galloway was permitted to testify that a party named Buck Garey ran the saloon in question; that one Doggett ran it next, and witness ran it about a month; that it was a beer saloon; did not notice the license; hauled some beer for Tom Blasengame; got the beer at the Corner Saloon, and defendant was there. Various other matters are detailed by the witness. The judge appends the following explanation to the bill: "The application to engage in business at Victor was sworn to by J. I. McLeod, the license issued to him, and the bond was made by McLeod, and the license was tacked up on the wall in the house where these parties were running the business, and the house was rented by McLeod; that is, the rent contract was in his name, and he had seen and ratified it, and really had it in his possession, at the time these several parties were running the business out there." This explanation certainly renders admissible the acts and conduct of the parties in the running of the saloon, and it was legitimate testimony against appellant going to show that he owned said saloon.

Bill No. 17 complains that the court erred in permitting the state to introduce the affidavit of appellant as to the loss of the license to sell malt liquor exclusively at Victor. The affidavit is set out, which shows the loss, and is signed by J. I. McLeod. Appellant contends that said affidavit could throw no light on the question of agency and the renting of the house at Victor, and could not show who owned the business, and that, these matters being the sole inquiry, the introduction of said affidavit could only serve to confuse the minds of the jury as to the real issues in the case, etc. This testimony was clearly admissible. If appellant had the license and lost it, and made affidavit that he was the owner of the license, and this being the license under which said saloon was run, it was certainly germane, and tended to prove the falsity of his statement, wherein he swore that he had no interest in the Victor saloon, and that he did not authorize any one to run the same, etc. It was upon this latter proposition that the state predicated the perjury wherein he had sworn that he did not authorize the running of the saloon at Victor, did not rent a house there, and had no interest in the saloon. This being the issue, it was germane for the state to introduce the affidavit of appellant stating he had the license, and that same therefore had been issued to him authorizing the sale of beer at Victor.

The eighteenth bill complains that the court erred in permitting the state to introduce the alleged bond and application for license, which bond was signed by J. I. McLeod, G. B. Maloney, A. M. Maloney, and W. J. Wasson. The application for the license is signed by appellant. Appellant urges various objections to the grammatical construc-

tion of the bond, but we do not deem it necessary to review them, holding that none of said objections are well taken.

Bill No. 19 complains that the state, on cross-examination of Tom Holden, asked certain questions. The court appends the following explanation to the bill: "The district attorney asked the witness what his occupation had been, and he answered that of gambling and running a gaming house." There was no error in the questions asked or answers given.

Bill No. 23 complains of the following portion of the charge of the court: "Evidence of acts of defendant McLeod and Blasengame or others, pertaining to the malt liquor business at Victor, Texas, prior to August 6, 1901, if any such has been admitted before you, and evidence of acts of the said McLeod, Galloway, or others in relation to said malt-liquor business at Victor, Texas, which acts happened or took place after the last day of October, 1901, if any such acts have been proved, and the letters written by McLeod to Bowen after said date admitted before you, and defendant's affidavits as to the loss of the license exhibited in evidence, cannot be considered by you for any purpose than as the same may tend, if it does so tend, to show the probability that the alleged false statement or statements assigned in the indictment, and which are copied in this charge, were in fact false, but for no other purpose." Appellant insists the court erred in restricting said evidence to the very purpose for which it was not admissible; that if same was admissible it was only on the credibility of the witness McLeod; that the charge permitted the jury to consider said evidence on defendant's guilt; that said evidence is irrelevant and immaterial, etc. This charge of the court was correct.

Bill No. 24 complains that the court in stating the style of the cause in his charge of the State of Texas v. J. I. McLeod gave the number as 2,275 instead of 2,475. This contention is hypercritical.

Bill No. 25 complains that witness Pat Bowen was permitted to identify some letters, the first one beginning, "Corner Saloon. J. I. McLeod, Proprietor; G. W. Boucher, Manager. Dublin, Texas, Dec. 27th, 1901," and signed by "George Boucher." The other two letters are signed by J. I. McLeod. The witness testified that he received said letters, and the signatures resemble each other, and he thinks were McLeod's signature; that at the time said letters were received he owned the house in Victor where the saloon was situated; that witness is not acquainted with appellant's handwriting and never saw him write. The state was then permitted upon such predicate to introduce the letters in evidence. The court appends the following explanation: "That the envelopes, with the card on corner, 'Return in ten days to the Corner Saloon. J. I.

McLeod, Proprietor; G. W. Boucher, Manager. Dublin, Texas,' were also admitted; that the letters and the postmark were regular on said envelopes, and were December 27, 1901, 8 p. m.; December 28, 8 p. m., 1901; March 15, 4 p. m., 1902, respectively; and each envelope had on it a canceled postal stamp; and Bowen stated that he got them out of the post office at Topaz, and defendant admitted on his cross-examination that he wrote all of said letters, the first for Boucher and the others for himself." This explanation clearly renders admissible the testimony of said witness, regardless of whether he knew the handwriting of appellant.

We have carefully reviewed all of appellant's assignments of error in this voluminous record, and find no merit in them. The judgment is affirmed.

HENDERSON, J., absent.

On Rehearing.

(June 23, 1903.)

PER CURIAM. The judgment was affirmed at a previous term of this court, and now comes before us on motion for rehearing. Appellant insists that the perjury was committed on an immaterial issue, and that this is in effect conceded in the following portion of the opinion: "Appellant also requested the following charge: 'You are further instructed that, although you believe beyond a reasonable doubt that George Boucher was the agent of McLeod, you cannot convict defendant, because George Boucher, as a matter of law, had no right to delegate his authority to Tom Blasengame without the express consent of J. I. McLeod.' The evidence shows that appellant was sued on a liquor dealer's bond, which he had signed with others as sureties. He pleaded and testified that at the time beer was being sold he was not in fact interested in the business; that he merely loaned to George Boucher his name; that the business was run in his name, but as a matter of fact he had no interest in it. This could not be any defense in law to that suit, even conceding its truthfulness, since one cannot sign an obligation to the state or a private party, and then shift liability by claiming that he loaned his name to another party as an accommodation. We do not think the evidence raised the issue or that the law authorized the giving of the charge requested." We did not intend to convey the idea that, in our opinion, the perjury was committed on an immaterial issue. Testimony may be material, though apparently collateral, which tends to solve some disputed issue in a case. We understand the contention to be, in effect, that, although appellant gave the bond, procured the license, and rented the house, this was done for the use of Boucher, and, while appellant would be bound if he permitted the business to be run in his name at Victor,

that he did not do this after the 5th of August, when a temporary transfer was made of the license, etc., to Dublin; that, if the business was operated afterwards at Victor, the license was clandestinely taken, and the business resumed over at Victor, without his knowledge or consent, and the issue was sharply drawn whether it was run, etc. Now, to meet this, in that suit it was competent and material for the state to prove that it was run with his consent; in fact, that it was really his business, or he was interested in it. This ownership or interest was denied by him, and it was competent for the state to prove any facts that would show his knowledge or consent; and if the facts showed that he received money, shipped beer, and spoke of the business as his, that would show his knowledge, and would be none the less pertinent because it developed his actual interest, and that said parties were his agents, and that he was interested in the house as lessee. So we believe the perjury was predicated upon a material issue in the case, to wit, that the business was run at Victor, with appellant's knowledge and consent, and all testimony that tended to prove that Blasengame and Arthur were agents of appellant, or that he leased the house, was material.

The motion for rehearing is overruled.

ROBINSON v. STATE.

(Court of Criminal Appeals of Texas. June 24, 1903.)

INTOXICATING LIQUORS — UNLAWFUL SALE — INDICTMENT — SUFFICIENCY.

1. An indictment charging that defendant did "engage in, and pursue the occupation of, selling spirituous, vinous, and malt liquors and medicated bitters" in a local option district, "without first obtaining a license for the purpose of selling same," etc., is bad; it should charge that defendant did "sell spirituous, vinous, and malt liquors without first having obtained a license," etc.

2. It is not necessary to aver or prove that the defendant is selling on prescription.

Henderson, J., dissenting.

Appeal from McLennan County Court; G. B. Gerald, Judge.

Buck Robinson was convicted of crime, and appeals. Reversed.

Lud Williams, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of pursuing the occupation of a liquor dealer in a local option district, without procuring a license, and his punishment assessed at a fine of \$300. The charging part of the information is as follows: "That Buck Robinson, in the county of McLennan, in the state of Texas, heretofore on the 1st day of June, A. D. 1902, did then and there unlawfully, in justice precinct No. 7 of said county, after an election had been held in said justice precinct of said county, by the qualified

voters thereof in accordance with law, to determine whether or not the sale of intoxicating liquors should be prohibited in said justice precinct, and such election had resulted in favor of prohibition in said justice precinct, and the commissioners' court of said county had duly made, passed, and entered its order declaring the result of such election and prohibiting the sale of intoxicating liquors in said justice precinct as required by law, and had caused said order to be published in the manner and form and for the length of time required by law, engage in and pursue the occupation of selling spirituous, vinous, and malt liquors and medicated bitters in quantities of one gallon or less, the said occupation being then and there taxable and was taxed by law, without first obtaining a license for the purpose of selling same on the prescription of a regular practicing physician, and without first having paid the taxes due the said state and the said county; and the said Buck Robinson not then and there being a druggist selling tinctures and drug compounds in the preparation of which such liquors and medicated bitters are usually sold on prescriptions of a physician; and the taxes then and there due by him to said state upon said occupation amounted to two hundred dollars; and the taxes then and there due by him to said county upon said occupation amounted to one hundred dollars; the said taxes due by him to said county having heretofore been duly levied by the commissioners' court of said county—against the peace and dignity of the state."

We hold that the information is insufficient. We lay the following down as a correct form of information, applicable to the facts of this case: " * * * That Buck Robinson, in the county of McLennan, in the state of Texas, heretofore, on the 1st day of June, A. D. 1903, did then and there unlawfully, in justice precinct No. 7 of said county, after an election had been held in said justice precinct of said county by the qualified voters thereof in accordance with law to determine whether or not the sale of intoxicating liquors should be prohibited in said justice precinct, and such election had resulted in favor of prohibition in said justice precinct, and the commissioners' court of said county had duly made, passed, and entered its order declaring the result of such election, and prohibiting the sale of intoxicating liquors in said justice precinct, as required by law, and had caused said order to be published in the manner and form and for the length of time required by law, sell spirituous, vinous, and malt liquors without first having obtained a license for the purpose of selling said liquors; and without first having paid the taxes due the state and county; and the said Buck Robinson not then and there being a druggist selling tinctures and drug compounds in the preparation of which such liquors and medicated bitters are sold on prescription of a physician. The said

taxes then and there due by him to said state amounted to two hundred dollars, and the taxes then and there due by him to said county amounted to one hundred dollars; the said taxes due by him to said county having heretofore been levied by the commissioners' court of said county—against the peace and dignity of the state."

Of course, if the prosecution is for violating the county local option law, the allegations in this form should be changed to comply with such state of facts. We are apprised of the conflict in the views on the question of form in prosecution of this character, as indicated in *Sneary v. State* (Tex. Cr. App.) 52 S. W. 547; *Williamson v. State*, (Tex. Cr. App.) 55 S. W. 568; *Watson v. State* (Tex. Cr. App.) 57 S. W. 101. The presiding judge of this court wrote the *Watson* Case in reference, as he understood at the time, to the views of the majority of the court as to what a valid indictment should contain. But we have carefully reviewed said decisions, in the light of the statute, and hold that the form above set out is sufficient, and the above decisions, to the extent that they conflict with the views herein expressed, are hereby overruled. It will be noted that article 411a, White's Ann. Pen. Code, inhibits the sale. Most statutes of this character inhibit the occupation. Under this character of indictment, if one sells at all in the inhibited district he is guilty of a violation of law, and is subject to prosecution for failing to pay the taxes required by law. It follows from the form above suggested that it is neither necessary to allege nor to prove that the party was or was not selling on prescription. To hold that the proof must show that the party is selling on prescription in order to make out a prosecution would neutralize, nullify, and indirectly vacate a law held by a majority of this court to be a valid subsisting statute.

The information was filed June 27, 1902. An inspection of the record shows that all the evidence to the effect that the offense was committed refers to acts subsequent to the filing of the information. This alone would require a reversal. The offense should be proved to have been committed prior to the filing of the information.

The judgment is reversed, and the prosecution ordered dismissed.

HENDERSON, J. (dissenting). A majority of the court hold that the information is bad, evidently on the ground that it alleges appellant pursued the occupation of selling intoxicating liquors, and then proceed to lay down what they conceive to be a good information. I disagree with both propositions. It appears to me that an examination of the act providing for the sale of intoxicating liquors in local option territory and levying a tax therefor shows an occupation tax. See article 5060a, *Sayles' Rev. Civ. St. (Acts 25th Leg. p. 223, c. 158)*. That portion of said

article relating to this matter is as follows: "And there shall be collected from every person, firm, corporation or association of persons for every separate establishment selling such liquors or medicated bitters within this state, located within a county, etc., in which local option is in force, the sum of \$200, provided the same shall not be sold in such locality except upon prescription," etc. Article 411a, White's Ann. Pen. Code, provides that any person or association of persons who shall engage in the sale of spirituous liquors, etc., without having obtained a license therefor, shall be fined, etc. Evidently the tax is levied on an occupation and not a mere sale, and the punishment is of those who engage in such sales where license is required. So, in my judgment, there can be no question that the tax is levied on the occupation of selling liquor in local option territory, under prescription. But whether it is on the occupation or on the mere sale, in my view the information is defective as set out in this record, as also that which has been prescribed by a majority of this court, because it does not allege that the sale was under prescription, etc. Whether the tax is levied on the occupation of selling, and a single sale is evidence of that occupation, or it is levied on the sale regardless of the occupation, in either event the business on which the tax is levied is that of selling under prescription. No other license in local option territory could be procured, and any other sale of intoxicating liquors than under prescription would simply be illegal. The statute was never intended to collect a tax on an illegal sale, or to punish a person or association of persons engaged in an illegitimate business, for which they could not procure a license, because they did not procure a license. I will not pursue this discussion further, but refer to my views as heretofore expressed in *Williamson v. State*, 41 Tex. Cr. R. 461, 55 S. W. 568, and *Watson v. State*, 42 Tex. Cr. R. 13, 57 S. W. 101. Of course, it follows, if the information or indictment must allege that the sale was made or occupation pursued of selling intoxicating liquors under prescription, etc., this fact would have to be proved in order to authorize a conviction.

COLE v. STATE.

(Court of Criminal Appeals of Texas. June 17, 1903.)

HOMICIDE — JUSTIFIABLE HOMICIDE — MAN-SLAUGHTER—EVIDENCE—INSTRUCTIONS.

1. A husband has the legal right to the company and custody of his wife and child, and the wife's father has no authority to keep her from him; and if it is necessary for the husband to kill the wife's father to prevent the latter's killing him or taking his wife and child away from him, and thus endangering him in life or serious injury, he would be justified.

2. If a husband becomes infuriated to such an extent that his mind is incapable of con-

reflection by reason of his wife's father trying to take the wife and child away from him, even though it is not necessary to kill the father to prevent this, and the killing occurs simply because of such provocation, it would be manslaughter only.

3. Refusal to charge on justifiable homicide and manslaughter was error, where there was evidence tending to show that the killing occurred by reason of deceased's trying to take defendant's (his son-in-law's) wife and child away from him, etc.

4. In a prosecution for homicide, it was error to admit in evidence the bloody clothes of deceased, where the shooting was admitted, and the nature of the wound, its character, location, and everything in connection with it, were clearly proved, and the only effect of the clothes was to influence the minds of the jurymen against accused.

5. In a prosecution for homicide, it was error, in attempting to show that deceased was not in his usual good health and strength at the time, to admit conversations and expressions of opinion, and matter of that sort, occurring away from accused.

6. In a prosecution of defendant for the murder of his wife's father, it being set up in defense that deceased was forcing the defendant's wife to remain away from him, and the state claiming that she was remaining away from choice, it was error to refuse to admit in evidence letters written by the wife to defendant during the spring preceding the homicide, in which she expressed in strong terms her affection for him and her desire to be with him.

7. Testimony that immediately after the shooting, and just as he was leaving the scene of the homicide, defendant stated to his mother-in-law and wife that he would get somebody to come as quick as he could, and that within 10 minutes he met a third person, and stated that he had shot deceased, and would be glad if he would go down and get a doctor, and that he was going for a doctor himself, etc., was *res gestæ*, and improperly excluded.

8. Testimony that defendant further told witness, if he saw the officers looking for him, to tell them he would return and give himself up; that afterwards he tried to go to a certain town to surrender, and went to a certain point, where he remained all night; that he could go no further that night, owing to high water, etc.—was improperly excluded.

9. Testimony that as defendant was returning to the scene of the shooting shortly after he first went away, his wife said to her mother (decedent's wife), "Run, mamma, and hide; he is going to kill you, for he said he would," and the mother's reply, were inadmissible.

Appeal from District Court, Brown County; John W. Goodwin, Judge.

Sam Cole was convicted of crime, and appeals. Reversed.

I. J. Rice, Chas. Sparks, and Woodward & Baker, for appellant. F. L. Snodgrass, Jenkins & McCartney, and Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of eight years.

The killing occurred in Coleman county, and the trial took place in Brown county, on change of venue. The record is unnecessarily voluminous. There is a great deal of reiteration in the facts, and the pleadings

and other documents used on the trial are repeated in the transcript. This court has frequently condemned this manner of making up transcripts, and there is no apparent reason why such thing should occur. The evidence discloses one of those sad pictures thrown on the canvass, so often occurring in family relations. Appellant had run away with and married the daughter of deceased, which very greatly angered deceased and his wife, and a great deal of talk pro and con was indulged in consequence of this marriage. This marriage and subsequent events brought a great many unpleasant scenes and incidents, resulting in several partial estrangements and separations of appellant and his wife. It is claimed by appellant that these matters were brought about by the acts and conduct of deceased and his (deceased's) wife; that they had forced these separations; that deceased had driven appellant from his home more than once, where he and his wife were at different times residing. It seems from the testimony that deceased was fitful and arbitrary at times in his conduct towards appellant, growing out of the fact that appellant was an unwelcome son-in-law; that he had threatened his life if he undertook to carry his (appellant's) wife from the home of deceased; that for some time prior to the homicide the wife of appellant had been at the home of her father (deceased), and about two months prior to the tragedy had there given birth to a child; that, by the acts and conduct of deceased and his wife, the wife of appellant was fitful in her mood, sometimes vowing intense love and fidelity to her husband in her affections, and at times siding with her father, and refusing to live with or have anything to do with her husband. It is also made to appear that the wife of appellant was afraid to live with her husband, or to go away from home with him, on account of the acts, conduct, and language of her father; that, from about the time of the birth of the child until the tragedy, appellant had been with his wife at the home of deceased, but he and his wife had determined to leave and live to themselves. It was understood by appellant and his wife that in that event it would be necessary to stealthily leave the father's home; that the father would not permit such leaving if aware of it. On the day of the killing, which was Sunday, deceased and his wife had driven away into a pasture, and, while they were gone, appellant and his wife decided to leave home, to avoid complications and trouble. To that end, he hitched a team to the buggy, and was in the act of driving away from the premises, when deceased and his wife suddenly reappeared. Because of the threats of deceased, and in order to avoid being shot, appellant took the gun of deceased, and had it in the buggy with him. This was done because his wife had stated she was afraid to leave with him, for fear her father would kill him. Appel-

¶ 4. See Criminal Law, vol. 14, Cent. Dig. § 891; Homicide, vol. 26, Cent. Dig. § 557.

lant testified that, when his father-in-law and mother-in-law started away to the pasture, he suggested to his wife that it was as good an opportunity as they would ever get to leave. The wife made no reply to this, and he continued to walk with her awhile, and she began crying, and he inquired the reason. She stated: "I am just scared to death. I am just simply afraid to leave." Appellant replied: "We will just have to take the chances; you know we will never have another minute's peace as long as we stay here." And after talking awhile, the wife replied: "I will risk it." Appellant hurried off to the barn, and hitched the team to the buggy; and, when he came back to the house for his wife, she had made no preparation to leave. He said to her, "For God's sake, get ready as soon as you can." She jumped up then and ran into the little room, where appellant had a grip. He ran in and put some clothes in the grip, ran and threw it in the buggy, and came back. His wife remarked to him, "Sam, I am just simply afraid to go." He said, "We will just have to take our chances." She replied, "I am afraid papa will overtake us and kill you." Appellant replied, "I am going to take the gun," and got the gun and set it in the buggy, while she was getting some of the baby's clothes out of the closet. Just as they were getting in the buggy, they looked around, and discovered deceased and his wife approaching. They were about 25 feet distant, and, while appellant and his wife were getting in the buggy, deceased and his wife drove up. Mrs. Hudson remarked, "Well, where do you all think you are going?" Appellant replied, "We are going up to the cove." Deceased said, "I don't know whether you are or not." Deceased and his wife jumped out of their buggy, and started toward appellant and his wife. Then came a scuffle between Mrs. Hudson, appellant's wife, and appellant, over the gun. Appellant was holding the baby, and when the scuffle began he laid it down as quick as he could and grabbed the gun. Deceased by this time was right up behind his wife, grabbing at the gun; and appellant said, "For God's sake, don't do that! stop! stop!" Deceased continued grabbing the gun, and appellant jerked it loose from his wife and Mrs. Hudson, and shot. The horses broke to run in a northerly direction, and appellant finally succeeded in stopping them. His wife then got out, and started back towards where deceased and wife were. Deceased continued approaching appellant, and came a few steps, and turned and went the other way; and, after going four or five steps, turned around, facing appellant, and started back towards him, and, after taking two steps, threw his hands to his breast and sank down. Mrs. Hudson remarked to appellant, "You have shot my husband," and he replied, "Mrs. Hudson, you know I had to do it." Appellant drove a short distance up the hill, turned around, and

went back to his wife, and requested her to go with him. Mrs. Hudson spoke up, and said, "Don't take her off." Appellant replied, "Mrs. Hudson, I hate to leave her." And she said, "You are not going to take her off." Appellant's wife said, "Sam, I hate to leave;" and appellant replied, "Well, I won't take you then. I will get somebody to come just as quick as I can"—and turned and drove off. Deceased was a man weighing some 170 or 180 pounds, about 45 years of age—a stout, healthy, robust man, except, perhaps, he had been suffering a little while before his death from an injury received from the kick of a horse. Appellant weighed from 115 to 125 pounds, and was not a healthy or vigorous man. It would be unnecessary to go into a detailed statement of all the troubles, criminations, and recriminations and threats testified as having been made by deceased against appellant; and the numerous troubles that were brought about by reason of these facts between appellant and his wife. It is evident that his married life had not been strewn with roses. The state met this view of the case by showing that on occasions deceased had assisted appellant financially and otherwise, and had manifested evidences of kindness. These matters pro and con were spasmodic and at intervals. There is no question upon either side of the fact that appellant and his wife thought it incumbent upon them to stealthily leave the home of deceased for fear of serious troubles if appellant undertook to carry his wife away.

The court gave a charge on manslaughter, which was rather stereotyped in form, in which he informed the jury, in general language, that they might look to all the facts and circumstances occurring between the parties, in order to determine the condition of appellant's mind at the time of the homicide, and, if they believed from those facts and circumstances that his mind was rendered incapable of cool reflection, appellant was entitled to a verdict of manslaughter. The court also gave a charge, in the usual language, on self-defense, predicated upon the theory that appellant may have been afraid of his life or bodily injury at the hands of deceased. Exceptions were reserved to the general charge, and special instructions requested to submit directly and pertinently the issues of self-defense and manslaughter, as appellant claims were made apparent from the facts adduced. In other words, appellant's insistence along this line was that, in regard to manslaughter, if deceased was seeking to take appellant's wife and child from him to prevent him carrying them away, and was approaching him for that purpose, and was in the act of doing so, and he shot and killed to prevent this, it would be manslaughter. This would be such provocation as would require a pertinent charge on manslaughter; and if it was necessary to prevent deceased from taking the wife and

child, and if, preventing this, he was in danger of death or serious bodily injury, then it would be justifiable homicide. The same principles would govern under these circumstances as in case of illegal arrest, and subject to the same limitations; and appellant would have the same right to kill as would his wife if she were resisting the alleged arrest or attempt to detain her. We believe these phases of the law should have been directly and pertinently submitted. Appellant had the legal right to the company and custody of his wife and child, and deceased had no authority to prevent it. If it was necessary to kill deceased in order to prevent deceased killing him or taking his wife and child from him, and thus endangering him in life or serious injury, he would be justified—that is, he could repel force with force until the attempted wrong was prevented; and, if this resulted in death of deceased, appellant would be justified, but if he was infuriated to such an extent that his mind was incapable of cool reflection, by reason of the fact that deceased was trying to take his wife and child from him, and it was not necessary to kill to prevent this, as above stated, and the killing occurred simply because of this provocation, it would be manslaughter. Because of the omissions of the charge in these respects, and the refusal to give the special requested instructions, reversible error was committed. We are not prescribing form of charge—only laying down the principles.

Over appellant's objections, the bloody clothes of deceased were exhibited to the jury. Various objections were urged to the exhibition of these bloody clothes. Under the peculiar facts of this case, we believe this should not have occurred. It sometimes becomes relevant testimony to admit the clothes of a deceased, to explain the nature of the wound or some connecting fact, or to assist in developing the case in some way. This character of testimony has been the subject of many decisions, and usually it has been held that their admission was proper. But in this case there was no necessity for it. It explained no fact, and was relevant to no controverted issue. That deceased was shot by appellant was an admitted fact. The nature of the wound, the character of it, its location, and everything in connection with it, was clearly proved, and there was no controversy about it. The admission of the bloody clothes before the jury could serve no purpose, except to inflame their minds against accused. If it was relevant to any fact, and was properly admitted, the fact that it may have had an injurious effect upon appellant's case would not render its admission improper; but the exhibition of clothes, like any other fact, is admissible, or not, as it may or may not be pertinent or relevant to some issue in the case. These clothes could explain nothing, and the sole tendency was to create prejudice.

Several witnesses were permitted to tes-

tify that, some three or four weeks prior to the homicide, deceased had been kicked by a horse, and that one of his ribs had been apparently knocked in. Gay testified in this connection that he saw deceased a few days before his death, and, as he remembered his appearance, he looked debilitated from an injury received from a horse throwing and dragging him, and that he looked injured physically. Witness Hanks testified that a few days prior to the homicide he saw appellant, and testified as to his physical condition, and the further fact that he walked "careened to one side," and that deceased told him he had been hurt by a horse, and was afraid one of his ribs was mashed in. Mrs. Hanks testified that she had received a card some three or four weeks prior to her father's death, in obedience to which she went to her father's residence; that she saw her father's side, and it looked like a rib had been knocked in; that her mother asked her to come and look at her father's side while she was putting a bandage with liniment on it; that her father complained of suffering very much with his side. We believe this testimony should have been excluded. These were matters and conversations occurring between parties, of a hearsay nature. Certainly, if it was relevant to prove the fact that deceased was not in his usual health and strength at the time of the homicide, as bearing upon the relative strength of the parties to the homicide, it could not be proved by conversations and expressions of opinions, and matters of that sort, occurring between the parties away from defendant. Perhaps it would have been admissible, under the circumstances, to prove, if it was a fact, that deceased was not in his usual vigorous health, inasmuch as the size, condition, health, and relative strength of the parties was made an issue by some of the testimony. But the conversation and expressions of opinions, as testified to by these parties, were not admissible.

It was an issue in the case as to whether deceased was forcing appellant's wife to remain away from him. And in this connection, the issue was injected as to the affections of appellant's wife for her husband. Defendant's theory was that she was an affectionate and dutiful wife, except when otherwise influenced by deceased and his (deceased's) wife, and that she was superinduced to remain from him by the threats and conduct of deceased and wife. The state's theory was that appellant's wife did not love him, and was remaining away from choice, and refusing to live with him. In this connection, appellant offered three letters written him by his wife during the spring preceding the homicide, while he was in Tom Green county and his wife was at the residence of her father, in which she expressed in strong terms her affection for her husband, how much troubled she was in her own mind and feelings about being away

from him, and expressing the desire and wish to come and be with him. These letters were rejected. In the attitude in which the case had been placed by reason of the searching investigation of these family matters, and acts and conduct of all the parties, and especially of the wife towards the husband, these letters should have been admitted. These were strong facts and circumstances, or might have been, bearing upon the condition of appellant's mind, and would have a strong tendency to explain, in connection with the immediate facts, why it was he carried the gun from the house to the buggy, and why he shot deceased. If deceased was keeping his wife from him, and she was desiring to live with him, and deceased was forcing, or undertaking to force, the separation, and keep them apart, it would have a strong tendency to explain the condition of appellant's mind at the time of the homicide, and his attendant acts and conduct.

Immediately after the shooting, appellant stated to his mother-in-law and wife, and just as he was leaving the immediate scene of the homicide, that he would get somebody to come just as quick as he could. Within 10 minutes afterwards he met witness Mask, and remarked to him, "I shot Mr. Hudson down there awhile ago, and I would be glad if you would go down and get a doctor, and see if they need anything, and give them assistance." Appellant further remarked that he was then en route to Glen Cove to get a doctor, and send him to Mr. Hudson. Mask promised to secure a doctor. This was res gestæ. There were some further conversations between witness and appellant at the time. This testimony was excluded, as also further conversation with this witness to the effect that, if the witness saw the officers looking for him, to tell them that he would return to Coleman and give up as soon as he could get to Glen Cove, and that Mask did see, and so informed, a deputy sheriff. And he offered the further fact that he tried to go to Coleman to surrender, and was as far in that direction as Collier's, where he remained all night; that he could not get nearer the town of Coleman that night on account of high water; and that he was arrested at Collier's the following morning. And he further proposed to prove, in this connection, that after he had been to Glen Cove he started toward Coleman to surrender. This testimony, on objection of the state, was excluded. We believe it should have been admitted. There were some matters apparently relied on by the state to show flight and evasion of arrest.

Immediately after the shooting, appellant drove away, was gone a short time, and returned. While he was returning, the witness Mrs. Hudson was permitted to testify that he came driving back very rapidly, and her daughter said to her, "Run, mamma; run, mamma, and hide; he is going to kill you, for he said he would." Witness replied, "Though

he shoot my brains out right here, I will not leave my darling loved one." This conversation occurred between the wife of appellant and his mother-in-law, Mrs. Hudson, after the homicide, and in his absence, and was clearly inadmissible.

Numerous exceptions were reserved to the argument and speeches of state's counsel, as well as to the refusal to continue the case. It is unnecessary, under the disposition we have made of the case, perhaps, to go into these matters; but, if there were no other reversible errors, these would require such action on the part of this court.

The judgment is reversed, and the cause remanded.

TWIGGS v. STATE

(Court of Criminal Appeals of Texas. June 10, 1903.)

PERJURY—EVIDENCE—STATEMENTS OF ACCUSED—WARNINGS—NECESSITY—EXAMINATION IN CHIEF.

1. The grand jury were investigating a case of rape against a third person. An attachment was issued for defendant, and he was carried by the officers before it. While the case was being investigated, a case against defendant for adultery, and another for carrying a pistol, were developed. Defendant testified that when he made his appearance before the grand jury he thought they were after him; that no member of the grand jury warned him; that he was trying to shield himself, and had no idea they were after the third person. *Held*, on trial for perjury before the grand jury, that the testimony of defendant before the grand jury could not be used against him.

2. On his examination in chief, a witness testified that his daughter was born on a certain day. *Held* error, on further examination in chief, to permit him, over objection, to testify to entries made on a slip of paper, on which he stated were written the ages of his children, and which showed the daughter to have been born on the day testified to.

Brooks, J., dissenting.

Appeal from District Court, Ellis County; J. E. Dillard, Judge.

Frank Twiggs was convicted of crime, and appeals. Reversed.

Anderson & Anderson, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. There are some 10 assignments of perjury set out in the indictment, predicated upon the testimony of appellant before the grand jury. There are quite a number of contentions urged for reversal. Without going into these seriatim, we are of opinion the conviction cannot be sustained on the facts.

The grand jury were investigating a case of rape against Earnest Stone upon Annie Heury, a girl under 15 years of age. An attachment was issued for appellant, and he was carried by the officers before the grand jury. They were also investigating a case of adultery between appellant and Goldie Heury, a sister of Annie Heury, as well as another case against appellant for carry-

ing a pistol. As one of the witnesses stated, while they were investigating the cases against Stone the cases of adultery with Goldie Heury and carrying a pistol were developed against appellant. He was next to the last witness before the grand jury on the evening of January 14th. The pistol case against appellant and rape case against Stone were returned on the 14th, and the adultery case against appellant on the following day, the 15th. Some of the witnesses were not certain whether the adultery case was returned against appellant on that evening, or on the morning of the 15th. The assistant county attorney, who was before the grand jury, investigating the matter, testified "that the information on which the indictment was returned against Stone for rape, and against Twiggs for carrying a pistol and adultery, grew out of the same investigation." Appellant was not warned in regard to the evidence which formed the basis of this prosecution. He was "not told of the matter under investigation, except as suggested by the questions asked him." The attachment was served upon appellant by Officer Forbes, and from that time he was either in the charge of this officer, or in the grand jury room, until after he had testified before that body, and immediately upon coming out of the grand jury room he was again taken in charge by the officer, and placed in jail the same evening on the capias for carrying the pistol. Defendant testified that when he made his appearance before the grand jury he was excited very much; that he had never been before a grand jury before, and had never been a witness in his life; that the second question asked him was as to his knowledge of Goldie and Annie Heury, and this made him believe "they were after me, as I knew I had been guilty of some little indiscretions with Goldie Heury. * * * No member of the grand jury warned me about the matter under investigation, and I was trying to shield myself, and did not have any idea they were after Stone; thought they were after me." Perhaps this is a sufficient statement of the case, as a basis for the decision of the main question.

Where a party is under arrest for a crime, his statements cannot be used against him, unless he has been warned as required by the statute. Where he is under arrest or constraint, or held as a witness, and testifies about an offense of which he is suspected, his statements in regard to such matters cannot be used against him, unless warned. *Wood v. State*, 22 Tex. App. 431, 3 S. W. 336; *Gilder v. State*, 35 Tex. Cr. R. 360, 33 S. W. 867; *Grimsinger v. State*, 69 S. W. 583, 5 Tex. Ct. Rep. 623. The testimony of appellant delivered before the grand jury, and upon which this prosecution is based, should have been excluded when the objection was raised on the trial.

The witness L. Heury testified for the

state, in regard to the age of his daughter Annie, that she was born on October 25, 1888. He was then, upon his examination in chief, and over appellant's objection, permitted to testify to certain entries made upon a slip of paper, on which he states were written the ages of his children, and which showed Annie to have been born on October 25, 1888. This the judge certifies was read by Heury before appellant cross-examined him. This testimony should have been excluded. It is not evidence in chief. The witness did not seem to be uncertain in his memory as to the date of the birth of his child, and it was not used for the purpose of refreshing his memory, but was used as original evidence.

There are other matters which would require a reversal, which we deem unnecessary to discuss, in the view we take of the case. The question discussed disposes of the case.

The judgment is reversed, and the cause remanded.

BROOKS, J., dissents.

MARCHAN v. STATE.

(Court of Criminal Appeals of Texas. June 10, 1903.)

HOMICIDE—TRIAL—WITHDRAWAL OF COUNSEL—PREJUDICE TO ACCUSED—EVIDENCE—THREATS BY DEFENDANT.

1. Where, after the commencement of a criminal trial, one of the counsel for accused withdrew from the case, but accused was represented by one who assisted as counsel in a previous trial, a motion for a postponement because of the withdrawal of the counsel was properly denied.

2. Where, on a prosecution for murder, a witness testified that accused had told him the day before the killing that he was going to a certain place the next day for the purpose of "settling" with deceased, it was proper to admit testimony that, about 15 minutes before the killing, accused said, in an angry tone, "I will kill him in less than 10 minutes," starting up the street as he made the remark, and being at the time about one-half a block from the scene of the crime.

3. On a prosecution for murder, counsel for accused asked a witness for accused if the mother of deceased had had a conversation with the witness; accused's counsel stating that he wished to prove that the mother of deceased had attempted to get the witness to testify falsely. *Held*, that it was proper to sustain an objection to the question, the mother not having been a witness, and it not having been shown that she had influenced or endeavored to influence any witness.

Appeal from District Court, Aransas County; E. A. Stevens, Judge.

Dan Marchan was convicted of murder in the first degree, and he appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the first degree, and his punish-

ment assessed at confinement in the penitentiary for life.

Bill No. 1 complains of the court refusing to permit appellant to withdraw the announcement of "Ready," and postpone the case, because Jack Elgin, Esq., who was alleged to be leading counsel, had withdrawn from appellant's case. The bill shows that H. R. Sutherland, Jr., Esq., an attorney, had announced "Ready," and started the trial of the cause, prior to the time that said Elgin withdrew therefrom. The explanation of the trial court to the bill shows that said Elgin withdrew from the case. On the trial, appellant was represented by said Sutherland, who had assisted as counsel in the previous trial of the case. Certainly there was no error in the ruling of the court under the circumstances.

Bill No. 2 complains of the following: The state introduced James Witt, and he testified that about 10 minutes before the killing he met defendant coming out of a saloon, and, as defendant came out of the saloon, he (defendant) made the remark, "I'll kill him in ten minutes." Appellant objected to this testimony because the language contained no threat towards deceased; because defendant may have been addressing some one else; because defendant may have been joking. Attached to the bill is the following qualification: The witness testified that defendant, some 15 or 20 minutes before he shot and killed deceased, in an angry tone, said in Spanish, "I'll kill him in less than ten minutes," and that as defendant made this remark he started up the street, and at the time was a half block from the scene of the homicide; that this testimony was admitted for the reason that another witness (Martinez) had testified that defendant had told him the day before, in Corpus Christi, that he (defendant) was going to Rockport the next day for the purpose of settling with the son of a bitch Pancho (the deceased). We do not think the court erred in admitting this testimony. "Although the name of the deceased be not mentioned, yet, if it can be reasonably gathered that deceased was meant or alluded to, the evidence of such threat will be admissible." *Taylor v. State*, 72 S. W. 396, 6 Tex. Ct. Rep. 911, and authorities there cited. The juxtaposition of defendant to deceased and to the act of the homicide at the time the declaration was made shows conclusively that said declaration related to deceased, and could not and did not relate to any one else.

Bill No. 3 complains that, while defendant's witness J. S. Munday was on the stand, appellant propounded the following question, "If the mother of deceased had had a conversation with said witness Munday." The state objected to said testimony, and the defendant's attorney stated he wished to prove that the mother of deceased had attempted to get the witness Munday to testify falsely. The court states: "The objection was sus-

tained for the reason that the mother of deceased was not a witness, nor did she testify in the case, nor was it shown or attempted to be shown by defendant that she had influenced or endeavored to influence in any way any witness who had then or who did thereafter testify in the case; hence it was immaterial what she said to the witness Munday, in the absence of any showing that he (Munday) was influenced by anything said to him. Said Munday was a witness for defendant, and testified in his behalf." We see no error in the ruling of the court in this matter.

The evidence amply supports the verdict of the jury. Appellant sought deceased, after breathing threats, with the avowed purpose of taking his life, and, without any provocation, shot and killed deceased.

No error appears in the record. The judgment is affirmed.

MCCOMAS v. STATE.

(Court of Criminal Appeals of Texas. June 23, 1903.)

HOMICIDE—INSTRUCTION ON MANSLAUGHTER—REFUSAL TO GIVE EVIDENCE—SUFFICIENCY—ERRORS CURED.

1. In homicide, where the record left the date of the last meeting between defendant and deceased previous to the killing in doubt, defendant should have had the benefit of the doubt by an appropriate instruction.

2. In homicide, testimony of state's witnesses showed that, a few days previous to the homicide, defendant had made statements indicating an intention to kill deceased, who he said had been slandering his wife. Defendant, on his own behalf, testified that the morning of the killing was the first time that he had seen deceased for over a month. *Held*, that the evidence called for an instruction on manslaughter, caused by insulting language used by deceased towards defendant's wife.

3. The conviction being of murder in the second degree, the fact that a charge was given on manslaughter with reference to insulting language used towards defendant's daughter did not cure the error.

Brooks, J., dissenting.

On rehearing. Granted, and judgment reversed.

For former opinion, see 72 S. W. 189.

DAVIDSON, P. J. Since the affirmance of the judgment, appellant has filed a motion for rehearing. In the opinion of affirmance, we held there was no error in the failure of the court to submit the law of manslaughter upon the theory of insulting conduct and language towards the wife of appellant, and limiting it alone to the insulting conduct and language towards his daughter. After a careful review of the facts, we believe we were in error, and that the question is properly presented. It is immaterial from what source the testimony comes. If it suggests an issue favorable to defendant, appropriate instructions should be given. Bearing upon this, Boyett testified, in behalf of the prosecution, that he was deputy con-

stable of precinct No. 1 of Lamar county at the time of the killing; that some two or three days—possibly four or five—before this killing, appellant was in the office of the justice of the peace, where he and witness were alone; that appellant inquired of the witness if he (witness) could make a complaint against a party. He says: "I told him I did not know—that under some circumstances I could—and asked what the trouble was. He said Dr. McCuiston had been going around slandering his wife; that he had been telling that she had the gonorrhea. I told him that was a matter I knew nothing about, and could not make a complaint for him, and advised him to go to the county attorney. He turned and went out, and, as he did so, remarked that, 'God damn him; if he could not stop him one way he would another.' I said nothing to any one about the matter, and thought no more of it until after the killing. I told Police Officer Bob Stewart of this on the afternoon of the killing." MacHam testified that he was working in the Indian Territory, and two or three days before he heard of the killing he went to the post office for his mail, and there saw defendant working inside of the building; had a conversation with him, in which he asked witness if he was going to Paris. Witness told him that he was not. Witness then asked him when he was going, and he said he did not know; that he hated to go down there, for "fear he would have to kill a son of a bitch for insulting his family or his daughter"—did not remember which. "I asked him who, and he said, 'A professional man.'" This was two or three days before he heard of the killing. Witness said he mentioned this when he first heard of the killing, and subsequently also to a Mr. Rutherford at Paris. These statements were denied by appellant. This killing occurred on the 28th of February. Appellant testified in his behalf, and stated that on the morning of the killing was the first time he had seen Dr. McCuiston (deceased) for a month or more. This testimony was introduced by the state, except the reply of defendant, and this was elicited on cross-examination of appellant while testifying in his own behalf. If it be conceded that this testimony was introduced by the state for the purpose of meeting the defensive testimony in regard to the insulting conduct and language of deceased towards the daughter, nevertheless it was testimony which shows insulting language in regard to the wife of appellant, and that there had not been a meeting until the morning of the homicide. But if the record should leave it in doubt as to whether or not there had been a meeting between appellant and deceased, appellant should have the benefit of that doubt by an appropriate instruction. The court is not authorized to resolve doubts on testimony adversely to appellant. This must be done by the jury under appropriate instructions. This evidence called for a charge on manslaughter

in regard to insulting conduct or language used by deceased in regard to appellant's wife, and the fact that the charge was given on manslaughter with reference to the insulting conduct and language by deceased towards the daughter of appellant would not cut him off from this phase of the law, for it will be remembered that the conviction herein was for murder in the second degree. Perhaps a failure to charge on this phase of manslaughter would not have been error if the conviction had been for manslaughter, and the punishment assessed at two years—the minimum penalty. Therefore we are of opinion that we were in error in affirming the judgment in regard to this phase of the case; and for the error of the court in not so charging the jury the rehearing is now granted, and the judgment is reversed and the cause remanded.

BROOKS, J., dissents, and holds there was no testimony presenting this issue, within contemplation of the statute requiring the court to charge all the law applicable to the different phases of the facts.

FULLERTON v. STATE.

(Court of Criminal Appeals of Texas. June 11, 1902.)

CRIMINAL LAW—DEALING IN FUTURES—SUFFICIENCY OF INDICTMENT.

1. A person dealing in futures in cotton and wheat, who controls no wheat or cotton, but merely accepts the money of purchasers, telegraphs their offers to brokers in other cities, and notifies them of the acceptance of the offers, and then keeps the purchasers informed of the fluctuations of the market, and requires them to cover their margins, comes within the provision of Pen. Code, art. 377, making it a misdemeanor to carry on the business of dealing in future contracts, with no intention of delivering the articles sold.

On Rehearing.

2. An indictment charging a defendant with dealing in futures need not allege the specific sales or contracts on which the prosecution is based, to be sufficient under Pen. Code, art. 377, making it a misdemeanor to carry on such business, and providing that each day the business is carried on shall constitute a separate offense.

Appeal from Hunt County Court; R. D. Thompson, Judge.

Harvey Fullerton was convicted of dealing in futures, and he appeals. Affirmed.

L. A. Clark, Craddock & Looney, and Harkless, O'Grady & Crysler, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged with conducting and carrying on a business commonly known as "dealing in futures," etc., and that he did then and there keep a house, and manage, conduct, and carry on and transact therein a business commonly known as a produce or stock exchange and

as a bucket shop, where future contracts were bought and sold with no intention of an actual bona fide delivery of the articles and things so bought and sold. The contention is that the evidence does not show a violation of the statute. The facts, which are rather voluminous, show that appellant opened a business in Greenville, Hunt county, where he bought and sold futures in cotton and wheat; that he acted as the agent of the purchasers and sellers; that he had connections East, and perhaps in Kansas City, with the Christi Bros.; that these orders were taken and telegraphed to New York and New Orleans for cotton futures, and to Chicago for grain futures; that he was not himself buying and selling, but simply acted as the agent of the purchasers and vendors. The business was carried on, it seems, as are the ordinary shops of that sort. That, where the purchasers of the futures would place the money with him and his firm, they would telegraph and place their offer. If the offer was accepted, he would notify the purchasers. The record shows no failure to secure a placing of the offer. He would keep the parties posted of the fluctuations of the market, and, where there was a change, these parties were required to put up margins or place more money to prevent forfeiture of their contracts. They did not have any cotton themselves, and did not control any, and made no contracts and sold no contracts on their own behalf. This evidently (and, it occurs to us, necessarily) indicated there would be no deliveries on their part. The contracts for the future delivery, if the delivery should ever occur, were to be had in the market where the contract was placed, and as appellant was but the agent of the purchasers or sellers, as the case might be, he never became responsible to them for the delivery of any cotton or grain, as his relation was simply that of a go-between. Article 377, Pen. Code, provides: "If any person shall, directly or through an agent or agents, manage or superintend for himself, or shall as agent or representative of any other person, firm or corporation, conduct, carry on or transact any business, which is commonly known as dealing in futures, in cotton, grain, lard, any kinds of meats or agricultural products, or corporation stocks, or shall keep any house or manage, conduct, carry on or transact any business commonly known as a produce or stock exchange, or bucket shop, where future contracts are bought and sold with no intention of an actual bona fide delivery of the article or thing so bought or sold, such person, whether acting for himself or for another, as aforesaid, shall be deemed guilty," etc. It occurs to us that, under this state of case, appellant has clearly brought himself within the provisions of this article of our Penal Code. It is clear from the testimony, as we understand it, that appellant was carrying on his business as the go-between, the agent, of these parties; was

carrying it on for himself, and acting as the agent of parties who were buying and selling futures in cotton and wheat; and that under his contract the real intent was simply for the parties to speculate in the rise and fall of prices, with no bona fide intention of delivery on the part of appellant. It is evident on the part of the parties making the purchase, that they had no intention of expecting a delivery of the cotton under the purchase of the futures, and that the whole matter was understood by the parties at the time to be simply a wager upon the rise and fall of the prices—a speculation or bet on the fluctuation of the prices in the article in which they were dealing. We believe, under the decisions, that appellant has clearly violated this statute.

The judgment is affirmed.

On Rehearing.

(June 24, 1903.)

At a previous term of this court the judgment herein was affirmed, the opinion being confined exclusively to a consideration of the facts. This was in accordance with the then expressed wish of counsel for appellant, as set forth in their brief. Motion for rehearing was filed, and the indictment not attacked. After the submission of the case on motion for rehearing, counsel who had been subsequently employed placed a little additional brief in the record, calling our attention to the fact that the indictment was not sufficient under the authority of *Cothran v. State*, 36 Tex. Cr. R. 193, 36 S. W. 273. Under the authority of that case, the indictment in this case is hardly sufficient. We have carefully reviewed the statute and the *Cothran Case*, supra, as well as *Goldstein v. State*, 36 Tex. Cr. R. 193, 36 S. W. 278. The intimation in those cases—especially in the *Cothran Case*—is to the effect, that a contract of sale must be specifically alleged, though it is not expressly so held. If such is the holding and effect of those two cases, a careful inspection of our statute would indicate that they are wrong, because it denounces a penalty against a party who for himself, or as agent of another, carries on the business of buying and selling future contracts, etc. And this is more clearly shown in the latter clause of the statute, which provides that each day such business or house is carried on or kept shall constitute a separate offense. To give it the construction that the specific sale or contract must be alleged in the indictment or information would nullify this latter provision of the statute, because that provision makes a separate offense for each day the business is carried on or transacted, whereas, if each sale constituted a separate offense, we might have an indefinite number of offenses committed during one day, because in that event each sale would be a distinct offense. This statute is somewhat analogous to the statute

which defines and punishes the keeping of houses of prostitution, which makes and constitutes each day a separate offense. We believe the information is sufficient, under article 377, Pen. Code, and that any intimations in the Cases of Goldstein and Cothran, supra, contrary to this view, are not correct. The charging part of the information is as follows: That Harvey Fullerton "did then and there unlawfully conduct, carry on, and transact a business commonly known as dealing in futures, in cotton, grain, lard, meats, agricultural products, and corporation stocks, and did then and there unlawfully keep a house, and manage, conduct, carry on, and transact therein a business commonly known as a produce or stock exchange, and as a bucket shop, where future contracts were then and there bought and sold, with no intention of an actual bona fide delivery of the articles and things so bought and sold," etc. The motion for rehearing is mainly devoted to an attack on the original opinion, wherein the evidence was held sufficient. We have carefully examined the record, and believe the former opinion is correct. The record clearly demonstrates that defendant was carrying on a business denounced by article 377, Pen. Code. We do not care to further review that phase of the case.

The motion for rehearing is overruled.

TAYLOR v. STATE.

(Court of Criminal Appeals of Texas. June 10, 1903.)

INTOXICATING LIQUORS—VIOLATION OF LOCAL OPTION LAW—EVIDENCE—INSTRUCTIONS.

1. Where, on a prosecution for violating the local option law, there was no evidence that defendant was the agent of the prosecutor in buying liquor, the court properly refused to charge on the law of agency.

2. On a prosecution for violating the local option law, the evidence for the state showed that the prosecutor gave defendant a quarter to buy a half pint of alcohol; that defendant secured it, and brought it to the prosecutor. Defendant's testimony denied this in toto. Held, that the evidence was sufficient to support a verdict of guilty.

Appeal from Parker County Court; D. M. Alexander, Judge.

George Taylor was convicted of violating the local option law, and appeals. Affirmed.

R. B. Hood and Sam Shadle, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25, and 20 days' confinement in the county jail.

The evidence for the state shows that prosecutor Henry Wykel gave appellant a quarter to buy a half pint of alcohol; that he went for and secured the alcohol, and brought it to prosecutor. Appellant's testimony and his witnesses deny in toto this

statement. He does not state that he was acting as the agent of Wykel, or that he ever bought any alcohol for Wykel as his agent. Hence the court did not err in refusing to charge on the law of agency. *Sebastian v. State*, 72 S. W. 849, 7 Tex. Ct. Rep. 15.

Appellant insists that the verdict of the jury is not supported by the evidence. This is not correct. The jury are the judges of the credibility of the witnesses and the weight to be given the testimony. The prosecutor testified positively that he did sell him the alcohol. The evidence is sufficient to support the finding of the jury.

The judgment is affirmed.

GREINER-KELLEY DRUG CO. v. TRUETT, Co. Atty.*

(Court of Civil Appeals of Texas. June 20, 1903.)

INTOXICATING LIQUORS—LOCAL OPTION—ALCOHOL—SALE BY WHOLESALE DRUGGISTS.

1. Alcohol is an intoxicating liquor within the meaning of the local option law, prohibiting the sale of intoxicating liquors in any local option district.

2. The local option law prohibits all sale of intoxicating liquors in any local option district, whether as a beverage or otherwise, except for sacramental and medicinal purposes.

3. The local option law does not prohibit the sale of alcohol for medicinal purposes on a prescription.

4. The local option law, prohibiting the sale of intoxicating liquors in any local option district, prohibits the sale of alcohol by wholesale druggists to retail druggists in due course of trade for medicinal purposes.

Appeal from District Court, Grayson County; Rice Maxcy, Judge.

Suit by the Greiner-Kelley Drug Company against J. H. Truett, county attorney. From a judgment for defendant, plaintiff appeals. Affirmed.

C. L. Galloway, Head & Dillard, and F. B. Dillard, for appellant. J. H. Truett, pro se.

BOOKHOUT, J. The appellant, the Greiner-Kelley Drug Company, is a Texas corporation, and for several years has been engaged in business at Sherman, Tex., as a wholesale druggist. It has paid all taxes and obtained licenses, as required by law for such purpose. It has, in its employ, officers, clerks, and salesmen, whose services are necessary to the prosecution of its business. One of the most important drugs and articles of merchandise handled by appellant in said business is alcohol. The appellant's business as a wholesale druggist consists entirely in selling drugs and medicines to retail dealers, in which is included alcohol. On the 7th day of March, 1903, an election was held, in compliance with the local option statutes of this state, to determine whether intoxicating liquors should be sold in Grayson county, and

*Rehearing denied July 3, 1903.

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 716; Intoxicating Liquors, vol. 29, Cent. Dig. § 142.

said election resulted in favor of prohibition. The result was so declared, and proclamation of said result was being published, and would cause prohibition to take effect on May 21, 1903. On the 2d of May, 1903, appellant was notified by the county attorney of said county that after May 21, 1903, that officer would enter prosecutions against all persons engaged in the sale of alcohol in Grayson county, including the servants and salesmen of appellant. On May 4, 1903, appellant filed its petition in the district court of Grayson county, praying for an injunction against said county attorney, restraining him from prosecuting its agents and salesmen in such sales. It was alleged that appellant's property would be ruined and greatly damaged if appellee was permitted to carry on said prosecutions; that its business is being damaged by reason of threats of prosecution. Said county attorney, on May 9th, filed his answer denying the allegations in the petition. On May 25, 1903, the cause came on for trial, and the appellee admitted as true the allegations contained in the petition, and thereupon the cause was submitted to the court on its merits. The court refused the injunction, and rendered judgment in favor of defendant for costs, from which judgment plaintiff prosecuted this appeal.

Appellant contends that article 16, § 20, of the Constitution, was not intended to prohibit the sale of alcohol by wholesale druggists to retail druggists, as a drug or medicine to be sold by such retail druggists; that the purpose of said section was to give counties, cities, etc., the right to prohibit the sale of intoxicating liquors in such counties as a beverage, and was adopted in the light of the universal use of a medicine. In other words, the contention of appellant is that the local option laws of Texas were not intended and do not prohibit the sale of alcohol by wholesale druggists in due course of trade, for medicinal purposes, to retail druggists. By the terms of the local option statute the sale of intoxicating liquor is prohibited in the territory in which the law is put in force, except for sacramental purposes, and as medicine in cases of actual sickness and upon prescription. Sayles' Civ. St. art. 3385. Before any person, firm, corporation, or association of persons is authorized to sell intoxicating liquors on prescription in the territory where local option has been adopted, an occupation tax of \$200 must be paid and a bond executed. Sayles' Civ. St. art. 5060a; *Watson v. State* (Tex. Cr. App.) 57 S. W. 101.

Intoxicating liquor is defined as "any liquor intended for use as a beverage, or capable of being so used, which contains alcohol, either obtained by fermentation or by the additional process of distillation in such proportion that it will produce intoxication when taken in such quantities as may be practically drunk." *Decker v. State* (Tex. Cr. App.) 44 S. W. 845; *Black on Intoxicating Liquors*, § 2.

The trial court found that alcohol is a drug without which some of the most important and necessary medicines cannot be compounded, and that it is also an article useful and necessary in the arts and sciences and in the manufacture of many necessary articles for daily use and consumption, and an article, which, by itself, is rarely, if ever, used as a beverage. It is insisted that alcohol, as such, is not used as a beverage, but is a medicine, and for this reason it was not the intention of the law to prohibit its sale. The statute clearly and in unambiguous language prohibits the sale of intoxicating liquor, and, if alcohol is an intoxicating liquor as that term is used in the statute, then it comes within the terms thereof. We can see no ground for argument on the proposition that alcohol is an intoxicating liquor, and would unhesitatingly so announce; but we find that it has been held by the court of last resort of the state of Arkansas, in a case where the question was at issue, that alcohol is not an intoxicating liquor. *State v. Martin*, 34 Ark. 340. The Supreme Court of Illinois seems inclined to a similar view, although that court does not affirmatively decide the question. *Bennett v. People*, 30 Ill. 389. On the contrary, the Supreme Court of Georgia holds that alcohol is an intoxicating liquor, and that the courts will take judicial cognizance of this fact. *Snider v. State*, 81 Ga. 753, 7 S. E. 631, 12 Am. St. Rep. 350. This decision, in our opinion, is supported both by reason and authority. Speaking generally, alcohol is the element in all intoxicating liquors which produces intoxication. The question in our opinion is not an open one in this state. In the case of *Nichols v. State*, 37 Tex. Cr. App. 546, 40 S. W. 268, a conviction for selling 30 cents worth of alcohol in a local option precinct, without a prescription, was sustained, although the seller made the sale under the belief that it was for medicinal purposes, and for a person actually sick. Thus it is seen that the court of last resort in this state, so far as this question is concerned, holds that alcohol is an intoxicating liquor within the terms of the local option statute. See, also, *Taylor v. State* (decided June 10, 1903) 75 S. W. 536.

Again, the court found that alcohol is an article which, if used in sufficient quantities, will produce intoxication. This finding brings alcohol within the definition of intoxicating liquor. But it is insisted that the intention of the law was to prohibit the sale of intoxicating liquor as a beverage; that it was aimed at the saloon, and the vice of tippling; and for this reason the sale of alcohol is not within the spirit or intention of the statute. This contention was raised in the case of *Pike v. State* (Tex. Cr. App.) 51 S. W. 396. In that case the defendant was prosecuted for selling blackberry cordial in a local option precinct, without a prescription. The defendant requested a charge reading: "Not

every liquor that can by any possibility produce intoxication is an intoxicating liquor within the meaning of the local option law. A liquor that is not manufactured and sold with the intent that it shall be used as a beverage is not an intoxicating liquor within the meaning of the local option law, although large quantities of it might produce intoxication." The trial court refused this charge, and the Court of Criminal Appeals sustained its action, holding that the charge did not present the law. The local option statute, in plain and unambiguous language, prohibits the sale of intoxicating liquor in the territory in which it has been put in force, except for sacramental and medicinal purposes, upon prescription. The statute is not capable of the construction that it was only intended to prohibit the sale thereof as a beverage. *Snead v. State*, 49 S. W. 597; *Watson v. State*, *supra*; *Nichols v. State*, *supra*.

The contention that the sale of alcohol as a medicine could not be prohibited without interfering with those constitutional rights guaranteed in the preservation of our natural rights is without merit. The statute does not prohibit its sale as a medicine. It may be sold in a local option territory, by a person duly licensed, upon prescription. This is not prohibition, but regulation. Nor is there anything in the statute which would authorize the construction that it was not intended to apply to a wholesale druggist selling alcohol to a retail druggist to be used in compounding medicines. The statute was intended to prohibit, and does prohibit, the sale of intoxicating liquors throughout the territory in which it has been put in force, except under the regulations prescribed therein. It applies to all sales, and all persons making sales, except upon prescription and by a licensed dealer. *Watson v. State*, *supra*. This holding renders it unnecessary for us to pass upon the question raised in the fourth and fifth assignments of error, *i. e.*, whether the district court will enjoin a threatened criminal prosecution to prevent irreparable injury and damage to property rights.

We conclude that there is no error in the judgment, and the same is affirmed.

FAUCETT v. SHEPPARD.

(Court of Civil Appeals of Texas. June 18, 1908.)

SCHOOL LANDS—APPLICATION TO PURCHASE—OBLIGATION—VALIDITY.

1. An application to purchase school land was not invalid, though applicant in the column of "prices per acre" gave the price as \$2, whereas the land had in fact been appraised at \$2.50.

2. The fact that the obligation for the remaining purchase money was given at the rate of \$2 per acre was immaterial, where, before award made, a proper obligation was filed with and accepted by the commissioner.

Appeal from District Court, Taylor County. Action by A. M. Sheppard against J. H. Faucett. From a judgment for plaintiff, defendant appeals. Affirmed.

J. M. Wagstaff, for appellant. Legett & Kirby and R. E. Chandler, for appellee.

CONNER, C. J. On a former appeal a judgment in this case in appellee's favor was reversed, on the sole ground that the evidence failed to show that the section of state school land in controversy was within a radius of five miles of appellee's home section. See *Faucett v. Sheppard*, 60 S. W. 276, to which we refer for statement of the case. This fact, however, was proven on the trial from which the present appeal was taken, and it is now insisted that appellee's application to purchase, which was prior to that of appellant's, is invalid, because appellee's title to his home section is void in that, in his application to purchase the same on March 2, 1897, in the column of "prices per acre" appellee gave the price as \$2, whereas it had theretofore been duly appraised at \$2.50, per acre, and in that appellee's obligation had then been given for the remaining purchase money at the rate of \$2 per acre. The facts, which are undisputed, show, however, that the misdescription noted as to price was induced by a letter from the Commissioner of the General Land Office, and that soon thereafter, and prior to the application of either party to purchase the land in controversy, the Commissioner discovered and notified appellee of said mistake in the statement of price, whereupon appellee forthwith executed and forwarded obligation for the proper amount, which was received by the Commissioner, and by him attached to the application in lieu of the original obligation; the Commissioner at the same time writing the figure "5" over the "0" in the application, so that in said column of "prices per acre" the proper appraised price of \$2.50 per acre appeared, and thereupon award was made.

Appellee's title to his home section was in all other respects regular, and we see no force in the contention that the proceedings above noted render such titles void. It would certainly be lamentable if the title of purchasers of our school lands could be held void because of matter at most constituting mere irregularities. The erroneous statement of the appraised value of appellee's home section in his application to purchase it was entirely immaterial. The law does not require the application to show the price of lands sought to be purchased. The only requirement in this particular is that the land desired shall be described. Nor does the law require the obligation to be filed at the same time as the application, nor as part of it. It is sufficient that it was shown beyond dispute that the proper obligation was in fact filed with the application and accepted by the Commissioner before the award was

made, there being no intervening right. We conclude that appellee had good title to his home section, and that he was an actual settler thereon at all times involved, and as such qualified to purchase, as additional thereto, the section in controversy.

It follows that we should affirm the judgment, the remaining questions now presented having been determined adversely to appellant's contention on the former appeal, and the admitted facts showing, as we conceive, prior and superior title in appellee to the land in controversy.

Judgment affirmed.

FRATERNAL UNION OF AMERICA v. HURLOCK.*

(Court of Civil Appeals of Texas. June 13, 1903.)

FRATERNAL INSURANCE — DELINQUENT ASSESSMENTS—PAYMENT—WAIVER OF CONDITIONS

1. The mere fact that the local secretary of a fraternal insurance order had, without authority, permitted a member of two years' standing, who had full knowledge of the rules of the association, to pay two delinquent monthly assessments without complying with the required conditions for reinstatement, while he enforced the rules against all other members, does not show a custom, binding on the order, to receive assessments tendered after the time for payment has expired; it not appearing that the superior officers had any knowledge of the violation.

Appeal from District Court, Navarro County; L. B. Cobb, Judge.

Action by Joel G. Hurlock against the Fraternal Union of America to recover on a benefit certificate. Judgment for plaintiff, and defendant appeals. Reversed.

Simkins & Mays, for appellant. W. J. Weaver, Balley & Wheeler, and Callicutt & Call, for appellee.

TEMPLETON, J. On November 7, 1899, the Fraternal Union of America, a mutual fraternal insurance order, issued a benefit certificate to Mrs. Rebecca Nelson whereby it contracted to pay her nephew, Joel G. Hurlock, the sum of \$600, upon her death while a member in good standing of the order. The certificate required the payment of monthly assessments, and it was provided by the laws of the order that a failure to pay such assessments should operate as a forfeiture of the insurance. Mrs. Nelson died on June 23, 1901, without having paid the May assessment. Liability was denied by the insurer, and the beneficiary thereupon brought suit on the certificate. The defendant pleaded the said provisions of the certificate and laws of the order, and the failure to pay the said assessment, in bar of a recovery. The plaintiff pleaded a tender of the assessment within the time allowed by the

certificate and laws of the order for the payment thereof, and that, if the tender was made after the expiration of the time allowed, the order was bound to accept the tender, for the reason that it was the custom of the collecting agent of the order to receive assessments tendered after the time allowed for paying the same had expired. There was a trial by jury, which resulted in a judgment for plaintiff.

The court instructed the jury that the plaintiff was entitled to recover if payment of the assessment was tendered within the time allowed by the laws of the order, or in accordance with the alleged custom. Appellant insists that the evidence wholly failed to show a custom that would be binding on the order, and that the court erred in submitting that issue to the jury. Under the laws of the order, the assessment for each month could be paid by the member at any time during that month. If not paid during the month, the member became delinquent, and could be reinstated only upon complying with certain conditions. The secretaries of the local lodges were collecting agents of the order, and had no authority to waive the said conditions. It was shown that the September, 1900, assessment was paid by Mrs. Nelson on October 12, 1900, and that the receipt for her December, 1900, assessment, was issued on March 13, 1901. It was also shown that these assessments were received without her being required to comply with the conditions prerequisite to a lawful reinstatement. It appears that the rules were enforced against all other members of the lodge who became delinquent. The laws of the order, including the rules governing the reinstatement of delinquent members and those limiting the authority of the collecting agent, were known to the assured and to the beneficiary. It was not shown that the supreme lodge, the officers and headquarters of which were located at Denver, Colo., had any notice whatever of the violation by the secretary of the local lodge to which Mrs. Nelson belonged of the laws of the order concerning the reinstatement of delinquent members. The evidence does not show a binding custom. Considering the total number of assessments paid by Mrs. Nelson, the fact that two of them were received after the time allowed for paying the same had expired did not justify her in assuming that the future assessments would be received after the time allowed for payment had elapsed. There was nothing in the circumstances attending the deferred payments to warrant such assumption, and the bald fact that the two assessments were accepted after the time allowed for payment had expired does not. Indeed, it is not clear that the December, 1900, assessment, if it was ever paid in fact, was not paid at maturity. There was evidently some mistake in regard to that assessment. If there was any waiver, it was by an agent without authority to make

*Rehearing denied July 2, 1903.

†1. See Insurance, vol. 28, Cent. Dig. §§ 1911, 1914.

it, and whose want of authority was known to the assured. We refrain from entering upon a discussion of the vexed question as to when the acts of such agent are binding on his principal. It is sufficient to say that, when an implied waiver by such agent is relied on to estop his principal, the waiver must be established by more cogent proof than has been adduced in this case. The proof was not sufficient to authorize the submission of the issue to the jury, and we cannot say that the error was harmless. The insurance was forfeited by the failure to pay the May assessment, unless payment of that assessment was tendered by the assured within the time allowed by the laws of the order. The evidence was sharply conflicting on that issue, and the jury may have found that payment of the assessment was not tendered within the prescribed time, and based their verdict on the theory that the tender in June was good, under the alleged custom. It is significant that the evidence offered by the plaintiff to show a tender in May indicates that the assured did not in fact rely on the custom of the secretary to accept payment after the member had become delinquent.

The judgment is reversed and the cause remanded.

CITY OF WHITESBORO v. DIAMOND et al.

(Court of Civil Appeals of Texas. June 18, 1903.)

CLERKS OF COURTS—JUDGMENT—PAYMENT TO CLERK—APPLICATION—SUMMARY RECOVERY—JURISDICTION—SATISFACTION OF JUDGMENT.

1. As it is not the duty of the clerk of the district court to receive money due on a judgment, he is liable for its conversion only in his individual capacity, and not as an officer of the court; and hence a motion to require him to pay over the money so appropriated is properly overruled.

2. A motion to require the clerk of the district court to pay over to a judgment creditor \$50 paid on the judgment and applied by the clerk to the costs in another suit cannot be treated as an original suit, as the amount in controversy is not within the district court's jurisdiction.

3. Unless the clerk of the district court is made the agent of the judgment creditor to receive money due on the judgment, a payment thereof to the clerk is not a satisfaction of the judgment.

Appeal from District Court, Grayson County; Rice Maxey, Judge.

Action by the city of Whitesboro against G. W. Diamond and others. From an order overruling a motion by the plaintiff to compel the clerk of the district court to pay over to it money paid on its judgment by the defendants, it appeals. Reversed and dismissed.

Chas. R. Crenshaw, for appellant. Wolfe, Hare & Semple, for appellee.

¶ 2. See Judgment, vol. 20, Cent. Dig. § 1644.

TEMPLETON, J. The city of Whitesboro instituted a number of suits in the district court of Grayson county against certain delinquent taxpayers of the city, the purpose of the suits being to recover the unpaid taxes and to foreclose alleged tax liens. Two of the suits were compromised, judgment being entered in favor of the city in each case for \$25 and all costs. The sums recovered by the city in these cases were paid to the clerk of the court, and he appropriated the same to the payment of costs he had charged against the city in the other cases, the costs in the said two suits having been paid by the defendants therein. The city denied the right of the clerk to make such appropriation, and filed a motion in said court to require him to pay over the money so appropriated. He resisted the motion, and the same was overruled; hence this appeal.

The district court had no jurisdiction of the matters set up in the motion. It was not the duty of the clerk to receive the money, and he cannot be held to have received it in his official capacity. *Railway Co. v. Walker*, 93 Tex. 611, 57 S. W. 568. It was not his duty, under the statute or the general law, to receive the money, and he had not been directed by any order of the court to receive it. He can be held liable, if at all, only in his individual capacity, and not as an officer of the court. His failure to pay over the money, even if he is not entitled to retain the same, was not a breach of any official duty, and he cannot be compelled, by motion filed against him in the district court, to discharge a personal obligation. The district court was without jurisdiction of the amount in controversy, and the motion cannot be treated as an original suit, and the cause determined on its merits. The payment to the clerk was not a satisfaction of the judgments, unless the clerk was the agent of the city to receive payment.

The judgment of the court below disposing of the cause on its merits will be set aside, and judgment entered dismissing the motion at the cost of appellant. Reversed and dismissed.

BEATY et al. v. OLYMER.

(Court of Civil Appeals of Texas. April 25, 1903.)

ADVERSE POSSESSION—REMAINDERMAN—ACCRUAL OF CAUSE OF ACTION—DOWER INTEREST—CONVEYANCE BY WIFE—SCOPE OF POSSESSION.

1. The possession of the grantee of a life tenant does not become adverse to the remainderman until the life tenant's death, no cause of action for possession accruing to the latter till then.

On Rehearing.

2. Adverse possession of an entire tract, taken under a conveyance by the owner's widow of her dower interest therein, relates only to the

¶ 1. See Life Estates, vol. 23, Cent. Dig. § 26.

life estate conveyed, and terminates therewith, so as not to constitute a portion of the period of occupancy necessary to establish title by adverse possession against a remainderman.

Appeal from District Court, Hunt County; H. C. Connor, Judge.

Action by Nancy Beaty and others against E. T. Clymer. Judgment for defendant, and plaintiffs appeal. Reversed and motion for rehearing overruled.

W. P. McBride, for appellants. J. G. Matthews and Finley & Knight, for appellee.

RAINEY, C. J. Action of trespass to try title, brought by appellants against appellee. Defendants pleaded the general issue, and statutes of limitations of five and ten years.

Conclusions of Fact.

"(1) The land in controversy was the separate property of Elias Atkinson, who died in 1859, leaving a widow, Christiana Atkinson, and Nancy Beaty and Mary Anderson, two daughters, as his only heirs at law. Christiana Atkinson, the widow, married Josiah McAdams in 1861, and died in November, 1900.

"(2) Elias Atkinson, who died in 1859, at the time of his death was the owner, in common with two brothers, of the Wm. Atkinson survey, of 640 acres; each of the brothers owning $213\frac{2}{3}/_{100}$ acres of land, which was at the time undivided.

"(3) The plaintiffs are the only heirs of Elias Atkinson, and are entitled to recover, unless they are defeated by the statutes of limitation, or are estopped from now claiming the land.

"(4) Christiana Atkinson, the surviving wife of Elias Atkinson, married Josiah McAdams in 1861, and on the 5th day of October, 1863, she and her husband, Josiah McAdams, conveyed the land in controversy to J. M. Clymer by warranty deed describing the land by metes and bounds, and reciting that it was all the right, title, interest, and claim that they have in the Atkinson survey of land.

"(5) The parties made the following agreement: 'In this case it is admitted by the plaintiffs and defendants that J. M. Clymer took immediate possession of the land in controversy, claiming the same under his deed from Jos. McAdams and wife, Christiana McAdams, at the date of the deed from them to him, on, to wit, October 5, 1863, claiming the same under said deed, and that he continued in peaceable, adverse possession of the same, and paying the taxes on the same, claiming the same under his deed from the said Josiah McAdams and wife, duly recorded in the office of the clerk of the county court of Hunt county, Texas, from the date of his purchase until he conveyed the land to O. B. Waller, and that Waller upon purchasing said land, at the date of his deed, on, to wit, August 17, 1869, without delay, went immediately into possession of the said

land under said deed from Clymer to him duly registered, and that he held the peaceable and adverse possession of the same, using and enjoying, cultivating the same, and paying the taxes thereon, and claiming the same under his deed from Clymer, from the date of same until he sold the land to E. T. Clymer, and that said E. T. Clymer, the defendant herein, immediately after his purchase from Waller, went into possession of said land, and has had the peaceable and adverse possession of the same from the date of his deed, to wit, November 21, 1894, until the filing of this suit, cultivating, using, and enjoying the same, and paying the taxes thereon, and claiming same under his deed from Waller, which is duly registered in the office of the county clerk of Hunt county, Texas, all of the above deeds registered about the time of their dates, and did all things necessary to be done under the five and ten years statutes of limitation, if limitation would run in this case.'

"(6) That in 1879 suit for partition of the Wm. Atkinson survey was brought by the two brothers of Elias Atkinson, to wit, Henry and Jesse Atkinson, against Christiana McAdams and her husband, Josiah McAdams, and Mary Atkinson, the mother of plaintiffs, who afterwards married Anderson, and Nancy Atkinson, one of these plaintiffs, which partition decree set apart the north third of the 640 acres, of which the land in controversy is a part, to Mary Atkinson and Nancy Atkinson, subject to the life estate of the mother, Christiana McAdams, in one-third of the same, as the heirs of Elias Atkinson; that neither Clymer nor Waller were parties to the suit, and were not mentioned in the records.

"(7) That Mary Atkinson and Nancy, the two daughters, afterwards sold and conveyed the remaining portion of the land owned by Elias Atkinson at the time of his death; that is, on the 2d day of November, 1878, the plaintiff Nancy Beaty and her sister, now deceased, joined by the husband of the deceased sister, conveyed to L. H. Marshall and O. L. Marshall $71\frac{1}{2}$ acres of the same, by deed describing the same as beginning at a stake in the timber on the northern boundary line of the original survey, 635 varas east of the N. W. corner; thence south with Waller's E. B. line 635 varas to a stake in prairie; thence east 635 varas; thence north 635 varas; thence west 635 varas to the beginning.

"(8) That on the 14th day of June, 1881, the plaintiff Nancy Beaty sold the east $71\frac{1}{2}$ acres to C. A. Swinson."

Conclusions of Law.

Limitation does not run against the remainderman during the life of the holder of a life estate. Cook v. Caswell, 81 Tex. 678, 17 S. W. 385; Govan v. Bynum, 17 Tex. Civ. App. 180, 43 S. W. 319; Gindrat v. Railway (Ala.) 11 South. 372, 19 L. R. A. 839, and

notes; Woods on Lim. (3d Ed.) § 259. Under our statute, limitation does not begin to run until a right of action accrues. Christiana McAdams had a life estate in the land in controversy, and this she had a right to enjoy during her life, to the exclusion of appellants. This estate she had a right to dispose of, and, when she sold to J. M. Clymer, her deed only carried with it her interest therein, which was a life estate; and those claiming under her had, as against appellants, the exclusive right of possession and use thereof during her life, and such possession was not adverse. Appellants were not entitled to possession. They had no right of entry. Therefore no cause of action had accrued in their favor, and hence they were powerless to act until the death of Christiana McAdams, which occurred in 1900. During the life of Christiana McAdams the law did not require the appellants "to look after the estate, the presumption being that the tenant in possession holds by such conveyance as the tenant for life had a right to give." Jackson v. Mancus, 2 Wend. 357. It follows that the acts of Christiana McAdams and those claiming under her, in holding possession of the land, using and enjoying the same, did not affect appellants' rights during the life estate. Appellants having no right of entry before the falling in of the life estate, and the possession of those claiming under Mrs. McAdams being consistent with her life estate, appellants were not estopped from asserting their title to the land.

The judgment of the court below is reversed, and judgment here rendered for appellants.

On Rehearing.

(July 3, 1903.)

Mrs. Christiana McAdams, upon the death of her first husband, Elias Atkinson, was seised, to the extent of a life estate, of an undivided one-third in the interest of Elias Atkinson in the William Atkinson survey, of 640 acres, which interest was an undivided one-third of said survey. Her deed only purports to convey her interest in the William Atkinson survey. That interest was only a life estate in a portion thereof, as stated, and which interest, when expressed in acres, was equivalent to the amount she conveyed to J. M. Clymer. The defendant claims under said deed, and as the interest conveyed was only a life estate, the possession of those claiming under Christiana McAdams was only adverse to the extent of the interest conveyed. Christiana McAdams having conveyed a specific portion as all of her interest, she was estopped from asserting claim to any portion of the balance, and such action on her part worked a partition as to her interest, if the other owners saw proper to acquiesce therein. This it seems they did, for they assumed control of the other portion, and conveyed it to

other parties. Eaton v. Tallmadge, 24 Wia 217.

It is insisted, however, that appellants did not convey any of the other portion until limitation had run a sufficient time to perfect title in appellee. In our opinion, as adverse possession, under the facts, could only relate to the life estate, it could only prevail against appellants to the extent of barring a claim, had they asserted any, that the life estate did not cover the whole of the land conveyed by Christiana McAdams.

We are still of the opinion that the appellants are entitled to the land, and the motion for rehearing is overruled.

COCHRAN et al. v. SIEGFRIED.

(Court of Civil Appeals of Texas. June 15, 1903.)

FORECLOSURE OF VENDOR'S LIEN—ACTION BY INDORSEE OF NOTE—ALLEGATIONS OF COMPLAINT—EVIDENCE—ADMISSIBILITY—PRINCIPAL AND AGENT—ACTION IN AGENT'S NAME—ASSIGNMENT OF ERROR—HARMLESS ERROR.

1. An assignment of error containing separate and distinct grounds of error will not be considered on appeal.

2. An agent who buys a note with his principal's money, and has it indorsed to himself, may maintain an action thereon in his own name.

3. Where, in an action on a note and to foreclose a vendor's lien on land for which it was given, plaintiff, an indorsee of the note, pleaded that before purchasing the note he made careful inquiry as to the nature of the transaction under which it was given, and became satisfied that it was a bona fide sale of the payee's homestead to the maker, evidence that the payee's attorney assured plaintiff that the transaction was a bona fide sale was admissible.

4. Where, in an action on a note and to foreclose a vendor's lien on land for which it was given, brought by an indorsee of the note, the payee and his wife testified that the sale to the maker was not absolute, but to secure a loan, and there was no opposing evidence, the exclusion of the written agreement by the maker to reconvey was harmless.

Appeal from District Court, Austin County; L. W. Moore, Judge.

Action by John Siegfried against Florence M. Cochran, executrix of N. Cochran, deceased, and others. From a judgment for plaintiff, defendants appeal. Affirmed.

John P. Bell and J. S. Brewer, for appellants. A. Chesley and W. A. Matthaei, for appellee.

GILL, J. This suit was brought by appellee to recover of appellant executrix on a note for \$500, and to foreclose a vendor's lien upon certain land for which the note was alleged to have been given in part payment. John W. Foster and his wife, Laura, also appellants, were made parties defendant as claiming an interest in the land. The defendants Foster pleaded that the property was their homestead at the date of the transaction in which the note was executed, that the

sale was a pretended one for the purpose of borrowing the \$500, and that appellee knew the facts when he purchased the note, and knew that the money was obtained for the use of Foster. Defendant John Foster confessed liability personally for the note according to its terms. Mrs. Cochran, independent executrix of the will of her deceased husband, set up the facts as averred by the Fosters, averred that the transaction was a loan made solely for his benefit, and denied all liability on the part of the estate. Trial by jury resulted in a verdict and judgment for plaintiff for his debt and foreclosure, from which all the defendants have appealed.

The facts as to the nature of the transaction are practically undisputed, the real issue being whether plaintiff was chargeable with notice of its character. Jno. W. Foster, being in need of money, deeded 45 acres of his homestead to N. Cochran, deceased, the deed being absolute in form, and reciting a consideration of \$400 in cash, and Cochran's promissory vendor's lien note for \$500, which was executed and delivered to Foster. The latter's wife joined in the deed. Foster at once sold the note to Siegfried, indorsing it in blank. Default being made at maturity, this suit was brought, resulting as stated above.

The first assignment of error will not be considered. It is multifarious, containing six separate and distinct grounds of error.

By the seventh assignment of error appellants complain of the refusal of the trial court to abate the suit, on the ground that plaintiff had no interest in the cause of action. The facts upon this point are that plaintiff had in his possession, as agent for Mrs. Soja, who resided in Germany, \$500 for investment. He placed the sum in the note sued on, and had it indorsed to himself. The transaction, however, was for the benefit of his principal. We are of opinion the point is not well taken. Having made the transaction in his own name, he can maintain the action in his own name. The fact that his pleadings did not disclose his trusteeship is immaterial. Plaintiff took the legal title by his purchase, and Mrs. Soja, being the beneficiary in the purchase, will occupy a like relation to the judgment. The defendants will not be heard to make the point.

Under the fifth assignment appellants complain of the admission of testimony of appellee to the effect that in his investigation of the character of the transaction between Foster and Cochran he consulted Shelburne, an attorney, who assured him the transaction was binding and bona fide. The objection embodied in the proposition is that there is no allegation to support the evidence, and it is therefore immaterial. We are of opinion the particular objection urged is not tenable. It appears from other evidence that plaintiff knew that the land conveyed to Cochran was a part of the homestead of the Fosters. He knew that, while they might sell it, they

could not in any way pledge it as security for a debt. With knowledge of its homestead character, it behooved him, before purchasing the note, to inquire whether the sale was absolute, or a mere device to evade the homestead laws. His question to Shelburne was a part of this inquiry which it was his duty to make, and Shelburne's answer, as sworn to by plaintiff, assumed to state a fact, viz., that the sale was a bona fide sale. Whether he ought to have relied on the assurance is another question. But the objection that the evidence is not justified by the pleading is answered by the allegation "that plaintiff, before purchasing the note, made careful inquiry as to the nature of the transaction, and became satisfied the sale was bona fide." After all, however, the issue was one of diligent inquiry, and the fact that plaintiff inquired of Shelburne, who, he testifies, was one of Foster's attorneys in the transaction, and who assumed to know, was admissible on that point. The point that the evidence was hearsay is not made. The exclusion of the written agreement by Cochran to reconvey was harmless. Foster, his wife, Mrs. Cochran, and her son all testified that the sale was not absolute, but made to secure the loan. There is no opposing evidence.

Because no harmful error is presented, the judgment of the trial court is affirmed. Affirmed.

TEXAS & P. RY. CO. v. KNOX.

(Court of Civil Appeals of Texas. June 13, 1903.)

RAILROADS—INJURIES AT CROSSING—DISCOVERED PERIL—FAILURE TO PLEAD—SUBMISSION OF ISSUE—REVERSIBLE ERROR.

1. Where, in an action for injuries at a railroad crossing, the pleadings did not raise the issue of discovered peril, the submission of such issue to the jury was reversible error.

2. Where the main charge embraced an issue sought to be submitted in a special charge requested, the refusal of the request was not error.

Appeal from Van Zandt County Court; Jno. W. Davidson, Judge.

Action by J. M. Knox against the Texas & Pacific Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

This is a suit brought by the appellee against the appellant in the county court of Van Zandt county, Tex., to recover damages for personal injuries growing out of a collision of a train of cars and plaintiff's wagon in the town of Grand Saline, Van Zandt county, Tex., as appellee was crossing the tracks of appellant going south, on the 4th day of October, 1902. The case was tried at the January term, 1903, resulting in a verdict and judgment for appellee in the sum of \$360, from which judgment, after motion for new trial was denied, defendant appealed.

T. J. Freeman and H. M. Cate, for appellant. C. H. Reese, for appellee.

BOOKHOUT, J. The court, in the ninth paragraph of the charge, submitted to the jury the issue of discovered peril in the following language: "Should you find and believe from the evidence that the employes of the defendant company, on the occasion in question, discovered the peril of plaintiff in time to have avoided the injury to the plaintiff, then you are charged that it was the duty of such employes to use every means within their power consistent with their own safety and that of their train to avoid injury to plaintiff, and their failure to do so would be negligence on the part of defendant corporation, and would entitle plaintiff to recover; and if you so find and believe you will find for the plaintiff." This charge was error, as the issue of discovered peril was not raised by the pleadings. It is reversible error to give a charge on an issue not pleaded. *T. & P. Ry. Co. v. French*, 86 Tex. 96, 23 S. W. 642; *Ry. Co. v. Powell* (Tex. Civ. App.) 41 S. W. 606.

The failure to give the special charge requested by appellant, the refusal of which is made the ground of the second assignment, presents no reversible error. The main charge embraced the issue sought to have submitted in the special charge.

For the error above pointed out, the judgment is reversed, and the cause is remanded.

VITKOVITCH v. KLEINECKE et al.*

(Court of Civil Appeals of Texas. June 10, 1903.)

NOTES — INDORSEMENT — CONSIDERATION — LIABILITY OF INDORSER—SUIT AGAINST MAKER—TERMS OF COURT—PLEADING—SIGNING—AMENDMENT—TRIAL.

1. Rev. St. 1895, art. 304, provides that the liability of an indorser of a negotiable note may be fixed without protest by suing the maker before the first term of the county or district court to which suit can be brought after the right of action accrues, or by suing at the second term and showing good cause for not suing at the first term. *Held*, that where, after the maturity of a note, there was not sufficient time to obtain service for the February term of court, and suit was brought at the April term, such suit was sufficient to charge an indorser, as the April term, under such circumstances, would be held to be the first term after the cause accrued.

2. The fact that there was not sufficient time in which to obtain service for the February term was a sufficient excuse for the bringing of the suit at the April term, though such term should be held to be the second term after maturity of the note.

3. Where a petition in an action on a note was not signed when filed, and thereafter, under leave of court, it was amended so as to cure such formal defect, and defendants appeared and answered at the succeeding term, waiving the issuance and service of citation, the cause was properly tried at that term, the defect in the petition being a mere irregularity subject to amendment, and, when amended, the petition relating back to the date of its filing.

4. Where a builder, in order to obtain a contract, procured a loan to be made by plaintiff to defendant, and the note securing the loan was executed to the builder as payee, who imme-

diately indorsed the same to plaintiff, he was not an accommodation indorser, but an indorser for value, and liable as such.

Appeal from District Court, Galveston County; Wm. H. Stewart, Judge.

Action by John Vitkovitch against Anna Kleinecke and others. From a judgment in favor of plaintiff against defendant Kleinecke, but in favor of defendant John Bautsch, plaintiff appeals. Reversed and rendered.

Jas. B. & Chas. J. Stubbs, for appellant. Wm. T. Austin, for appellees.

FLY, J. This action was instituted by appellant against Anna Kleinecke, as the maker, and John Bautsch, as indorser, of a promissory note for \$1,800, and against S. S. Hanscom, as trustee, in a certain deed of trust given by Anna Kleinecke to secure the payment of said note, and for foreclosure of the lien. The cause was tried by the court, and resulted in a judgment in favor of appellant for his debt and foreclosure of his lien as to Anna Kleinecke, but against him as to John Bautsch. Hanscom being only a formal party, judgment was rendered in his favor. Appellant desires a review of the judgment in favor of Bautsch.

On January 21, 1899, Anna Kleinecke executed a note to John Bautsch for \$1,800, due three years after date, bearing 7 per cent. interest, and 10 per cent. attorney's fees if placed in the hands of an attorney for collection. She at the same time executed a builder's lien and deed of trust on certain lots in the city of Galveston to secure the same. On the same day, for a valuable consideration, the promissory note was indorsed by Bautsch to appellant. Nothing was paid on the note, except the interest up to July 21, 1900. The note became due on January 21, 1902, and, allowing for three days' grace, suit could have been instituted on January 25, 1902. The first term of the district court in Galveston county after the note became due began on the first Monday in February, 1902, being the third day of that month, and could last until the Saturday before the first Monday in April, on which day another term of the court began. Appellant filed this suit on February 10, 1902, but the petition was not signed by the appellant or his attorneys. Service was obtained on appellees for the term beginning on the first Monday in April, 1902, and on April 5, 1902, both of them answered, Kleinecke's answer being a general demurrer and general denial, and Bautsch's being a general demurrer, and that if at all liable it was as an indorser, and by special exception setting up that he had not been sued at the first term of the court after the note became due, and no good cause was alleged for not bringing the suit at an earlier date. On May 14, 1902, appellant, by leave of the court, amended his petition by signing the names of his attorneys thereto, and on the same day filed

*Application for writ of error pending in Supreme Court.

a supplemental petition setting up the facts as to when the note became due, when the February term of the court began, and claiming that the April term was the first term in contemplation of law after the note became due. Bautsch filed a motion on May 15th to strike out the original petition because it had not been signed until that day, and also filed general and special demurrers, and pleaded generally and specially to the merits of the case. The trial court held that the February term of the district court was the first term after the cause of action accrued, and that the filing of an unsigned petition was not the institution of the suit for the April term, and that the suit was really not instituted until May 14, 1902, when, under leave of the court, the petition was signed by the attorneys for appellant.

It is provided in article 304, Rev. St. Tex 1895, that the holder of any bill of exchange or promissory note, assignable or negotiable by law, may fix the liability of the drawer or indorser, without protest, by suing the acceptor of the bill of exchange, or the maker of the note, before the first term of the county or district court to which suit can be brought after the right of action shall accrue, or by suing at the second term and showing good cause for not suing at the first term. It appears from the evidence that the cause of action accrued not more than eight days before the February term of the district court of Galveston county began, and, if suit had been instituted on the note at the very earliest moment, service could not have been perfected at the February term. The statute says that the action must be instituted before the first term of the district or county court to which suit can be brought after the right of action shall accrue. Would the institution of suit be required at a time when it would be impossible to obtain service? Upon this question we have been unable to find direct authority, although in the case of *Bailey v. Heald*, 14 Tex. 226, it is held that inability to perfect service before the first term of the court after the cause of action accrued would be a sufficient excuse to justify a suit against an indorser at the second term. The validity of that excuse must rest on the premise that the first term of the court to which the suit can be brought or perfected was in reality the one to which it was brought. However, if that is not a legitimate inference to draw from the decision, it does hold, in no uncertain terms, that such facts would form a reasonable excuse for failure to earlier institute the suit.

Appellant filed an imperfect petition on February 10th, in that it was not signed, and appellees, in response to the citation, came into court and answered, without attacking the petition on account of that defect. Afterwards the petition was amended under leave of the court, and proper allegations were made in a supplemental petition

as to why the suit had not been filed at the February term. At that time appellees were duly in court, and if it should be held, as was done by the trial judge, that the suit was then and there instituted, and that it was during the second term of the court after the accrual of the action, still it was as fully brought to the second term as though appellees had been served with citation, because they appeared, and, by answering, waived the issuance and service of citation. They were both in court, and it cannot be denied that the suit could have been properly tried at that term of the court. We think, however, that the amendment did not set up any new cause of action, but merely cured formal defects in the petition, and went back to and dated from the filing of the petition on February 10, 1902. Speaking on the subject under consideration, in the case of *Boren v. Billington*, 82 Tex. 137, 18 S. W. 101, the Supreme Court, through the present Chief Justice, held: "A petition, however defective in substance, is certainly capable of amendment, and we see no reason why the right should be denied when the defect is one of form. The signature to a pleading is a formal requisite. The failure to comply with the requirement is an irregularity that may subject the pleading to be stricken out upon motion, or to be treated as a nullity by the court, but it is one which does not operate to the injury of the opposing party, and therefore its amendment cannot prejudice his rights upon the trial of the cause." Being a formal defect, a mere irregularity, it did not go to the foundation of the action, and, when the signature was appended, the suit stood as though instituted free of defects or irregularities on the date of its filing. *Fidelity Co. v. Lopatka* (Tex. Civ. App.) 60 S. W. 268. Perhaps the excuse for not suing at the February term, if it was at all necessary, should have been embodied in an amended petition, instead of being set up in a supplemental petition, but, in the absence of exceptions attacking it on that ground, it will be considered as though pleaded in the proper form. We conclude that if, as held in the *Bailey-Heald* Case, the failure to file suit at the February term was sufficiently excused by the fact that service at that term was impossible, to all intents and purposes the April term was the first term after the cause of action accrued, and that the filing of the unsigned petition was an institution of the suit at that term. But if it be held that the April term was the second term after accrual of the action, then the suit was properly instituted at that term, and good cause shown for failure to sue at the first term.

Appellee Bautsch insists that although the court may have given reasons for its action which cannot be sustained, yet that the facts show that Bautsch was not liable as an indorser, because the note and deed of trust constituted an original transaction between

appellant and Kleinecke to which Bautsch was not a party and in which he had no interest, he having allowed his name to be used as payee in the note, and beneficiary in the deed of trust, purely as an accommodation to appellant. The facts show that Mrs. Kleinecke wanted a house built, and Bautsch, who was a builder of houses, desired the job. Mrs. Kleinecke did not have the money to build with, and Bautsch, having a direct interest in her getting it, sought some one who would lend her the money. In order to get the money, she entered into a building contract with Bautsch, and also gave him the promissory note. The papers were drawn at the instance and request of appellees, and appellant had no connection with them until they were indorsed by Bautsch to him, and he gave a check for the money, which was paid to Bautsch. The whole affair seems to have been gotten up largely for the accommodation of Bautsch. The negotiations with appellant were conducted through Johnson, an agent of appellees. The method of raising the money in this instance was one often pursued by Bautsch. An accommodation bill or note is one to which the accommodating party has put his name, without consideration, for the purpose of accommodating some other who is to use it and is expected to pay it. In order to render a bill or note accommodation, the indorser must lend his credit to the maker for the benefit of the latter, and without benefit to the indorser. Daniell, Neg. Instr. § 187; Tiedeman, Com. Pap. § 158. Under the very terms of the definition of accommodation paper, Bautsch could not sustain the character of accommodation indorser. He was as greatly benefited by it as the maker of the note, it being a joint enterprise on their part. The inference may be indulged in that he signed the papers in order to get the profit that he would make on his contract, and that he did get it.

We conclude that the judgment should be affirmed as to Mrs. Kleinecke and Hanscom, and that it should be reversed as to John Bautsch, and judgment here rendered that appellant do have and recover of John Bautsch, as indorser of said promissory note, the amount of his debt, together with the costs of this and the lower court, and that Bautsch have judgment over against Mrs. Kleinecke.

GULF, C. & S. F. RY. CO. v. WILDER.*

(Court of Civil Appeals of Texas. June 13, 1903.)

RAILROADS—INJURIES TO EMPLOYE—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—NEGLIGENCE OF FELLOW SERVANTS—MASTER'S LIABILITY—INSTRUCTIONS.

1. In an action by an employé against a railroad for injuries the court instructed that plaintiff had assumed all the risks ordinarily inci-

dent to the service, and could not recover unless his injury was caused directly by the negligence of defendant, without fault on his part contributing thereto, and unless he was injured as alleged, and such injury was caused by the negligence of defendant or its servants in the respect alleged, without fault on the part of plaintiff contributing thereto. *Held*, that this instruction correctly stated the law as to assumption of risk.

2. Though the instruction also referred to the issue of contributory negligence, it is not open to the objection that it confused the issues of assumed risk and contributory negligence, and was thus misleading, as it required a finding for defendant, unless the injury was caused directly and solely by defendant's negligence.

3. A railroad company is liable to an employé making a coupling for the negligence of the servant in charge of the engine attached to the cars.

Appeal from District Court, Johnson County; W. Poindexter, Judge.

Action by J. B. Wilder against the Gulf, Colorado & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals. *Affirmed*.

J. W. Terry and Ballinger Mills, for appellant. S. C. Padelford, for appellee.

TEMPLETON, J. J. B. Wilder was injured while in the service of the Gulf, Colorado & Santa Fé Railway Company. He brought suit on account of his injuries, and on a jury trial obtained judgment for \$950. At the time he was injured the plaintiff was working in the company's shops and yards at Cleburne in the capacity of assistant hostler. He and the hostler were directed to take an engine and change the position of some tank cars. The hostler acted as engineer and the plaintiff coupled the cars. The first coupling was made, and the engine and car there-to attached were brought to a standstill a short distance from another car which was to be coupled onto and moved. The plaintiff signaled the hostler to move slowly up to the second car, and went in between the cars which were to be coupled. He went to the standing car, and prepared to make the coupling. He then looked toward the moving car, and discovered that it was almost upon him. Before he could get off the track, the cars came together, and he was caught between them and injured. It was alleged in the petition that the hostler disregarded the slow signal which the plaintiff gave him, and negligently moved the engine and attached car at a dangerously rapid speed up to and against the standing car, thereby causing the accident. The defendant pleaded the general issue, assumed risk, and contributory negligence.

Complaint is made of the eighth paragraph of the court's charge, which reads as follows: "When plaintiff entered the service of the defendant company, he assumed all the risks and dangers ordinarily incident to the service in which he was engaged, and, though

*Rehearing denied July 2, 1903.

§ 3. See Master and Servant, vol. 34, Cent. Dig. § 512.

you might believe from the evidence that the plaintiff was injured as alleged, you could not find for him unless such injury was caused directly by the negligence of the defendant company, without fault on his part contributing thereto, and unless you believe from the evidence that the plaintiff was injured as alleged, and that such injury was caused by the negligence of the defendant company or its servant in charge of said engine in the respects alleged without fault on the part of plaintiff contributing thereto, you should find for the defendant." The complaint is that the charge does not correctly present the law of assumed risk, and confuses the defenses of assumed risk and contributory negligence. The charge properly instructed the jury that "when plaintiff entered the service of the defendant company he assumed all the risks and dangers ordinarily incident to the service in which he was engaged." And it is the law, as stated in the charge, that the plaintiff was not entitled to recover, even if he was injured as alleged, "unless such injury was caused directly by the negligence of the company, without fault on his part contributing thereto." Nor is there any doubt as to the legal correctness of the instruction that, "unless you believe from the evidence that plaintiff was injured as alleged, and that such injury was caused by the negligence of the defendant company or its servant in charge of said engine in the respects alleged, without fault on the part of the plaintiff contributing thereto, you should find for the defendant." The contention of appellant that the issue of assumed risk was incorrectly presented cannot be sustained.

The other contention of appellant is that the charge was misleading, in that it confused the issues of assumed risk and contributory negligence. The charge informed the jury that the plaintiff assumed the risks ordinarily incident to his employment, and that he was not entitled to recover, even if he was injured as alleged, "unless such injury was caused directly by the negligence of the defendant company, without fault on his part contributing thereto." This instruction required a finding for the defendant unless the injury was caused directly and solely by the negligence of the company. If the injury was caused by such negligence, it was not caused by any of the risks assumed by the plaintiff, for he did not assume the risks arising from his employer's neglect. The issue of contributory negligence was evidently referred to by the trial judge in this connection in order to preclude a recovery by the plaintiff unless the negligence of the defendant was the sole cause of the accident. A reference to the issue for such purpose was not calculated to mislead the jury to the injury of the defendant, or to confuse the issues in the minds of the jurors.

The court instructed the jury, in substance, that, if the servant of the company in charge

of the engine was negligent, the defendant was responsible therefor. The proposition is too well settled to admit of argument. The proposition was stated abstractly, and the charge did not require the jury to find for the plaintiff if the engineer was negligent, without regard to the other issues in the case. The charge was a correct statement of the law, and the criticisms urged against it by appellant are without merit.

It is contended that the evidence was not sufficient to warrant the verdict, but we do not concur in the contention.

We find no reversible error in the record, and the judgment will therefore be affirmed.

TEXAS & P. RY. CO. v. HUBER et al.
(Court of Civil Appeals of Texas. June 13, 1903.)

RAILROADS — ACCIDENT AT CROSSING — CONTRIBUTORY NEGLIGENCE — INSTRUCTIONS — REMOVAL OF CAUSES — ASSIGNMENTS OF ERROR.

1. An action against two defendants is not removable from the state to the federal courts on their joint petition averring that the controversy arises under the laws of the United States as to one of them alone, where there is no separable controversy between plaintiff and the latter defendant, nor any evidence showing that the other defendant was made a party solely to defeat the removal.

2. An assignment of error embracing separate and distinct propositions, but not submitted as propositions, nor followed by any proper statement, will not be considered on appeal.

3. Plaintiff's decedent was struck by defendant's switch engine and killed. He was walking along the sidewalk going west, and the engine which killed him was traveling east. When he turned to cross the track, he was in a position to see the engine, there being nothing to obstruct his view. *Held*, that defendant, having pleaded contributory negligence, was entitled to an instruction that decedent was bound to use such precaution to learn of the engine's approach, before attempting to cross, as men of ordinary prudence would use under the circumstances.

Appeal from District Court, Dallas County; T. F. Nash, Judge.

Action by M. E. Huber, for herself and as the next friend for Georgia Huber, an infant, against the Texas & Pacific Railway Company and another. From a judgment for plaintiff, defendant railway company appeals. Reversed.

T. J. Freeman and Hall, Flippen & McCormick, for appellant. M. M. Parks and W. T. Strange, for appellees.

RAINEY, C. J. In February, 1902, a switch engine, while being operated by appellant's servants along Pacific avenue, a public thoroughfare in the city of Dallas, ran over and killed Lawrence Huber. His surviving wife, M. E. Huber, for herself and as next friend for Georgia Huber, minor, daughter of deceased and said M. E. Huber, brought this suit against appellant and R. J. Oliphant, the engineer who was operating the engine at the time, to recover damages

occasioned to them by reason of said killing, which, it was alleged, was caused by the negligence of said Oliphant in operating said engine as an employé of appellant. The defendants in due time filed their petition for removal to the United States Circuit Court for the Northern District at Dallas, the ground alleged being, in effect, that this is a suit arising under the laws of the United States, in that the appellant Texas & Pacific Railway Company was incorporated by acts of Congress of the United States, under which it was being operated. This petition was denied, to which ruling exceptions were duly taken. Defendants then answered by general demurrer, general denial, and plea of contributory negligence. Judgment was rendered in favor of plaintiff against the railway company only, which prosecutes this appeal.

The appellant contends that the court erred in assuming jurisdiction and trying the cause after the petition and bond for removal were presented. The effect of filing a proper petition for removal with bond in a suit that is removable pending in a state district court is to deprive the said court of jurisdiction and confer jurisdiction upon the federal court. Such being the effect, did the filing of the petition for removal in this case deprive the district court of Dallas county of jurisdiction to try the same? The defendant Oliphant is alleged to be a resident of Texas. Plaintiff's action is one of tort brought jointly against said Oliphant and the railway company. It contains no separate controversy which would authorize a removal by one of the defendants alone. *Powers v. Chesapeake, etc., Ry. Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 873. The petition for removal was made by both defendants, but no federal question is stated therein that affects said Oliphant. The only federal question stated therein relates only to the railway company. It not being shown that Oliphant was made a party solely to defeat a removal to the federal court, the petition fails to allege sufficient grounds for removal, unless the mere fact that Oliphant joined the railway company in the petition for removal is sufficient. We have been unable to find an authority in point on this question. It seems to be well settled that, to bring the case within the removal act on the ground of diverse citizenship and that there is no separable controversy, all the plaintiffs must be citizens of the state in which suit is brought and all of the defendants must be citizens of some other state or states, and, further, that all the defendants must join in asking for the removal. *Dillon, Rem. Causes*, § 16, p. 18, and cases there cited. In *Railway Co. et al. v. Martin*, 178 U. S. 245, 20 Sup. Ct. 854, 44 L. Ed. 1055, where the removal was sought by a part of the defendants, it being alleged that the controversy arises under the Constitution and laws of the United States, the court, in effect, holds that the same rule

of procedure obtains where the removal is sought either on the ground of a federal question being raised or of diverse citizenship. The court also held that all the defendants must join in the application, but the facts show that all the defendants were entitled to removal had they joined in the application, but some of them did not do so. To the same effect, *Miller v. Bank* (C. C.) 116 Fed. 551. In *Mayor et al. v. Independent Steamboat Co.* (C. C.) 21 Fed. 593, all the defendants did not have grounds for removal, and only one of the defendants made application on the ground that "the controversy arises under the Constitution and laws of the United States." The suit was removed to the federal court, but was remanded, the court holding that "the suit can only be removed on the petition of all the defendants, unless there is also a separable controversy as between the plaintiff and the removing defendant." That case negatively seems to support appellant's position. But the question here raised was not passed upon there. Had it been, we can only conjecture the holding. The proper construction of the foregoing decisions on this question, in our opinion, is that the courts only intend to hold that in suits involving no separable controversy, there being more than one defendant, each defendant should have a cause for removal, and each should join in the application for removal; otherwise in this case the question of removal would be absolutely controlled by the pleasure of defendant Oliphant, as to whom no legal ground for removal exists. We cannot believe that the law confers such a privilege upon a defendant in his condition, and therefore hold that the court did not err in retaining jurisdiction to try the case.

Appellant's third assignment of error complains of the action of the court in refusing to submit three special instructions, Nos. 2, 3, and 5, requested by it. These embrace separate and distinct propositions, but are not submitted as propositions, and there is no proposition presented under said assignment, nor is there any statement made thereunder or reference to any other in the brief. The assignment, therefore, is not presented in accordance with the rules, and will not be considered by this court.

The fifth assignment of error complains of the refusal to submit the following requested instruction, viz.: "From the fact that there was an injury no presumption arises as to the guilt or innocence of either, but the deceased, before attempting to cross the track, to fulfill the burden of care resting upon him, was bound to take such precaution to learn of the approach of trains as men of ordinary prudence would take under like circumstances of danger. If you believe from the evidence that in consequence of the want of care on the part of the deceased he was guilty of such negligence as proximately contributed to his death, the plaintiffs cannot

recover, and you will find for the defendants." While it is true that no presumption of negligence arises from the mere fact that there was an accident, and while the charge announces a correct rule of law, the wording as to a presumption is not entirely free from criticism. However, in view of the evidence, as the charge asked properly applied the law to the facts, and the court's charge not being sufficiently full on this issue, it was error to refuse said special charge. The evidence shows that deceased was walking along the sidewalk going west. The engine which killed him was traveling east. When he turned to cross the track, he was in a position to see the approaching engine, there being nothing to obstruct his view. Under these facts, the defendant having pleaded contributory negligence, it was entitled to have the jury told that the deceased was bound to use such precaution to learn of the approach of trains, before attempting to cross the track, as men of ordinary prudence would use under like circumstances, and, if he failed to use such care, he was guilty of contributory negligence. Ry. Co. v. Graves, 59 Tex. 330.

The judgment is reversed, and the cause remanded.

TEXAS CENT. R. CO. v. HARBISON.*

(Court of Civil Appeals of Texas. May 30, 1903.)

RAILROADS—KILLING MARE—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

1. In an action against a railroad for killing a mare left unhitched within a few feet of the track, and frightened at an approaching train, and caused thereby to run in front of the engine, the evidence examined, and held insufficient to disclose negligence on the part of defendant.

2. Whether plaintiff was guilty of contributory negligence was for the jury.

Appeal from Eastland County Court; J. R. Stubblefield, Judge.

Action by M. T. Harbison against the Texas Central Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

Calhoun & Webb, for appellant. B. W. Patterson, for appellee.

SPEER, J. Appellee recovered judgment against appellant in the sum of \$150 for killing a mare, and, as establishing negligence, relies principally upon the testimony of his father, which is as follows: "I was hauling express last December at Cisco. Working for the Pacific Express Company. That company had then been in business at Cisco many years. Mr. J. T. Wilson, the local agent for the defendant company, told me that we could store the express in the baggage room at the Union Depot at Cisco, and we had been storing it there for four months before the wreck occurred. On the night of

December 12, 1901, I had quite an extra amount of express to haul to the depot. It required three loads, and it was cloudy or foggy that night, and, as soon as dark came, it got extremely dark. I was down there with my last load. I had turned the mare and backed the hack in against that sill there, just as usual. I could not get directly into the baggage room, but had to go around one corner about 12 feet and unlock a door, and go in that way with the express. I had just opened up and come back to the back end of the hack when I heard the train, and the mare frightened at it and started to run. I ran quickly around the left or east side of the hack and caught her by the bits. The train was running very fast, and instantly struck the back end of the wagon, and drove and drug it past me. In an instant the mare was also past me, and I was crushed back against the fence. The mare was also caught in the rubbish, and her hind foot injured or broke. My leg was broken, and I was carried into the depot. I never saw the mare any more. The train ran nearly 100 feet after I saw it before it struck the wagon. There were several trains that carried Pacific Express Company's freight. The T. & P. had two trains each way a day, two in the middle of the day, and two about 2 o'clock a. m. The express office in town closed at 6 p. m., and at that time I hauled all of its freight to the Union Depot. I did not hear the train that wrecked the wagon and team until just as the mare started. If any bell or whistle was sounded I did not hear them. There was some light, but it was dim. If there was any headlight it was very dim, and train was running very fast. When I drove in there to unload I saw an engine switching some cars down on the T. & P. track, but I thought it was a T. & P. engine. I did not habitually unload express there at night, but on account of having three loads to deliver that night after 6 o'clock, and the extreme darkness of the night, I was in the dark that time, and had been on several occasions that fall. I do not say that Mr. J. T. Wilson, agent, told me to stand my express wagon where I stood it, but he told me that we could store the express goods in the baggage room of that depot, and he frequently saw us stand and unload there, and did not object; in fact, we could not reasonably be expected to stand the wagon anywhere else. We could have stood the express wagon south of that side track and carried the express across the track into the baggage room, but one man could not do it, and the express company did not furnish me any man to help carry that express that far. At the time of the wreck, as I now recollect, the express wagon was loaded with sacks of pecans, and I had just started to unload when the mare started to run. I did not hitch or tie the mare while unloading, and she was not hitched. I was not expecting a train to come along there at that time. A train passing on

*Rehearing denied June 27, 1903.

that side track would pass within a few feet of the mare's head where she was standing. I never had her stand there while a train passed on that side track. I always took her away and hitched her, if I had occasion to remain at the depot longer than necessary to load or unload. I do not know whether or not Mr. Elisha Moore ever told me that it was dangerous to stand that mare there to load or unload. He probably told me to be careful and not let her run away or get the best of me, or something of that kind. I do not know of any special warning or caution as to that particular place. He frequently helped me unload there, and I cannot remember all that he said. That side track was used by the railroads delivering cars back and forth, and also when they ran around the 'Y' to turn. There was quite an amount of freight handled at Cisco last December by the railroads, and cars were run along the side track frequently. I knew that a passing train on that side track would frighten the mare, but I was not expecting one to come along then. The place where my hack was standing just before the injury is a place where baggage and passengers are frequently unloaded, and where hacks stand and people frequently pass." One or two other witnesses testified substantially as did this witness.

The testimony for appellant was to the effect that the engineer was looking ahead and the fireman ringing the bell at the time of the accident, and that they did not see the animal until just about the time the engine struck the vehicle; that the headlight, which was an ordinary oil light, was burning, and enabled them to see objects upon the track, distinctly, 400 feet ahead; that the train was running slowly—about five or six miles per hour—and that the operatives had no knowledge that any person was about the depot, the premises being not lighted up.

We fail, after a careful examination of all the testimony, to discover sufficient evidence to establish negligence upon the part of appellant. It is undisputed that the driver left the mare unhitched within a few feet of the track, with no possible way to escape except along or across the track, and that she suddenly became frightened at the approaching train, and ran immediately in front of the engine and was injured almost instantly. While we think it is true that the evidence tends to show such contributory negligence as would preclude a recovery, yet we cannot hold, as matter of law, that the facts in evidence constitute such contributory negligence. It is a question for the jury or trial court to say whether or not a reasonably prudent person would have acted as did the person in charge of the animal.

The judgment is reversed because of the insufficiency of the evidence in the particular first discussed, and the cause remanded for a new trial.

KING v. HILL et al.

(Court of Civil Appeals of Texas. June 13, 1903.)

DEEDS—DELIVERY—EVIDENCE—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—APPLICATION—INSTRUCTIONS—HARMLESS ERROR.

1. In trespass to try title, evidence held insufficient to show that a deed through which defendant claimed had ever been delivered by the grantors therein, with intent to pass title to the property.

2. Where, in trespass to try title, the evidence failed to show delivery of a deed through which defendant claimed, an error, if any, in an instruction requiring delivery by two joint grantors instead of by either, was harmless.

3. Where defendant was represented by two attorneys, an application for a new trial for newly discovered evidence, sworn to by only one of his counsel, and averring that he did not know of the newly discovered testimony before the trial, but which did not negative the fact that defendant or his other attorney had knowledge thereof, was insufficient.

Appeal from District Court, Camp County; J. M. Talbot, Judge.

Action by Phillip Hill and another against H. G. King. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

John W. Hooper and M. M. Smith, for appellant. W. R. Heath, for appellee.

BOOKHOUT, J. This suit was originally brought by Hattie Grundy, joined pro forma by her husband, as plaintiffs, against P. C. Kebble, John W. Hooper, and H. G. King, as defendants, in trespass to try title, and for cancellation of deeds to each of the defendants to the property in controversy. Pending the suit, Hattie Grundy, the plaintiff, died, and Phil and Emily Hill intervened as plaintiffs, claiming the land, one half as the heirs at law of their daughter, Hattie Grundy, and the other half by purchase from R. L. Grundy, the surviving husband of said Hattie Grundy. Defendants John W. Hooper and P. C. Kebble filed pleas of disclaimer, and defendant H. G. King filed answer of general issue, not guilty, and also set up by cross-action a claim of title to the land sued for as a purchaser in good faith, for value and without notice, and praying for judgment for title and possession. Plaintiff Hattie Grundy claimed the land as her separate property. Phil and Emily Hill, who were father and mother of plaintiff Hattie Grundy, claim as heirs at law of said Hattie as to half the land, and by deed and purchase from R. L. Grundy, the surviving husband of said Hattie, as to the other half. A trial by jury resulted in a verdict and judgment for plaintiffs, and defendant King appealed.

Opinion.

The controlling question in this case is, was there a delivery of the deed, signed and acknowledged by R. L. and Hattie Grundy, to the grantee P. C. Kebble? The contention is made under the first assignment that there was error in the charge which required the

jury to find that the grantee obtained possession of the deed with the knowledge and consent of Hattie and R. L. Grundy. It is insisted, under the facts, if he obtained possession with the knowledge or consent of either, that this would be a sufficient delivery. In order to make the deed effective, there must have been a delivery of it by the grantors, with the intention on their part to pass title, and an acceptance by the grantee. *Hubbard v. Cox*, 76 Tex. 230, 13 S. W. 170. And it is held that "an instrument that passed to the hands of the grantee, without the intention on the part of the grantor that it shall become operative as a conveyance, is wholly inoperative as a conveyance, and a purchaser from such grantee acquires no title to the property which it purports to convey." *Steffian v. Bank*, 69 Tex. 519, 6 S. W. 823. This is true although the vendee from the grantee pays value for the land.

R. L. and Hattie Grundy were husband and wife. Hattie was sick and confined to her bed, and Dr. P. C. Kebble was her physician. Kebble had a deed prepared from R. L. and Hattie Grundy to himself for their homestead, the same being the separate property of Hattie. The deed recited a cash consideration, and on the night of April 15, 1901, was acknowledged by R. L. and Hattie Grundy, and placed in a bureau drawer in which she kept her papers. The bureau was in her bedroom. Three or four days thereafter the deed was filed for record by Dr. Kebble. The parties to this deed are all negroes. On May 13, 1901, Kebble borrowed from H. G. King \$210, for which he executed a note payable in 90 days, and to secure said note he executed a deed of trust on this land. The note not being paid at maturity, the trustee, after giving the required notice, sold the land under the deed of trust, and H. G. King became the purchaser, and a conveyance was executed to him by the trustee. It is by virtue of this conveyance that King claims the land. Hattie Grundy and husband were in possession of the land, and at the trustee's sale she caused notice to be given that she claimed title to the land. Hattie died in the early part of June, 1901. This suit was instituted June 1, 1901. R. L. Grundy testified that he did not deliver the deed or authorize any one else to deliver the same for him, and there is no direct testimony contradicting him in this respect. The record fails to show, except circumstantially, how or from whom Kebble obtained possession of the deed. The testimony of Emily Hill, the mother of Hattie, who waited upon and nursed Hattie during her sickness, fairly showed that he did not obtain possession of the deed the night it was signed and acknowledged. As soon as R. L. Grundy ascertained that Kebble had the deed, he reported that fact to his wife. As soon thereafter as Hattie Grundy saw Kebble, she said to him: "Dr. Kebble, Mr. R. L. [meaning her husband] says that you have

got my papers all mangled up. Where are my papers, and when did you get them?" to which he made no reply, and she further said: "I believe you have got my papers, and I want to know how you got them." To this Kebble replied: "Here you are worrying over your business matters. I told you not to worry about your business matters. I never can cure you if you do. I let you have one hundred dollars just so you would not worry." Thereupon Emily Hill entered the room and asked, "What is this?" Hattie replied: "Mr. R. L. says Dr. Kebble has got my papers all mangled up, and I want to know when he got my papers, and how he got them." To this Kebble replied: "I don't want your papers; all I want is my hundred dollars." These replies of Dr. Kebble to his patient, then on her deathbed, on her demand to know how he procured her papers, do not indicate that the deed had been delivered to him by her with the intention to pass title to her property. Had Kebble been as solicitous about keeping his patient quiet and preventing her from worrying over business as he pretended to be, it would seem the best way to accomplish such purpose would have been to tell her how he got her deed, and if, as he says, he did not want it, to have returned the same to her. He had the opportunity to get her papers and the deed. When visiting Hattie, he would not permit any third person in the room. R. L. Grundy testified that no money was paid to him by Kebble, and he did not see him pay any one any money for the property. Emily Hill testified that Dr. Kebble never paid Hattie any money that she knew of, and that there was no money about the house. When the whole evidence is considered, no other conclusion can be fairly drawn therefrom than that Kebble did not obtain possession of the deed with the knowledge or consent of Hattie Grundy. The evidence fails to show a delivery by either or both of the grantors with the intention to pass title to the property. The criticism made to the charge, that it requires a delivery by both grantors when under the facts of the case a delivery by either would have been sufficient under the evidence, is not sound.

The contention that there was error in overruling the motion for new trial, based on the ground of newly discovered evidence, is without merit. The application fails to show that the evidence which it is alleged was newly discovered was not known to the defendant at the time of the trial. The defendant is represented by two attorneys. The application is sworn to by one of defendant's counsel, and shows that the affiant did not know of the testimony before the trial, but it does not negative the fact that the defendant himself or his other attorney did not have knowledge of said testimony before the trial.

We conclude that there is no error in the judgment, and that it should be affirmed.

FT. WORTH & R. G. RY. CO. v. GREER et al.*

(Court of Civil Appeals of Texas. June 6, 1903.)

RAILROADS—PUBLIC CROSSINGS—RINGING BELL—INSTRUCTIONS.

1. Rev. St. art. 4507, which provides that "the whistle shall be blown and the bell rung at the distance of at least eighty rods from the place where the railroad shall cross any public road or street, and such bell shall be kept ringing until it [the engine] shall have crossed such public road or stopped," requires the bell to be rung though the train is within less than 80 rods of the crossing when it starts.

2. Any error in the charge in not employing the term "market value" in defining the measure of damages for injury to and destruction of property was not ground for reversal, even though there was a difference between the value and the market value, where no such difference was developed on the trial below.

3. The objection that the charge of the court in instructing the jury to find against the plaintiff, whose negligence contributed to the injury, instead of stating that the negligence of either should be imputed to the other, was error, was untenable, as, under the charge given, the jury, in finding a verdict for each plaintiff, must have found that neither was guilty of negligence.

Appeal from District Court, Parker County; J. W. Patterson, Judge.

Action by G. T. and Guy W. Greer against the Ft. Worth & Rio Grande Railway Company. Judgment for plaintiffs. Defendant appeals. Affirmed.

West, Chapman & West, for appellant. McLean, Booth & Morton, for appellees.

STEPHENS, J. For a statement of the case, see the opinion on former appeal. 5 Tex. Ct. Rep. 541, 69 S. W. 421.

The train which collided with the wagon in which appellees were riding along Adams street, in Ft. Worth, was less than 80 rods from the crossing when it started, and it is therefore contended that article 4507 of the Revised Statutes was wholly inapplicable to this case. It was held on the former appeal that this article did not require the whistle to be blown within 80 rods of the crossing, but it does, we think, require the bell to be rung in such case, and this construction seems to have been sanctioned by the Supreme Court in *M. K. & T. Ry. Co. v. Magee*, 92 Tex. 620, 50 S. W. 1014. The court did not therefore err on the last trial, as assigned, in so charging the jury.

In submitting the measure of damages as to the wagon and team, the court instructed the jury to allow the value of the property destroyed and the difference in value before and after the collision of the property injured, and, because the usual term "market value," was not employed, error is assigned to the charge. Nothing was said by the witnesses as to the market value, but the owner of the property was allowed, without objection, to state in general terms the value of the wagon and harness destroyed and the

reduction in value of the team injured, and there seems to have been no controversy on this point. If there was any difference between value and market value it should have been developed on the trial below, and it is too late now to raise such an issue.

The improper use of "and" in the fifth paragraph of the charge has apparently led counsel for appellant into an erroneous construction of that paragraph, as will be seen from the fourth assignment of error; but as the use of this word was evidently due to inadvertence, as is apparent from the context and the third paragraph, we hardly think it could have misled the jury.

The objection to the fourth and seventh paragraphs on account of the use of the word "contributed" is equally untenable.

The seventh paragraph is further objected to on the ground that it instructed the jury to find against the plaintiff, whose negligence contributed to his injury, and error is assigned to the refusal of the fifth special charge—which, however, was not requested till the jury had retired to make up their verdict—on substantially the same ground, the contention being that, as both plaintiffs were traveling together, the negligence of either should be imputed to the other. It is a sufficient answer to this contention that the jury, under the charge given, in finding a verdict for each of them, must have found that neither of them was guilty of negligence.

No complaint is made of the insufficiency of the evidence to sustain the verdict in any respect, and, as the foregoing conclusions dispose of all the assignments of error, the judgment is affirmed.

CHRISWELL v. LUSSIER.

(Court of Civil Appeals of Texas. April 15, 1903.)

DISTRICT COURT—INTERFERENCE WITH JUDGMENT IN COUNTY COURT—JURISDICTION.

1. Plaintiff filed her petition in the district court, alleging that defendant had obtained judgment in the county court foreclosing a mortgage against her, that the sheriff had seized her property by virtue of an execution against her, that defendant had taken the property by an illegal writ of sequestration, that a judgment on a replevin bond had been rendered against her, and that defendant had applied to the county court for mandamus to compel the clerk thereof to issue an execution, he having withdrawn a previous one. She prayed that defendant and the sheriff be enjoined from proceeding under the execution, that defendant be enjoined from prosecuting his application for mandamus, that the sheriff be required to deliver the property to her, that it be adjudged to be her property, and that she recover damages for the wrongful detention thereof. *Held*, that by reason of the prayer for damages the district court had jurisdiction of the cause, and could render a judgment adjudging the property to belong to plaintiff and ordering the sheriff to deliver it to her, it appearing that the county court had not adjudged the property to belong to defendant, nor even foreclosed a lien against it, and that the sheriff did not hold it under any execution.

*Rehearing denied June 27, 1903.

Appeal from District Court, Dallas County; T. F. Nash, Judge.

Suit by H. A. Lussier against J. W. Chriswell. Judgment for plaintiff, and defendant appeals. Affirmed.

M. T. Conner and W. H. Useary, for appellant. Carden, Senter & Carden, for appellee.

FLY, J. On January 17, 1902, appellee, as plaintiff, filed her petition in the district court, alleging that she owned and operated a barber shop in the city of Dallas, and had therein certain articles of furniture used in her vocation; that she had bought the property at an execution sale; that afterwards, J. W. Chriswell obtained a judgment in the county court of Dallas county against appellee and one J. B. Douglas, foreclosing a mortgage lien on the property described, said mortgage being one given subsequently to the one which had been foreclosed on the property by Sam Freshman, under whose execution appellee had bought the property; that J. Roll Johnson, sheriff of Dallas county, had seized her property by virtue of the execution against appellee and Douglas, and advertised the same for sale; that appellant, J. W. Chriswell, had taken the property from appellee by an illegal writ of sequestration; that appellee was too poor to give a supersedeas bond in the case of Chriswell against Douglas and herself; and that the judgment in said suit and the value of the property was less than \$100. In an amended petition it was alleged, in addition to the foregoing, that judgment in the suit in the county court had been rendered against her and her sureties on a replevin bond for \$134; that since she had filed this suit appellant had applied for another writ of execution, which had been issued, but afterwards withdrawn from the sheriff by the clerk of the county court; and that appellant had applied to the county court for a mandamus to compel him to issue the execution, and that the application was pending in that court. The prayer was as follows: "(1) That a writ of mandatory injunction shall issue herein to the said J. W. Chriswell and the said J. Roll Johnson, sheriff of Dallas county, Texas, commanding and requiring them to proceed no further under said writ of execution issued out of the county court of Dallas county, Texas, as aforesaid, and that said writ shall be served upon the said M. T. Conner and W. H. Useary, attorneys and agents in fact for said J. W. Chriswell. (2) That said Chriswell and his said agents, representatives, and attorneys be enjoined from prosecuting said application for a writ of mandamus brought in the county court as aforesaid, and from instituting any other action anywhere against plaintiff based upon the judgment obtained in said Chriswell against Douglas et al. (3) That the defendant J. Roll Johnson be required and commanded to deliver the prop-

erty in controversy to the plaintiff, and that the same be adjudged to be her property. (4) That citation issue herein, in terms of the law, to the said J. W. Chriswell; and that on final hearing hereof plaintiff shall have judgment against the said Chriswell for six hundred (\$600.00) dollars actual damages, and five thousand (\$5,000.00) dollars exemplary damages, because of the premises, and such other and further relief as to the court may seem just and equitable." Appellant moved to dismiss the suit, on the ground that the district court was without jurisdiction to restrain the execution issued by a county court and to restrain the trial of a cause pending therein, and because it appeared from the petition that appellee had an adequate remedy by appeal. Appellant pleaded in answer that he had obtained a valid judgment in the county court against appellee for the property in controversy, and that the whole matter was res adjudicata. A temporary writ of injunction was granted appellee, and, after overruling the motion to dismiss and exceptions filed by appellant, the court adjudged the property to belong to appellee, and ordered the sheriff to deliver it to her; that she recover nothing for damages, and that she recover all costs against appellant.

The prime purpose in this suit, it is clear, was to set aside and render nugatory and ineffective the judgment of a court of competent jurisdiction. The allegations show that the county court had fully passed upon and determined the issues in the suit between appellant and appellee, and had decreed that the property in controversy was subject to the mortgage held by appellant. Appellee, ignoring the method provided by law for reviewing the judgment of county courts, invoked the jurisdiction of the district court, and the spectacle is presented of the judgment of the county court being completely set aside by a court that had no jurisdiction of the matter. Under the Constitution and laws of Texas, the district court has no revisory power over the judgment of county courts, except in probate matters. Even in probate matters, over which the district court has appellate jurisdiction, it cannot, in a direct proceeding, annul the decree of a county court, and certainly it has no authority to exercise such power about a matter over which it could have neither original nor appellate jurisdiction. *Franks v. Chapman*, 60 Tex. 46, and *Id.*, 61 Tex. 576.

It is provided in article 2996, Rev. St. 1895, that "writs of injunction granted to stay proceedings in a suit, or execution on a judgment, shall be returnable to and tried in the court where such suit is pending, or such judgment was rendered." The language of the statute is imperative, and seems to be so comprehensive as to include all cases, and so clear as to render construction absolutely unnecessary; but still it has been so construed as to narrow its terms, and ingraft exceptions upon it that do not appear on the

surface of its simple language. For instance, in *Van Ratcliff v. Call*, 72 Tex. 491, 10 S. W. 578, it is held that the statute does not apply to injunctions restraining the sale of property claimed to be exempt from execution, and in *Seligson v. Collins*, 64 Tex. 314, it was held, in effect, that the statute only applies to injunctions that question the validity and regularity of the writ of execution, but not to those that suspend or stay the execution. In the case of *Leachman v. Capps*, 89 Tex. 690, 36 S. W. 250, the Supreme Court said: "We do not wish, however, to be understood as holding that the district court was without jurisdiction over the subject-matter of the validity of the execution." In that case an injunction was applied for in a district court in Dallas county to restrain an execution issued out of a district court in Tarrant county. In the case of *Bell v. York* (Tex. Civ. App.) 43 S. W. 68, it appeared that judgment had been rendered in the county court, and an injunction was sought in the district court to enjoin its execution on the ground that it was fraudulently obtained, without jurisdiction, and that the property sought to be taken was exempt from forced sale, and it was held that the district court had no jurisdiction to enjoin the judgment of the county court or any process issued thereon.

These different decisions may perhaps cause some uncertainty as to what class of cases the statute is applicable, but we conclude that if the law has any force and effect whatever it must apply in a case like the one now under consideration. It would seem, on the ground of public policy, there should be such comity between the different courts of the state as to prevent unseemly conflicts and advance the orderly administration of the laws of the state.

Under the allegations in the petition, the question as to the ownership of the property had been fully considered, and definitely determined in favor of appellant, in a court of competent jurisdiction, and the effect of the action of the district court was to set aside and render nugatory that judgment. The statute and public policy condemn such action. *Smith v. Morgan* (Tex. Civ. App.) 67 S. W. 919. The demand for an injunction was ignored by the district court, but no injunction was needed when it took the property levied on by the sheriff and placed it in the possession of appellee, and declared, in effect, that it was not subject to the execution that had been issued out of the county court.

In the amended petition appellee set up a demand for damages for the seizure of her property of which the district court had jurisdiction. That part of the suit was adjudged against appellee, and of this action she has made no complaint. We think there is no doubt, as intimated in *Leachman v. Capps*, above cited, that although the court had no authority to grant an injunction, or

to annul and set aside the judgment of the district court, it had jurisdiction over the matter of damages.

The judgment, in so far as it adjudges that appellee is not entitled to damages against appellant, is affirmed, but that part of it decreeing the property in controversy to belong to appellee, and ordering the sheriff to place it in her possession, is reversed, and the cause dismissed.

On Motion for Rehearing.

(June 10, 1903.)

Another investigation of this case convinces this court that its former judgment was erroneous, and that, although the prayer of appellee was for interference with a judgment and pending suit in the county court, there was really no interference therewith by the terms of the judgment of the district court. The court had jurisdiction of the cause by reason of the demand for damages, and in adjudging the property to belong to appellee, and ordering the sheriff to turn over the same to appellee, nothing was contravened that had been settled by the judgment of the county court. The judgment of the county court did not adjudge the property to belong to the appellant, as this court was led to believe, and did not even foreclose a lien against it, and the execution issued under the judgment of the county court had been recalled by the clerk, and the property was not held by the sheriff by reason of the execution. Nothing was done by the district court to interfere with the suit for mandamus pending in the county court.

The former judgment of this court will be set aside, and the judgment of the district court affirmed.

HAMILTON et al. v. JONES et al.*

(Court of Civil Appeals of Texas. June 6, 1903.)

DEED—RESERVATION—INTENTION OF PARTIES—VALIDITY.

1. A deed recited that the grantors, husband and wife, "do grant, bargain, sell, convey and release unto the said * * * [grantees] the following described property. * * *. Now the conditions of this contract or deed is that * * * [the grantors] is to have full control of the above described land during their natural life time or either one of them if one dies the other holds the same as if both was living and reserve the write to sell same as tho this deed never had bin mad," etc. The land described was the wife's separate property. Husband and wife continued to occupy it for several months after the deed was executed, when the husband died. Two days later the wife delivered the deed to the grantees, saying, "Here is your deed; take your land." At one time thereafter she refused to pay for improvements on the land, on the ground that it belonged to the grantees. Held to show an intention, at the time of delivery, to pass the title in present, and the reservation, being in conflict therewith, was void.

*Rehearing denied June 27, 1903.

Appeal from District Court, Erath County; W. J. Oxford, Judge.

Trespass to try title by M. A. Hamilton and others against H. T. Jones and others. Judgment for defendants. Plaintiffs appeal. Affirmed.

F. H. Chandler and Eli Oxford, for appellants. W. W. Moores and M. J. Thompson, for appellees.

CONNER, C. J. This is a suit in trespass to try title, in which the opposing parties claim the land in controversy from Mary J. Jones as the common source of title.

The facts as found by the trial court, and which we approve and adopt, show that on July 30, 1896, said Mary J. Jones, joined by her then husband, G. A. Jones, made and duly acknowledged the following deed or instrument in writing: "The State of Texas, County of Comanche. Know all men by these presents: That we G. A. Jones and Mary J. Jones wife of G. A. Jones of the County of county Comanche and State aforesaid, in consideration of the sum of sum of five hundred dollars, to us in hand paid by R. W. Jones H. T. Jones of the County of Erath and State of Texas and receipt of which sum we hereby acknowledge grant bargain and sell unto the said R. W. Jones H. T. Jones of the County of Erath and State of Texas Have granted, bargained, sold, conveyed and released, and by these presents do grant, bargain, sell, convey and release unto the said R. W. Jones H. T. Jones their heirs and assigns, the following described property, to wit: a part of the head write of Andrew M. Nelson 640 acres lying and situated on the water of flat creek in Erath county Texas described as follows beging in the South East corner Lara Belle owen seventy acre track a Black Jack bears N 24 West 4 varas thence S. 19 W 409 for S E corner a post oake for corner thence N 71 W 1108 vras thence S 19 W 38 varas thence N 71 W 236 vras a rock for corner thence N 19 W 855 varas a rock for corner Black Jack brs S 63 W 2 varas thence N 71 E 1344 vrs to the place of beginning containing one hundred and one and one half acres of land now the conditions of this contract or deed is that G A Jones and Mary J Jones is to have full controle of the above described land during their natural life time or either one of them if one dies the other holds the same as if boath was living and reserve the write to sell same as tho this deed never had bin mad and sold or exchanged for any other land and owned it is to hold good to R W Jones H T Jones in place of the discribed land in this deed if not sold in our life time this deed hold good together with all and singular the rights, members, improvements, heriditaments and appurtenances to the same belonging or in any wise incident or appertaining. To have and to hold all and singular the premises above mentioned, unto the said R

W Jones H T Jones heirs and assigns forever; and we do hereby bind ourselves heirs, executors and administrators, to warrant and forever defend, all and singular, the said premises unto the said R W Jones H T Jones heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof. Witness our hands at DeLeon this 30th day of July A. D. 1896. G. A. Jones. Mary J. Jones." The land described in the deed was the separate property of Mary J. Jones, who, together with G. A. Jones, continued to occupy it as a homestead until about February 28, 1897, when G. A. Jones died. Two days thereafter, March 1, 1897, Mary J. Jones delivered the deed to appellees, saying, "Here is your deed; take your land," and appellees soon thereafter caused the deed to be recorded and went into possession, which has been held by them ever since. At one time thereafter Mary J. Jones also refused to pay for some improvements placed on the land in controversy, on the ground that the land belonged to appellees. On December 1, 1900, Mary J. Jones executed and delivered to appellants M. A. Hamilton and B. O. Hawkins her general warranty deed, in form sufficient to convey the same land described in the deed to appellees. Being denied possession, this suit was instituted by them.

The court concluded "that the exception clause in said deed from Mary Jane Jones and her husband, G. A. Jones, of date July 30, 1896, to the defendants, is contradictory to and repugnant to the granting and habendum clauses in the balance of said deed, and said exception is therefore void," and hence rendered judgment in appellees' favor. We concur in the conclusion reached by the trial judge. Mary J. Jones was a feme sole, and the granting and habendum clauses in the deed to appellees, when construed in the light of the circumstances at and subsequent to the delivery thereof, as may be done, manifest the controlling intention on her part to be the conveyance of an estate to appellees in present, and the clause of the deed relied upon by appellants as authorizing the subsequent conveyance to them is obviously in direct conflict therewith, and must give way. The delivery of the deed and of possession and control to appellees evidence the purpose of Mary J. Jones, at the time it first took effect, not to rely upon any reserved power to control and sell. She could not both convey, as was her evident purpose, and at the same time reserve all potential elements of absolute ownership. The exception clause in appellees' deed, therefore, was void. See the following pertinent authorities in support of the conclusion reached: *Chester v. Bretling* (Tex. Sup.) 32 S. W. 527; *Epperson v. Mills*, 19 Tex. 66; *Carlton v. Cameron*, 54 Tex. 72, 38 Am. Rep. 620; *Ferguson v. Ferguson*, 27 Tex. 340; *Fogarty v. Stack* (Tenn.) 8 S. W. 846; *McWilliams v. Ramsay*, 23 Ala. 813; *Chrisman v. Wyatt*, 7 Tex. Civ. App. 40, 26

S. W. 759; *Matthews v. Moses*, 21 Tex. Civ. App. 494, 52 S. W. 113; *Martin v. Farles*, 22 Tex. Civ. App. 539, 55 S. W. 601; *Leslie v. McKinney* (Tex. Civ. App.) 38 S. W. 378; *Pico v. Coleman*, 47 Cal. 65; *Jameson v. Balmer*, 20 Me. 425, and authorities cited in volume 18, *Century Digest*, §§ 269, 439, 464. Judgment affirmed.

TEXAS CENT. R. CO. v. BOWMAN et al.*
(Court of Civil Appeals of Texas. May 30, 1903.)

SCHOOL LAND—RAILROADS—RIGHT OF WAY OVER.

1. *Sayles' Rev. Civ. St. art. 4167*, which provides that every railroad corporation "shall have the right of way * * *, through and over any land belonging to the state," etc., when construed in the light of *Const. 1876, art. 7, §§ 2, 4, 5*, dedicating the public free school lands to educational purposes, does not embrace the public free school lands.

Appeal from District Court, Comanche County; J. C. Randolph, Special Judge.

Suit by the Texas Central Railroad Company against E. Bowman and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Clark & Bolinger, Hutchinson & Presler, and J. A. Kibler, for appellant. G. H. Goodson, for appellees.

SPEER, J. This suit was originally instituted as an injunction proceeding by appellant against appellees, but later, by agreement of parties, was tried as an action of trespass to try title upon the allegations of ownership of the land involved contained in appellees' answer. The real controversy is over the title to the right of way claimed by appellant across three quarter sections of public free school land sold by the state to appellees.

The determination of this controversy depends upon the interpretation of, and the effect to be given to, article 4167 of *Sayles' Revised Civil Statutes*, which reads as follows: "Every such corporation shall have the right of way for its line of road through and over any lands belonging to this state, and to use any earth, timber, stone or other material upon any such land necessary to the construction and operation of its road through or over said land." This article was in force at the time appellant constructed its line across the land, and if its language embraces public free school land, and the article itself is not in violation of the provisions of the Constitution dedicating the public free school lands to educational purposes, then appellant is entitled to a reversal and rendition of this judgment. The language, "through and over any lands belonging to this state," is very broad, and would probably, upon a fair construction, be held

to include public free school lands, if that construction be not influenced in any respect by the constitutional provisions setting apart such lands, which provisions are as follows: "All funds, lands and other property heretofore set apart and appropriated for the support of public schools; all the alternate sections of land reserved by the state out of grants heretofore made or that may hereafter be made to railroads, or other corporations, of any nature whatsoever; one half of the public domain of the state; and all sums of money that may come to the state from the sale of any portion of the same, shall constitute a perpetual public school fund." *Const. 1876, art. 7, § 2*. "The lands herein set apart to the public free school fund shall be sold under such regulations, at such times and on such terms as may be prescribed by law; and the Legislature shall not have power to grant any relief to the purchasers thereof. The Comptroller shall invest the proceeds of such sales, and of those heretofore made, as may be directed by the board of education herein provided for, in the bonds of this state, if the same can be obtained, otherwise in United States bonds; and the United States bonds now belonging to said fund shall likewise be invested in state bonds, if the same can be obtained on terms advantageous to the school fund." *Id. § 4*. "The principal of all bonds and other funds, and the principal arising from the sale of the lands hereinbefore set apart to said school fund, shall be the permanent school fund; and all the interest derivable therefrom and the taxes herein authorized and levied shall be the available school fund which shall be applied annually to the support of the public free schools. And no law shall ever be enacted appropriating any part of the permanent or available school fund to any other purpose whatever; nor shall the same or any part thereof, ever be appropriated to or used for the support of any sectarian school; and the available school fund herein provided shall be distributed to the several counties according to their scholastic population and applied in manner as may be provided by law." *Id. § 5*.

We think it clear from these provisions that the Legislature has no power to divert any portion of the public free school lands or fund, or to appropriate the same to any other purpose whatever than that pointed out in the organic law creating that fund. The language quoted is an unmistakable inhibition of the exercise of such a power. Such we understand to be the holding of our Supreme Court in several cases. *Smisson v. The State*, 71 Tex. 222, 9 S. W. 112; *Fannin County v. Riddle*, 51 Tex. 360; *Kuechler v. Wright*, 40 Tex. 600.

We think it equally clear that a grant to a railroad company of an easement in the right of way across such land is an appropriation of the same to another purpose than that to which it has been destined. It acts

*Rehearing denied June 27, 1903, and application for writ of error pending in Supreme Court.

directly as an impediment to the sale of such portion (the only legitimate ultimate utilization that can be made of it), and, if not permanent in its nature, is of such an indefinite duration as to be practically so.

We are therefore of opinion that the appellant can claim no rights under the statute, and that the judgment of the district court in favor of appellees for the land, but allowing appellant an easement upon its paying appellees therefor, should be affirmed.

INTERNATIONAL & G. N. R. CO. v. ANCHONDA et al.*

(Court of Civil Appeals of Texas. June 10, 1903.)

CARRIERS — INJURY TO PASSENGER — BOARDING TRAIN — CONTRIBUTORY NEGLIGENCE — INSTRUCTIONS — APPEAL — ASSIGNMENT OF ERROR — REMARKS OF COUNSEL — PREJUDICE.

1. The statement of a witness that the agent of a railway company saw the children accompanying plaintiff before he gave them the tickets is the statement of a fact, and not the conclusion of the witness.

2. An assignment of error complaining of the competency of a witness to give certain testimony will be overruled, where he does not appear to have given the testimony as stated in the bill of exceptions.

3. Remarks of plaintiff's counsel, on objection to a question as to the attendance of a witness, that he desired to show where he was and what became of him, are not prejudicial to defendant, where the jury were instructed not to consider anything as to the witness' absence or presence.

4. In an action to recover for injuries and mental anguish suffered by plaintiff in being thrown from a train in attempting to board it, and being separated from her children on the train, an instruction authorizing a recovery regardless of the defendant's knowledge of the relationship is not prejudicial, where a subsequent paragraph relating to recovery for mental anguish expressly removed the objection.

5. In an action for injuries suffered by plaintiff in being thrown from a train in attempting to board it, an instruction to find for defendant unless it stopped its train a reasonably sufficient time to enable plaintiff to get on the cars by the use of ordinary diligence and care, and the failure to do so was through the negligence of plaintiff, is not misleading, as requiring the jury, in order to find for defendant, to go further than to find that the train was stopped long enough to have enabled plaintiff to get on the cars by the exercise of ordinary care, and to find, in addition, that her failure to board the train was due to her negligence.

6. In an action to recover for injuries and mental anguish suffered by plaintiff in being thrown from a train in attempting to board it, and being separated from her children, an instruction is not erroneous because it does not condition recovery for the mental anguish on the absence of contributory negligence in attempting to board the train, where preceding instructions had authorized a finding for defendant if such contributory negligence existed.

7. In an action to recover for injuries and mental anguish suffered by plaintiff in being thrown from a train in attempting to board it, and being separated from her children, an instruction is proper that if certain conduct of defendant was negligence, and such negligence was the proximate cause of the injuries complained of by plaintiff, she should recover for

all the damages, physical and mental, arising from such physical injuries.

8. An assignment of error, having no proposition of law presented in connection with it, cannot be considered.

9. Contributory negligence is such an act or omission of plaintiff, amounting to a want of ordinary care and prudence, as, concurring or co-operating with the negligent act of defendant, is the proximate cause or occasion of the injuries complained of.

10. In an action to recover for injuries and mental anguish suffered by plaintiff in being thrown from a train in attempting to board it, and being separated from her children, an instruction to find for defendant if plaintiff caused her children to board the train in motion, and, while it was still in motion, attempted to board it, unless an ordinarily prudent person would have done so under like circumstances, is properly refused.

Appeal from District Court, Frio County; E. R. Lane, Judge.

Action by Elvida Anchonda and others against the International & Great Northern Railroad Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Hicks & Hicks, for appellant. Mason Manney and R. W. Hudson, for appellees.

JAMES, C. J. The case was here once before. See opinion in 68 S. W. 743.

This is a suit by appellee, Elvida Anchonda, in her own right and as mother and next friend of her minor children, Simon, Soleda, and Rosaleo Anchonda, to recover damages for the physical and mental suffering alleged to have been caused appellee through the alleged negligence of the appellant on or about the 25th day of November, 1900. Appellee alleges that on said date she, with her children, was at Moore, a station on appellant's line of railway, and held tickets for passage on appellant's train from Moore to Cotulla, defendant having knowledge of the relationship between her and the children. That, when appellant's train arrived, appellee placed her children and her niece, who was also with her, on board said train, and attempted to board the train, but, by reason of the fact that appellant negligently failed to stop said train a reasonable length of time for passengers to get off and on, she was unable to board the train. That in trying to do so she was thrown down and sustained physical injuries. That appellant's train moved off with her children and her said niece, and took them to Cotulla. That appellee suffered great physical and mental pain by reason of her physical injuries, and suffered great mental pain by reason of her separation from, and her anxiety for the safety of, her children. Appellee claims that appellant was negligent in failing to stop its train a reasonable length of time at Moore station, and failing to observe, look, ascertain, or discover appellee and her children trying to board the said train. Appellant answered by general and special exceptions, general denial, and specially pleaded that it had no knowledge of the relationship, if any,

*Rehearing denied July 1, 1903.

between appellee and the children with her, and that appellee was guilty of contributory negligence in attempting to board the train while in motion, and in failing to board said train while it was standing still, and in failing to use reasonable diligence to ascertain the safety of her children after the train left Moore station.

The suit was originally brought by Filipe Anchonda, the husband of appellee, who, however, died during the pendency of the suit. The case was tried on the 8th day of December, 1902, and resulted in a verdict and judgment in favor of appellee for \$1,500 in the aggregate, or \$750 for Elvida Anchonda, and \$750 to her said minor children, jointly.

The statement of the witness Ignacio Garza that the agent saw the children before he gave them the tickets, was the statement of a fact, not the conclusion of the witness. The same testimony, in effect, was given by others, without objection. We therefore overrule the first assignment.

The second assignment may be overruled for the reason that the witness Ignacio Garza does not appear to have given any testimony in effect the same as that stated in the bill of exceptions. The bill sets forth that in answer to the question, "How long did that child sickness last?" this witness was allowed to testify "that the injuries claimed to have been inflicted upon plaintiff were the ones from which she has suffered, and not the injuries following or produced by childbirth." The statement of facts sets forth the question and the answer to it specifically, and the answer was not either in substance or effect what is stated in the bill. The only testimony of this witness that approaches what is recited in the bill appears to have been given prior to the putting of the question, and we quote this testimony to show that she did not testify as charged. "Previous to the time she fell from the train at Moore, she had been sick a little while from the birth of a child. She had been complaining, and this sickness down here was on account of the birth of her baby, but she didn't have this sickness up here. She had been sick at Mr. Finch's ranch from the birth of her baby. She was complaining down here, but not up here with her side. This was all the sickness she had prior to the fall." In this testimony she stated facts only, and facts that existed prior to the fall. We can see nothing in this which can be said to be an attempt at expert testimony as to whether or not plaintiff's suffering was the result of injuries received in the accident complained of, instead of the childbirth. We think it unnecessary to consider the question of the witness' competency to give testimony such as she is charged with giving, in connection with statements of the judge qualifying the bill.

We also overrule the fourth assignment. Defendant's witness, A. C. Kennedy, was

asked the question: "Did Nathan Williams come to Pearsall with the balance of the witnesses a few days ago?" To which question defendant objected, because immaterial and irrelevant, whereupon plaintiff's counsel stated to the court: "We stated to the court the other day that we would like to have him put under the rule if we could have him here, and we desire to show where he is and what became of him. The object is to show the jury why we don't put him on the stand." The witness appears to have made answer: "He was here the other day, and he has not gone by our consent." The bill was taken to the above remarks of plaintiff's counsel, because they were calculated to and did prejudice the jury against defendant. Defendant, of course, did not except to the answer of the witness. The judge states in the bill that he thereupon instructed the jury not to consider anything as to Nathan's absence or presence at all. It seems to us that there is nothing substantial presented by the assignment of error.

The sixth, seventh, ninth, tenth, eleventh, twelfth, and thirteenth assignments are attacks on the court's charges.

There is, we believe, nothing advanced under the sixth and seventh assignments which would tend toward a reversal of the judgment.

The ninth assignment presents this proposition: Appellant would not be liable for any mental suffering of appellee by reason of the separation from her children, unless at the time appellee attempted to board said train the appellant knew of the relationship, or at least that some relationship existed, between appellee and the said children. If paragraph 6 of the charge, the one to which this assignment is addressed, were not qualified in some proper manner, the assignment would be well taken. The criticism, briefly stated, is that it instructed the jury to find for plaintiff, regardless of the question of appellant's knowledge of the relationship between appellee and the children. We can readily concede that, if appellant was not at the time cognizant of relationship between plaintiff and the children, it ought not to be held for mental anguish resulting from the separation that took place. If the charge stood alone, it would be erroneous. But subsequently in the charge the court deals with this form of mental anguish, and refers back to paragraph 6, and expressly removes the objection now urged. In paragraph 6 the jury are distinctly told that plaintiff could not recover for mental anguish arising from such separation, unless the jury believed from the evidence that defendant knew of the relationship existing between plaintiff and the children; and in paragraph 9 all seeming contradictions on the subject are explained and harmonized. To illustrate this we copy paragraph 9 of the charge: "There being two concurring causes of negligence complained of in this case, the court instructs

the jury that if under subdivisions 6 and 7 of this charge, if you find for the plaintiff upon either or both of the instructions in said subdivisions respectively, that the plaintiff is entitled to recover, then you will consider, in assessing the damages sustained by plaintiff, all personal injuries and physical pain consequent thereon and mental anguish arising from such personal injuries, and also all mental anguish of plaintiff arising from the separation of plaintiff from her children (unless you find against plaintiff under subdivision 8, as to this last item) which you may find from the evidence to be the direct and proximate result of the negligence of the defendant, as heretofore instructed you under subdivisions 6 and 7 (if you believe from the evidence that the defendant was negligent), such sum as actual damages as will in your judgment reasonably compensate plaintiff for the injuries she has sustained, and no more, not to exceed the amount claimed by her in her petition. By proximate cause we do not mean the last act of cause, or nearest act to the injury, but such act wanting in ordinary care as actively aided in producing the injury as a direct and existing cause. It need not be the sole cause, but it must be a concurring cause, such as might reasonably have been contemplated as involving the results under the attending circumstances."

Under the ninth assignment we find another proposition, complaining of the closing sentence of the same paragraph, which was: "Unless, however, you believe from the evidence that the defendant's servants and employees stopped its train at Moore, on the day and date alleged by plaintiff, a reasonably sufficient length of time which would have permitted plaintiff with her niece and children to get on the cars by the use of ordinary diligence and care, and the failure to do so was through the negligence of plaintiff, then you should find for the defendant." The criticism offered to this part of the instruction is that it requires the jury, in order to find for defendant, to go further than to find that the train was stopped long enough to have enabled appellee to get on the car by the exercise of ordinary care, and to find, in addition, that her failure to board the train was due to her negligence. If the clause quoted had been conditioned on the use of ordinary diligence and care under all the circumstances then existing, it may be that the words "and the failure to do so was negligence of plaintiff" would have been a useless and unnecessary addition. This may have been unnecessary in any event. We think, however, there was no error in the added words. They were not calculated to mislead a jury of ordinary capacity, in view of the definition which the charges give of ordinary care and of negligence. Charges similarly framed in this respect have been approved. *Railway v. Casseday*, 92 Tex. 528, 60 S. W. 125.

The eighth paragraph of the charge is brought into question by the eleventh assignment upon the grounds: (1) That it deals with the subject of defendant's liability for plaintiff's mental anguish caused by the separation from her children, and does not condition recovery therefor on the absence of her contributory negligence in attempting to board the train; and (2) that, by language used in said clause, to wit, "The court instructs you that knowledge of defendant's agent at Moore is knowledge of the company," the court assumed that the agent had such knowledge. This latter contention does not demand discussion, and is overruled. The former will also be overruled, as the two preceding paragraphs of the charge had told the jury plainly to find for defendant if such contributory negligence existed, and the jury could not have failed to understand that paragraph 8 was intended to apply only if they found for plaintiff under other instructions.

The tenth questions the seventh paragraph of the charge. We believe there is nothing requiring a special discussion in the first proposition. The second proposition has to deal with this language of the charge: "If you so believe was negligence, and that such negligence, if any, was the direct and proximate cause of the injuries complained of by plaintiff in her petition, then and in that case plaintiff should recover for all the injuries, physical and mental, arising from such physical injuries, if any, complained of in her petition." We can detect nothing wrong in this instruction. The one proposition advanced in the brief is in about these words, that, if defendant was guilty of negligence, plaintiff could recover damages for such injuries as are shown by the evidence to have proximately resulted from such negligence. To us there seems to be no substantial difference whatever between injuries the proximate result of an act and injuries of which the act is the proximate cause.

The twelfth assignment cannot be noticed, as no proposition of law is presented in connection with it.

Under the thirteenth this definition of contributory negligence is questioned: "Contributory negligence, in its legal signification, is such an act or omission on the part of the plaintiff, amounting to a want of ordinary and proper care and prudence, as, concurring or co-operating with some negligent act of the defendant, is the proximate cause of the occasion of the injuries complained of." It is contended that the effect of this charge, as worded, was to inform the jury that there could be no contributory negligence upon the part of plaintiff unless there was concurrent negligence on the part of defendant. There is nothing of a substantial nature in the point. If no negligence of defendant appeared, plaintiff could not recover at all. Contributory negligence becomes important in any case only where defendant's negli-

gence is found to exist. It necessarily must concur or co-operate to produce the injuries.

The substance of the requested charge referred to in the seventeenth assignment was given. The eighteenth and nineteenth assignments, complaining of the verdict as being against the testimony in reference to plaintiff's contributory negligence, and to notice to defendant of the relationship of the children to plaintiff, are not sustained. Also the twentieth, which urges that the undisputed evidence is that plaintiff failed to use the means she had at hand to discover and know that the children were safe, and thus could have avoided mental suffering on that account. The twenty-first, twenty-second, and twenty-third are overruled.

The sixteenth assignment complains of the refusal of the following charge: "Gentlemen of the Jury: If you believe from the evidence that plaintiff, Elvida Anchonda, caused her children to board defendant's train while it was in motion, and then before it stopped, and while it was still in motion, herself attempted to board said train, you will return your verdict for the defendant, unless you believe that an ordinarily prudent person would have done so under like circumstances." It is not denied that the issue was submitted in a general manner by the general charge, but appellant insists that it was entitled to have it submitted in the particular form. We think what is said of a similar charge in *Ry. v. Rogers*, 91 Tex. 58, 40 S. W. 956, applies to this one.

Our conclusions of fact are that the injuries sustained, and for which the judgment allows a recovery, were the proximate result of defendant's negligence; that defendant had notice of the relationship existing between plaintiff and the children; that plaintiff was not guilty of contributory negligence; and that the verdict is not excessive.

Judgment affirmed.

GREAT COUNCIL OF TEXAS, IMPROVED ORDER OF RED MEN, v. ADAMS et al.*

(Court of Civil Appeals of Texas. June 10, 1903.)

INDEMNITY BOND—CONSTRUCTION—PLEADING.

1. In an action to recover a bank deposit claimed to be the property of another, the bank interpleaded the claimants, after taking a bond and paying the deposit to them. The only prayer for the recovery of an attorney's fee by the bank, contained in its pleadings, was for such fee in the event judgment should be rendered against the bank and "in favor of plaintiff" in the suit. The judgment in the action was in favor of the defendants. Held error to render judgment for attorneys' fees in favor of the bank, though such fees were covered by the bond.

Appeal from District Court, Harris County; C. E. Ashe, Judge.

Action by Elizabeth Adams, as administratrix of Frank E. Adams, deceased, against the First National Bank of Houston. Defendant bank interpleaded Jerome B. Cochran and others, who in turn interpleaded the Great Council of Texas, Improved Order of Red Men, and another. From a judgment in favor of the bank against Cochran, and a judgment over against the Order of Red Men, the latter appeals. Reversed.

Jas. A. Breeding, for appellant.

JAMES, C. J. Elizabeth Adams, as administratrix, brought this suit against the First National Bank of Houston for \$2,719.86, the amount of a deposit there in the name of her deceased husband. The bank pleaded that the deposit was to the credit of Frank E. Adams, treasurer, and that the bank had paid it over to Jerome B. Cochran, treasurer of said organization, taking from him an indemnity bond in the sum of \$5,439.72, with sureties, conditioned that the said Cochran shall indemnify and save harmless this defendant from any loss, damage, or expense that it might incur by reason of the payment of said sum of money to said Cochran. The above allegations were followed by this prayer: "Wherefore this defendant prays that the said Jerome B. Cochran, E. C. Cochran, James A. Painter, and O. L. Cochran may be made parties defendant to this suit, and that, in the event that judgment should be rendered against this defendant in this suit in favor of the plaintiff, that this defendant may have judgment over against the said Jerome B. Cochran, E. C. Cochran, James A. Painter, and O. L. Cochran for the amount of such judgment, and all costs and expenses herein, including the sum of two hundred and fifty dollars (\$250.00) for attorney's fees incurred by it in this suit, and for general relief." The said Council of Improved Order of Red Men had likewise given Cochran an indemnity obligation, and it and its surety were made defendants by Cochran. It is unnecessary to state these pleadings. Judgment was rendered against plaintiff in favor of the bank, but the court gave the bank judgment against Cochran and his sureties for \$250, as an attorney's fee incurred by it in this matter, and also gave Cochran a judgment over against appellant for the same. This is the sole matter involved in the appeal.

A consideration of the assignments of error has brought us to the conclusion that, as the bank's pleading stood, it was not sufficient to support a judgment for the attorney's fee. We think the bond covered any proper expense sustained or incurred by the bank in reference to the litigation, and that it could contract with an attorney for a fee that was reasonable, and recover same from Cochran under the terms of the bond. We are inclined to think also that the prayer for \$250 for attorney's fees "incurred by it in this suit" constituted a sufficient allegation, at least in the absence of special demurrer.

*Rehearing denied July 1, 1903.

But the prayer is for such fee in the event judgment should be rendered against the bank in favor of the plaintiff. The event did not occur. There being no prayer nor pleading for such a recovery on any other contingency, but only on that contingency, we conclude that the judgment is without pleading to support it, and must therefore be reversed.

The judgment, in so far as it deals with the subject of this attorney's fee, will be reversed, and the cause remanded for another trial.

TEXAS CENT. R. CO. v. BENDER.*

(Court of Civil Appeals of Texas. May 30, 1903.)

SERVANT—INJURIES—CONTRIBUTORY NEGLIGENCE—RISKS ASSUMED—INCONSISTENT FINDINGS—DISTRICT COURTS—SPECIAL TERMS—SPECIAL JUDGE PRESIDING.

1. Rev. St. 1895, art. 1111, which provides that "the several judges of the district courts shall hold the regular terms of their said courts * * * twice in each year * * * and shall hold such special terms as may be required by law," does not preclude a special judge from presiding at a special term of the court.

2. In an action by a section foreman for injuries sustained in a collision between a freight train and a handcar on which he was riding, the jury found that defendant was guilty of negligence in respect to a defective brake on the handcar; that plaintiff was guilty of contributory negligence in not discovering the defect; that the defective brake was not the proximate cause of the accident, though it may "possibly to some extent have contributed thereto"; and returned a verdict for plaintiff, based on the negligence of the engineer of the freight train in failing to whistle. Proximate cause was defined in the charge as "that cause producing the injury that was the natural and probable consequence of the negligence complained of, and that ought to have been foreseen in the light of the attending circumstances." *Held* that, read in the light of the charge, there was no such conflict in the findings as to warrant reversal.

3. Whether a section foreman riding on a handcar which he knew had a defective brake, and injured in a collision between the handcar and a freight train in a cut at a curve in the road, was guilty of contributory negligence in turning the lever of the car loose after entering the cut and starting on a downgrade, having speeded the car up to 7 or 8 miles an hour so as to make it run by itself, *held* to be a question for the jury.

4. The violation by an employé of a railroad company of a rule of the company is not negligence per se.

5. The section foreman assumed the risk of the defective brake, but not of the trainmen failing to whistle for the cut and curve.

6. The fact that he assumed the risk of the defective brake, and that that concurred, with the negligence of the trainmen in failing to whistle, in causing the injury, would not preclude the foreman from recovering.

7. The foreman did not forfeit his right of recovery by attempting to remove the hand car from the track on discovering the approaching train.

Appeal from District Court, Comanche County; J. C. Randolph, Special Judge.

*Rehearing denied June 27, 1903, and application for writ of error pending in Supreme Court.

†4. See Master and Servant, vol. 34, Cent. Dig. § 759.

Action by A. K. Bender against the Texas Central Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Clark & Bolinger and Hutchinson & Presler, for appellant. T. D. Webb and G. H. Goodson, for appellee.

STEPHENS, J. This cause was tried at a special term of the district court before a special judge and on special issues, resulting in a judgment for appellee in the sum of \$13,750, from which this appeal is prosecuted.

The first proposition submitted by appellant is that it is not competent for a special judge to preside at a special term of the district court, in support of which article 1111 of the Revised Statutes of 1895, is cited, reading: "The several judges of the district courts shall hold the regular terms of their said courts * * * twice in each year, * * * and shall hold such special terms as may be required by law." The last clause of this article is quoted in appellant's brief with "shall" italicized, and it is argued that the Legislature meant by the use of this word in that connection to prevent any other than the regular judge from presiding at a special term; but the argument proves too much, for the very same word is used in the first clause, as will be seen from above quotation. We could not therefore adopt appellant's construction without repealing the Constitution and laws providing for the election of a special judge in the absence of the regular judge, etc.

The next proposition assails a ruling on demurrer which was rendered immaterial by the verdict.

In the remaining numerous assignments of error, complaint is made of the verdict and judgment, which we will now consider. Appellee, a section foreman long in the service of appellant, was seriously injured July 4, 1901, in a cut at a curve on appellant's railroad, by a collision between one of appellant's freight trains going south or east, and a hand car going north or west on which appellee and other section hands were riding. The train was about 100 yards away when first seen by the men on the hand car, and was traveling about the usual rate of speed for freight trains, that is, from 20 to 25 miles an hour. The hand car was traveling seven or eight miles per hour, which was a little less than the usual rate of speed for hand cars. The men on the hand car all escaped unhurt, except appellee and one other, who undertook to remove the hand car from the track, and got it nearly off before it was struck. The jury found, in response to special issues, that the engineer in charge of the train failed to give the usual and customary whistle blasts, or any whistle blast at all, on approaching said curve and before entering said cut, and that

this failure was both negligence and the proximate cause of the collision and injuries. These findings are sustained by the evidence. The jury also found that the hand car was defective, the axle being bent, and the brake being worn, so that it would not readily stop the car when applied, and that it was dangerous to use it in this condition; that this defective condition was due to the negligence of appellant; that appellee was also guilty of negligence in not inspecting the hand car and discovering the defective condition that morning before he took it out on the road, although it had just been returned from the repair shop, to which he had sent it for repairs; but that this negligence, whether of appellant or of appellee, was not the proximate cause of the collision; though they further found, in response to issue submitted at instance of appellant, that the defective brake "possibly to some extent" contributed to appellee's injuries. The defective condition of the brake was discovered by appellee that morning after he had gone a few miles from the section house; but the jury found that in continuing to use the hand car after this discovery was made, under the circumstances then existing, appellee was not guilty of negligence, and also that that was not the proximate cause of the collision. The jury found that appellee, in approaching the curve and entering the cut, and in propelling the hand car through the same, did not fail, as was his duty, to keep a careful lookout for approaching trains, or to have his hand car under control, or to use ordinary care as to its speed, and that he was not only free from negligence in these respects, but also that the collision was not due to any such negligence. The jury further found that appellee, after the discovery of the approaching freight train, did not fail to act as an ordinarily careful person would have done under the same or similar circumstances, and that the collision was not due to any negligence on his part at this juncture. They found that he was trying to save both himself and the hand car when the collision took place, but did not know whether he would have been injured or not if he had not attempted to remove the hand car from the track. The jury further found that it was the duty of appellee and the section gang to repair their car when found to be defective, but did not know whether they could have done so in this instance after discovering the defect in the brake, and that the rules prohibited the use of cars so defective as to be dangerous. The jury found that if the brake had been in proper condition the hand car could have been stopped in about 40 feet, but, as it was, it ran 167 feet after the approaching train was discovered. Proximate cause was defined in the court's charge to be "that cause producing the injury that was the natural and probable consequence of the negligence com-

plained of, and that ought to have been foreseen in the light of the attending circumstances."

There is no such conflict in these findings as to warrant us in setting aside the judgment on that ground. True, the finding that negligence in respect to the defective brake of the hand car was not the proximate cause of the injury may seem to be, as appellant insists it is, inconsistent with the further finding that the defective brake "possibly to some extent contributed" thereto, as it must be held to have done, since the jury also found that if the brake had been in proper condition the hand car could have been stopped in about 40 feet, whereas it ran 167 feet before the collision took place. But when the findings are read in the light of the above definition of proximate cause, the seeming inconsistency disappears. The negligence of appellee in failing to inspect the hand car that morning before he took it out on the road, which was the only act of negligence charged to him by the verdict, was expressly found not to have been the proximate cause of the collision, and may therefore, in view of the other findings, be treated as a remote cause, which it evidently was.

The most difficult question in the case is raised by the assignments complaining of the verdict for being against the evidence in finding that appellee was not guilty of negligence proximately contributing to his injury after he discovered the defective condition of the brake, the strongest contention being that, with full knowledge of the defective condition of the hand car and of the consequent difficulty of promptly stopping and removing it from the track, appellee was traveling downgrade at a rate of speed which he must have known to have been dangerous under the circumstances, it being his duty as section foreman to keep the hand car at all times under such control as to enable him to stop it easily so as to avoid collisions with passing trains. From the testimony of the men on the hand car, who were returning to the section house after the day's work was done, it appears that they had just entered the cut and started downgrade, turning the levers of the hand car loose after speeding it up so as to make it run by itself, when, just as they turned the levers loose and rose up, they looked and saw the approaching train some "two or three telegraph poles" from them. All immediately jumped from the hand car and escaped unhurt, except appellee and one Harris, who assisted him in the effort to remove it from the track. Whether, under the same circumstances, persons of ordinary prudence would have so speeded up and turned loose a hand car in the condition of this one, was peculiarly a question for the jury, and we have finally concluded, though not without some hesitation, that we would not be warranted in disturbing their finding. Even the violation of a rule of the company is not

negligence *per se*. *Railway Co. v. Cornell*, 69 S. W. 980, 5 Tex. Ct. Rep. 675.

We are not prepared to say that it was wholly unreasonable for the men on the hand car to conclude, as they seem to have done, that the car could be easily stopped, though running seven or eight miles an hour, before it would collide at that place with an approaching train, notwithstanding the defective condition of the brake. While they were required to look out for such trains, and knew they were liable to pass at any time, they also had a right to expect signals to be given at such places, which, if given in this instance, would have enabled them to both stop the car and remove it from the track.

Nor did appellee assume the risk of danger arising from the negligence of the trainmen in failing to whistle for the cut and curve, of which he was ignorant. It is insisted, however, that he assumed the risk involved in the continued use of a defective hand car, of which defect he was aware, and but for which the collision would have been avoided. And so he did, but that assumption did not extend to the extraordinary dangers of a collision of which the unknown and unexpected negligence of appellant was the proximate cause. Whatever danger was reasonably to be apprehended as the ordinary and natural result of the defective condition of the hand car, and that only, was included in the risk assumed by him.

Though the defective condition of the hand car, of which appellee had knowledge, may have concurred with the negligence of appellant, of which he was ignorant, in producing the collision, that would not prevent a recovery on the ground of assumed risk, as would contributory negligence in case of concurring causes of injury.

Nor did appellee forfeit his right to recover by trying to remove the hand car from the track. It is by no means clear from the evidence that a prudent man in his situation would have pursued a different course.

The findings that certain acts of appellee which were found not to be acts of contributory negligence were not proximate causes of the collision are complained of, both for not being responsive to the issues submitted and for not being sustained by the evidence, but in view of the foregoing conclusions these assignments become immaterial. The judgment is therefore affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. COCA-COLA CO.*

(Court of Civil Appeals of Texas. June 6, 1903.)

JUSTICES OF THE PEACE—JURISDICTION—JUDGMENT—APPEAL—EXECUTION—INJUNCTION.

1. Where a justice of the peace had jurisdiction to determine a plea of *res judicata* in a suit

involving an amount insufficient to sustain an appeal, an injunction will not lie to restrain the execution of the judgment rendered on determination of the plea.

Appeal from District Court, Dallas County; Richd. Morgan, Judge.

Action by the St. Louis, Iron Mountain & Southern Railway Company against the Coca Cola Company. From a judgment in favor of defendant, complainant appeals. Affirmed.

W. A. Rhea, Jr., and Henry & Henry, for appellant. C. W. Lewelling and Dwight L. Lewelling, for appellee.

RAINEY, C. J. Appellant instituted this suit in the district court to enjoin the execution of a judgment recovered by appellee in the justice's court against appellant. A temporary injunction was granted, but upon final hearing said injunction was dissolved, and the cause dismissed, at plaintiff's cost. The ground alleged for injunction was that the judgment sought to be enjoined was rendered by the justice upon the identical cause of action that had been adjudicated between the same parties by said justice at a former date, and final judgment rendered for appellant. No controversy exists as to the facts, which show that the Coca Cola Company instituted suit in the justice's court to recover of the St. Louis, Iron Mountain & Southern Railway Company the value of a barrel of Coca Cola which was alleged to have been lost by the said railway company in shipment, the value being less than \$20. On a hearing of the cause, final judgment was rendered in favor of the railway company and against the Coca Cola Company. It was shown that this suit was based on a sworn account, which the justice thought not proper evidence; and, plaintiff offering no other testimony, judgment was rendered for the defendant. Subsequently the Coca Cola Company brought suit against the said railway company on the identical cause of action before the same justice. The railway company interposed as a defense, among other things, the former judgment. On final hearing the said court disregarded said plea, and rendered judgment in favor of the Coca Cola Company and against the railway company. It is the execution of this last-mentioned judgment that is sought to be enjoined.

The question decisive of this appeal is whether an injunction will lie under the facts stated. It is settled in this state that an injunction will not issue to restrain the execution of a judgment rendered by a justice of the peace—it being final and not appealable under the statute—where the justice had jurisdiction, and the object of the suit is for the purpose of reviewing his action. *Odum v. McMahan*, 67 Tex. 292, 3 S. W. 286; *Railway Co. v. Dowe*, 70 Tex. 1, 6 S. W. 790. The plea of *res judicata* having been interposed in the second suit, the justice had jurisdiction to determine the issue thus

*Rehearing denied June 27, 1903.

raised, and, having done so, it matters not how erroneous his decision, it was final, under the statute; the amount in controversy and the amount of the judgment being less than \$20. The court having jurisdiction to try and determine the issue, the appellant is without remedy, and was not entitled to redress by injunction.

The judgment herein is therefore affirmed. Affirmed.

ST. LOUIS S. W. RY. CO. OF TEXAS v. CAMPBELL.*

(Court of Civil Appeals of Texas. June 6, 1903.)

CARRIERS — TRANSPORTATION FACILITIES — UNWARMED COACH — EXPOSURE OF PASSENGERS — ILLNESS — MEDICAL EXPENSES — INSTRUCTIONS.

1. Where, on an application for continuance being made for absence of witness, plaintiff admitted that the alleged facts recited in the application, which defendant desired to prove by such witness, were true, the application was properly overruled.

2. Where, in an action for damages to plaintiff from injuries to his wife and child while passengers on defendant's railroad train, plaintiff admitted, in order to prevent a continuance, that an absent witness saw plaintiff's wife and child on their return; that they seemed to be in good health, did not complain, nor appear to be sick; that plaintiff's wife said she had a good time on the trip; and that witness was requested to sit up with plaintiff's wife and child, and give them medicine, in order that they might be enabled to "get the defendant"—such admission was not conclusive of the question of the illness of plaintiff's wife and child on such trip, so as to authorize the exclusion of other evidence of such sickness.

3. Where plaintiff sued to recover expenses incurred by reason of an alleged sickness of his wife and child arising from being compelled to ride in defendant's unwarmed railway coach in inclement weather, an instruction that, if plaintiff's child was made sick by exposure to cold while on defendant's train, plaintiff was entitled to recover expenses incurred in consequence of the child's sickness, did not conflict with an instruction that plaintiff could not recover anything on the ground of the sickness and suffering of the child.

Appeal from District Court, Hunt County; H. C. Connor, Judge.

Suit by V. O. Campbell against the St. Louis Southwestern Railway Company of Texas. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

E. B. Perkins and Perkins & Craddock, for appellant. Evans & Elder, for appellee.

TEMPLETON, J. Suit by V. O. Campbell against the St. Louis Southwestern Railway Company of Texas to recover damages alleged to have been sustained by him in consequence of his wife and child being made sick by reason of being compelled, while passengers on one of the company's trains, to ride in an unwarmed coach in inclement

weather. Verdict and judgment for the plaintiff for \$700.

The defendant asked for a continuance on account of the absence of a sick witness who had been duly subpoenaed. The application was in proper form, and showed that the witness was expected to testify to certain facts which were material, but the plaintiff admitted that the alleged facts were true, and the application was overruled. Appellant contends that it was entitled to have the application granted as a matter of right, regardless of the admission. We do not concur in the contention. The jury was instructed that the plaintiff had admitted the truth of the facts set out in the application, and that the said facts must be taken as true. The admission, followed by such instruction, rendered the presence of the witness wholly unnecessary. It was while Mrs. Campbell and her child were on a journey from Neyland, Tex., to Birmingham, Ala., that they were subjected to the exposure of which the plaintiff complains. They left Neyland on December 20, 1899, and returned on January 20, 1900. Objection was made by the defendant to the introduction of evidence tending to show that Mrs. Campbell and her child were sick while in Alabama, the ground of the objection being that such evidence was contradictory of the facts which the plaintiff had admitted to be true. The admission was to the effect that the witness for whom the continuance was sought saw Mrs. Campbell and her child on the day of their return, and again on the following evening; that they seemed to be in good health; that they did not complain of being sick, and did not appear to have been sick; that Mrs. Campbell said that she had a good time on the trip; that the witness was requested to sit up with the Campbells, and give them medicine, in order that they might be enabled to "get the defendant." The admitted facts tended to show that the plaintiff's wife and child were not sick while in Alabama, but were not conclusive of the question. They might have been sick notwithstanding the existence of the admitted facts, and the admission cannot be held to have included the disputable inferences deducible from the facts admitted. The jury was instructed to accept the admitted facts as true, and to disregard all evidence in conflict therewith. In view of such instruction, the jury cannot have found that there was a conflict between the facts admitted and the evidence introduced over the objection of the defendant, and followed the said evidence in preference to the admission. The objection to the evidence was properly overruled.

Complaint is made of the action of the trial court in submitting to the jury as a basis, in part, of the plaintiff's right to recover, the issue as to whether the plaintiff's child was made sick by reason of being exposed to cold while on the defendant's train, and in charging the jury that the plaintiff

*Rehearing denied June 27, 1903.

¶ 1. See Continuance, vol. 10, Cent. Dig. § 112.

could not recover anything on account of the sickness and suffering of the child. The complaint is based on the theory that the said charges were confusing, if not conflicting. The plaintiff did not sue to recover damages for injuries to the child, but only the expenses incurred by him in consequence of the child's sickness. Before he could recover such expenses, he was bound to show that the child was exposed to cold, and thereby made sick as a result of the defendant's negligence, and that the expenses were made necessary by reason of the sickness so occasioned. The court correctly instructed the jury that the plaintiff was entitled to recover such expenses if the evidence established the facts enumerated, and properly protected the defendant against a recovery for injuries to the child by instructing the jury not to allow the plaintiff anything on account of its sufferings. The two instructions are not in the least conflicting.

The remaining assignments of error attack the evidence as not being sufficient to warrant the verdict. The evidence authorized the conclusion that Mrs. Campbell and her child were compelled, on account of the negligence of the railway company, to ride in a coach that was not heated in disagreeably cold weather, and that they suffered injury as a result of such negligence. The extent of the injury was peculiarly a question for the jury, and we cannot say that the verdict in that respect was not justified.

The judgment is affirmed.

ST. LOUIS S. W. RY. CO. OF TEXAS v. WRIGHT.*

(Court of Civil Appeals of Texas. June 13, 1903.)

CARRIERS—PASSENGERS—PROTECTION FROM ACTS OF FELLOW PASSENGERS—FEME SOLE—UNLIQUIDATED DAMAGES—COMMUNITY PROPERTY—SUIT—MARRIAGE—HUSBAND NECESSARY PARTY—MISJOINDER—SUFFICIENCY OF PETITION—EVIDENCE—CONCLUSION.

1. Rev. St. 1895, art. 2967, providing that all the property, real and personal, owned or claimed by a woman before marriage, shall be her separate property after marriage, includes a claim for unliquidated damages against a carrier for suffered indignities, and such claim does not become community property on marriage.

2. Under Rev. St. 1895, art. 1252, requiring that, on the marriage of a feme sole who has instituted a suit, her husband shall be made a party plaintiff, the joinder of the husband as plaintiff in an action begun by the wife before marriage does not constitute a misjoinder of parties.

3. In an action by a passenger against a carrier for permitting other passengers to insult plaintiff with offensive language, it was sufficient to allege that the language used was profane, vulgar, obscene, and indecent, without setting out the specific language used.

4. Plaintiff had the burden of showing as nearly as possible the language used—at least, the substance and meaning of the words—and this was not done by a mere statement that the

passengers complained of "cursed, and used vulgar and obscene language, and sang vulgar songs."

Appeal from District Court, Navarro County; L. B. Cobb, Judge.

Action by Pearl Wright against the St. Louis Southwestern Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Reversed.

E. B. Perkins and Frost, Crabtree & Blanding, for appellant. J. T. Williams and Callicutt & Call, for appellee.

TEMPLETON, J. Pearl Wright, a girl 18 years old, brought this suit against the St. Louis Southwestern Railway Company of Texas, and for cause of action alleged that, while she was a passenger on one of the company's trains, a number of other passengers used profane, vulgar, obscene, and indecent language in her presence and hearing, which greatly distressed and humiliated her; that the conductor in charge of the train was present at the time, and was aware of the misconduct of the offending passengers, but did not prevent or attempt to prevent them from insulting the plaintiff by their objectionable behavior. A trial by jury resulted in a judgment for the plaintiff for \$800.

After the suit was begun, and before the trial, the plaintiff married a man named Williams. The fact was set up by amended petition, and Williams was made a party plaintiff. The defendant demurred to the petition on the ground that there was a misjoinder of parties plaintiff, and requested a special charge directing a verdict for the defendant because of the misjoinder. The demurrer was overruled, and the charge was refused. It is insisted that the plaintiff's unliquidated claim for damages became community property upon her marriage, and that her husband alone was entitled to maintain a suit for the recovery thereof. The proposition is not tenable. It has been held that a claim for unliquidated damages for personal injuries received by the wife during coverture is community property, and that the husband is the proper party to sue for the recovery of such damages. *Ezell v. Dodson*, 60 Tex. 331; *Railway Co. v. Burnett*, 61 Tex. 638. But it is not the law that a claim of that character which has accrued in favor of the wife while a feme sole becomes community property upon her marriage. It is provided by article 2967, Rev. St. 1895, that "all property, both real and personal, of the wife, owned or claimed by her before marriage, * * * shall be the separate property of the wife." We think the demand sued on herein was property, within the meaning of the statute. The right of the plaintiff Pearl to recover was fully vested before her marriage, and was in no wise affected by her marriage. That event did not transfer to her husband an interest in the cause of action. No right of any kind against the railway company was acquired

*Rehearing denied July 3, 1903.

after her marriage. Under the provisions of article 1252, Rev. St. 1895, the suit which she had brought while a feme sole did not abate upon her marriage, but her husband became a necessary party plaintiff. The statute does not provide that the wife shall be dismissed from the suit, and we conclude that the trial court did not err in overruling the demurrer and in refusing to give the requested charge.

It was alleged in the petition that, while the plaintiff was a passenger on one of the defendant's trains, "several drunken men entered said coach, who were also passengers on said train, and, in the presence and hearing of plaintiff, cursed, and used vulgar, indecent, and obscene language, sang vulgar songs, and repeated vulgar and obscene verses." The defendant demurred to the petition on the ground that the language used was not stated, and that the aforesaid allegation amounted to no more than a conclusion of the pleader. We think the demurrer was properly overruled. The plaintiff's right to recover did not depend on the particular language used. Her suit was not based on the offensive words uttered by her fellow passengers, but on the negligence of the conductor in failing to interfere for her protection. She was bound to allege misconduct which called for the interposition of the conductor, and the use of profane, vulgar, obscene, and indecent language in her presence and hearing would be such misconduct. It was the nature and character of the language used, and not the utterance of any particular words, which made it the duty of the conductor to intervene. The averments of the petition were sufficient to fully inform the defendant of the nature of the plaintiff's cause of action, and it was unnecessary for the plaintiff to plead the evidence on which she relied to sustain the allegations of her petition.

The plaintiff testified on the trial that "the passengers referred to cursed, and used vulgar and obscene language, and sang vulgar songs, in the coach I was in, which both frightened and humiliated me." This statement of the witness was objected to by the defendant on the ground that the same was merely a conclusion of the witness; the contention being that the witness should have been interrogated as to what language was used, and required to state the substance of what was said by the offending passengers. We are of the opinion that the objection should have been sustained. The witness may have considered language vulgar and obscene which was not so in fact. We do not mean to hold that the witness should be required to give the exact language. Generally, the literal expressions used would not be remembered accurately, but the witness should give the language as nearly as possible; and, if none of the words could be remembered, the substance and meaning thereof should be stated. Enough of the language, or the substance thereof, should be

proven, to show that the language was of the character alleged, and to enable the jury to properly estimate the damages. The plaintiff cannot be relieved of the burden of proving her case because it would be embarrassing to her to repeat in court the offensive language. Her yielding to necessity should not cause her the slightest humiliation, and would not tend to disgrace her in public estimation.

The judgment is reversed and the cause remanded.

LAKEY v. TEXAS & P. RY. CO.*

(Court of Civil Appeals of Texas. June 11, 1903.)

MASTER AND SERVANT—FELLOW SERVANTS—WHO ARE—RAILROAD EMPLOYE—OPERATION OF CAR.

1. Under *Sayles' Rev. Civ. St. art. 4560h*, providing that all persons engaged in the common service of a railroad company in the same grade of employment, and doing the same character of work, and working together at the same time and place and at the same piece of work, and to a common purpose, are fellow servants, an employé engaged in taking rails from a car and laying them on the track is a fellow servant with another employé, who, at the foreman's direction, gives signals which control the work, but who exercises no other authority over the men.

2. *Sayles' Rev. Civ. St. art. 4560f*, makes railroad companies liable for injuries to employés operating cars, notwithstanding the fellow-servant doctrine. *Held*, that employés taking rails from a car and laying them on the ties and heeling them ready for the spikers were not operating a car, and hence were within the fellow-servant rule.

Error from District Court, Gregg County, John Young Gooch, Judge.

Action by Elbert Lakey against the Texas & Pacific Railway Company. Judgment for defendant entered on a directed verdict, and plaintiff brings error. Affirmed.

J. L. H. Terry and Jno. B. Howard, for plaintiff in error. H. E. Lasseter and John M. Duncan, for defendant in error.

GARRETT, C. J. This action was brought by Elbert Lakey against the Texas & Pacific Railway Company to recover damages for personal injuries received by the plaintiff, while in the employment of the defendant, through its alleged negligence. A jury was impaneled to try the case, and, after the evidence had been heard, the court instructed the jury to return a verdict for the defendant, which was done, and judgment was rendered in its favor.

The plaintiff has assigned as error: "The court erred in instructing the jury to return a verdict for the defendant." The defendant objects to our consideration of this assignment for the reason stated that it is too general in its terms, and does not distinctly specify the grounds of error relied on, or point out that part of the proceedings con-

*Rehearing denied.

tained in the record in which error is complained of in a particular manner so as to identify it. We have had occasion recently to pass upon a similar assignment, and held that under a liberal construction of the rules 25 and 26 (67 S. W. xv) it was sufficient. *McCarthy, Adm'r, etc., v. Mutual Reserve Fund Life Association* (May 28, 1903) 74 S. W. 921. Plaintiff was at work with a gang of 8 or 10 men under a foreman laying steel or building track. The rails were being taken for that purpose from a hand car called the "steel car" or "push car." There were other men behind doing back-spiking, but those at the car were doing the same work. The rails were taken or dragged off the car over a dolly fixed in the end of the car, and thrown onto the ties and heeled. In dragging a rail off the car, four or five of the men would take hold of the front end, and pull it over the dolly with their backs to the car, and two or three of them would remain behind to put the rail in place and guide it. It was the business of one of the men, called the "caller," to watch the rail, and when it got over the dolly to near the end of the rail to call "Steady!" and the men would stop, and steady themselves, and prepare to throw the rail off onto the ties. The caller would then call "Long launch!" or "Long drag!" and the men would throw the rail. At the time the plaintiff was injured he was with the men in front, dragging a rail off the hand car, and the caller failed to call "Steady!" and the rear end of the rail was dragged off the dolly and dropped to the ground and the jar caused the men in front to drop their end, and it fell on the plaintiff's foot and injured him. The foreman was present. The caller had no control of the men except that he was designated by the foreman as "caller," and in the discharge of his duties as such called the signals "Steady!" and "Long launch!" or "Long drag!" for the men to act together in the throwing of the rail. If the plaintiff and the caller, by whose negligence the plaintiff was injured, were fellow servants, the defendant would not be liable for the resulting damages, unless the push car was a car within the meaning of article 4560f, Sayles' Rev. Civ. St., and the men were engaged in the work of operating the car. The plaintiff and the caller were working together to the common purpose of unloading the steel rails from the car and laying them upon the ties and heeling them ready to be spiked. They were at work under the direction of a foreman, and the caller had no control of the men, but his simple duty was to call out the movements to be made by them so as to secure concert of action, and to prevent the throwing of the rail until all were ready for it. The statute defines who are fellow servants, and the facts bring the plaintiff and the caller and the other men laying steel clearly within its terms. Sayles' Rev. Civ. St. art. 4560h. They were fellow servants.

Were they operating the car? Plaintiff relies on the case of *Tex. & Pac. Ry. Co. v. Webb*, 72 S. W. 1044, 7 Tex. Ct. Rep. 34, as authority that they were. It seems to be very well settled that the steel car was a car within the meaning of the statute. *Ry. v. Webb*, supra. In the case relied on Webb and a fellow servant, Greathouse, were engaged in loading stone at a quarry on a push car, which, when loaded, they ran down an inclined switch track to a rock crusher. Their duty was to load the car, mount and start it, and control its movements by brakes, and, after unloading it at the rock crusher, to push it back to the quarry for another load. While they were loading the car, Greathouse negligently threw a stone on Webb's foot, and injured it. The Court of Civil Appeals for the Second District, in an opinion by Chief Justice Conner, which reviews the authorities and discusses the question in a thorough manner, held that Webb and Greathouse were engaged in the operation of a car, and affirmed a judgment in Webb's favor for damages. A writ of error has been refused by the Supreme Court. From the statement of the Webb Case it appears that the car was being operated on the defendant's railroad. In the case under consideration the men were laying steel in the construction of a railway track. They were not loading, transporting, and unloading the rails, and for that purpose operating the car, but their work consisted of taking the rails from the car or unloading them only so far as the car was concerned; not ending there, however, but ending only with the laying of the rails on the ties and heeling them ready for the spikers. The distinction between the two cases lies in the employment or work the men were engaged in. In Webb's Case they were transporting stone, and for that purpose were operating the car. In the present case the men were engaged in track laying, and, for convenience in handling, the steel rails were laid on a hand car, from which, over a dolly, fixed in the front end, they were dragged into place. The plaintiff's gang were not engaged in the operation of a car, and the plaintiff has failed to show any liability on the part of the defendant for the damages sustained by him, and the court did not err in directing a verdict for the defendant.

The judgment of the court below will be affirmed. Affirmed.

THOMPSON v. GALLAGHER.*

(Court of Civil Appeals of Texas. June 6, 1903.)

PUBLIC LANDS—CLASSIFICATION—APPRAISEMENT—PRESUMPTION FROM SALE—TRESPASS TO TRY TITLE—NECESSITY OF PROOF.

1. There is no presumption arising from the act of the land commissioner in selling public lands that they have been classified and ap-

*Rehearing denied.

praised, and hence, in trespass to try title, classification and appraisal must not only be alleged, but proved.

Appeal from District Court, Nueces County; Stanley Welch, Judge.

Action by Frank Thompson against Thomas Gallagher. Judgment for defendant, and plaintiff appeals. Affirmed.

D. McNeill Turner, for appellant. McCampbells & Stayton, for appellee.

GILL, J. This suit was brought by appellant, in the form of an action of trespass to try title, to recover of appellee a section of land numbered 402, which, by amendment, appellant claimed he had purchased from the state as public school land. By this amendment appellant pleaded the various things which had been done toward the completion of his purchase. The defendant answered by plea of not guilty. The trial court, after hearing the facts, instructed the jury to return a verdict for appellee; stating his reasons therefor in the charge.

It was shown that in 1897 appellant made application to the land office to purchase the section in question; that his application was allowed, the necessary cash payment made, the obligation and oath filed, and thereafter everything was done by him which the law required to perfect his purchase, except the fact of proper occupancy, upon which the evidence was conflicting. The record, however, is silent as to whether the land was ever classified and appraised for sale as required by law. In 19— appellee appeared before the land commissioner and filed affidavits to the effect that the land was unoccupied. Notice of this was mailed to appellant, who failing to appear on the day named for the hearing, the land commissioner canceled the sale to appellant, and awarded the land to appellee, on his application to purchase it as a detached section. Thereafter appellant filed affidavits as to his occupancy, which, if true, would have entitled him to his purchase receipt, but for the cancellation. The commissioner refused to reinstate him, whereupon this suit was brought.

In urging the reversal of the judgment, appellant assails the reasons given by the trial judge for giving the peremptory instruction. In view of the disposition we are constrained to make of this appeal, we shall not concern ourselves with the reasons given for the judgment. We will content ourselves with a designation of one tenable reason why, in the present state of the record, no other result could have been reached. It seems to be well settled that proof of classification and appraisal is a prerequisite to recovery in a suit of this sort. Mere allegation will not answer. The act of the commissioner in undertaking to make the sale does not establish it *prima facie*. The presumption reasonably indulged in favor of the regularity of official acts is not indulged in aid of

such sales. The establishment of that distinct fact has been held to be one of the essentials of a plaintiff's case, so that no recovery can be had without it. The following authorities seem to settle the matter beyond question: *Martin v. McCarty*, 74 Tex. 134, 10 S. W. 221; *Thompson v. Autry* (Tex. Civ. App.) 52 S. W. 581; *Anderson v. Walker*, 70 S. W. 1003, 6 Tex. Ct. Rep. 251; *Hardman v. Crawford*, 66 S. W. 206, 3 Tex. Ct. Rep. 871; *Reeves v. Smith*, 23 Tex. Civ. App. 711, 58 S. W. 185.

For the reason given, the judgment of the trial court is affirmed. Affirmed.

GALT v. HOLDER.

(Court of Civil Appeals of Texas. May 30, 1903.)*

PUBLIC WEIGHERS—STATUTES—CONSTRUCTION.

1. Laws 1899, p. 264, c. 155, provides for the election of public weighers to weigh cotton and other produce for hire, and declares that it shall be unlawful for any factor, commission merchant, or other person or persons, to employ other than the public weigher to weigh produce. *Held*, that the expression "any factor, commission merchant, or other person or persons," should be construed as limited to persons engaged in similar occupation or employment as factors and commission merchants, and hence the statute did not prohibit a person engaged in storing cotton for customers, but who did not transact business as a factor or commission merchant, from weighing same for his customers.

Appeal from District Court, Franklin County; J. M. Talbot, Judge.

Action by David Holder against Ed. F. Galt to restrain defendant from weighing cotton for hire. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Glass, Estes & King, for appellant. J. F. Jones and R. T. Wilkinson, for appellee.

BOOKHOUT, J. Plaintiff, D. H. Holder, filed his petition for writ of injunction on 13th day of September, 1902, alleging that he was duly elected and qualified and acting public weigher of Franklin county, Tex., and was well equipped and prepared to receive and weigh all produce presented to him for weighing, and that he had scales and a cotton yard conveniently located in the town of Mt. Vernon, and was capable of weighing and storing all cotton and other produce offered to him for weighing; that, some time after plaintiff was elected and qualified, the defendant, Ed. F. Galt, opened up a yard, and commenced to weigh cotton and all other produce offered to him, and solicited such weighing, and weighed all cotton and produce that he could get to weigh for farmers, merchants, and other persons. Plaintiff alleged that the defendant had weighed enough cotton to amount to about \$300 in fees, that plaintiff would have earned, had not defend-

*Rehearing denied July 2, 1903.

ant weighed as aforesaid; that the defendant had a yard in said town of Mt. Vernon, and received and stored cotton and other produce. Plaintiff alleged that the injury complained of was a continuing one, and that the remedy afforded by law was inadequate to protect him. Plaintiff prayed for a writ of injunction restraining defendant from weighing cotton and other produce for the public, for damages, costs of suit, etc. Defendant demurred generally and specially to the plaintiff's petition, and pleaded that he did not receive cotton from a commission merchant, factor, or other person in like business, and that he was doing the business of a warehouseman, and received cotton, and stored it and weighed it, but did not charge anything for weighing; charging 25 cents per bale for storing and hauling cotton to the depot. On the 18th day of September the court heard the petition in chambers, and continued the writ in force that had been granted on the filing of plaintiff's petition until the case was finally tried, on the 14th day of December, which was at the fall term of the district court of Franklin county, and upon said trial the writ of injunction was perpetuated, restraining the defendant from weighing produce not his own. From this judgment, defendant appealed.

The trial court filed conclusions of fact as follows: "That on the first Tuesday in November, 1900, the plaintiff, David Holder, was duly elected to the office of public weigher at Mt. Vernon, in and for Franklin county, Texas, and on the 24th day of November, 1900, he qualified in compliance with law, and the order of the commissioners' court of said county establishing said office. That immediately thereafter plaintiff fitted up proper scales and appliances, and a yard for the storage of cotton, for the purpose of weighing all cotton and other produce sold and offered for sale in said town of Mt. Vernon, and has, continuously since qualifying as such, performed and stood ready to perform, in person and by legally appointed deputies and assistants, the official duties of public weigher at Mt. Vernon, in and for Franklin county, Texas, and has continuously maintained the scales and appliances necessary to weigh all cotton and other produce sold and offered for sale at said town of Mt. Vernon, and has in every way complied with the law, and the order of said county commissioners' court creating the office of public weigher at Mt. Vernon, in Franklin county, Texas, and has continuously since his qualifications as such been engaged in the performance of the duties of said office, and has weighed a large amount of cotton, and can weigh all the cotton sold or offered for sale on the market at, or shipped from, said town of Mt. Vernon, and for weighing cotton and storing the same in his cotton yard he charges only the sum of twenty-five cents for each bale, ten cents of which is for weighing each bale—balance for storage and

hauling to depot. That on or about the 1st day of December the defendant, Ed. Galt, was buying cotton in Mt. Vernon, Texas, and established scales and a storage yard for weighing and storage of cotton in said town, and has continuously maintained the same. That said defendant, upon the request of all parties selling cotton to him, or any other person, weighs the same, to ascertain the weight of same, but has not and does not make any charge or deduction for, or receive any fee for, same. That, in addition to weighing the cotton purchased by himself, said defendant has weighed and continues to weigh all cotton offered to him in said town to be weighed for himself and other cotton buyers, but weighs it only upon request of the parties offering it, and has not and does not make any charge for weighing same. That, after weighing said cotton, he places the same in his storage yard, where it remains stored until he receives direction to load it for shipment, and after keeping said cotton in storage, and after moving it from his storage yard and loading it for shipment, he charges and collects from whoever the owner of the cotton may be at the time a fee of twenty-five cents per bale for the storage, moving, and loading of said cotton. That said defendant did not handle any of said cotton on commission, and is not now, nor has he ever been, a factor, commission merchant, or engaged in a similar occupation or business. That since the service of the temporary writ of injunction he has refrained from weighing cotton. Both plaintiff and defendant collect twenty-five cents per bale as a fee from the owner of the cotton at the time said bale of cotton is shipped out from Mt. Vernon. The plaintiff charges ten cents for weighing each bale of cotton, and fifteen cents for storing and hauling to the depot. Defendant charges twenty-five cents for each bale of cotton received and weighed by him, for storing and hauling said bale of cotton to the depot in the town of Mt. Vernon, and placing the same on the platform for shipment."

Conclusions of Law.

The question presented for our determination is, did the court pronounce the proper judgment on these facts? This depends upon the construction to be placed upon the statute of 1899 in reference to public weighers. See Sess. Laws 1899, p. 264, c. 155; 2 Laws Tex. p. 266. The original act creating the office of public weigher was passed in 1879. It was amended in 1883. See Sayles' Civ. St. (Old Ed.) arts. 4088, 4089b. This act, as amended, was construed by the Supreme Court in the case of *Watts v. State*, 61 Tex. 187, in effect, to authorize persons to engage in weighing cotton, either for the owners or for factors, with written authority from the owner. The object of this statute was stated to be to protect owners of produce from the fraudulent conduct of their factors and agents in rendering a false account of the

weights of produce shipped to them. This court held in the case of *Martin v. Johnston*, 33 S. W. 306, that the statute did not prohibit the owner of produce from procuring any one to weigh his produce when such owner is present. It was there stated that the statute should be so construed as to accomplish this object, but it should not be given such a range as to interfere with the complete dominion of the owner over his property. The act of 1899 omits the section of the act of 1879 which prohibited all persons other than public weighers from weighing cotton. It re-enacted in substantially the same language the section which made it unlawful for factors, commission merchants, or other person or persons, to employ other than a public weigher to weigh produce. The expression "any factor, commission merchant, or other person or persons," used in article 4314 of the Statutes of 1899 (page 266, c. 155), means persons engaged in similar occupations or employment as factors and commission merchants. *Whitfield v. Terrell Compress Co.* (Tex. Civ. App.) 62 S. W. 117. The statute does provide that nothing in the act shall prevent any person from weighing his own cotton in person. The trial court seems to have been of the opinion, and so held (following the holding in *Davidson v. Sadler* [Tex. Civ. App.] 57 S. W. 54), that the statute of 1899 prohibits the weighing of cotton by any person whomsoever, except the public weigher or the owner himself. If this construction of the law is sound, the effect of the statute is to require one who brings his produce to market to have it weighed by the public weigher, although, for some good reason, he may object to such official handling his property; that, although the owner be present, he cannot merely observe or superintend the weighing of his produce, but must himself weigh it. As we have seen, such was not the purpose and intent of the original statute. *Watts v. State*, supra; *Martin v. Johnston*, supra. If this is the proper construction of the statute, then article 4314 is superfluous, for, if all persons except public weighers were prohibited from weighing produce under any circumstances, then factors commission merchants, and men in such business, would be thereby included, and it would therefore have been unnecessary to have specifically mentioned and prohibited them. The statute of 1899 does not, in our opinion, prohibit any person from weighing cotton or other produce tendered him to be weighed, and does not prevent any person from soliciting such business, and equipping and maintaining a place for the transaction of such business, unless such person be a factor, commission merchant, or person engaged in a similar occupation or business. This holding is in accord with the holding of the Court of Civil Appeals for the First District in the case of *Whitfield v. Terrell Compress Co.*, supra, in which case a writ of error was refused by the Supreme Court.

It follows that there is error in the judgment, for which the same is reversed, and here rendered for appellant. Reversed and rendered.

ESPEY v. BOONE et al.

(Court of Civil Appeals of Texas. June 16, 1903.)

FRAUD—LAND CONVEYED BY TRUSTEE—ACTION TO RECOVER VALUE—DESCRIPTION—SUFFICIENCY OF PETITION—JURISDICTION.

1. An action to recover damages for the fraudulent conveyance by defendants to an innocent purchaser of property deeded by plaintiff to defendants in trust to secure a loan is not an action to try title to land, nor one in which title to land is directly involved, and where the county court had jurisdiction of the amount claimed it had jurisdiction of the action.

2. Plaintiff, by absolute deed, conveyed land to defendant to secure a loan, and subsequently the latter conveyed the land to an innocent purchaser without notice. *Held*, that plaintiff was entitled to maintain an action against defendant for the value of the property.

3. Plaintiff's petition in an action for damages for conveyance of land held in trust stated the location of the land, and referred to a judgment of the district court of a certain county for a full description. *Held* that, if the judgment described the property, no further description in the petition was necessary.

Appeal from Wharton County Court; G. S. Gordon, Judge.

Action by Etta Espey against Joe Boone and others. Judgment for defendants, and plaintiff appeals. Reversed.

Brooks & Cline, for appellant. I. N. and J. H. H. Dennis, for appellees.

PLEASANTS, J. Appellant brought this suit to recover damages for the alleged wrongful and fraudulent sales by appellees of property belonging to appellant, the title to which she had placed in appellee Lucy Boone in trust. The petition alleges that during December, 1901, or January, 1902, plaintiff conveyed to defendant Lucy Boone certain lots in Cleburne, Tex., by deed absolute on its face; that in fact such instrument was intended as a mortgage to secure a loan of \$60 then made by defendants to plaintiff; that defendants took charge of said property, and collected the rents from same to an amount sufficient, or nearly sufficient, to repay said loan; that on October 4, 1902, defendants, in violation of the trust reposed in them, sold said property to one Minnie Williams for a consideration of \$350, of which \$100 was paid in cash and \$250 in notes; that said Minnie Williams was a purchaser in good faith, and without knowledge of the secret trust ingrafted on said deed; and that plaintiff was without remedy for the recovery of said land. Defendants filed four special exceptions to said petition, same going to the jurisdiction of the court, which were all sustained, and, plaintiff declining to amend, the suit was dismissed, and from the judgment dismissing same appellant prosecutes this appeal.

This is not a suit to try title to land, nor one in which title to land is directly involved; that issue being only incidental to the question of the defendants' liability for the sale of the property. The amount claimed in the petition being within the jurisdiction of the county court, that court had jurisdiction of the cause of action set up in the petition, and the exceptions to the petition should have been overruled. *Melvin v. Chancy* (Tex. Civ. App.) 28 S. W. 241.

Appellees contend that plaintiff, under the facts alleged in the petition, could only sue for the land, and is not entitled to recover damages for its conversion by appellees; and in support of this contention cite *Willis v. Morris*, 66 Tex. 628, 1 S. W. 799, 59 Am. Rep. 634. There is no merit in the contention, and it finds no support in the authority cited. That case announces the well-established rule that, when the owner of real estate is dispossessed by a trespasser, he cannot abandon his claim to the property, and sue for its value, but must sue to recover the property. It is manifest that this rule has no application to a case in which the plaintiff has been deprived of his title to land by the wrongful and fraudulent act of the defendant. It is well settled that in such case the person injured may sue for the value of the property of which he has been deprived. *Phillips v. Herndon* (Tex. Sup.) 14 S. W. 857, 22 Am. St. Rep. 59; *Boethe v. Feist* (Tex. Sup.) 15 S. W. 799; *Id.*, 19 S. W. 398.

The exception to the petition on the ground that the description of the land alleged to have been fraudulently conveyed by the defendants was insufficient should not have been sustained. The petition states the location of the property, and refers to a judgment of the district court of Wharton county for a full and accurate description. If, as alleged in the petition, the judgment referred to describes the property, reference to said judgment was sufficient to put the defendants upon notice of what property they were charged to have fraudulently conveyed, and it was not necessary that the petition contain any further description.

The judgment of the court below is reversed, and this cause remanded for a trial upon the merits. Reversed and remanded.

BLAKE v. AUSTIN et al.*

(Court of Civil Appeals of Texas. June 19, 1903.)

REAL ESTATE BROKERS—DIVISION OF COMMISSION—CONTRACT—CONSTRUCTION OF PETITION—OFFER OF PAYMENT—ADMISSIBILITY OF EVIDENCE—INSTRUCTIONS—PROPRIETY.

1. A petition by real estate brokers alleged that they secured a client ready to purchase a tract of land; that they requested defendant to see the owner and make the trade for them, authorizing defendant to offer the owner \$1.50 less per acre, the difference to constitute the

commission on the transaction, of which they would allow defendant one-third; that defendant assented to the terms, and made the contract with the owner for their and his own benefit, etc. *Held*, that the petition alleged an express contract, by which defendant agreed, in consideration of plaintiffs' having procured a purchaser and assisting in consummating the sale, to pay them two-thirds of the commission realized by him, and was not demurrable on the theory that the allegation that the services performed by defendant were at plaintiffs' request excluded the idea of liability on defendant's part to plaintiffs.

2. Where real estate brokers, suing another broker for their share of commissions on a contract, claimed an agreement whereby they were to have two-thirds, and defendant denied this, and claimed that no agreement as to the apportionment of the commission was made, evidence that before any litigation was in prospect he offered a certain sum to plaintiffs is not objectionable, as proving an offer of compromise.

3. In a suit by real estate brokers against another broker for their share of commissions on a transaction, the court instructed that "plaintiffs sue the defendant on a verbal contract wherein it was agreed between them that plaintiffs," etc.; "that it was also understood between them," etc.; "It is alleged that the sale was so made that defendant has received and has in his possession the entire amount of plaintiffs' share. The defendant denies that he ever entered into any such contract and agreement. Now, if you believe * * * that said parties made such agreement, * * * then find a verdict for plaintiffs; but, if you do not believe that such agreement was made, * * * then find for defendant." *Held*, that the instruction was not objectionable as assuming the existence of the contract claimed by plaintiffs.

Appeal from District Court, Matagorda County; Wells Thompson, Judge.

Action by W. E. Austin and others against J. J. Blake. Judgment for plaintiffs, and defendant appeals. Affirmed.

Brown, Lane & Garwood and E. F. Higgins, for appellant. W. O. Carpenter and Linn & Austin, for appellees.

PLEASANTS, J. Appellees, W. E. Austin, J. L. Ladd, A. P. Owens, and F. A. Sears, brought this suit against the appellant to recover the sum of \$1,500, alleged to be due them as their proportion of certain commissions received by appellant for the sale of a tract of 1,500 acres of land in Matagorda county, purchased by M. D. Chillson from T. E. Partain. Omitting the formal portions plaintiffs' petition is as follows: "That on, to wit, about the 10th day of April, 1902, plaintiffs brought to Matagorda county a man by the name of M. D. Chillson, who desired to purchase a large body of land, and plaintiffs, at their own expense and loss of time, hired teams and conveyances, and showed to him several different tracts of land in said county, among which was a tract of fifteen hundred acres belonging to T. E. Partain, composed partly of lands out of the J. C. Partain league and Richard Groves league. That said Chillson was pleased with said tract of land, and offered to purchase it at the price of \$14 per acre, and that, it being inconvenient for plaintiffs to visit said T. E.

*Rehearing denied.

Partain at that time, they saw and requested defendant to go see him and make the trade for them; authorizing said Blake to offer him twelve and $\frac{50}{100}$ dollars per acre for said land, and that, if he made a deal with him at said price, plaintiffs would allow defendant, as his compensation therefor, fifty cents per acre; plaintiffs to have the balance of the difference between twelve and $\frac{50}{100}$ dollars and fourteen dollars, or one and $\frac{50}{100}$ dollars per acre. That said defendant assented to said terms, and did make and enter into a contract with said Partain and said Chillson upon such terms, for plaintiffs' and defendant's benefit, in the proportion above named. That afterwards, to wit, on the 28th day of June, 1902, said T. E. Partain, joined by his wife, in pursuance of said contract, did convey said 1,500 acres of land to A. A. Plotner and John W. Stoddard, assignees of said Chillson, and at his request, by warranty deed, duly executed and acknowledged and delivered, for said sum of fourteen dollars per acre, whereby, and by reason of which, plaintiffs became entitled to be paid one dollar per acre for 1,500 acres, or \$1,500. That on, to wit, the 15th day of August, 1902, in pursuance of his agreement with plaintiffs and defendant, said T. E. Partain paid to defendant, for his and plaintiffs' benefit, said \$1.50 per acre for 1,500 acres of land, or \$2,250, as their commissions for effecting said sale, whereupon and by reason of which defendant became legally bound to pay plaintiffs their portion thereof, or \$1,500. That plaintiffs demanded said amount of defendant, but he refused to pay same, and offered to pay plaintiffs \$1,165, and, plaintiffs declining to accept said last-named amount as their share and portion of said commissions, defendant refused, and doth still refuse, to pay any portion thereof, to plaintiffs' damage \$1,600." The defendant answered by general and special exceptions and general denial, and specially denied that he ever made any agreement with the plaintiffs as to division of the commission on the sale of the Partain land. The trial in the court below by a jury resulted in a verdict and judgment in favor of plaintiffs for the sum of \$1,310.

The evidence shows that the plaintiffs secured an offer from Chillson to purchase the land at \$14 per acre, as alleged in their petition, and that they informed defendant of Chillson's offer, and requested him to see Partain and offer him \$12.50 per acre. Defendant induced Partain to accept \$12.50 per acre for the land. Partain made the deed to Chillson, and received therefor \$14 per acre. He paid defendant as commission for making the sale the sum of \$1.50 per acre, amounting to \$2,250. A short time after the sale was made, the defendant went to the office of plaintiff Austin for the purpose of settling with plaintiffs, and paying them their interest in the commission on the sale of the land. He told Austin that he had to pay \$250 attorney's fees to have the title to the land

cleared, and \$35 surveying fees, which left \$1,965 of the amount received as commission, of which amount he offered to pay plaintiff one-half. Austin refused to accept this amount, and told defendant that this was not according to his contract with plaintiffs, and that by the terms of the contract they were to receive two-thirds of said commission. Defendant then offered to pay him \$1,165, which amount was also refused. There is a conflict in the evidence as to the agreement for a division of the commission. The defendant testified that there was no agreement as to how the commission should be divided, and, while he expected and understood that he was to pay plaintiffs a part of the commission, nothing was said about how it was to be divided. The plaintiff Ladd, who conducted the negotiations with defendant, testified that it was expressly agreed and understood between them that plaintiffs were to receive two-thirds of the commission realized from the sale of the land to Chillson. Plaintiffs refused to allow defendant any credit for the amount claimed to have been paid by him as attorney's and surveying fees, on the ground that defendant was not authorized to incur such expenses.

The first assignment of error is as follows: "The court erred in overruling defendant's general demurrer, because the petition, on its face, shows such an inconsistency as would render it impossible for plaintiffs to recover upon proof of the allegations thereof." Under this assignment it is urged that the allegation in the petition that the services performed by Blake were at the request of plaintiffs excludes the idea of liability on Blake's part to plaintiffs for any portion of the compensation received by him for such services, and, since no contract or privity between plaintiffs and Partain is alleged which would authorize them to sue defendant for money had and received of Partain for their benefit, the petition fails to state a cause of action. We think the petition clearly alleges an express contract between plaintiffs and defendant, in which defendant agreed, in consideration of the services of plaintiffs in procuring a purchaser and assisting in consummating the sale of the land, to pay them two-thirds of the commission realized by him from such sale. That a breach of said contract by the defendant would give a cause of action to plaintiffs cannot be questioned. It is wholly immaterial that Partain had no knowledge of this contract. When he paid the commission to Blake, the latter became liable to plaintiffs for their portion of same on his contract with them, and not as the recipient from Partain of money due by him to plaintiffs. The general demurrer was properly overruled, and the assignment cannot be sustained.

The appellant specially excepted to the allegation in the petition that defendant had offered plaintiffs the sum of \$1,165, and also objected on the trial of the case to the ad-

mission of proof of such offer; the ground of said exception and objection being that the offer to pay the \$1,165 was an offer of compromise, and therefore not admissible as evidence of defendant's liability. We do not think this contention is sound. The offer of defendant to pay the \$1,165 was not made in an effort to compromise, prospective of or pending litigation. The defendant admitted that he was liable to plaintiffs for a portion of the commission, but claimed that there was no agreement as to how same should be divided. Under these circumstances, his offer to pay \$1,165 cannot be considered as an offer to buy his peace, but was an admission on his part that that much was due plaintiffs as their part of the commission.

The trial court charged the jury as follows: "Gentlemen of the Jury: The plaintiffs sue the defendant on a verbal contract, wherein it was agreed between them that plaintiffs were to find a purchaser for the lands (1,500 acres) belonging to T. E. Partain, at \$14 per acre; that defendant agreed to secure Partain's consent and conveyance of the lands to the purchaser so found by plaintiffs; that it was also understood between them that defendant was to secure Partain's agreement to take the sum of \$12.50 per acre for his share of the purchase money, and that \$1.50, the difference between \$12.50 and \$14.00, was to be divided between the plaintiffs and defendant, two-thirds to plaintiffs and one-third to defendant; that plaintiffs' part was to be two-thirds of said sum, viz., \$1,500, and defendant's part the remainder, or one-third. It is alleged that sale was so made, and that defendant has received and has in his possession the entire amount of plaintiffs' share. The defendant denies that he ever entered into any such contract and agreement. Now, if you believe from the preponderance of the evidence that said parties made such agreement, and the land was sold as agreed, and that defendant has possession of the \$1,500, it being plaintiffs' share, then find a verdict for plaintiffs. But if you do not believe that such agreement was made between the parties, then find for defendant." The fourth assignment assails this charge on the ground that it is upon the weight of the evidence, in that it tells the jury that the contract between the plaintiffs and defendant provided that plaintiffs were to be paid two-thirds of the commission received by the defendant from the sale of the land. We think it clear from the charge as a whole that the statement therein made as to the terms of the contract sued on was intended merely as a statement of the allegations of the petition, made for the purpose of informing the jury as to the issue to be determined by them. The charge distinctly submits to the jury the issue as to what the agreement was, and they could not have understood from the charge as a whole that they were to assume the existence of the contract as claimed by the plaintiffs, nor that the court

intended to intimate that, in his opinion, such contract had been established. We think the charge fairly presents to the jury the only issue raised by the evidence, and none of the remaining assignments, which complain of said charge, and of the refusal of the court to give special charges requested by the defendant, should be sustained.

There being no error in the record which requires a reversal, the judgment of the court below is affirmed. Affirmed.

CRANFILL et al. v. HAYDEN.*

(Court of Civil Appeals of Texas. May 23, 1903.)

LIBEL—MATTER LIBELOUS PER SE—TRUTH AS DEFENSE—REFUSAL OF REQUESTED INSTRUCTIONS—SCOPE OF JUSTIFICATION—PRIVILEGED PUBLICATION—BURDEN OF PROVING TRUTH—MALICE AS MOTIVE—CONSPIRACY—SUFFICIENCY OF EVIDENCE—JOINT RESPONSIBILITY FOR PUBLICATIONS.

1. A challenge to a preacher's right to sit as a member of a church convention, which declares that he has rendered himself "utterly unworthy of membership" by a ceaseless and hurtful war on the plans, policies, and works of the convention, producing discord and animosity, resulting in serious and permanent injury to its work; that he has "convicted himself of dishonorable conduct," by attacking the integrity of the secretary's report after its approval by the convention, and by viciously attacking the convention and the character of the secretary; that he is "unworthy of a seat in this convention on moral grounds," having assailed the character of the superintendent of missions and board of directors by falsely accusing them of misuse of moneys and of conspiring to thwart the will of the church membership; that his conduct has been such as to convict him of being "an incorrigible foe to the whole organization, and * * * to render his connection with it a standing menace to the life of the whole body, and to the cause of religion, morality, and education, as represented by it"—is libelous per se.

2. In libel, defendants requested an instruction that, if the matters published were substantially true, the jury should find for the defendants, even if they were actuated by malice; the truth of the charges being a complete defense, without regard to malice. The court refused this, but directed a verdict for defendants if the jury found the charges true. The gravamen of the charges was that plaintiff was morally unworthy of a seat in a church convention. *Held*, that the refusal of the special instruction was not error, as requiring defendants to prove the literal truth of the charges.

3. In an action for libeling a preacher by asserting that he was unworthy a seat in a church convention, because he had attacked the integrity of the secretary's report after it had been approved by the convention, thereby convicting himself of dishonorable conduct, defendants requested an instruction that if the secretary's report had been audited by the board and passed on by the convention and found correct, and plaintiff thereafter attacked the report, the jury should find the charges were true, whether the accounts were in fact correct or not. *Held*, that as plaintiff was not guilty of dishonorable conduct unless the accounts were actually correct, and he knew or should have known that fact when he made his attack, the special instruction was properly refused.

4. A libelous statement made on a privileged occasion is presumed to be untrue, and the bur-

*Rehearing denied June 27, 1903, and application for writ of error pending in Supreme Court.

den of proving its truth is on defendants, though the nature of the occasion saves them, in the first instance, from the imputation of malice; nor is the falsity of the charges a part of plaintiff's case in support of the issue of malice, that being provable by other evidence.

5. If malice enters to any degree as a motive in the publication of libelous matter on a privileged occasion, the defense of privilege is lost.

6. In libel, a requested instruction that mere proof of ill will against plaintiff is not proof of defendants being actuated by malice, is properly refused as misleading and an invasion of the province of the jury.

7. It is not error to refuse requested charges, which, though proper on one issue, embrace instructions on other subjects which are improper.

8. Members of a church convention may lawfully combine to exclude by lawful means an elected member from a seat.

9. Evidence in an action for libel published, as charged by plaintiff, in pursuance of a conspiracy, examined, and held to show such conspiracy.

10. Where a conspiracy to publish a libel is shown, all the conspirators are responsible for all of the publications, though no one of them was concerned in all.

Appeal from District Court, Dallas County; Richard Morgan, Judge.

Action by S. A. Hayden against J. B. Cranfill and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Henry & Henry, Crane, Greer & Wharton, L. J. Truett, R. B. Allen, and L. C. Alexander, for appellants. Crawford & Crawford, D. A. Holman, J. E. Cockrell, and E. B. Muse, for appellees.

TEMPLETON, J. This suit was brought by S. A. Hayden against J. B. Cranfill, J. M. Carroll, J. B. Gambrell, W. H. Jenkins, R. T. Hanks, L. M. Mays, G. W. Bines, T. J. Walne, A. E. Baten, Bennett Hatcher, J. C. Burkett, R. A. Lee, I. B. Kimbrough, L. R. Millican, J. B. Riddle, and others, to recover damages on account of the publication of an alleged libel. A jury trial resulted in a verdict and judgment in favor of the plaintiff against the defendants named for \$10,000 actual damages and \$5,000 exemplary damages. There was no recovery against the other defendants.

At the time of the publication complained of, and for many years prior thereto, the plaintiff was a Baptist minister, and editor and proprietor of the Texas Baptist and Herald, one of the leading papers of that denomination. The defendant Cranfill was also a Baptist minister, and was editor and proprietor of the Baptist Standard, another of the leading papers of the church. The other defendants were prominent members of the Baptist Church, several of them being preachers of the gospel. Many of the local churches of the state, including those to which the plaintiff and defendants belonged, had created a state organization known as the "Baptist General Convention." This organization had been duly incorporated, and it was de-

clared in the constitution of the body that "the object of this convention shall be missionary and educational, the promotion of harmony of feeling and concert of action among Baptists and a system of operative measures for the promotion of the interests of the Redeemer's Kingdom." In furtherance of this object a board of missions was established. About 1894 a controversy arose concerning the work and the officers of the board. The plaintiff complained in his paper and otherwise of some matters connected with the business of the board. Some of the defendants were officers of the board, and they and their friends resented the criticisms of the plaintiff. The controversy was carried into the general convention, and resulted in the formation of hostile factions; the plaintiff and others heading one faction, and the defendants and others leading the opposing faction. In 1897 the annual meeting of the general convention was held at San Antonio. The plaintiff had been elected as a messenger to the convention by certain constituent bodies. The defendants had also been chosen as messengers to the convention, and were opposed to the admission of plaintiff. The defendant Hanks prepared a written challenge to the right of the plaintiff to a seat in the convention, and the defendant Mays signed the same and presented it to the convention. The challenge was based on the ground that the plaintiff was unworthy of admission because of personal unfitness. The challenge was sustained by the convention, and the plaintiff excluded from participation in its deliberations. The challenge was published in the minutes of the convention and in the defendant Cranfill's paper. The plaintiff thereupon brought this suit, alleging that the statements contained in the challenge were false and libelous; that the same were made and published maliciously, and in furtherance of a conspiracy to injure and destroy the reputation and influence of the plaintiff as a man, as a minister of the gospel, and as publisher of a denominational paper. The defendants pleaded the general issue, justified the publication on the ground that the statements made therein were true, and asserted the privilege of the occasion, claiming to have acted in good faith and from a sense of duty in making the publication.

The issues in the case are: (1) Was the publication libelous per se? (2) Were the statements contained in the publication true? (3) Was the publication conditionally privileged, and, if so, was the privilege abused; that is, did the publishers act in good faith and from a sense of duty, or were they prompted by malice? (4) Was there a conspiracy, as alleged, and, if so, was the publication included in the purpose of the conspiracy? These issues, and the questions arising thereon, will be considered in the order stated.

¶ 5. See Libel and Slander, vol. 32, Cent. Dig. § 149.

1. Was the publication libelous per se? The plaintiff's suit was brought on the theory that it was, and the defendants, contending that it was not, interposed a demurrer to the petition. The demurrer was overruled, and the jury was instructed that four of the paragraphs of the challenge were libelous. The said paragraphs read thus:

"First. He [Hayden] has violated the spirit and letter of the constitution of this body, which says: 'The object of this convention shall be missionary and educational, the promotion of harmony of feeling and concert of action among Baptists and a system of operative measures for the promotion of the interests of the Redeemer's Kingdom.' This fundamental law he has violated by a ceaseless and hurtful war upon the plans, policies, work, and workers of this convention; thus misusing his privilege as a member, and, instead of harmony, producing discord, contention, strife, and animosities, which has resulted in serious and permanent injury to the work undertaken by the convention, and which has rendered him utterly unworthy of membership in this convention.

"Second. He is and has been in open and notorious opposition to the convention and its mandates: First. (a) A strong resolution of censure and condemnation of his course in attacking the board of directors of the convention was passed at Houston, and the mandate was 'that he desist from such attacks in the future.' This mandate he has held in utter contempt and refused to obey. He has violated it by open and notorious attacks upon the superintendent of missions of this body, upon its board of directors, and upon the plans of work adopted by this convention. Second. (b) Because of his ceaseless attacks upon the previous secretary of this convention for the years 1891 and 1892, whose report had been audited by the board, and further passed upon by the convention and found correct, and was again passed upon by this body at Marshall and found correct. Because he still attacked the integrity of said report, this body did again at Houston review said report, and found it correct, and did by resolution state that 'further agitation of this matter would show a distrust and an evil motive, which would be dishonorable in the agitator.' Against this action he did not speak or vote at the time. He has, since said convention, viciously attacked said convention and the character of said secretary and the action of this body thereon, and has by so doing convicted himself of dishonorable conduct. * * *

"Fourth. He is unworthy of a seat in this convention on moral grounds. He has assailed the public and private character of the superintendent of missions and the board of directors by falsely accusing them of dishonorable practices in the use of mission money. He has falsely accused them of conspiracy among themselves, and with other

brethren and churches, city councils, and others, to thwart the will of the Baptists of Texas. He is a breeder of strife and contention among the brethren and associations.

"Fifth. That said course of conduct has been pursued by him to such a length of time, and with such continuous and persistent malice and traduction toward the convention, its officers, boards, and objects, and in spite of repeated admonitions and mandates of this convention, as to convict said Hayden as being an incorrigible foe to the whole organization and work of the convention, and to render his connection with it a standing menace to the life of the whole body, and to the cause of religion, morality, and education, as represented by it."

Appellants complain of the action of the court in overruling the demurrer and in giving the instructions aforesaid. The contention of appellants is that the statements in the challenge that the plaintiff's conduct "has rendered him utterly unworthy of membership in the convention"; that he "has convicted himself of dishonorable conduct"; that he "is unworthy of a seat in this convention on moral grounds"; that his conduct had been such as to convict him of "being an incorrigible foe to the whole organization and work of the convention, and to render his connection with it a standing menace to the life of the whole body, and to the cause of religion, morality, and education, as represented by it"—were not libelous, for the reason that the same were merely inferences drawn by the challenger from certain facts stated, and that the facts stated show that the said inferences drawn therefrom by the challenger were not intended by him to be understood as imputing to the plaintiff any moral turpitude, or as reflecting upon his personal character. To state the contention in other words, it is that the challenge, considered in its entirety, shows that the charges of unworthiness were not intended to be understood in an offensive sense, and were not calculated to injuriously affect the reputation or standing of the plaintiff. If we give to the language in which the charges of dishonorable conduct and moral unfitness were expressed its ordinary meaning and significance, there can be no doubt that the charges were libelous. Townshend, §§ 146, 176; Newell, p. 43. We find nothing in the statements preliminary to the charges tending to relieve the charges of their defamatory character. Instead of the statements giving to the charges an innocent meaning, the charges explain the sense in which the statements were made. The challenge, considered as a whole, shows that the challenger and his associates sought to have the plaintiff excluded from the convention on the ground that he was morally unworthy to sit in conference with his fellow churchmen, and not simply because his insubordination and criticisms had rendered him

an undesirable member. The construction contended for by appellants is not admissible, and their contention cannot be sustained.

2. Were the statements contained in the publication true? Appellants do not complain of the manner in which this issue was submitted to the jury in the main charge, except in respect to the burden of proof, but do complain of the refusal of a special charge which reads thus: "If you believe from the evidence that the statements made in the paper entitled 'A Challenge to the Right of S. A. Hayden to a Seat in the Convention' were substantially true, then you will find a verdict in favor of all the defendants, even if you believe that they, or some of them, were actuated by malice in publishing it. The truth of the charges is a complete defense, without regard to malice." It is conceded that the defendants were not required to prove the literal truth of the charges, but only that the same were true in substance and in fact, and that, if the charges were true, their defense was complete, without reference to the other issues in the case. We think, however, that the special charge was rendered unnecessary by the instructions embraced in the main charge. The court affirmatively directed the jury to return a verdict for the defendants if they found that the charges were true. The only complaint of appellants in respect to the refusal of the special charge is that, had the same been given, it would have relieved them of the burden of proving the literal truth of the libelous statements. But the main charge did not impose such burden upon them. A finding that the statements contained in the challenge were literally true was not required. The gravamen of the charge against the plaintiff was that he was morally unworthy of a seat in the convention, and this accusation was either true or untrue. The issue was whether the evidence was sufficient to establish the truth of the accusation, and this issue was much more fully and perspicuously presented in the main charge than in the special charge. Indeed, the special charge was evidently prepared with another object in view, and the action of the court in refusing to give the same cannot be classed as erroneous.

In this connection we will consider the complaint of appellants that the court erred in refusing to give a special charge to the effect that if the jury believed that the accounts of the secretary of the convention for 1891-92 had been audited by the board, passed on by the convention, and found correct, and that the plaintiff thereafter attacked the integrity of the report, then the jury should find that the allegations in the challenge in reference to said secretary were true, and in such case it was immaterial whether the accounts of the secretary were in fact correct. In the first place, this issue

was sufficiently covered by the main charge, wherein the truth or falsity of the statements relating to the said secretary was correctly submitted to the jury. In the second place, the special charge ignored the rule of law that the proof offered in support of the plea of justification, to be sufficient, must be as broad as the libelous charge, and that the justification must be as to the effect, substance, and imputations of the publication. The special charge was intended to apply to subdivision "b" of the second paragraph of the challenge. The libelous imputation derivable from the statements made in said subdivision, as disclosed by a specific declaration therein contained, was that the plaintiff had convicted himself of dishonorable conduct by attacking a report which had been approved by the convention. The imputation was not warranted unless the plaintiff attacked a report which he knew or ought to have known was correct. The substance of the issue, therefore, was whether the accounts of the secretary were correct, and the plaintiff knew or should have known the fact when he attacked the report approving the same, not whether the accounts had been audited and reported by the auditing board to be correct. The special charge declared a different rule, and was properly refused.

The court instructed the jury that on all the issues in the case, except the issue as to whether the libelous statements were true, the burden of proof was on the plaintiff, and that on the excepted issue the burden of proof was on the defendants. Appellants contend that the burden on all the issues should have been placed upon the plaintiff. The contention is based on the theory that the publication was privileged, and that the fact destroyed the presumption, which would otherwise have obtained, that the libelous charges were untrue. This brings us to the third of the principal issues in the case, and the question just stated will be there considered.

3. Was the publication conditionally privileged, and, if so, was the privilege abused; that is, did the publishers act in good faith and from a sense of duty, or were they prompted by malice? It was held by this court on a former appeal of the case that the occasion on which the publication was made was conditionally privileged; that if the defendants believed the libelous statements to be true, and published the same from a sense of duty to the organization to which they belonged, the plaintiff could not recover, even if the statements were untrue, but that the defendants could not avail themselves of the privilege of the occasion if they were actuated by malice in making the publication. *Cranfill v. Hayden*, 55 S. W. 805. This proposition being settled, the question is whether a libelous statement made on a privileged occasion is presumed to be untrue.

A libelous statement made on an occasion not privileged is presumed by law to be false and to have been made maliciously. In such case the burden is on the publisher to show the truth of the statement, and upon his failure to do so the presumption of malice becomes conclusive. The libelous statement will be presumed to be false for the reason that no person will be deemed guilty of infamous or dishonorable conduct merely because a charge of that nature has been preferred against him. The publication will be presumed to have been made maliciously for the reason that a defamatory charge, made gratuitously and without necessity, must have been induced by an evil motive. Where, however, the circumstances of the occasion are such as impose upon the publisher an apparent duty to speak, the presumption of malice is removed, and it will be assumed that the publication was prompted by a sense of duty, and not by malice. In such case, the burden is on the plaintiff to show malice in fact, and, if he fails to do so, the question as to whether the statement was true is immaterial. If, however, actual malice be shown, the privilege is destroyed, and the plaintiff is entitled to recover, unless the truth of the statement is established. Actual malice may be proved by showing that the publisher knew the statement to be false when he made it, but this is not the only way of proving actual malice. It may be shown by proof of "previous ill feeling or personal hostility between the parties, threats, rivalry, squabbles, other actions, former libels or slanders, and the like, or * * * the violence of defendant's language, the mode and extent of its publication, etc." Newell, pp. 324, 336. It follows that the contention of appellants that the plaintiff was bound to show that the charges against him were untrue, in order to establish actual malice, cannot be sustained. He could establish malice in fact by evidence of another character. Even when the plaintiff relies on the falsity of the statement to show malice, it is not the falsity of the statement, but knowledge of its falsity on the part of the publisher, which proves the existence of malice. A libelous statement is always presumed to be false. Newell, p. 771. The presumption in favor of the publisher is that he believed the statement to be true, not that it was true in fact. Justification must be specially pleaded by the defendant, and upon this issue the burden is always on him to show the truth of the libelous statement. Newell, p. 651. There is no merit in the contention of appellants that the burden of proof on the said issue should have been placed on the plaintiff.

The next question is, did the publishers act from a sense of duty, or were they prompted by malice? The court instructed the jury that the occasion was privileged, and that "the defendants are not liable for

publishing such matter on a privileged occasion, if they believed the libelous statements to be true, and believed it to be their duty to give publicity to said libelous statements on that occasion, and were actuated solely by a sense of such duty in so publishing said libel; * * * but if, on the contrary, any one who so took part in said publication of said challenge was in fact prompted, either in whole or in part, by malice in so publishing said challenge, then as to him such occasion was not a privileged occasion." Appellants complain of this charge on the ground that the same permitted a verdict for the defendants only in the event the jury found that they were actuated solely by a sense of duty, and required a verdict for the plaintiff if the jury found that they were prompted, either in whole or in part, by malice; their contention being that there was no liability unless malice was the controlling motive which influenced them in making the publication. There was evidence tending strongly to show that the defendants were actuated partly by a sense of duty and partly by malice. They may have believed that the plaintiff's conduct had been such that the interests of the organization required his exclusion. They may also have disliked the plaintiff personally, and have entertained a desire to injure him. They may, therefore, in publishing the libel, have been influenced in part by their wish to protect the church, and in part by their desire to injure the plaintiff. If such was the case, can it be said that they were justified in making the publication? We think not. An act cannot be innocent if malice was one of the motives which prompted it. Where the doing of an act is influenced by malice, the act is unlawful. An act done to the injury of another cannot be excused on the ground that malice but slightly influenced the actor. If it influenced him at all, the law condemns the act. One claiming the right to do an act injurious to another must have a purpose entirely innocent; his motive must be unmixed with malevolence. The line is drawn against malice when it appears, not when it has become the sole or dominating influence. It is true that malice may exist in a potential state, and the act be justifiable. One is not prevented from doing his duty in a matter which concerns his enemy, but he must act solely from a sense of duty. He cannot take advantage of the occasion in order to gratify his desire to injure. The application of these rules to this case leads to an approval of the court's charge. The privilege enjoyed by the defendants was the right to perform a duty. It was their duty to protect the convention against the admission of an unworthy member, but it was no part of their duty to injure the plaintiff. If they were moved to action solely by a sense of duty, no liability was incurred on account of the resulting injury, and the mere exist-

ence of a desire to injure would not prevent them from acting in the performance of duty. But if the desire to injure had some influence in causing them to act, the shelter of privilege was thrown away, and the law will not shield them from the consequences of their act. One may perform a duty, though he inflict injury, but he is not permitted to inflict injury under a cover of duty. If malice entered into the motive which prompted the publication, duty was more or less a mere pretense. A pretense of duty affords no excuse, and cannot be urged in justification of the injury inflicted. Newell, p. 392; Townshend, § 209; White v. Nicholls, 3 How. 266, 11 L. Ed. 591.

Appellants complain of the refusal of a number of special charges bearing upon the issue just considered. Some of the special charges were to the effect that the defendants were not liable unless malice was the motive which controlled them in making the publication. Such instruction would have been in conflict with the main charge, which declared the law to be that the defendants were liable if malice entered into the motive which prompted the publication. Other of the special charges were to the effect that "mere proof of ill will by the defendants against the plaintiff was not proof of their being actuated by malice in publishing the challenge." Such instruction, if not actually incorrect, would have been misleading and an invasion of the province of the jury. As stated above, the existence of malice would not have precluded the defendants from performing their duty, but proof of the existence of malice would authorize the inference that they were actuated by malice in making the publication. Proof of ill will on the part of the defendants towards the plaintiff tended to prove that they were prompted by malice in publishing the challenge, and it would have been improper for the court to have withdrawn such testimony from the jury, or to have attempted to control its effect. Under the instructions given in the main charge, the jury was not authorized to find for the plaintiff unless they believed that the defendants were influenced by malice in publishing the libel. The verdict, therefore, cannot have been based on the idea that the defendants were liable if they were angry with the plaintiff or bore him ill will, without regard to whether they were actuated by such feelings. It was for the jury to determine what weight should be attached to proof of the existence of malice, and appellants have not been injured unless the main charge was calculated to cause undue effect to be given to such proof. It is not even contended that such was the case, and no real cause of complaint is shown. The special charges were calculated, had the same been given, to unduly impress the jury with the importance of the theory of the defendants, and to mislead the jury as to the legal

effect of the evidence. Moreover, the special charges relating to the point we are considering embraced instructions on other subjects not necessary or proper to be given. There was no error in refusing to give the requested charges.

4. Was there a conspiracy as alleged, and, if so, was the publication included in the purpose of the conspiracy? The evidence was sufficient to warrant the conclusion that prior to the meeting of the convention there was an understanding between the defendants that they would endeavor to have the plaintiff excluded from the convention. Appellants contend—and we concur in the contention—that the defendants had a right to combine for such purpose. They had no right, however, to accomplish their purpose by the use of unlawful means. The question is whether the combination or understanding contemplated the use of such means. The regularity of the plaintiff's credentials was never questioned, and it is clear that his right to a seat in the convention was to be challenged on other grounds. He was actually challenged on the ground that he was morally unworthy of membership, and the purpose of the combination was accomplished by the making of the libelous charges contained in the challenge. The defendants indorsed the challenge when it was presented to the convention, and actively assisted in having it sustained. They did not seek to have the charges modified, or urge any reasons for the exclusion of the plaintiff, except those assigned in the challenge. The inference is plain that the conspiracy contemplated the use of the means which were employed. The state of feeling between the parties rendered a resort to such means not surprising. While some of the defendants may not have known exactly what charges against the plaintiff were to be incorporated into the challenge, the evidence authorized a finding that they all knew the nature of the charges which were to form the basis of the challenge. The exclusion of the plaintiff was advocated by the faction to which the defendants belonged at the annual meeting of the convention held the year previous, upon substantially similar grounds. The charges against the plaintiff had been widely discussed, and the defendants were thoroughly familiar with the nature of the same when the conspiracy was entered into. They knew that any challenge which might be made would be published by being read in the convention. In view of these facts, we cannot say that the evidence was not sufficient to establish the conspiracy alleged.

W. R. Maxwell was one of the original defendants, and died before the trial. He was a messenger to the convention, and largely directed the fight which resulted in the exclusion of the plaintiff. If there was a conspiracy, he was a party to it. On his way to the convention he stated that they would

keep the plaintiff out of the convention, and, when asked how that could be done if he had the proper credentials, said that, if the credentials could not be questioned, the committee on credentials would hold up their report until near the close of the convention, when the business of the convention was about over. Objection was made by the defendants to the admission of this evidence on the ground that the statement was hearsay, the objection being based on the theory that the evidence in the case was not sufficient to establish a conspiracy. We have seen above that this theory of the defendants is not supported by the record, and it follows that the objection was not well taken. We will state in this connection that the plan outlined by Maxwell in his said statement was that which was pursued at the convention.

The challenge was published by being read in the convention. It was also published in the minutes of the convention and in the defendant Cranfill's paper. All of these publications were complained of by the plaintiff in his petition. Some of the defendants were directly concerned in the first publication, others in the second, and still others in the third. No one of them, however, was concerned in all of the publications, unless there was a conspiracy as alleged in the petition. Such conspiracy having been shown, all of the defendants were responsible for all of the publications. The evidence warrants the conclusion that all of the defendants anticipated that all of said publications would be made, and that they were instrumental in having the same made. The charge of the court submitted the issue of conspiracy or no conspiracy to the jury, and fully protected each of the defendants against liability for any publication for which he was not responsible. There is no merit in the contention of appellants that they ought not to be held jointly liable for the several publications.

In view of the conflicting evidence in the case, it may be that the jury would have been warranted in finding a verdict different from that which was returned. It is clear, however, that the evidence authorized a verdict in favor of plaintiff, and the findings of the jury must be approved. Every issue raised by the pleadings and evidence was fully covered by the charge which was given to the jury. That the various phases of the case were fairly submitted is shown by the few complaints made of the charge by appellants. The trial judge deserves to be commended for having so skillfully guarded every right of each of the defendants as to preclude the possibility of injury to any of them.

The assignments not discussed have been considered and found to be without merit. No reversible error is disclosed by the record, and the judgment will therefore be affirmed. **Affirmed.**

MISSOURI, K. & T. RY. CO. OF TEXAS et al. v. OWENS.*

(Court of Civil Appeals of Texas. June 13, 1908.)

RAILROADS—TRACKS IN CITY STREETS—PEDESTRIANS—INJURIES—USE OF TRACKS BY DIFFERENT RAILROAD—LIABILITY OF OWNER—CONTRIBUTORY NEGLIGENCE—EVIDENCE—PENAL ORDINANCES—SPEED—REGULATIONS—TRAIN RULES—REQUESTED INSTRUCTIONS—REFUSAL.

1. Where, in an action for injuries to plaintiff by being struck by a railroad train, it was contended that the train was running at a speed prohibited by a city ordinance, no objection was made to the introduction of a book of ordinances of the city containing the ordinance in question, a subsequent objection on appeal that it did not appear that the ordinance was in force at the date of the accident, could not be sustained.

2. Under Sp. Acts 22d Leg. 1891, p. 58, §§ 164, 172, incorporating the city of Denison, and providing that the act shall be deemed a public act, of which judicial notice shall be taken, and that ordinances of the city, when printed and published by authority of the city council, shall be admitted and received in evidence without further proof, an ordinance book of the city, admitted to be authentic, containing an ordinance alleged to have been violated by defendant, was admissible without proof of the date of the passage of the ordinance.

3. The violation of a city ordinance published pursuant to legislative authority, regulating the speed of railroad trains within the city limits, is negligence per se, and, if such negligence is the proximate cause of an injury, may form the basis for the recovery of civil damages.

4. Where a city charter expressly authorized its city council to regulate the speed and use of locomotives within the city, and an ordinance was passed prohibiting any person from running any engine or car at a greater rate of speed than six miles an hour within the city, such ordinance was binding on the railway companies as well as the persons operating their engines and trains.

5. Where there was no issue raised by the evidence, in an action for injuries by plaintiff's being struck by a railroad train, as to the fact that the engine was owned by the M. Ry. Co. at the time of the accident, and was being operated by its employes over the tracks of another railway company, it was not error for the court to assume such propositions in its charge as settled by the undisputed evidence.

6. Where there was no statutory authority for a lease of the railroad tracks of one company to another, the company owning the tracks was liable for injuries sustained through the negligence of the employes of the other company in operating its trains over such tracks.

7. In an action for injuries to a pedestrian while walking along a railway track laid in a city street in a collision with a railway train approaching him from the rear, evidence held insufficient to establish that plaintiff was guilty of contributory negligence as a matter of law.

8. Where, in an action for injuries to a person walking along a railway track, an expert witness had testified as to the construction of certain rules and bulletins of the defendant offered in evidence, one of which provided that whenever the word "train" was used it should be understood to include an engine in service with or without cars, equipped with signals, as provided in rules 33 and 34, which was contrary to the evidence of the witness, it was competent for plaintiff to introduce rule 33, requiring trains to display certain green flags and green lights, etc., as bearing on the qualifications of the witness as an expert, though it was not

* § 6. See Railroads, vol. 41, Cent. Dig. § 808

*Application for writ of error pending in Supreme Court.

claimed that the train which struck plaintiff did not display the signals called for in the rule.

9. Where, in an action for injuries by plaintiff's being struck by a railroad train while walking along the track, the court had fully instructed as to the degree of care required of plaintiff and of defendants, the refusal of a requested charge on such subject was not error.

10. A requested charge that the degree of care required of one entering the railroad tracks of defendant to discover and avoid injury from an approaching engine was as great as that which devolved on defendant's employes to discover and avoid injuring plaintiff, and, if the jury believed that if plaintiff had exercised as high a degree of care to guard against injury as defendant's employes should have observed to avoid injuring plaintiff, plaintiff would not have been injured, he could not recover, was properly refused as argumentative.

Appeal from District Court, Grayson County; Rice Maxey, Judge.

Action by J. W. Owens against the Missouri, Kansas & Texas Railway Company of Texas and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

T. S. Miller and Head & Dillard, for appellants. Wolfe, Hare & Semple, for appellee.

BOOKHOUT, J. On January 20, 1902, appellee, J. W. Owens, instituted this suit against appellants, Missouri, Kansas & Texas Railway Company of Texas and the Missouri, Kansas & Texas Railway Company, to recover damages in the sum of \$51,000 for personal injuries alleged to have been sustained by his being run over by a locomotive at Myrick avenue, in the city of Denison, on the 4th day of the same month in which the suit was instituted as aforesaid. A trial before a jury on the 28th day of October, 1902, resulted in a verdict and judgment against both defendants for the sum of \$20,000, to reverse which this appeal is prosecuted.

Conclusions of Fact.

On the 4th day of January, 1902, appellee, who resides in the city of Denison, was in the employ of the Missouri, Kansas & Texas Railway Company as locomotive fireman. He left his residence, which fronts on Nelson street, to go to the tinshop of the Missouri, Kansas & Texas Railway Company of Texas to have his torch repaired. There are two railroad tracks laid in Nelson street, one being in the center of the street, and the other south thereof; there being nine feet between the tracks. These tracks are owned by the Missouri, Kansas & Texas Railway Company of Texas. Nelson street is a public street, and is 75 feet wide, and runs nearly east and west. After appellee had walked about 2 blocks from his residence east on Nelson street, and at a point 133 feet west of Myrick avenue, he stopped, and looked back for trains. He had a clear view of the track for over 807 feet. He saw no train, and continued his walking. Just as he reached

Myrick avenue, which crosses Nelson street at right angles, and is also a public street, he heard a passenger train approaching from the east on the north track. He turned, while this train was passing him, to cross the south track to go to the yards of the Missouri, Kansas & Texas Railway Company of Texas, where the tinshop was located. After getting on this track, he heard and saw a train approaching him from the west, and only about 18 or 20 feet from him. He attempted to step back off the track, but before he could do so he was struck by the tender of said train, and knocked down, and seriously and permanently injured. This train was composed of an engine and tender, which were backing—the tender being in front—and the engine was pulling a caboose. The train was running 20 miles per hour, and the engine bell was not being rung, and there was no lookout on the train to discover persons who might be walking on the track or attempting to cross the same. The ordinances of the city of Denison make it unlawful to operate locomotives and trains in the city at a greater rate of speed than six miles an hour, and to run or operate the same across a public street without ringing a bell attached thereto. The train which struck plaintiff was owned by the Missouri, Kansas & Texas Railway Company, and was being operated by the employes of that company. We find that the appellants, and each of them, were guilty of negligence in operating the said train and in permitting the same to be operated at an unusual and unlawful rate of speed in the city of Denison, and in failing to ring the bell or keep a lookout on said train, and in operating the same in violation of the ordinances of the city and the rules of the appellants, and that such negligence was the proximate cause of the injury to appellee, and that by reason thereof appellee has sustained damages in the amount found by the jury. We find the appellee was not guilty of contributory negligence. Additional facts appear in the opinion.

Opinion.

The appellants challenge the correctness of the following part of the court's general charge: "The undisputed evidence in this case shows that at the time the plaintiff alleges he was injured, to wit, on the 4th day of January, A. D. 1902, certain ordinances of the city of Denison were in force, the same being as follows:

"Art. 306. That any person who shall in this city run or cause to be run any railway engine or car at a speed greater than at the rate of six miles per hour shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than two dollars nor more than fifty dollars.

"Art. 307. That any person who shall in this city conduct, run or cause to be run any railway engine or locomotive without ringing a bell attached thereto before starting,

or neglect to ring the bell all the time said engine is in motion, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than two nor more than fifty dollars."

The contention is that there is no evidence of the date of the passage of either of these ordinances, or that said ordinances were passed before or were in force at the date plaintiff was injured, and that it was error for the court to charge the jury that the undisputed evidence shows that said ordinances of the city of Denison were in force at the time plaintiff alleges he was injured. Appellee was hurt on January 4, 1902. His original petition was filed on January 20, 1902. After setting out these ordinances appellee alleged "that said ordinances were in force in said Denison, Texas, at the time the plaintiff was injured." No such objection to the court's charge as that presented in appellants' brief was made in the motion for a new trial. J. D. Yoakum testified: "I live in Denison, and have lived there for twenty four years. Have been mayor thereof, a member of the city council, and now secretary of said city. * * * The book I have in my hands is the ordinance book of the city of Denison, which is a record of my office. It contains the following ordinances [the ordinances introduced by plaintiff], and which are also contained in a printed book of ordinances published by authority of the city council of said city." The witness then read from said book the ordinances above set out. We think it evident that the book of ordinances in the hands of the witness at the time he was testifying showed the date of their passage. No objection was made to their admissibility. As the undisputed evidence showed the authenticity of the ordinance book, the failure of counsel for defendant to raise any question as to the date of the passage of the ordinances, or as to their competency, justifies the inference that they were in force at the date of the accident. *A., T. & S. F. Ry. v. Feehan* (Ill.) 36 N. E. 1038; *M., K. & T. Ry. Co. v. Dilworth* (Tex. Sup.) 67 S. W. 88; *Boyd v. Ghent* (Tex. Sup.) 64 S. W. 929; *Chappell v. Ferrell* (Tex. Civ. App.) 54 S. W. 1072; *Bliss v. Sickles* (N. Y.) 36 N. E. 1064; *Sanger v. Frele Bros.* (Wis.) 41 N. W. 436. Again, an examination of the record fails to show that there was any contention in the court below that the ordinances were not in force at the time of the accident. *Gallagher v. Bell* (Iowa) 47 N. W. 897; *Roulo v. Valcour*, 58 N. H. 347; *Jones v. McGuirk*, 99 Am. Dec. 558. No motion was made during the trial to exclude the ordinances, nor were there any instructions asked concerning the same, nor did defendants complain in their respective motions for new trial that the evidence did not warrant the verdict in this respect. It is held that objections to the introduction of evidence not made when the evidence is offered will not be considered on appeal. *Watson*

v. Blymer, 66 Tex. 561, 2 S. W. 353; *Pierson v. Tom*, 10 Tex. 145; *Lufkin v. Galveston*, 73 Tex. 348, 11 S. W. 340. By the terms of the act incorporating the city of Denison it is provided that said act "shall be deemed a public act, and judicial notice shall be taken thereof in all courts and places without the same having been read in evidence"; and, further, that the ordinances of said city, when printed and published by authority of the city council, shall be admitted and received in evidence in all courts and places without any further proof whatever." *Sp. Acts 22d Leg. 1891*, p. 58, §§ 164, 172. We conclude that the contention of appellant that there was error in the charge is not tenable.

2. Appellants contend that because the ordinances set out in the above charge only make one guilty of a violation thereof subject to a fine, and do not undertake to regulate the civil rights of the parties growing out of their breach, it was error for the court to charge the jury that a failure to comply therewith would be negligence on the part of the defendant, for which it would be liable in damages for the injuries sustained thereby. This contention is untenable. We have heretofore held that a violation of a penal ordinance passed pursuant to a legislative grant of express authority is negligence per se, and, if such negligence is the proximate cause of the injury, it becomes actionable. *Railway v. Holt* (Tex. Civ. App.) 70 S. W. 591, and authorities there cited. These ordinances applied to and were binding on the railway companies as well as those operating their engines and trains. The charter of the city of Denison expressly authorized the city council "to regulate the speed and use of engines and locomotives within the city." *Sp. Laws 22d Leg. 1891*, p. 46, § 106; also section 107.

3. The following clause of the court's charge is assigned as error: "If you believe from the evidence that plaintiff was an employé of the defendant Missouri, Kansas & Texas Railway Company, as alleged in his petition, and that while en route from his residence to the tinshop of the Missouri, Kansas & Texas Railway Company of Texas in the city of Denison for the purpose of having his torch repaired, at a point at or near the place where Nelson street and the railroad tracks cross Myrick avenue in the said city of Denison plaintiff started to cross one of said tracks, and was struck and injured by the tender of an engine then and there being operated and run along and over said track; and if you believe from the evidence that the employé or employes in charge of the engine at the time did or omitted to do any one or more of the following acts or things as charged in plaintiff's petition, namely, if at the time they were running said engine at a greater rate of speed than six miles an hour, or if they failed to ring the bell on said engine as required by said ordi-

nance of said city of Denison, or if they did not keep such lookout to discover persons on the track at said point as an ordinarily prudent person would have done under like circumstances, or if they did not give such signals or warning on approaching the place of the accident as an ordinarily prudent person would have given under similar circumstances; and if you further so believe that such acts or omissions which you find have been so done or omitted by such employes was or were the proximate cause of the plaintiff's injuries, and that such employes were guilty of negligence as negligence has been hereinbefore defined in doing or omitting to do any of the said acts or things which you find to have caused plaintiff's injuries; and if you find that plaintiff was not himself guilty of contributory negligence proximately causing or contributing to cause his injuries—then you will return a verdict for plaintiff." The charge is criticized in that, as appellant contends, it authorizes a recovery against the defendant without requiring a finding that the engine which caused the injury was being operated by it, or by any one for whose acts it was responsible, or by either of the defendants in this suit, and also it submits grounds of negligence not authorized by the pleadings, in that there was no allegation either that the employes operating the engine did not keep such lookout to discover persons on the track as an ordinarily prudent person would have done under like circumstances, nor was there any allegation that such employes did not give such signals or warning on approaching the place of the accident as an ordinarily prudent person would have given under similar circumstances; and, further, that it submits grounds of negligence not authorized by the evidence. The tracks of the Missouri, Kansas & Texas Railway Company do not extend south of Red River. The tracks of the Missouri, Kansas & Texas Railway Company of Texas begin at Red River, and extend south through Ray Station and Denison. The Missouri, Kansas & Texas Railway Company uses the tracks of the Missouri, Kansas & Texas Railway Company of Texas from Red River south under some arrangement between the two companies, in order to get into Denison. There are double tracks in Nelson street, which street runs about east and west from Ray Station to Denison. Engines and trains going from Denison to Ray use the north track, and in coming from Ray to Denison they use the south track. The undisputed evidence shows that the engine by which plaintiff was injured was owned by the Missouri, Kansas & Texas Railway Company, and at the time of the accident was being operated by employes of that company over the tracks of the Missouri, Kansas & Texas Railway Company of Texas. There was no issue raised by the evidence on these two propositions, and it was not error for the court to assume the same in its charge, they

being conclusively settled by the undisputed evidence. The contention that the allegations contained in the petition were not sufficient to authorize the submission of the issue of negligence on the part of the employes operating the engine in failing to keep such lookout to discover persons on the track as an ordinarily prudent person would have done under like circumstances is not tenable. The petition did contain such allegations, and there was evidence which made it necessary for the court to submit the issue. The contention that the contract between the two companies for the use of the tracks of the Missouri, Kansas & Texas Railway Company of Texas by the Missouri, Kansas & Texas Railway Company was legal, and therefore the former company could not be held liable for an injury caused by the negligence of the employes of the latter company in the operation of its locomotive over such tracks, is not tenable. There was no attempt to show a valid lease by private act, and there is no general law authorizing such lease. In the absence of statutory authority, one railroad company cannot lease its road to another, so as to absolve itself from its obligations to the public. Every railroad company in this state is liable for the acts of all persons to whom it confides the management and control of its road as fully as though operated under the immediate control of the agencies provided for by its charter for injuries resulting in the operation of trains over its track. *Railway v. Underwood*, 67 Tex. 589, 4 S. W. 216; *Railway v. Moody*, 71 Tex. 614, 9 S. W. 465; *Railway v. Bryant* (Tex. Civ. App.) 68 S. W. 804. The appellant Missouri, Kansas & Texas Railway Company of Texas not having shown a legal lease of its tracks to the Missouri, Kansas & Texas Railway Company, is not absolved from liability for the injury to appellee.

4. The refusal of the court to instruct, at the defendants' request, a verdict for defendants on the ground that the undisputed evidence showed that plaintiff was guilty of contributory negligence, was not error. Appellee lived on the north side of Nelson street, on the second lot east of Armstrong avenue. Nelson street is 75 feet wide, and there are two railroad tracks laid in the street—one in the center of the street, and the other south of it, with nine feet between the two tracks. The space between the tracks is used by people walking in the street. The distance from Armstrong avenue to Myrick avenue is 940 feet. When appellee had reached a point 133 feet west of Myrick avenue, at which point a switch leads off from the south track, he turned, and looked back, and saw no train in sight. He had an uninterrupted view as far as Armstrong avenue, a distance of 807 feet. He had two purposes in looking back—he wanted to see if his wife was hitching the horse to the buggy, and then he looked for trains. He saw no train. He then walked on to Myrick avenue. He heard a train

whistle, and looked up, and saw a passenger train going west on the north track. He turned to cross the south track to go to the tinshop to have his torch repaired. As he started to cross the south track, he looked, saw and heard a train approaching from the west on the south track. It was about 15 or 20 feet from him. He turned to go back off the track, but did not succeed. The corner of the tender struck him, and knocked him down and injured him. The train which struck him was running about 20 miles per hour. The employes operating said train failed to have the engine bell rung, and failed to keep a lookout to discover persons on the track. In view of the evidence, it cannot be said, as a matter of law, that appellee was guilty of contributory negligence in attempting to cross the track at the time and under the circumstances surrounding him. When within 133 feet of the crossing, he looked for a train on the south track, and saw none, although he could see as far back as 807 feet. He knew the rate at which trains were permitted to run by the terms of the ordinances of the city and the rules of the company, and the rate they usually ran, and he may have believed—and under the evidence the jury could have found—that it was not negligence on his part to fail to look again before attempting to cross the track. He was walking at the rate of 3 miles per hour, and had only walked 133 feet since he last looked for a train. Had not the train which injured him been running at an unusual and unlawful rate of speed, and had not those operating the same violated the ordinances of the city and the rules of the company in failing to ring the engine bell and keep a lookout, the accident would not have occurred. *Caraway v. Railway Co.* (Tex. Civ. App.) 71 S. W. 769; *Railway Co. v. Wagley* (Tex. Civ. App.) 40 S. W. 538; *Railway Co. v. Holland* (Tex. Civ. App.) 66 S. W. 68; *Railway Co. v. Crowder* (Tex. Civ. App.) 64 S. W. 90.

5. It is insisted that the court erred in admitting in evidence rule 33, for the reason that the same was irrelevant and immaterial to any issue in the case, and its admission was calculated to prejudice the jury against the defendant. The plaintiff put the witness Stoner on the witness stand, who testified that he was the agent of the Missouri, Kansas & Texas Railway Company of Texas at Denison, and also as to the ownership of the tracks, and the publication and existence of various rules and bulletins relating to the operating of trains. In connection with this testimony appellee offered various rules and bulletins identified by said witness as being in force at the time of the accident, and as having been promulgated for the government of the employes of both defendants. Among these was bulletin No. 332, which was in the following language: "In all cases where trains or cars are backed over street crossings it must be done at a slow rate of speed, and only on signals from some member of

the crew sent ahead to flag the crossing, protect trains, and warn pedestrians." On cross-examination the witness, in response to questions propounded by defendants' counsel, testified that circular No. 332 only applied to an engine—either yard or road engine—backing a string of cars over a crossing, and that it has no application to any engine which is simply backing up with its tender in front and pulling a caboose hitched on the nose or head end. Thereafter the plaintiff's counsel examined the witness on the new matters brought out by defendants, and asked him to define a train. He answered that: "A train consists of engine and cars. As we railroad people understand it, a train necessarily includes cars; and that an engine, cars, and caboose are referred to if it was a freight train." He was then asked to read rule 79 under the head of "Train Rules." Witness read the rule as follows: "Train Rules: Classification of Trains. Whenever the word 'train' is used it must be understood to include an engine in the service without or with cars, equipped with signals as provided in rules 33 and 34. Regular trains are those registered on the time-table." Thereupon, in connection with rule 79, plaintiff's counsel offered in evidence rule 33, referred to in rule 79. The defendants objected for the reasons above set out. The objection was overruled, and the rule was read, as follows: "Each train while running must display two green flags by day and two green lights by night, one on each side of the rear of the train, as markings to indicate the rear of the train. Yard engines will not display markers." Stoner was the agent of the Missouri, Kansas & Texas Railway Company of Texas at Denison. He was interrogated as an expert as to the construction of the rules and bulletins offered in evidence. Having, in answer to the question by defendants, testified in reference to the meaning of these rules, it was competent, as bearing upon his knowledge, experience, and qualification as an expert, to read in evidence rule 33 in connection with rule 79. No attempt was made to show that the train which struck appellee did not display the signals called for in said rule, nor any contention presented that the defendants were guilty of negligence because of a failure to comply with such rule. The accident occurred in the daytime, and it is not contended that the display of flags would or would not have had anything to do with respect to the injury to plaintiff. The admission of the rule could not have influenced the jury one way or the other, and, if there was error in its admission, the same was harmless. Rule 79 was admissible as tending to contradict the testimony of the witness as to the meaning of the word "train." If the defendants wished this testimony specifically limited to the purpose for which it was admissible, they should have requested a charge to that effect. The admission of other rules is complained of in various assignments. We

have considered these assignments, and are of the opinion that they are without merit.

6. Error is assigned to the action of the court in refusing the following special charge, requested by defendants: "The degree of care required of plaintiff on entering upon the tracks of defendant to discover and avoid injury from an approaching engine was as great as that which devolved upon the employes of defendants to discover and avoid injuring plaintiff, and if you believe from the evidence that, if plaintiff had exercised as high degree of care to discover and guard against the engine which injured him which you find the employes of the defendant in charge of said engine should have observed to avoid injuring plaintiff, he (the plaintiff) would not have been injured, you will find in favor of defendants." There was no error in refusing this charge. The court had correctly instructed the jury as to the degree of care required of plaintiff at the time he was injured, and also as to the degree of care owed by defendants to the plaintiff under the circumstances surrounding him at the time of the accident. The requested charge is argumentative, and the giving of the same could only have tended to confuse the jury.

The assignments not discussed have been considered, and we are of the opinion that they fail to point out any error in the record.

The judgment is affirmed.

On Rehearing.

(July 3, 1903.)

In appellants' motion for rehearing it is insisted that the statement in the opinion that: "His [appellee's] original petition was filed on January 20, 1902. After setting out these ordinances, appellee alleged that said ordinances were in force in said Denison, Texas, at the time plaintiff was injured. No such objection to the court's charge as that presented in appellants' brief was made in the motion for new trial"—is not supported by the record. This contention is sound. The ordinances referred to in the original petition were not articles 306 and 307 under discussion, but other and different ordinances. We were drawn into this mistake by statements contained in appellee's brief upon which we relied. The statement is not literally correct, and the same is withdrawn. Notwithstanding this, we are still of the opinion that there is no error in the charge that the said Ordinances 306 and 307 were in force on January 4, 1902.

The motion for rehearing is overruled.

MARSHALL et al. v. STATE.

(Supreme Court of Arkansas. June 6, 1903.)
LARCENY — MONEY — DESCRIPTION — PROOF —
COMMENT OF PROSECUTING ATTORNEY.

1. Under Sand. & H. Dig. § 1717, providing that in prosecutions for the unlawful taking of

money by larceny, etc., it shall not be necessary to particularly describe in the indictment the kind of money taken, further than to allege gold, silver, or paper money, an indictment for grand larceny, describing the money stolen as "thirty-five dollars, gold, silver, and paper money of the United States, of the value of thirty-five dollars," was sufficient.

2. Recital in the indictment describing the money as "of the United States," while unnecessary, becomes a part of the description, and must be sustained by proof, to warrant conviction.

3. Opening statement of the prosecuting attorney in a prosecution for grand larceny, in which he stated that defendants had a reputation in certain large cities as professional pickpockets and thieves, and that their pictures were in the rogues' gallery in certain cities, and that one of them had served a term in the penitentiary, was ground for reversal.

Appeal from Circuit Court, Sebastian County; Styles F. Rowe, Judge.

E. J. Marshall and another were convicted of grand larceny, and appeal. Reversed.

Appellants were indicted as follows: "The grand jury of Sebastian county, for the Ft. Smith district thereof, in the name and by the authority of the state of Arkansas, accuse the defendants, E. J. Marshall and Ed. Burdett, of the crime of grand larceny, committed as follows, to wit: The said defendants, in the county and district aforesaid, on the 15th day of October, 1902, one pocket-book, of the value of \$1, thirty-five dollars, gold, silver, and paper money of the United States, of the value of \$35, all the property of Jim Dyer, feloniously did steal, take and carry away, against the peace and dignity of the state of Arkansas." Defendants demurred to the indictment for the insufficient description of the money, which demurrer being overruled, they excepted. In his opening statement of the case in behalf of the plaintiff, the prosecuting attorney stated to the jury that he would prove that the defendants had the reputation in New York, in St. Louis, in New Orleans, in Chicago, and in other cities, of being professional pickpockets and thieves, to which statement defendants immediately objected on the ground that such evidence was only admissible to contradict them, and not as substantive evidence, which objection the court overruled, stating that he would control that, and, if it became inadmissible, he would so tell the jury, to which defendants excepted, whereupon the prosecuting attorney proceeded, and stated that he would prove that defendants' pictures were in the rogues' gallery at St. Louis, and that defendant Marshall had served a term in the penitentiary, to all of which defendants objected. At the conclusion of the trial, defendants asked the court to instruct the jury "that the proof of the amount of money taken, \$34 or \$36, was not sufficient to sustain a conviction," which being refused, defendants excepted.

Mechem & Bryant, for appellants. Geo. W. Murphy, Atty. Gen., for the State.

WOOD, J. The indictment was sufficient. Sand. & H. Dig. § 1717 State v. Boyce, 65 Ark. 32, 44 S. W. 1043.

It was not necessary, under section 1717, *supra*, to particularly describe in the indictment the kind of money taken, further than gold, silver, or paper money. But inasmuch as the money was described as "of the United States," it was made a part of the description, and the prosecuting attorney should have proved it; also that it was gold, silver, and paper money, as alleged. This was not done, and the court should have given the instruction asked for by appellants. *Wilburn v. State*, 60 Ark. 141, 29 S. W. 149; *Starchman v. State*, 62 Ark. 538, 36 S. W. 940; *Hamilton v. State*, 60 Ind. 193, 28 Am. Rep. 653; *Watson v. State*, 64 Ga. 61.

The object and scope of opening statements, under the statute, are discussed in *McFalls v. State*, 66 Ark. 16, 48 S. W. 492. According to the doctrine there announced, and the authorities generally, the statement of the prosecuting attorney in this case was highly prejudicial—so much so, that we do not think the charge of the court could have eliminated the poison from the minds of the jury. He is not supposed to know what the evidence for the defense will be. *Ayrault v. Chamberlain*, 33 Bar. 229. Judge Graves, in *Scripps v. Reilly*, 35 Mich. 371, 24 Am. Rep. 575, says, "The cases unite in substantially denying the right to get before the jury a detail of the testimony expected to be offered, and especially any not positively entitled to be introduced, and deny the right to use it as a cover for any topic not fairly pertinent."

For the errors indicated, the judgment is reversed, and the cause is remanded for a new trial.

VIEFHAUS & BOHENSTEHN v. STATE.

(Supreme Court of Arkansas. June 13, 1903.)

INTOXICATING LIQUORS—STATUTES—APPLICATION—UNLAWFUL SALE—LICENSE—DEFENSES.

1. Acts 1881, p. 140, prohibits the sale of liquors within three miles of any schoolhouse, where a majority of the inhabitants shall petition the county court praying that the sale of liquors within such distance be prohibited, provided that the act shall not affect persons who have already obtained a license in any locality wherein the act shall be put in force, until such license shall expire. *Held*, that such proviso protected only such persons as had obtained a license prior to the passage of the act.

2. Under Acts 1895, p. 86, empowering the county courts to prohibit all sales of liquors on petition of the majority of the adult inhabitants within a radius of three miles from a church or school, on such prohibition being made, the fact that a liquor seller had a license previously granted to keep a dramshop within such radius was no defense to a prosecution for violating the prohibitory order by a subsequent sale of liquors therein.

Appeal from Circuit Court, Scott County; Styles T. Rowe, Judge.

Viefhaus & Bohenstehn were convicted of illegally selling intoxicating liquors, and they appeal. Affirmed.

Mechem & Bryant, for appellants. Geo W. Murphy, Atty. Gen., for appellee.

BUNN, C. J. At the February term, 1902, of the Scott circuit court, the defendants were indicted for selling liquor in violation of an order of the county court prohibiting the sale of intoxicants within three miles of Fair's Chapel, in said county of Scott. The defendants, on the case being called for trial, pleaded not guilty, and the cause was submitted to the court, sitting as a jury, on the following agreed statement of facts, to wit: "It is agreed that at the general election of September, 1900, Scott county, and Hickman township therein, voted for license; that on the 9th day of January, 1901, the county court of said county issued to defendants (they paying the legal sums therefor), legally and regularly, a license for a dramshop, which license is hereto attached as a part thereof, as Exhibit A, and which is introduced with this agreement as a part of the evidence and agreed facts; that upon petition regularly and properly presented to said county court, signed by a majority of the inhabitants within three miles of Fair's Chapel, praying that the sale and giving away of vinous, spirituous, and intoxicating liquors of any kind, and alcohol or any compound or preparation thereof, called 'tonics' or 'bitters,' be prohibited within three miles of Fair's Chapel, an institution of learning and church house, the said court did, on the 15th day of August, 1901, enter an order thereon, regularly and according to law, prohibiting the sale and giving away of vinous, spirituous, and intoxicating liquors of any kind, or alcohol or any compound or preparation thereof, commonly called 'tonics' or 'bitters'; that defendants did, on the 10th day of September, 1901, at and in said dramshop and place mentioned in the license attached hereto marked 'Exhibit A,' the same being in Hickman township, Scott county, and within three miles of said Fair's Chapel, sell, vend, and give away vinous, spirituous, and intoxicating liquors and alcohol." The defendants were convicted, and appealed to this court.

The sole question in the case is, will an order of the county court, prohibiting the sale of liquor within three miles of a schoolhouse or church named in the petition, have the effect of revoking the license of a dramshop keeper previously granted in the same year, and thus make the sale of liquor under such license a violation of law? The defendants' counsel contend that the issuance of the license to a dealer for a large sum, as in this case, is contractual, and is protected by the constitutional provision against impairing the obligation of contracts, while the same is or

may not be the case if the price of the license is a small amount, only enough to pay the expenses of issuing it, as in the latter case the issuance and requirement of the license would be an exercise of the police power merely, while the payment of large amounts, as required by the laws of this state, is for revenue, and not for regulation merely. The defendants call attention to the first proviso in the original act of 1881 (Acts 1881, p. 140), and contend that the language of the proviso is to be construed as protecting not only those who have obtained their licenses before the passage of the act, but all such as may have obtained the license at any time before the making of the prohibitive order by the county court. A majority of the court are of the opinion that the proviso protected only those who had obtained license before the passage of the act by the Legislature, and that the digester of the statutes for that reason was right in leaving out that proviso in his digest of 1884; that this court cannot assume to say that the Legislature, in amendatory acts, was guilty of being misled in its leaving out said proviso, which it did in enacting the statute now in force (Acts 1895, p. 86) on the subject. We cannot call in question the reasons or reasoning of the legislative branch in enacting, repealing, or amending a statute, but must construe the enactment to mean what its language imports under the known rules of construction. The law, as it stands, empowers the county courts to prohibit all sales of liquors on the petition of a majority of the adult inhabitants within the three-mile radius, and thus prohibition is against those holding licenses previously granted as well as those who may apply therefor thereafter, until the period of prohibition fixed by law expires. This being true, the defendants were guilty of violating the order of the county court prohibiting the sale of liquor within the district, notwithstanding the license previously granted.

The judgment of the Scott circuit court is therefore affirmed.

STATE ex rel. SCOTT v. SMITH et al.

(Supreme Court of Missouri. June 15, 1903.)

ATTORNEYS—DISBARMENT—APPEAL—JURISDICTION OF COURTS OF APPEALS—TRIAL DE NOVO—CHANGE OF VENUE.

1. On appeal to the Kansas City Court of Appeals in proceedings for the disbarment of an attorney, the order made recited that the court, "being of the opinion that the matters involved are triable here de novo, and being duly advised, doth find" that defendant was guilty, etc. *Held* to show that the Court of Appeals tried the case de novo, rather than having exercised appellate jurisdiction.

2. Rev. St. 1899, § 4924, provides that an attorney guilty of misconduct may be removed on charges exhibited; and section 4925, conferring jurisdiction on certain courts to try the charges, provides that they may be exhibited in the Courts of Appeals, or the circuit court of the county. Section 4926 provides that the

court where the charges are exhibited shall fix a day for hearing, allowing a reasonable time, and that a citation shall be issued, etc. Section 4935 provides that, in all cases of the trial of charges in the circuit court, defendant may appeal as in an action at law. Section 866 provides that the Courts of Appeals shall, on any appeal, examine the record, award a new trial, and reverse or affirm, or give such judgment as ought to have been given. *Held* that, on appeal to the Kansas City Court of Appeals from a judgment of the circuit court in disbarment proceedings, the Court of Appeals had no jurisdiction to try the case de novo, but its jurisdiction was appellate only.

3. The Court of Appeals had no authority to hear the case de novo on the theory that it was an equity case, as such court in equity cases reviews the evidence, etc., but does not try a case de novo.

4. Rev. St. 1899, § 819, provides that if the judge is interested, or related to either party to a cause, he shall award a change of venue, without any application from either party, unless all the parties consent that he may sit. *Held* that, where, in disbarment proceedings, defendant moved for a change of venue on the ground that the judge was prejudiced against him, it was the duty of the latter to award a change of venue.

In Banc. Certiorari by the people, on the relation of William J. Scott, to review proceedings of the Kansas City Court of Appeals on appeal thereto in proceedings to remove relator from practice as an attorney at law. Judgment removing relator reversed.

Adiel Sherwood and Scaritt, Griffith & Jones, for relator. Gardiner Lathrop, F. F. Rozzelle, Frank F. Brumback, R. E. Ball, and H. M. Beardsley, for respondents.

Statement.

FOX, J. The proceeding in this court is a writ of certiorari directed to the judges of the Kansas City Court of Appeals, requiring them to send to this court the record and proceedings in a matter pending before them on appeal from the circuit court of Jackson county, Mo., at Kansas City, Division No. 1, entitled, "In the Matter of Proceedings to Remove William J. Scott from Practice as an Attorney at Law." The issuance of the writ by this court, directed to the judges of the Kansas City Court of Appeals, springs from a proceeding instituted in the circuit court of Jackson county to disbar the relator, who was a practicing attorney. On January 13, 1900, there was filed in the office of the clerk of the circuit court of Jackson county, Mo., a petition signed by Gardiner Lathrop, F. F. Rozzelle, Frank F. Brumback, R. E. Ball, and H. M. Beardsley, who represented themselves to be a committee appointed by the Kansas City Bar Association to file and prosecute proceedings for disbarment against Mr. Scott. This petition alleged that Mr. Scott had been guilty of improperly retaining his client's money, and of deceit in his professional capacity. Mr. Scott was cited to answer said charges. On June 16th the parties appeared for trial, and Mr. Scott filed an application for a change of venue on the ground that the judge of said division was an active member

of the Kansas City Bar Association, and was therefore interested in said cause, and was also personally prejudiced against Mr. Scott, and that Scott could not have a fair trial before him. This application was denied. Mr. Scott then filed his answer in said cause, which was a general denial of the charges. He then moved the court to impanel a jury to try the cause, and this motion was also denied. The court then, over Scott's protest, heard the evidence, and on June 22, 1900, rendered judgment of disbarment against Mr. Scott. Motions in arrest and for new trial were duly filed and overruled, and a bill of exceptions in due and regular form was by the court signed, sealed, approved, allowed, and ordered to be filed as part of the record in said cause. This cause was argued and submitted to the Kansas City Court of Appeals on December 8, 1900, and it is asserted by relator that after consideration the said Court of Appeals filed its written opinion in said cause, and, after deciding and holding that the lower court had committed error, proceeded to assume original jurisdiction itself, and rendered a judgment of disbarment against Mr. Scott, without affirming, reversing, modifying, or correcting the decision of the lower court. On March 13, 1902, Mr. Scott filed in said court his motion for a rehearing, which was by the court overruled. Mr. Scott then petitioned this court for a writ of certiorari, which was granted, served, and due return thereof made to this court, and the record is now before us for final disposition.

That we may fully comprehend and appreciate the action of the Kansas City Court of Appeals in respect to the disbarment proceeding pending in that court, we here quote the opinion announced in that case:

"On January 13, 1900, a complaint was filed in the circuit court by Gardiner Lathrop, Frank F. Rozzelle, R. E. Ball, Henry M. Beardsley, and Frank F. Brumback, in which it was alleged that they were each and all attorneys at law, duly and regularly licensed, enrolled and practicing in the circuit court of Jackson county, Missouri; that they were each and all members of the Kansas City Bar Association, as a committee to present to that court, and prosecute therein, charges against William J. Scott, an attorney at law practicing at the bar of said court, for improperly retaining his client's money, and for deceit in his professional capacity as such attorney, and to petition this court for the removal of said William J. Scott from practice as an attorney at law. And as such committee, and individually as attorneys as aforesaid, it was in said complaint charged by them that on the 9th day of June, 1879, William J. Scott was by the circuit court of Jackson county, Missouri, at Kansas City, duly and regularly licensed and enrolled as an attorney at law, and upon such date last named duly and regularly took the oath as then prescribed by the laws of the state of

Missouri, and ever since the said 9th day of June, 1879, said William J. Scott has been, and now is, an attorney at law, duly and regularly licensed, enrolled, and practicing at the bar of the circuit court of Jackson county, Missouri. * * * The respondent [appellant] contends that the judgment should be reversed because the trial court erred in refusing to grant him a change of venue on his application made for that purpose.

"This is a case where the matter charged in the complaint is not indictable, and was for that reason triable by the court. Rev. St. 1899, § 4933. And here it is triable de novo. We will examine the evidence contained in the record, and give such judgment as we consider shall be warranted, uninfluenced by the finding and judgment of the court below. We will proceed to examine the case as if it were one in equity, or one in which we were exercising original, rather than appellate, jurisdiction. It is our duty to hear, try, and determine the matter in issue anew, without regard to any error, defect, or imperfection in the proceedings, trial, or judgment of the circuit court.

"When the attention of the learned trial judge was called to the fact that he was a member of the bar association, the complainant and active prosecutor in the matter, and was therefore interested therein (*Inhabitants, etc., v. Smith* [Mass.] 11 Metc. 390; *Fitch v. Bates*, 11 Barb. 471; *State v. Fullerton* [decided at present term] 78 S. W. —), it became his duty, sua sponte, under section 819, Rev. St. 1899, to award a change of the venue to some other division of the Jackson circuit court (*State v. Woodson*, 86 Mo. App. 254; *Lacy v. Barrett*, 75 Mo. 469; *Gale v. Michle*, 47 Mo. 326; *Barnes v. McMullins*, 78 Mo. 261). But suppose the disqualification of the judge did deprive him of jurisdiction, and notwithstanding this he erroneously proceeded with the trial and gave judgment, and after that the matter has been transferred here by appeal, and for trial de novo; what figure can such an error cut in our determination of the case? How can it prejudice the complainant [appellant] in his new trial here? By the respondent's appeal the matter is brought before us to be tried and determined just as if we were exercising our original, instead of appellate, jurisdiction. Our original jurisdiction in a matter of this kind is concurrent with that of the circuit court (Rev. St. 1899, § 4925); and since it is here by appeal, and the parties have voluntarily subjected themselves to our jurisdiction, all previous defects in the proceedings must be considered as waived. The respondent, who has invoked by his appeal the exercise of our jurisdiction, can derive no benefit in the new trial, to which his appeal entitles him, by reason of any error which may have intervened in the proceeding in the court below. *Wilkerson v. Sampson*, 56 Mo. App. 276; *Pearson v. Gillett*, 55 Mo. App. 312. * * *

"(4) The charge that the respondent improperly retained the money of Kirkendall & Co., his clients, as we understand it, is abandoned here by the prosecution, so that it only remains to determine from the evidence whether or not that for deceit in his professional capacity the judgment should be sustained. The respondent affirms, if of anything he is guilty, it consists mainly in certain representations made by him in certain letters written by him to Kirkendall & Co. * * * The charge in the complaint that the respondent was guilty of deceit in his professional capacity as an attorney at law we think fully sustained by the evidence contained in the record before us. It only remains for us to pronounce judgment according to the nature of the facts found. The judgment will be that the respondent be removed from the practice."

As a result of the conclusions reached in the opinion, the following judgment was entered of record in said court:

"The above cause having been heretofore submitted to the court upon the record, argument and briefs of counsel, and the court having considered the same, and being of the opinion that the matters involved are triable here de novo upon the record, and being duly advised in the premises, doth find that the said William J. Scott is guilty of deceit in his professional capacity as an attorney at law, as set forth in the charges filed in the court below, and contained in the record. Wherefore it is considered, ordered, and adjudged by the court that the said William J. Scott be removed from practice as an attorney at law."

This is a sufficient statement as to the record before us to indicate the controverted question involved in this proceeding.

Opinion.

Upon the petition of the relator, this writ was issued, duly served, its commands were obeyed, and the record certified to this court. By this proceeding it is sought to correct alleged errors of the Kansas City Court of Appeals that cannot be reached by an appeal or writ of error. The office of a writ of this character is so well known and universally understood, we take it, that it is unnecessary to burden this opinion with a citation of authorities treating of its functions. Under the Constitution, certiorari is one of the methods by which the Supreme Court exercises its superintending control over the Courts of Appeals. It only brings up the record, and this court will only treat of such errors and defects which appear upon the face of the record, and which are jurisdictional in their nature. This writ may be resorted to not only in cases where it is alleged that the lower court is absolutely without any jurisdiction whatever, but it also may reach and afford a remedy in cases where such court has jurisdiction, but undertakes to exercise unauthorized powers. This

principle was very clearly announced by Judge Black in *State ex rel. Dawson v. St. Louis Ct. of App.*, 99 Mo., loc. cit. 221, 12 S. W. 662, where it is said: "But it cannot be said that the writ will be issued only in those cases where the lower court has no jurisdiction whatever over the case before it. High says: 'The province of the writ is not necessarily confined to cases where the subordinate court is absolutely devoid of jurisdiction, but is also extended to cases where such tribunal, although rightfully entertaining jurisdiction of the subject-matter in controversy, has exceeded its legitimate powers.'" There is but one question involved in this proceeding. That is, does the record before us disclose that the Kansas City Court of Appeals, in the disposition of relator's case, pending before it upon appeal, exceeded its legitimate powers, or, in other words, did the Court of Appeals assume to exercise original, and not appellate, jurisdiction of the cause, and, if so, was it such an exercise of unauthorized power as this court will, upon certiorari, correct and remedy.

Many questions are presented to us for determination in the briefs of the learned counsel in this cause. They are earnestly and very ably discussed. We shall, however, be content with the determination of the one vital question involved.

We shall not undertake to review the action of the circuit court in respect to its refusal to award relator a change of venue. The learned judge of the appellate court, in his opinion herein quoted, fully settled that question, and we are of the opinion that it was correctly determined.

The question with which we are confronted in this proceeding must be determined by the statutory provisions applicable to it. The disbarment proceeding, which is the origin of this case, is purely statutory; and when the statute, in a proceeding of this character, is involved, the jurisdiction entertained by the court must be determined by a correct interpretation and application of the statute which confers the jurisdiction. Our attention is directed in the briefs of learned counsel, both for relator and respondent, to numerous cases. We have searched in vain to find any adjudication upon the precise or a similar question to the one before us for determination. It must be conceded that the Kansas City Court of Appeals had appellate jurisdiction of the disbarment proceeding against the relator. The case was tried by the circuit court of Jackson county, testimony heard, trial proceeded in regular order, and relator preserved in due time and form his exceptions to the action of the trial court during the progress of the trial. His appeal was in all respects duly perfected, and the record, as provided by law, transmitted to the appellate court. Relator's case was before the appellate court for review, as is provided by the statute, the same in all respects as in actions at law.

This leaves us to the inquiry as to the nature and character of jurisdiction exercised by the appellate court in respect to this case, as disclosed by the record before us. It is insisted by respondents that the Court of Appeals only exercised its appellate jurisdiction. The record must answer this question. No one can read the opinion in this cause, and reach any other conclusion than that the appellate court was not exercising its appellate jurisdiction, but did undertake to exercise original jurisdiction, as conferred by section 4925, Rev. St. 1899. In the opinion the Court of Appeals very clearly and correctly pointed out the error of the trial judge, and then proceeded, in most forcible and unambiguous terms, to determine the nature and character of jurisdiction it was entertaining in the disposition of the cause. It announced: "But suppose the disqualification of the judge did deprive him of jurisdiction, and notwithstanding this he erroneously proceeded with the trial and gave judgment, and after that the matter has been transferred here by appeal and for trial *de novo*; what figure can such an error cut in our determination of the case? How can it prejudice the complainant [appellant] in his new trial here? By the respondent's appeal the matter is brought before us to be tried and determined just as if we were exercising our original, instead of appellate, jurisdiction. Our original jurisdiction in a matter of this kind is concurrent with that of the circuit court (Rev. St. 1899, § 4925), and since it is here by appeal, and the parties have voluntarily subjected themselves to our jurisdiction, all previous defects in the proceedings must be considered as waived. The respondent, who has invoked by his appeal the exercise of our jurisdiction, can derive no benefit in the new trial to which his appeal entitles him by reason of any error which may have intervened in the proceeding in the court below."

It is, however, earnestly urged by respondents that the reason given by the appellate court in the opinion is no part of the record, and hence cannot be considered in determining the nature of the jurisdiction exercised. This may be conceded for the purposes of this case; still we have the conclusions reached in the opinion, clearly emphasized by the final judgment of the appellate court. Thus it is stated in the order: "And being of the opinion that the matters involved are triable here *de novo* upon the record, and being duly advised in the premises, doth find that the said William J. Scott is guilty of deceit in his professional capacity as an attorney at law, as set forth in the charges filed in the court below, and contained in the record. Wherefore it is considered, ordered, and adjudged by the court that the said William J. Scott be removed from practice as an attorney at law." Here we have the final declaration of the court that it tried the case anew upon the record

before it, indicating by no doubtful terms that it was exercising its original and concurrent jurisdiction with the circuit court, as conferred by section 4925, *supra*. We are of the opinion that but one conclusion can be reached from this record, upon this inquiry, and that is that the appellate court disregarded the errors apparent in the record, and proceeded to dispose of this case as though the complaint had been originally filed in that court. This is made apparent from the opinion announced, and final judgment rendered.

This leaves us to the second and last proposition in this proceeding: Did the appellate court, by the exercise of its original jurisdiction in the disposition of this disbarment proceeding pending before it upon appeal, exceed its legitimate powers? This proposition must be solved by a correct interpretation and application of section 4925, *supra*. Section 4924, Rev. St. 1899, provides: "Any attorney or counselor at law who shall be guilty of any felony or infamous crime, or of any malpractice, deceit or misdemeanor in his professional capacity, may be removed or suspended from practice, upon charges exhibited and proceedings thereon had, as hereinafter provided." Then follows section 4925, conferring jurisdiction upon certain courts to try the charges exhibited. It provides: "Such charges may be exhibited and proceedings thereon had in the Supreme Court, the St. Louis Court of Appeals, the Kansas City Court of Appeals, or the circuit court of the county in which the offense shall have been committed or the accused resides." This section clearly undertakes to confer original as well as concurrent jurisdiction with the circuit court upon the Supreme Court and the Courts of Appeals. It is equally clear that, to authorize the appellate court to exercise original jurisdiction in proceedings of this character, the charges must be exhibited in that court; in other words, the proceedings must originate before that court. Section 4926, Rev. St. 1899, indicates very clearly how this original jurisdiction must be exercised. It provides: "The court in which such charges shall be exhibited shall fix a day for the hearing, allowing a reasonable time, and the clerk shall issue a citation accordingly, with a copy of the charges annexed, which may be served upon the accused wherever found." It will be observed, by the last section cited, that the court, whether it be the Court of Appeals or the circuit court, shall issue process and fix a day for the hearing of the cause. It certainly will not be contended, in view of this statute, that the charge can first be exhibited in the circuit court, tried, the evidence preserved, the record transmitted to the appellate court, and then the appellate court can appropriate all the proceedings of the circuit court, in the exercise of its original and concurrent jurisdiction. We are unwill-

ing to sanction any such interpretation of that statute. Appellate courts, in the exercise of their appellate jurisdiction, are courts of review. They review the record transmitted upon appeal or writ of error, and after doing so they are authorized to affirm, reverse and remand, or modify the judgment, or enter the judgment that the trial court should have entered. The jurisdiction first acquired must be entertained. In this proceeding the first and only jurisdiction the appellate court acquired was an appellate jurisdiction, and it was not authorized to exercise any other. Relator exercised the right conferred upon him by the statute. Section 4935, Rev. St. 1899, provides: "In all cases of a trial of charges in the circuit court, the defendant may except to any decision of the court, and may prosecute an appeal or writ of error, in all respects as in actions at law." In pursuance of this section, relator's case was before the Court of Appeals for the purpose of correcting any errors that might be disclosed by the record committed by the trial court in the disposition of the case.

It is further insisted that this record discloses a proper exercise of appellate jurisdiction, and it is earnestly contended that the appellate court had the right to review the facts and enter such judgment as the trial court should have entered. In support of this contention, our attention is directed to section 866, Rev. St. 1899, which, so far as pertinent, provides: "The Supreme Court, St. Louis Court of Appeals and Kansas City Court of Appeals, in appeals or writs of error, shall examine the record and award a new trial, reverse or affirm the judgment or decision of the circuit court, or give such judgment as such court ought to have given, as to them shall seem agreeable to law." In pursuance of the provisions of this section, if the trial court had failed to enter its judgment in proper form, or had entered an erroneous judgment, the appellate court, in the exercise of its appellate jurisdiction, could have modified it or entered the judgment it should have given. But that section has no application to the record before us. There is no pretense in this proceeding that the judgment of the trial court was defective or erroneous in any respect, and the Kansas City Court of Appeals did not undertake to modify, correct, or in any way change the judgment of the trial court; but, as indicated by the final order, which is emphasized by the opinion of the court, it tried the case anew, and entered its own independent judgment, and the same judgment that was rendered by the trial court. This simply emphasizes the position that the appellate court, in relator's proceeding, notwithstanding he had perfected his appeal in due form, proceeded to exercise original jurisdiction, and try the case anew, and render its judgment, as though said charges had been first exhibited in that court.

Counsel for respondent, in their brief, in-

sist that it must be remembered that the Court of Appeals had both original and appellate jurisdiction, and cite the case of *State v. Harber*, 129 Mo. 271, 31 S. W. 889. Will say, as to this suggestion, that the appellate court, in this proceeding, did not have original jurisdiction, for the reason its jurisdiction had been determined by the appeal and transmission of the record to that court, and this operated only to confer upon that court appellate jurisdiction. It could only have acquired and exercised its original jurisdiction, as to this disbarment proceeding, by having the charges exhibited as provided by the statute, and issuing its process to the relator. That is not this case.

It is finally contended by counsel for respondents that the record in this cause should be sustained for the reason that the appellate court had the power to hear the whole case de novo on the record as an equity case. If by this contention is meant that appellate courts can hear or try equity cases de novo, it is a misconception of the jurisdiction of appellate courts, even in purely equitable proceedings. While the Supreme and appellate courts in equity cases review the evidence upon which the findings of the trial court are based, they do not retry the case anew, but, being a case appealing to the conscience of the chancellor, this court, in the exercise of its appellate jurisdiction, reviews all the facts, to ascertain if all the equities have been adjusted in keeping with good conscience; but by no means would this court hesitate to reverse an equity case if the chancellor had ignored, in the trial of the cause, some plain and mandatory statute applicable to the proceeding, even though the evidence fully supported the finding of the chancellor. Some of the equity cases cited may apply the term, in reviewing the facts by the appellate court, as a trial de novo, but, in our opinion, this is a misappropriation of the term. This phrase is only applicable in appeals to a higher court, that corrects the errors of the inferior tribunal, not by review, but by a trial anew.

This proceeding was instituted in pursuance of the statute. In that respect it is purely statutory. Relator, during the progress of the trial, preserved his exceptions, as he was fully authorized to do under the statute. He had the right to have an impartial tribunal try his case. His affidavit for a change of venue, whether true or false in point of fact, must be taken as true; and the Court of Appeals correctly held that it was error to refuse his application to change the venue, and the court should have reversed and remanded the cause, with directions to the trial court to send said cause to another division of the Jackson county circuit court for trial.

We have carefully considered the record before us, and we are unable to reach any other conclusion than that the Kansas City Court of Appeals assumed original jurisdic-

tion of the disbarment proceeding, without acquiring it in the manner pointed out by the statute, and proceeded to try said cause *de novo*. In this, with all due respect to said court, we are of the opinion that it exceeded its legitimate powers. It is therefore ordered that the judgment of the Kansas City Court of Appeals be set aside, and it is directed to reverse the judgment of the circuit court, with direction that the change of venue be awarded. All concur.

OLIVER v. SNIDER, Judge, et al.

(Supreme Court of Missouri. June 15, 1908.)

COURTS—CAPE GIRARDEAU COMMON PLEAS—EQUITABLE JURISDICTION—ISSUANCE OF INJUNCTION—POWERS OF JUDGE.

1. Under Rev. St. 1899, p. 2582, § 18, organizing the Cape Girardeau court of common pleas, and giving said court "concurrent original jurisdiction in all civil actions at law" with the circuit court of the county, said common pleas court has equitable jurisdiction.

2. Rev. St. 1899, p. 2582, § 18, gives the Cape Girardeau court of common pleas concurrent original jurisdiction in all civil actions with the circuit court; and section 30 (page 2583) provides that the judge shall have like power in relation to suits therein as the circuit court judge has in like cases, and that he may grant writs of injunction, returnable to the circuit court. Held that, while such "court" had equitable jurisdiction, the powers of the "judge" must be strictly limited to the special statute granting them, and injunctions issued by him in vacation must be "returnable to the circuit court."

3. This construction is not objectionable on the ground that irreparable injury may ensue, as a writ returnable by him to the circuit court has all the efficacy it would have if returnable to the common pleas.

4. Rev. St. 1899, § 4161, providing that, when the term "circuit court" is used in "any law general to the whole state, it shall include courts of the common pleas," unless such construction would be inconsistent with the intent of such law, or of some law specially applicable to courts of common pleas, does not apply to the provisions of Act 1851 and amendments (Rev. St. 1899, p. 2579), granting power to the judge of the Cape Girardeau court of common pleas to issue injunctions returnable to the "circuit court," the act being special.

In banc. Original proceedings by John F. Oliver for a writ of prohibition against John A. Snider, judge of the Cape Girardeau court of common pleas and another. Writ granted.

Wilson Cramer and R. B. Oliver, for plaintiff. L. F. Parker and Frank E. Burroughs, for defendants.

GANTT, J. This is an original proceeding in this court to obtain a writ of prohibition against the defendant Judge John A. Snider, the judge of the Cape Girardeau court of common pleas, and the St. Louis, Memphis & Southeastern Railway Company, from further proceeding and asserting jurisdiction to hear and determine a certain suit by the said railway company against the plaintiff, John F. Oliver, wherein a temporary writ of in-

junction was issued by Judge Snider in vacation of his said court, restraining the plaintiff, Oliver, from entering upon the right of way of said railway company, and cutting down some of the telegraph poles, and from obstructing and preventing said railway company from grading its road, and from interfering with its subcontractors, agents, and servants in carrying on its work of constructing its railroad over certain lands which it alleged it had duly condemned and appropriated for a right of way. The petition alleges that the plaintiff is the owner of, and for a long time has been in the peaceable possession of, the following real estate in the county of Cape Girardeau, to wit, the northwest fractional quarter of section 28, the northeast fractional quarter of section 29, and the southeast fractional quarter of section 20, in township 83, range 14; that on the 23d day of January, 1902, the said railway company (a railroad company duly organized under the laws of this state, and engaged in the construction of a railroad in and through said county) presented to the said Snider, as judge, aforesaid, of said common pleas court, its petition for the condemnation of a certain portion of said real estate. The said petition for condemnation is then set out at length, wherein, in brief, it was alleged the said company needed and sought to condemn for its said railroad certain strips of land, 100 feet in width, in a general northerly direction, and specifically describing the lands and the names of the several owners, and, among others, 100 feet in a general northerly and southerly direction over and through and upon the northwest fractional quarter of section 28, the northwest fractional quarter of section 29, and the southeast fractional quarter of section 20, in township 33, range 14, and that the same was owned by J. Frank Oliver, upon which the county of Cape Girardeau held a mortgage for \$985; that the said 100 feet in width in each of the parcels of ground specified was 50 feet on each side of the center line of said railroad, as the same was then located on the ground by stakes driven in the ground along said center line, and as indicated on a plat thereof therewith filed, and made a part of said petition, and that the owners of said parcels and said company could not agree upon the proper compensation to be paid for said strips, or any interest therein, which it sought to acquire, or the damages to the remainder of the tracts by reason of such acquisition, and prayed for the appointment of commissioners to ascertain the damages which said owners might sustain, as a just compensation; that thereupon it was ordered that a hearing of said petition be had before said judge on the 14th day of February, 1902, at the courthouse in Cape Girardeau, and that plaintiff was duly summoned to appear on that day at said place; that upon the hearing the matter of the appointment of commissioners was taken under advisement

until February 20, 1902, at which time certain commissioners were appointed to assess said damages, and directed to view and assess the same and make return thereof, and afterwards qualified and undertook to discharge their duties as such, and file their report in the office of the clerk of said court. "And plaintiff states that after the appointment of said commissioners the said railroad company abandoned its line of railroad across plaintiff's lands as set out and described in its said petition for condemnation, and has surveyed and located an entirely different line instead thereof, and has wrongfully and without authority of law undertaken to occupy and take possession, for the purposes of its railroad, of an entirely other and different strip of plaintiff's lands than that described in its petition for condemnation aforesaid; that plaintiff, being in the lawful possession of said land, undertook by lawful means to protect his property from the unlawful acts and encroachments of said railroad company; that on 23d day of December, 1902, said railroad company, for the purpose of harassing, annoying, and intimidating this plaintiff, and of taking and obtaining possession of his said property, wrongfully and without due process of law filed in the office of the clerk of the Cape Girardeau court of common pleas its petition for injunction against plaintiff, as follows:

"In the Cape Girardeau Court of Common Pleas, County of Cape Girardeau, State of Missouri. January Term, 1903. St. Louis, Memphis & Southeastern Railroad Company v. John Frank Oliver. Petition for Injunction. The petitioner herein, the St. Louis, Memphis & Southeastern Railroad Company, respectfully presents that it is a corporation duly incorporated under the laws of the state of Missouri, and has full power and authority to construct, operate, and maintain a railroad, and incidentals thereto, from the city of St. Louis, through the city of Cape Girardeau, in the state of Missouri, to the town of Luxora, in the state of Arkansas. That it has begun the construction of its railroad, and has nearly completed the entire grading of the same, excepting some few small places. That it owns a right of way one hundred feet (100) wide through the lands of the defendant, John Frank Oliver, being the northwest fractional quarter of section 28, and the northeast fractional quarter of section 29, and the southeast fractional quarter of section 20, township 33, range 14, in Cape Girardeau county, Missouri. An accurate description of said right of way is indicated on the plat of same herewith filed and made a part thereof, the center line of which one hundred feet crosses the north line of said Oliver's property at a point 1,992.5 feet from the northeast corner of the lands of D. Moore, and the southeast corner of the lands of S. A. Moss or George Peterson, and crosses the southerly line of said Oliver's property at a point 1,338.5 feet easterly from

the quarter-section corner common to sections 28 and 29 in said township 33, range 14, in said county. That petitioner has completed grading along part of said right of way above described, and is now seeking to complete the grading of the road along the balance of said right of way, to lay track thereon, and telegraph poles, and string its wire for its use. That the petitioner has also placed upon said right of way telegraph poles of the usual dimensions, for the purpose of stringing its wires to be used in operation of its trains. That the defendant, John Frank Oliver, wrongfully and without cause and without right, has entered upon said right of way, and has cut down some of the telegraph poles and thrown them in the river, and has, with force and arms, obstructed and prevented the petitioner, by its contractors, agents, and servants, from further grading upon part of the right of way aforesaid, and from further erecting poles and stringing wires thereon. That said Oliver has threatened, with force and arms, to shoot and kill the petitioner's subcontractors, agents, and servants. That the petitioner has no adequate remedy at law, and therefore prays that the defendant, John Frank Oliver, his agents, servants, and attorneys, be enjoined and restrained from cutting down the telegraph poles of the plaintiff, and from forcibly obstructing the petitioner in the construction of its grading, track-laying, pole-setting, wire-stringing, and the completion of its railroad and appurtenances on the right of way described. Petitioner prays that a temporary writ of injunction be issued as above, returnable to the next term of court, and restrain the defendant, as above prayed, until the further finding of the court, as, in duty bound, the petitioner will ever pray. Frank E. Burroughs, Attorney for Petitioner.

"F. E. Dewey, upon oath, states that he is the general superintendent of petitioner, and that he is general superintendent of construction of its new lines, and has in charge construction of petitioner's road upon the aforesaid lands; that the allegations in the foregoing petition are true. F. E. Dewey.

"Subscribed and sworn to before me this 22d day of December, 1902. My term expires November 10, 1906. Rollin B. Andrews, Notary Public. [Seal.]

"That subsequently, on the 31st day of December, 1902, the said railroad company presented its said petition for injunction to defendant John A. Snider, as judge of the Cape Girardeau court of common pleas, in vacation, who thereupon, without the authority of law, issued a temporary writ of injunction against this plaintiff, and made the same returnable to the Cape Girardeau court of common pleas."

Upon the presentation of this petition a preliminary rule was made by this court on the 29th day of January, 1903, and was served on Judge Snider and the said railway

company on the 2d of February, 1903. Thereafter, on the 7th day of February, 1903, Judge Snider made his return as follows:

"Comes now the respondent John A. Snider, and, for his return to the writ of prohibition issued in this case, respectfully says that he is now, and was at the time mentioned in the said writ, and in the petition for the said writ, the duly acting and qualified judge of the Cape Girardeau court of common pleas; that all the various proceedings set out in the petition for the writ herein occurred as is therein pleaded. He avers that, as to the identity of description in the condemnation proceedings and the injunction proceedings, he has no information sufficient to form a belief, except from the face of the pleadings themselves, and that he believes the lands described to be identical. He further avers that, after the filing of the commissioners' report in the condemnation suit, relator accepted the award made by the commissioners, being the sum of \$2,500; that the petitioner for injunction, the St. Louis, Memphis & Southeastern Railroad Company, filed the petition in the Cape Girardeau court of common pleas some time in December; that petitioner gave due notice to the defendant therein, John F. Oliver, that it would apply to said judge for a temporary injunction, and that at the hearing of the said temporary writ of injunction the defendant therein, John F. Oliver, was present in person and by counsel; that petitioner for said injunction made and executed a good and sufficient bond, both as to amount and security, indemnifying John F. Oliver against all damages which might accrue by reason of the issuance of said temporary injunction; and that said judge issued said injunction, as he was authorized by law so to do. And respondent further says that it is not true that the judge of the Cape Girardeau court of common pleas has no power to issue writs of injunction returnable to the common pleas court, and it is not true that the law expressly requires said judge to make all such writs returnable to the circuit court of said county; that it is not true that the Cape Girardeau court of common pleas has no jurisdiction to hear and determine writs of injunction; that it is not true that all petitions for injunctions in the county of Cape Girardeau must be filed in the office of the circuit court of said county. But on the contrary, respondent says that the Cape Girardeau court of common pleas has full power, authority, and jurisdiction to entertain all proceedings for injunction, and that the judge of the said court has full power and authority to issue a temporary writ of injunction, returnable to said Cape Girardeau court of common pleas; and, for his authority for such belief, respondent says: That the Cape Girardeau court of common pleas was established by an act of the Legislature passed in the year 1851, and that its power was supplemented by various acts

since passed, all of which are collated in the appendix to the Revised Statutes of 1899, at page 2579 and following. That, among other things, the charter of said court provides in section 2 thereof as follows: 'The said court of common pleas shall have power and jurisdiction within the said city, county and township of Cape Girardeau as follows: First, concurrent original jurisdiction in all civil actions at law with the circuit court of said county.' Section 18 of the charter of said court provides: 'The circuit court and court of common pleas shall have jurisdiction to hear and determine all civil cases in law and in equity which shall be transferred to them, respectively.' That section 23 of the charter of said court provides: 'The practice, process and proceedings in said court of common pleas shall be the same in all respects as is or may be provided by law for the government of the circuit court and county court respectively except as herein otherwise specially provided.' That section 30 of the charter of the said court provides, among other things: 'The judge of said court shall have like power in relation to suits, processes and proceedings in said court of common pleas as the circuit court judge by law has in like cases in the circuit court: he may grant writs of ne exeat and injunctions returnable to the circuit court.' That, in addition to the powers and jurisdiction conferred by the foregoing sections, section 4161 of the Revised Statutes of 1899 provides: 'Whenever the term "circuit court" is used in any law general to the whole state, the same shall be construed to include "courts of common pleas," unless such construction would be inconsistent with the evident intent of such law or of some law especially applicable to courts of common pleas.' * * * Respondent avers and believes that the clause in the charter giving the judge in said court power to issue a temporary writ returnable to the circuit court is not a limitation upon his general jurisdiction in all civil cases, but is additional power. Respondent says that he is willing now and at all times to obey whatever orders this honorable court may see proper to make in the premises, and avers that he issued the writ of injunction, as he believed he had a right to do, relying upon the authorities aforesaid, and, having fully made return, respectfully prays to be hereof discharged. John A. Snider, by Frank E. Burroughs and L. F. Parker, Attorneys for Respondents."

The return of the company is to the same effect.

To which returns plaintiff on March 4, 1903, filed his replies, denying the new matter.

Prohibition is asked in this case on the ground that the judge of the Cape Girardeau court of common pleas exceeded his jurisdiction in granting a temporary writ of injunction returnable to said court of common pleas. With the sufficiency or insufficiency

of the application for injunction, we have nothing to do at this time. The point for determination is the power of the judge of that court in vacation to issue a temporary writ returnable to his own court. This must depend upon the statutory power conferred upon the judge of that court by the General Assembly. The said common pleas court was established by an act of the Legislature approved February 22, 1851 (Laws 1851, p. 201). Among other powers, it was given "concurrent original jurisdiction in all civil actions at law, with the circuit court." From time to time, amendatory acts have since been passed, extending and defining its jurisdiction. Laws 1853, pp. 80, 81. By section 14 of the act of 1853 (page 82), "the judge of said court shall be a conservator of the peace throughout the county, and shall have like powers in relation to suits, process and proceedings in the said court of common pleas as a circuit judge by law has in like cases in the circuit court; he may grant writs of ne exeat and injunctions, returnable to the circuit court, take and certify the proof and acknowledgment of deeds, conveyances and other instruments of writing; administer oaths, issue writs of habeas corpus and hear and determine the same, in the same manner as a judge of the circuit court." Rev. St. 1899, p. 2583. In *Fulenwider v. Fulenwider*, 53 Mo. 439, the jurisdiction of said court in causes in equity was challenged, but this court said: "At the time this act was passed, our Code of Civil Practice was in full force as enacted in 1849 (Laws 1849, p. 73). By this Code the distinction between actions at common law and suits in equity was abolished, and it was declared that only one form of action should exist in this state, to be denominated a 'civil action.' Although the line of demarcation between cases in equity and cases at law still exists, there is but one form of action for all remedies. Therefore when the Legislature used the phrase 'civil actions at law' in the above-named act, it was to denote that no concurrent criminal jurisdiction with the circuit court was intended to be conferred." Accordingly it was held said court had concurrent jurisdiction over causes in equity with the circuit court. Afterwards, in *Roth v. Tiedeman et al.*, 53 Mo. 489, the jurisdiction of said court to enforce mechanics' liens was denied; and this court, overruling that contention, through Sherwood, J., said: "It is difficult to perceive how the Legislature could have employed more plain and unambiguous language as to the jurisdiction intended to be conferred than in the act now under consideration. By the very terms of the act the jurisdiction of the Cape Girardeau court of common pleas is made coextensive with the circuit court in all civil actions. To hold that this sweeping clause does not include actions for the enforcement of mechanics' liens would be to rob the words of their manifest meaning." More re-

cently, in *State ex rel. v. Ross*, 122 Mo. 455, 25 S. W. 951, 23 L. R. A. 534, this court, while differing as to other propositions involved in that case, all agreed that said court had jurisdiction to appoint a receiver on a bill in equity; Judge Brace, voicing the opinion of the majority, saying on this point "that the property of the railway company is partly within the jurisdiction of the Cape Girardeau court of common pleas; and that, in a proper action pending in that court, it had jurisdiction to appoint a receiver thereof, is conceded." Barclay, J., for the minority, referring to *Fulenwider v. Fulenwider*, 53 Mo. 439, and *Roth v. Tiedeman*, 53 Mo. 489, said: "These decisions have stood unreversed for thirty years, and we adhere to them without discussion, as expressing the law touching the right of the common pleas court to hear and adjudicate suits of the general class to which the receivership proceeding in that court belongs." In view of this uniform construction of the act creating said court, and the fact that to now hold otherwise would unsettle many property rights which have doubtless vested upon the exercise of equitable jurisdiction by said court, we have no hesitancy in holding that said court has equitable jurisdiction, and, as incident thereto, the power to issue and try suits for injunction and enforce its decrees in such cases.

But granting that said court has such power, it does not follow that the judge thereof may issue writs of injunction, in vacation, returnable to said court. The contention of the defendant judge herein is that inasmuch as, by the old chancery practice, the judge of the court having jurisdiction in equity could grant a temporary writ in vacation, and as this court has ruled that the common pleas court has jurisdiction in equity and in injunction cases, it necessarily follows that he has the same power that a circuit judge has to issue temporary writs of injunction returnable to his own court. On the other hand, the plaintiff insists that as this is a statutory court, and as we must look to the act creating it for the powers of the judge thereof, and as the act expressly directs that injunctions granted by him shall be "returnable to the circuit court," his powers in injunctions issued by him in vacation are necessarily limited by the statute, and he can only make them returnable to the circuit court. Counsel for defendants refer us to section 4161, Rev. St. 1899, which provides that "whenever the term 'circuit court' is used in any law general to the whole state, the same shall be construed to include 'courts of common pleas,' unless such construction would be inconsistent with the evident intent of such law or of some law specially applicable to courts of common pleas." And inasmuch as section 3627, Rev. St. 1899, provides that "injunctions may be granted by the circuit court or judge thereof in vacation," if we read into said section "common

pleas court," instead of "circuit court," the judge of said common pleas court would, by express statute, be given the power in vacation to issue writs of injunction. But by recurring to section 4161, Rev. St. 1899, it will be observed that the words "common pleas" are not to be read into the statute, if by so doing such a construction would be inconsistent with "some law specially applicable to courts of common pleas." As we are considering a statute "specially applicable" to the Cape Girardeau court of common pleas, and as that statute expressly provides that "writs of injunction issued by the judge of said court shall be returnable to the circuit court," it is quite obvious that section 4161 in no way enlarges the powers of the judge of the Cape Girardeau court of common pleas, but is inconsistent with the special act creating that court. So that, after all, this record calls for a construction of the various acts defining the power of the judge of the common pleas court. The Legislature created the court, and had plenary power, subject to the Constitution, to give that court, and the judge thereof, just such authority as it deemed proper. That its attention was directed to the power it should confer on the judge in vacation is too plain for discussion. It saw fit not to leave his power in granting injunctions open to inference, but expressly directed such writs to be "returnable to the circuit court." It is not our duty or right to add to or amplify that power or change it by construction. Generally throughout our legislation, when the Legislature has deemed it necessary to grant the judge, in contradistinction to his court, the power to make orders and grant writs in vacation, it has done so by positive enactment; and, in view of the general doctrine that a judge in vacation has only such powers to transact judicial business as are expressly conferred upon him by statute, we think that, when it authorized him to issue injunctions returnable to the circuit court, it excluded his right to issue an injunction returnable to his own court. Nor do we think that this involves the hardship which counsel urge—that irreparable injury may ensue if he is denied this power. His writ, issued and returnable to the circuit court, has all the efficacy and restraining power that it would have if returned to his own court, for the purposes of staying a threatened injury, remediable only in chancery. It is returnable to a court having full equity powers, and every presumption must be, and is, indulged that, if the applicant therefor is entitled to such a remedy, it will be sustained by the circuit court, and, if not, it ought to be dissolved.

Our conclusion is that the judge of the court of common pleas exceeded his jurisdiction in granting an injunction in vacation returnable to his own court, and hence the provisional rule for prohibition must be, and is, made absolute. All concur.

CHANEY v. LOUISIANA & M. R. R. CO.*

(Supreme Court of Missouri, Division No. 1.

June 20, 1903.)

MASTER AND SERVANT—RAILROAD EMPLOYEES—WHAT CONSTITUTES—CARRIER—PASSENGER—CROWDED CAR—ASSUMING DANGEROUS POSITION—INJURY—CONTRIBUTORY NEGLIGENCE—ABSENCE OF PLEA.

1. One who is acquainted with the conductor and brakeman on a mixed train, and for several years has ridden once a week thereon without paying fare, but rendering assistance in handling baggage and unloading cars, etc., is not an employé of the railroad company.

2. Neither on general principles, nor under Rev. St. 1899, § 1080, providing that if a railroad passenger shall be injured while on the platform, or in any baggage, wood, or freight car, in violation of printed regulations posted inside of the passenger cars, the company shall not be liable if at the time it furnished room inside its passenger cars sufficient for passengers, is a passenger justified in taking a position, on account of the crowded condition of the passenger car, on the top of a freight car, holding on to a brake with his legs dangling over the end of the car.

3. Though in an action by a passenger for injuries there is no plea of contributory negligence, yet where it clearly appears from plaintiff's own evidence that he was guilty of negligence directly contributing to his injury, it is proper to take the case from the jury by an instruction in the nature of a demurrer to the evidence.

Appeal from Circuit Court, Audrain County; E. M. Hughes, Judge.

Action by John Chaney against the Louisiana & Missouri River Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Geo. Robertson, for appellant. F. Houston, for respondent.

VALLIANT, J. Plaintiff sues to recover damages for personal injuries sustained by him in an accident on a railroad owned by the defendant corporation, but leased to and operated by the Chicago & Alton Railroad Company. The accident is alleged to have resulted from a defective condition of the road and the negligent running of the train. The petition is in two counts. In the first count plaintiff declares that he was an employé of the Chicago & Alton Company, engaged in operating the train, and in the second that he was a passenger.

The plaintiff's evidence tended to show as follows: The defendant is a Missouri corporation owning a railroad extending from Louisiana, Mo., south to the Missouri river, which road is leased to and operated by the Chicago & Alton Railroad Company. Plaintiff lived near Auxvasse, which is a station on this road a few miles from Mexico, Mo. A local train composed of freight cars and a caboose, in which passengers were usually carried, ran regularly on that part of the road. The plaintiff was familiar with this train, was well acquainted with the conductor and brakeman, and made fre-

*Rehearing denied July 2, 1903.

quent trips on it from Auxvasse to Mexico and return. He was not in the habit of paying fare, and did not expect to do so. The conductor never asked him for fare, but frequently would ask him to assist in handling the baggage and unloading cars, and he always assisted in whatever he was asked to do. He frequently rode on the top of the cars, and helped with the brakes when requested. He had been going to and fro on this train, on these conditions, once a week for several years. On the day of the accident the plaintiff boarded the train at Auxvasse, aiming to go to Mexico; he got on the front platform of the caboose; the conductor at that time was on the rear platform, giving the signal to the engineer to start; plaintiff at that time was in the line of the conductor's vision; whether he was seen by the conductor or not he did not know. When the train pulled out from Auxvasse, the plaintiff, standing on the front platform, looked into the caboose and saw that all the seats were occupied, four or five men were standing in the aisles, and thereupon he climbed upon top of the freight car next in front, and walked on along to the front over about six cars and sat down on the top of a freight car. The two brakemen saw him. When the train stopped at the next station, he got down on the ground. While the train was standing there one of the brakemen asked him to go up and let off a brake; he went up on top of the car for this purpose; it was the third or fourth car from the caboose; he let off the brake as requested, and then sat down on top of the car at one end, facing to the rear, with his legs hanging down between two cars, holding to a brake. He was in that position when three of the cars in front jumped the track, the rails spread, the wheels of the car he was on dropped between the rails, the rear cars crushed against it, and his leg was crushed. The result was his leg was afterwards amputated. The road was in bad condition, and the train was being run unusually fast. Upon the conclusion of the plaintiff's testimony, the court, at the request of the defendant, gave an instruction to the effect that the plaintiff was not entitled to recover, which resulted in a judgment of nonsuit, from which the plaintiff appeals.

The plaintiff, as shown by his petition, was not entirely satisfied in his own mind whether he was on the train in the capacity of an employé to assist in its operation, or that of a passenger to be taken care of by those in charge of the train; in his brief before us he inclines to the position that he was a passenger, but insists that, whether employé or passenger, he was entitled to have his case submitted to the jury. We think it is very clear he was not an employé, but it does not follow from that conclusion that he was a passenger. If he was on the train with the knowledge and consent of the conductor, for the purpose of being carried, he

was a passenger. The only evidence from which it could be inferred that the conductor knew he was on the train at all is to the effect that he was in the line of the conductor's vision when the latter was giving the signal to the engineer to start. But at that time the plaintiff was on the front platform of the caboose; there is no evidence that the conductor saw him on the top of the freight car. It is perhaps unnecessary, however, for us to decide that question, because, if we concede to the plaintiff that his relation to the defendant was that of a passenger on the train, we cannot concede that he was justified as a passenger in taking his seat on top of the freight car, and we cannot adjudge the carrier liable for an injury received by the plaintiff, to the producing of which his position, so unnecessary and so unusual for a passenger, contributed.

The plaintiff, in giving his testimony, was unable to divest himself entirely of either of the two characters in which he sued. Having in mind that perhaps his relation was that of an employé, he conveys the idea that he was on top of the car to assist with the brakes; but, if he is to be adjudged a passenger, he says he climbed on top of the car and took his seat there because all the seats in the caboose were occupied and four or five were already standing in the aisles. If we should sustain the plaintiff's suit on that theory, then we would be laying down the law that whenever a passenger train is so crowded that one cannot obtain a seat inside he may climb on top of the train, and if then, through the negligent handling of the train, there comes a jar sufficient to throw him off his elevated seat, and he is injured, the carrier is liable, notwithstanding the fact that his position on top of the train had as much to do with the injury as the jar. Of course the bare statement of the proposition is its refutation.

But the plaintiff relies on section 1030, Rev. St. 1899: "In case any passenger on any railroad shall be injured while on the platform of a car, or in any baggage, wood or freight car, in violation of the printed regulations of the company, posted up at the time in a conspicuous place inside of its passenger cars then in the train, such company shall not be liable for the injury: provided said company, at the time, furnished room inside its passenger cars sufficient for the proper accommodations of the passengers." There were no such printed regulations posted in this caboose. That is a quaint old statute. It was enacted in 1853 (Acts 1852-53, p. 143) passed into the revision of 1855, and seems to have escaped the pruning knife of all the revising sessions of the General Assembly since that date.

The art of operating railroads has improved since that statute was enacted, and the people of this state now know more about railroad traveling than they did 50 years ago. That act seems to contemplate that it was expected that passengers, when the car

or cars especially designed for them happened to be crowded, would find seats in the baggage car, or in a freight car, or in a "wood car," whatever that may have been, and it devolved the duty on the railroad company to post conspicuous notices on the passenger cars warning the people not to do so. But we need not say in this opinion what the effect of that statute would be at this day on a case brought within its terms, for the reason that the plaintiff's case does not come within those terms. The statute contemplates that, when the passenger car is crowded, men may take refuge in a baggage car, in a freight car, or in a wood car; but it makes no provision for a man who is so reckless as to take a position on the top of a freight car, as this passenger did. The plaintiff was the only person hurt in the accident, and it is certain the perilous position which he voluntarily and unnecessarily assumed contributed to the result.

Although there was no plea of contributory negligence, yet where it clearly appears, as it does in this case from the plaintiff's own evidence, that he was guilty of negligence that directly contributed to produce the injury, it is the duty of the court to take the case from the jury by an instruction in the nature of a demurrer to the evidence. *Hudson v. Wabash Ry. Co.*, 101 Mo. 13, 14 S. W. 15; *Buesching v. Gas L. Co.*, 73 Mo. 219, 39 Am. Rep. 503.

We are tempted to follow the learned counsel in their able discussion of the question of the liability of a lessor company when the injury, as in this case, is alleged to have resulted from the negligent management of its train by a lessee company, but the facts of this case showing no right of recovery in plaintiff against the defendant, even if the defendant itself had been operating the train, it is not only unnecessary, but would be improper, for us to decide what would be the defendant's attitude if the case was different.

The judgment is affirmed. All concur.

CASTEEL v. POTTER et al.

(Supreme Court of Missouri. June 15, 1903.)

DOWER—WIDOW'S QUARANTINE—LANDS UNDER CONTRACT—UNPAID PURCHASE MONEY—PAYMENT AFTER DECEDENT'S DEATH.

1. Rev. St. 1899, § 2933, provides: "Every widow shall be endowed of the third part of all the lands whereof her husband * * * was seised of an estate of inheritance at any time during the marriage." Section 2935 provides: "If the husband shall have made a contract for lands, and at the time of his decease the consideration shall not have been paid, but after his death the same shall be paid out of the assets of his estate, his widow shall be endowed of the third part of said lands, in the same manner as if he had been seised of an estate of inheritance in such lands at any time during the marriage." Section 2936 provides that if the husband made a contract for the purchase of land, and paid a part only of the purchase price, and the land is sold after his death under a judgment, or under a power created by the

contract or his will, the widow shall have dower in the land against every person except those holding a lien for the unpaid purchase money and those claiming under them. A husband purchased a tract of land subject to two trust deeds, and subsequently purchased 17 acres adjoining, which was unincumbered, establishing his home on the land purchased and using the whole as his farm. After his death his executor sold both tracts and paid off the deeds of trust, the balance of the proceeds going into the assets of the estate and being used to pay the debts of deceased. *Held*, that his widow was entitled to dower in the whole farm, and the purchaser from the executor took subject to her rights.

2. Being entitled to dower, the widow was entitled to quarantine in the mansion house and plantation, which here embraced all the land, until dower was assigned to her.

Valliant, J., dissenting.

In Banc. Appeal from Circuit Court, Lafayette County; Samuel Davis, Judge.

Action by Mary C. Casteel against Herman Potter and others. Judgment for defendants, and plaintiff appeals. Reversed.

R. Frank Jones and Wm. Aull, for appellant. W. H. Chiles and Jno. S. Blackwell & Son, for respondents.

MARSHALL, J. The following opinion, heretofore rendered in Division No. 1, is hereby adopted as the opinion of the Court in Banc, with the express understanding, however, that what is herein said shall not preclude the defendants, upon a trial anew, from relying upon and showing that the plaintiff abandoned the premises, or that she is estopped to claim quarantine:

This is an action by the widow of Thomas H. Casteel for her quarantine in about 340 acres of land in Lafayette county. The husband died on December 13, 1891, testate, and making provision in his will for his wife. She renounced the will and elected to take her dower under the statute, and afterwards, on May 9, 1899, brought this action for quarantine and another action for dower. The circuit court entered judgment for the defendants, and the plaintiff appealed.

The case made is this: On August 21, 1889, Thomas H. Casteel bought a tract of land of about 323 ²¹/₁₀₀ acres, known as the "Maloney Tract." At that time there were two deeds of trust on the land, made by Maloney and wife—one to Geo. M. Catron, curator, dated July 15, 1887, securing a note for \$6,150, payable at three years with 8 per cent. interest from date, and the other of the same date to Turner Williamson for \$1,588.20. Casteel took the land with these incumbrances on it, and therefore he acquired only the equity of redemption in the land. He did not, however, assume the payment of the deeds of trust. Afterwards, on August 30, 1890, Casteel purchased 17 acres of land that adjoined the aforesaid land. This last-named land was, and ever since has been, free and clear of incumbrance.

¶ 2. See *Executors and Administrators*, vol. 22, Cent. Dig. § 656.

Casteel then established his home upon the land so purchased, and used the whole of it as one farm. He died on the 13th of December, 1891, never having paid the two deeds of trust upon the 323 acres. After renouncing the provisions of the will, the plaintiff remained in possession of the home and the plantation for quite a while, and enjoyed all the rents and profits arising therefrom. The defendants set up in their answer that she abandoned the premises, and that she was estopped to claim quarantine; but the court declared, by the third instruction given for the plaintiff, that the evidence did not support these defenses, and therefore found those issues for the plaintiff. The defendant did not except to this ruling, and did not appeal therefrom, so that those issues are not open to review in this court. The personal estate was not sufficient to pay the debts, and hence, at the August term, 1893, of the probate court, the executor procured an order for the sale of all the real estate. Under this order the executor on May 29, 1894, sold the 17-acre tract to the defendant Potter for \$545.50, and thereafter, on May 31, 1895, he sold the 323-acre tract to the defendant Potter for \$10,660. With these funds the executor paid off the two deeds of trust, aggregating at that time \$10,320.07, and the balance of the \$10,660, amounting to \$339.93, together with the \$545.50 realized from the sale of the 17 acres, and aggregating \$884.43, went into the assets of the estate, and was used to pay the debts of the deceased. After these sales the executor put the defendant Potter in possession of the land, and thus the matter rested from 1895 to 1899, when this suit for quarantine and the other suit for dower were instituted.

1. "By the seventh section of Magna Charta the widow was allowed, under a right known as 'quarantine,' to remain in the mansion house 40 days after the death of her husband, during which time her dower was to be assigned, and during her continuance a reasonable support was allowed her out of the estate." 10 Am. & Eng. Enc. Law (2d Ed.) p. 148. The statute of Missouri (section 2954, Rev. St. 1899) provides: "Until dower be assigned, the widow may remain in and enjoy the mansion house of her husband, and the messuages or plantation thereto belonging, without being liable to pay any rent for the same." Because of this right to remain in (the term at common law was "tarry in") the mansion house of her husband until dower is assigned her, it is important to note what the dower rights of a widow are; for, if she is not entitled to dower, she is not entitled to quarantine. Our statute (Rev. St. 1899, § 2933) is as follows: "Every widow shall be endowed of the third part of all the lands whereof her husband, or any other person to his use, was seised of an estate of inheritance, at any time during the marriage, to which she shall not have relinquished her right of dower, in the manner prescribed by

law, to hold and enjoy during her natural life," etc. The term "estate of inheritance" has an accepted and settled meaning in law. It means an estate that will descend to a man's heirs by the simple operation of law, and it may be an absolute or fee-simple estate, or it may be a limited estate, such as a base fee, or (at common law) a fee tail. Therefore it does not include an estate for the life of the husband, or other lesser estates. Cooley's Blackstone (4th Ed.) *104 et seq. Our statute as to dower is almost identical in this respect with the common law. Cooley's Blackstone (4th Ed.) *129. The "estate of inheritance" here referred to need not necessarily be free of incumbrance or lien; for its inheritable character is sufficient to pass the title to the heir, subject to the lien or incumbrance, just as it stood in the ancestor. Until the passage of the dower act in England, dower was not permitted in mortgaged estates. Scribner on Dower (2d Ed.) c. 22, p. 463. But such is not the law in most of the United States. Certainly, ever since 1845 (Rev. St. 1845, p. 430, c. 54, § 1), dower in mortgaged estates has been permitted in Missouri. Atkinson v. Stewart, 46 Mo. 510. The provisions of our statute now are found in sections 2935 and 2936, Rev. St. 1899, which are as follows:

"Sec. 2935. If the husband shall have made a contract for lands, and at the time of his decease the consideration, in whole or in part, shall not have been paid, but after his death the same shall be paid out of the assets of his estate, his widow shall be endowed of the third part of said lands, to hold and enjoy during her natural life, in the same manner as if he had been seized of an estate of inheritance in such lands at any time during the marriage.

"Sec. 2936. If the husband shall have made a contract, subsisting at the time of his death, for the real estate, and paid only part of the consideration, and said real estate shall be sold after his death, under the order or judgment of a court or by virtue of any power in such contract, or of any power or devise in the will of the husband, the widow shall be entitled to hold and enjoy, as dower, during her natural life, the third part of such real estate, as against every person except such as may hold a lien on such real estate for the payment of the purchase money, and those claiming under them."

The law is settled in this state that if the husband executes a mortgage on his land, in which his wife joins, and dies, leaving the mortgage unpaid, and if the administrator, under an order of court, sells the land and pays off the mortgage, the widow will be entitled to dower in the land, and the purchaser at the administrator's sale is not entitled to be subrogated to the rights of the mortgagee; for the purchaser does not hold under the mortgagee, and there is therefore no equitable assignment of the mortgage to him, but the mortgage is extinguished by

payment out of assets of the husband's estate. *Jones v. Bragg*, 33 Mo. 337, 84 Am. Dec. 40; *Atkinson v. Stewart*, 46 Mo. 510; *Sweeney v. Mallory*, 62 Mo. 485. So, too, the husband's right to curtesy is not cut off where the wife mortgages her lands, and after her death the administrator sells the land and pays off the mortgage. Nor is the purchaser subrogated to the rights of the mortgagee. *Casler v. Gray*, 159 Mo. 588, 60 S. W. 1032. If the deed from the administrator is defective, so that it does not pass the title at the administrator's sale, the purchaser is entitled to be subrogated to the rights of the creditors of the estate. *Carey v. West*, 139 Mo. 146, 40 S. W. 661. In this case, however, the executor's deed was not defective, and hence this principle does not apply.

But, while the defendants do not deny that this is the law where the husband (or wife) executes the mortgage, they contend that it is different where, as here, the husband bought the land subject to a mortgage already on the land. If, however, dower is allowable in land of which the husband was seised of an estate of inheritance, and if an estate of inheritance means an estate that will descend to the heir by operation of law, it can make no difference whether that estate is unincumbered, or subject to a mortgage or other lien. If the mortgage is foreclosed (the wife having joined in it), or if the land is sold to satisfy the lien created before the marriage (2 *Minor's Institutes*, p. 155), of course, dower is cut out. But whether the mortgage is put on the land by the husband, or is on the land at the time the husband acquired the land, the result is the same. The husband has only an equity of redemption. In either case, if the husband during his lifetime pays off the mortgage, the wife's inchoate right of dower attaches, or, if the husband's administrator pays off the mortgage by a sale of all the husband's lands, the widow's dower immediately attaches. In both cases it was the husband's money that paid off the mortgage, and, as the purchaser did not acquire title under the mortgage, he cannot be subrogated to the mortgagee's rights under the mortgage. 10 *Am. & Eng. Ency. Law* (2d Ed.) p. 106, and cases cited in note 2. In such cases the purchaser takes whatever title the administrator could convey, and, as the administrator paid off the mortgage, the purchaser took the title the administrator had power to convey, and that then belonged to the husband's estate. But the administrator could not convey the wife's dower rights. The husband himself could not do that. The wife alone could defeat her dower, and in this case the trial court found that she had done nothing that would estop her from setting up her claim.

This results in holding that upon this showing the widow is entitled to dower in the whole 840 acres. As to the 17 acres, there could be no question as to her right to dower; for it was free of incumbrance,

and the trial court evidently overlooked this fact and this part of the land. Being entitled to dower, the widow was entitled to quarantine in the mansion house and plantation, which here embraced all the land, until dower was assigned to her. This has never been done.

The judgment of the circuit court denied her this right, and its judgment is therefore reversed, and the cause remanded to be proceeded with in accordance herewith.

ROBINSON, C. J., and BRACE, GANTT, BURGESS, and FOX, JJ., concur.

VALLIANT, J. (dissenting). The effect of the opinion of the court in this case, as I understand it, is to declare that the widow is entitled to dower of an estate which her husband in his lifetime never owned. I dissent from that proposition. The plaintiff's husband in his lifetime owned the equity of redemption in this land, and she is entitled to her dower in that estate, but nothing more. If he had owned the unincumbered fee during coverture, and had placed a mortgage on the land without her joining in the act, she would have been entitled to dower in the land superior to the mortgage, and if she had joined in the deed of mortgage, and her husband in his lifetime had paid it off, she would have been entitled to dower in the whole; but in such case, if the husband had died leaving the mortgage unpaid, her dower right would have been subject to the mortgage. In the case at bar the husband bought the land incumbered by the mortgage. He bought only the equity of redemption, and never owned a greater estate in the land. If he had paid off the mortgage in his lifetime, the fee would have then for the first time vested in him, and his wife's inchoate right of dower would then have attached to the land, and would have become absolute at his death; but, as he never paid off the mortgage, her inchoate right of dower never attached during the coverture, and there was no inchoate right to become absolute.

Our statute (section 2933, Rev. St. 1899) gives the widow dower in "lands whereof her husband * * * was seised of an estate of inheritance at any time during the marriage," etc. It is only of the estate of which her husband was seised during the marriage. Section 2935 gives the widow dower in land which her husband in his lifetime had contracted to purchase, but had not paid for at the time of his death, and the purchase money is paid by the administrator out of the assets of the estate. But in such case the husband in his lifetime had become bound for the debt, and his estate responded to his obligation. In the case at bar the plaintiff's husband had not assumed to pay the mortgage, and his estate was under no obligation in regard thereto. Under section 2936, if the husband had made a contract for the pur-

chase of land, and had paid only a part of the purchase price, and the land had been sold after his death under a judgment, or under a power created by his contract or his will, the widow would have dower in the land against every person, except the one holding the lien for the unpaid purchase money. That section is in harmony with the view that she is entitled to dower only in that estate which her husband in his lifetime owned. If by his part payment of the purchase price he had acquired only an estate liable to be defeated upon a foreclosure of the lien for the rest of the purchase price, she only had dower in the land subject to that lien. So, when the husband buys and pays for only an equity of redemption, the wife's inchoate dower attaches to the land subject to the mortgage, and when he dies her inchoate dower becomes absolute in the estate as he left it, and nothing more.

Those three sections of our statutes contain all that there is in our law defining of what estate in land the widow shall be endowed, and from them we see that her dower is limited, first (section 2933), to "lands whereof her husband * * * was seised of an estate of inheritance at any time during the marriage"; second (section 2935), land which the husband had contracted to purchase, but had not paid for, and the purchase money was paid after his death out of his estate; and, third (section 2936), land which he had purchased, and paid for in part, in which case she was to have dower subject to the lien for the unpaid part of the purchase money—that is, that she was to have dower in the land to the extent that her husband had paid for it. I am unable to see how, upon that foundation, she can build a claim to dower in an estate in land which her husband did not own at any time during the marriage.

DOERR v. ST. LOUIS BREWING ASS'N.*

(Supreme Court of Missouri, Division No. 1.
May 27, 1903.)

INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

1. Where a servant, in oiling machinery, accidentally dropped a funnel in a crank pit, and inserted his hand in the pit to remove it, knowing that the whole operation must be performed within the space of three seconds in order to avoid injury, and that the funnel might be easily and safely withdrawn by means of a twisted wire, he was negligent.

Appeal from St. Louis Circuit Court; John W. Booth, Judge.

Action by Oscar Doerr against the St. Louis Brewing Association. From a judgment for plaintiff, defendant appeals. Reversed.

Kehr & Tittmann, for appellant. Cunningham & Maurer, for respondent.

BRACE, P. J. This is an action for personal injuries instituted in the St. Louis city circuit court, taken by change of venue to the St. Louis county circuit court, where the plaintiff obtained judgment for \$5,000, and the defendant appeals.

At the close of the plaintiff's evidence the defendant demurred thereto, the demurrer was overruled, and exception taken. The defendant offered no evidence, and the case was submitted to the jury on instructions. The question to be determined on this appeal is whether the evidence for the plaintiff made a case for the jury. It appeared from that evidence that on 2d day of June, 1899, the plaintiff was in the employ of the defendant, as a fireman in one of its breweries in the city of St. Louis, in which was a machine operated by steam, to oil which was among the duties of his position. That on that day he was engaged in oiling the crank shaft of the machine while the same was in motion. The motion of this shaft was vertical, the head revolving in a pit below. This crank pit was about two feet deep, two feet wide, and two feet long, was directly under the crank shaft, and in it the head of the shaft moved up and down elliptically, approaching the bedplate at the bottom closely, and at no time leaving open a space of more than 18 inches. On the shaft was a stationary oil cup, directly above the crank pit, for the reception of oil for the machine. The appliances furnished the plaintiff for supplying this cup were a small funnel made to fit in the oil cup, and an oil can or filler—the latter about six inches in diameter, and about six inches high—from the bottom of which projected a spout about five inches long. In order to use them, the oiler stood up in front of the machine, placed the funnel in the oil cup, and poured the oil into the funnel from the filler while the shaft was in motion. On the day aforesaid the plaintiff was so engaged in supplying this cup with oil, when the can which he was holding in his hand "bumped up against the funnel," displacing the funnel, which fell into the crank pit, and thereupon he stooped down, reached into the crank pit with his right hand and arm to recover the funnel, when his arm was caught by the shaft above the wrist, and so mangled as to subsequently necessitate amputation. There was no person present when the accident occurred, except the plaintiff. He testified that, when he reached down into the pit for the funnel, the shaft was revolving at the rate of about 18 or 20 revolutions a minute. That he could have recovered the funnel in half a second. That when his arm got right under the shaft it began to revolve at the rate of at least 40 revolutions more a minute, and the theory of the plaintiff's petition is that his injury was caused by defective appliances furnished him for oiling the machine, and a defect in the governor of defendant's engine, by reason of which the speed of the crank shaft

*Rehearing denied July 2, 1903.

was instantaneously accelerated, as stated, while his arm was in the crank pit. The answer is a general denial and a plea of contributory negligence. The plaintiff testified further that he had been in the employ of the defendant as fireman continuously from the 1st of August, 1898, until the day of the accident, and that he commenced the duty of oiling the machinery in March, 1899, and continued in the discharge of that duty from that time until the accident. That he oiled this crank shaft every half hour, that in doing so the funnel frequently fell into the shaft pit, and that he had always recovered it in the manner in which he attempted to do it in this instance, and that during all that time he had never observed the shaft move suddenly with accelerated speed, before the moment in which he was injured. Other evidence for the plaintiff tended to prove that the maximum speed of the shaft was 60 revolutions a minute. That this oil can and funnel had been used in oiling the machine for some years prior to the accident. That it was necessary to pour the oil into the stationary cup on the shaft while it was in motion. That in doing so the funnel sometimes became displaced and fell into the pit. That it was the custom of the engineer with whom the plaintiff worked in such instances, to extract it from the pit with his hand. That if the shaft was moving at the rate of 60 revolutions a minute this would have to be done within one second, at 40 revolutions within two seconds, and at 20 revolutions within three seconds, to escape being caught. That the funnel could have been easily recovered, without risk of injury, by means of a stick with a nail driven through the end of it, or by a piece of wire bent at the end in the shape of a hook, and that material for such appliances were on the premises, easily accessible to the oiler. The evidence further tended to prove (although the plaintiff says he had never observed it) that the engine would at times, without any apparent cause, suddenly commence moving at an increased rate of speed. The actual cause of this eccentric movement was frequently sought for but never found, but was attributed by the engineer to some defect in the governor.

1. There was no evidence tending to prove that the oil can or funnel—the appliance furnished to plaintiff with which to oil the machine—was defective or unsafe. But it is contended that there was evidence tending to show that the plaintiff's injury was caused by the defect in the engine, which caused the eccentric movement in the crank shaft testified to by the plaintiff. If it be credible that the plaintiff could have reached down two feet to the bottom of this pit, grasped the funnel, and withdrawn it from the pit within a second of time, and while attempting to do

so this crank could in an instant have jumped from a speed of one revolution in three seconds to one revolution in a second, and that the plaintiff, who was not an engineer or skilled mechanic, could in his situation have detected and approximately estimated the alleged instantaneous increase of speed, it might be conceded that there was evidence tending to show that but for this eccentric movement the plaintiff might not have been injured. Counsel for defendant contend that the facts upon which this proposition is based are incredible, and hence there was no case for the jury. The proposition may be conceded, however, but it does not then follow that the case should have gone to the jury. In order that it should so go, it devolved upon the plaintiff to introduce evidence tending to prove more than this, i. e., that this eccentric movement was the proximate cause of his injury. Now, it is manifest beyond question, from the plaintiff's own evidence, that if he had kept his arm out of the shaft pit he could, with ordinary care, have gone on oiling this machine until doomsday without suffering any injury from the eccentric movement of the engine. That pit was a dangerous place for a human arm to be in at any time when the shaft was in motion, whether moving at the rate of one revolution every one, two, or three seconds. No man has the moral or legal right to put his life or limb to the hazard of a second, unless duty and the exigencies of his situation imperatively demand it. No man of ordinary prudence will do so. There was no such demand in this instance. The plaintiff was a man of mature years. He had been oiling this machine for four months. He knew the danger of thrusting his arm into this pit when the shaft was in motion. The risk was manifest, the danger imminent. The discharge of no duty within the scope of his employment called for the assumption of such risk. The recovery of the funnel was a matter of little or no importance, and could have been easily effected without incurring the risk. The fact that the plaintiff had before this accomplished the feat of recovering the funnel by hand when the shaft was in motion, or that others may have done so, affords no excuse for his action, nor furnishes any reason for charging his employers with the consequences of his folly. Hence, conceding that the marvellous instantaneous acceleration of the speed of the shaft took place as testified to by the plaintiff, this eccentric movement could at most have been no more than a cause contributing, with his own recklessness and want of ordinary care, to his injury.

The court erred in refusing to sustain the demurrer to the evidence, and for this error the judgment will be reversed. All concur, except ROBINSON, J., absent.

WILSON v. LUBKE.

(Supreme Court of Missouri, Division No. 1.
June 20, 1903.)

MECHANICS' LIENS—ATTACHMENT—PURCHASE OF LAND—PRIORITY—JUSTICES OF THE PEACE—JURISDICTION—JUDGMENTS—RES JUDICATA—FORECLOSURE OF LIEN—SALE OF BUILDINGS—REMOVAL.

1. Where a subcontractor, claiming a mechanic's lien for materials furnished, delivered a part of such materials before the property had been conveyed to the purchaser, who had contracted for the erection of the buildings, his contract for the materials could not relate back beyond the date of the purchase of the land, so as to impair the rights of the vendor under a mortgage given to secure a part of the purchase price.

2. Where a justice of the peace in an action to foreclose a mechanic's lien had no jurisdiction to decide the question of the priority of the mechanic's lien and a purchase-money mortgage on the land, a finding in his judgment that a delivery of the materials for which the mechanic's lien was claimed began on June 29, 1897, and that the purchasers of the land who had contracted for the buildings were then the owners, was not res judicata of the question when the purchasers acquired title to the land.

3. Under Rev. St. 1899, § 650, providing that, in an action for the foreclosure of a mechanic's lien, the court shall define and adjudge by its judgment or decree the title, estate, and interest of the parties severally in and to the real property, where the court found that a mechanic's lien was entitled to priority over a mortgage for purchase money as to the buildings, but was subsequent to such mortgage as to the land, the court had no jurisdiction to ascertain the amount of the mechanic's lien, and charge the same as an incumbrance on the buildings, with a right to the owner of the land to pay the same within a given time and redeem the property.

4. Rev. St. 1899, § 4205, provides that mechanics' liens shall attach to the buildings for which materials were furnished, in preference to prior liens or mortgages on the land, and any person enforcing such a lien may have the buildings sold under execution, and the purchaser may remove the same within a reasonable time thereafter. *Held*, that where buildings had been sold under foreclosure of a mechanic's lien, and the purchaser had received his deed therefor, the court, in an action to quiet title between the owner of the land and the owner of the building, had no power to fix the amount due under the mechanic's lien, and authorize a removal of the buildings only in case of the landowner's failure to pay the same within 30 days.

Appeal from St. Louis Circuit Court; P. R. Flitcraft, Judge.

Action by Asa B. Wilson against George W. Lubke, Jr. From a judgment in favor of plaintiff, defendant appeals. Reversed.

W. Christy Bryan, Will Brown, and Geo. W. Lubke, Jr., for appellant. Rassieur & Rassieur, for respondent.

VALLIANT, J. This is a suit, under the statute, to quiet title to real property. Section 650, Rev. St. 1899. Plaintiff claims as purchaser at a foreclosure sale under two deeds of trust. Defendant claims as purchaser at a sheriff's sale under execution upon two judgments establishing mechanics' liens. The question is, which was the prior lien? The facts are as follows: On June 30, 1897,

one Laumeler sold the east half of the lot in question to Ida M. Smith, and the west half to John M. Houser and wife. At the same time Ida M. Smith executed back to Laumeler a deed of trust on the half of the lot sold to her to secure her notes to him for \$4,000 and interest, and Houser and wife likewise executed back to Laumeler a deed of trust on the half sold to them to secure their notes for a like sum and interest. The notes covered the purchase money of the lot, and money advanced by Laumeler to build houses on the same. The deeds from Laumeler to Smith and Houser, and the deeds of trust from them back to him, were all executed and filed for record at the same time, on June 30, 1897. On September 28, 1898, those deeds of trust were regularly foreclosed. The plaintiff became the purchaser and received the trustee's deeds. That is the plaintiff's title. Before Ida M. Smith and Houser and wife purchased the lot from Laumeler, but in contemplation of such purchase, they made a contract with one Claus for the erection of certain buildings on the lot. Claus conducted the negotiations for Smith and Houser in the purchasing of the lot, and, without waiting for the completion of the purchase, and without the knowledge of Laumeler, began excavation for the buildings on the 28th of June, and sublet the millwork to the Tower Grove Planing Mill Company, which concern began delivering the material for the buildings on the ground on June 29th, which was one day before the consummation of the purchase of the lot by Smith and Houser from Laumeler, and one day before the execution and delivery of the deeds above mentioned. Shortly after the execution of the deeds, Laumeler delivered the money he advanced for the buildings to Claus, who, as already said, was acting in the matter for Smith and Houser, so that Claus, the contractor, received the contract price of the buildings in advance. The Tower Grove Planing Mill Company, beginning on June 29th, continued to deliver materials, which were used in the buildings up to September 18, 1897. After giving due notice, that concern on January 6, 1898, filed two mechanics' liens (one against each building) for \$310 each, and on January 8th filed suits in a justice's court to enforce the same (one against Ida M. Smith, and the other against Houser and wife). Claus and Laumeler were made parties defendant in both suits. There was a judgment for plaintiff in each suit for \$317.75 and costs, which was a personal judgment against Claus, the contractor, and special against the lot and building. In each judgment was a recital that the materials, for the value of which the plaintiff sued, were begun to be delivered on the lot on June 29th, and continued until September 18th, and that Smith and Houser were the owners, respectively, at those dates. Executions issued on those judgments, and, at a sale by the sheriff thereunder, the defendant, as trustee for his

clients, became the purchaser, and received the sheriff's deed. That is the defendant's title. There were executions under other mechanics' lien judgments in evidence, but in those it appeared that the materials were not delivered until after June 29th. Those executions, however, informed the court of the aggregate amount of all the mechanics' liens against the houses. The decree of the court was that the plaintiff had the better title to the land, but the defendant the better title to the buildings; that the amount of all the mechanics' liens against the houses was \$1,545.08; that if plaintiff would pay that sum, and six per cent interest from date, to the defendant, within 30 days, the plaintiff's title to land and houses would be perfect, but, unless he paid that sum within that time, defendant had the right to remove the houses from the land within 90 days. The plaintiff was satisfied with the decree, but the defendant appeals.

1. A mechanic's lien must have for its foundation a contract made by the owner of the land—not necessarily the absolute owner in fee, but the owner of the estate to be charged with the lien. *Lumber Co. v. Clark* (Mo. Sup.) 73 S. W. 137. Until one is such owner, he can make no contract that will impose a burden on the land. He may, in contemplation of becoming the owner, make a contract that will affect the land as soon as it becomes his property; but such contract cannot relate back beyond the date of his purchase, so as to impair the rights of the former owner. In the case before us, Smith and Houser were not the owners of the land when they made the contract with Claus for the buildings, and they never thereafter became the owners, except as subordinate to the rights of Laumeier under these deeds of trust. They never had a title that rose above the rights secured by those deeds. Therefore they could not impart such a title to another, either directly or indirectly, voluntarily or involuntarily. The Tower Grove Planing Mill Company, claiming as subcontractor under the contract of Smith and Houser, can take no better title than they had. Their title was subordinate to the deeds of trust, and the title of the subcontractor can rise no higher. Appellant contends, however, that the recital in the justice's judgments that the delivery of the materials began on June 29th, and that Smith and Houser were the owners then, makes the fact of ownership at that date *res adjudicata* against Laumeier, because he was a party to those suits, and is concluded by the judgments. Whatever fact was necessary for the justice to find in order to establish the mechanic's lien, we must now consider was found, and such fact is not now disputable by the parties to that suit. *Reilly v. Hudson*, 62 Mo. 383. In the case just cited by appellant, a judgment establishing a mechanic's lien on account of a cooking range that had been built in a house had been ren-

dered, and a sale had under execution on the judgment. It was held that, as between the parties to that suit, the fact that the cooking range was attached to and became a part of the realty was adjudged in the suit to establish the lien, and could not be again questioned. That was a fact essential to the establishing of the lien. But in the case at bar it was not essential to the establishing of the lien of the Tower Grove Planing Mill Company that Smith and Houser were the owners of the land on June 29th. It was essential that they should have been the owners, but, for the purposes of that suit, the fact that they became the owners on June 30th was sufficient. If the fact was conceded that they owned the property on June 30th, it would add nothing to the force of the lien to show that they owned it on the 29th, nor would it detract from the effect of the lien to show that they did not own it before the 30th. The fact that the judgment recites that they owned the land on June 29th was immaterial. Laumeier, as the holder of the notes secured by the deeds of trust, was made a party defendant in those suits. In his capacity of mortgagee, his rights were not within the jurisdiction of the justice of the peace; that is to say, the justice of the peace could not in those suits decide the question of the priority of the liens. The justice's jurisdiction extended only to matters relating to the establishment of the mechanics' liens and a judgment against the contractor. Since the justice could render no judgment as to priority of the liens, his findings of facts could not be held to be conclusive in the circuit court in a suit between the parties to settle the question of priority. His findings are *res adjudicata* for the purposes for which he is to pronounce judgment, but they do not go beyond that. We hold that Laumeier is not precluded by the recitals in the justice's judgments from showing that Smith and Houser did not own the land on June 29th, and since it appears that they did not own it on that day, and that their title, when acquired, was subject to the deeds of trust, the court was right in adjudging that Laumeier's title to the land was superior to that of defendant. And the court was also right in holding that the defendant's title to the buildings was superior to that of the plaintiff. Section 4205, Rev. St. 1899.

2. This suit is brought under section 650, Rev. St. 1899, but the decree takes a wider range than that statute authorizes. The limit of the power of the court under that statute is "to define and adjudge by its judgment or decree the title, estate, and interest of the parties severally in and to such real property." *Seidel v. Cornwell*, 166 Mo. 51, 65 S. W. 971. It was proper, therefore, for the court to decree that the plaintiff's title to the land was superior to that of the defendant. And since the houses are attached to, and have become a part of, the freehold,

they may be considered as part of the real property, within the meaning of the statute; and therefore the court could, as it did by its decree, settle the rights of the parties in respect to the houses. But when the court undertook to ascertain the amount of the mechanics' liens, and charge them as an incumbrance on the houses, in favor of defendant, with right in the plaintiff to pay the same within a given time, and thus redeem the property, it went beyond the scope marked out by the statute. Besides, under the terms of section 4205, Rev. St. 1899, after a sale under execution to satisfy a mechanic's lien judgment, and the purchaser has received his deed, the day of redemption has passed, and the purchaser has a right within a reasonable time to remove the buildings off the land, and is not bound to take a price for them. The houses are his property. He can fix his own price on them, or refuse to sell them at all. But he must remove them within a reasonable time. The narrow limits within which the statute under which this suit is brought confines the decree will not admit of the adjustment of the equities of the parties on this point. Therefore the court cannot, in its decree in this case, specify the time within which the defendant must remove the buildings. The statute says within a reasonable time, and so the court in this case must leave it.

The judgment is reversed, and the cause remanded to the circuit court, with directions to enter a judgment to the effect that the plaintiff has title to the land named in the petition superior to that of the defendant, that the defendant has title to the buildings on the land superior to that of the plaintiff, and that defendant has a right within a reasonable time to remove the buildings from the land, and that plaintiff and defendant each pay one-half of the costs. All concur.

HOGAN v. CITY OF ST. LOUIS et al.

(Supreme Court of Missouri, Division No. 1.
June 20, 1903.)

FOREIGN CORPORATIONS—TRANSACTIONING BUSINESS IN STATE—MAKING OF CONTRACTS.

1. Rev. St. 1899, §§ 1024, 1025, declare that a foreign corporation shall not transact business within the state until it establishes a public office therein where books are kept and process may be served, and until it pays its quasi incorporation tax and takes out a license. *Held*, that the mere entering into a contract with a city for street lighting by a foreign corporation before it had complied with such statutory requirements did not constitute transacting business within the state, so as to render such contract invalid.

Appeal from St. Louis Circuit Court; D. D. Fisher, Judge.

Suit by John B. Hogan against the city of St. Louis and others. From a decree in

favor of defendants, plaintiff appeals. Affirmed.

Grover & Grover, for appellant. Chas. W. Bates and Wm. F. Woerner, for respondents.

VALLIANT, J. Plaintiff, as a resident taxpayer of defendant city, brings this suit in equity to enjoin the city, its officers, and their codefendant, the Kern Incandescent Gaslight Company (hereinafter called the Kern Company), from carrying out what the petition calls a pretended contract alleged to have been made by the city with the Kern Company for lighting the streets. According to the petition, on January 11, 1900, the board of public improvements, acting under authority of City Ordinance 19,892, approved December 7, 1899, advertised for bids for a contract to light a large part of the city. In answer to the advertisement, the Kern Company submitted a bid, which was accepted by the board, whereupon a contract was entered into between the city and the Kern Company whereby the latter became obligated, for a certain consideration, to furnish the light specified; and, to secure the faithful performance of its contract, the Kern Company, as the contract required, executed its bond, with security, payable to the city, in the penalty of \$200,000. The contract and bond are exhibited with the petition, the details of which it is unnecessary to set out in this statement. The petition alleges that the Kern Company is a corporation organized under the laws of New Jersey, with a nominal capital stock of \$12,000,000, whereof, however, only \$1,000 had been subscribed, and \$500 paid; that at the time this pretended contract was entered into, and this bond given to secure its faithful performance, this foreign corporation had not complied with the statute requirements of this state prerequisite to its admission into the state with authority to do business here (that is, had not complied with the requirements of sections 1025, 1026, 1315-1318, Rev. St. 1899), but that, after the contract and bond had been executed, the corporation, preparatory to entering upon its performance, did file its statement, and receive from the secretary of state a license, as required by section 1025. For its failure to comply with the terms of the statute before executing the contract, the plaintiff, in his petition, draws the conclusion that the alleged contract and bond are void, and upon that ground he seeks to have their performance or enforcement enjoined. The petition is quite lengthy, but the force of it is contained in what is above stated. The city and the board of public improvements filed a demurrer, as did also the Kern Company. The grounds of the demurrers were that the plaintiff had not legal capacity to maintain the suit, and that the petition did not state facts sufficient to constitute a cause of action. The demurrers were sustained, and, plaintiff declining to plead further, final judgment for defend-

¶ 1. See Corporations, vol. 12, Cent. Dig. § 2528.

ants was entered, whereupon plaintiff brings the cause here for review.

Section 1024, Rev. St. 1890, declares: "Every corporation for pecuniary profit formed in any other state, territory or county, before it shall be authorized or permitted to transact business in this state, or to continue business therein if already established, shall have and maintain a public office or place in this state for the transaction of its business where legal service may be obtained upon it, and where proper books shall be kept to enable such corporation to comply with the constitutional and statutory provisions governing such corporation," etc. Section 1025 requires every such corporation to file in the office of the Secretary of State a copy of its charter, and a sworn statement by its chief man in this state, showing the proportion of its capital stock employed in its business here, and to pay into the State Treasury, on that proportion of its stock, incorporating taxes and fees equal to those required of domestic corporations upon their organization, whereupon the Secretary of State is required to give the corporation a certificate that it has complied with the laws of this state, and is authorized to do business here. Section 1026 imposes as a penalty for failure to comply with those requirements a fine of \$1,000, and disability to maintain a suit in any court of this state. Section 1315 forbids any such corporation to do business in this state "without first procuring a license therefor, which license shall be granted by the Secretary of State." Section 1316 forbids the Secretary of State to issue such license to any corporation "if (upon inspection of its charter) it shall appear that such company or corporation could not organize under the laws of this state." When the Kern Company entered into the contract in question, it did not have an office or place of business in this state, as required by section 1024, and it had not taken out a license to do business here, as provided in section 1025; and, for the failure of the corporation to comply with those conditions, the plaintiff says this contract is void. That is the main proposition upon which the plaintiff's case is bottomed. The effect of the demurrers is to admit the facts pleaded, but not the conclusions drawn by the pleader. It does not appear on the face of the petition where the contract was entered into—whether the Kern Company sent an agent to St. Louis, and entered into the contract there, or the city sent an agent to New York, and entered into the contract there. The contract filed as an exhibit seems to indicate that it was executed, on the part of the Kern Company, at least, in New York. If that is the case, then, even taking plaintiff's interpretation of the term, the corporation did not "transact that business" in this state; and, if it was a lawful contract where it was made, the statute of Missouri would have no influence upon it, until the party

should come to this state to perform it. Then the corporation would be in the act of transacting or attempting to transact business here, and, before it could lawfully do so, it would have to comply with our laws. But we do not consider it material whether the contract was made in St. Louis or in New York. We refer to fact merely to illustrate the difference, in relation to the term "transact business," between entering into a contract to do an act and the performance of the act. The one may be lawful per se, and the other lawful only on condition. Of course, a contract cannot be lawfully made to do an unlawful act, but a contract may be lawfully made to do an act which the contracting party can lawfully do only when he shall have complied with conditions or satisfied other demands, and his unconditional contract to do it carries with it the obligation to comply with those conditions or satisfy those demands. He assumes the risk of being able to do so. Therefore, when the Kern Company entered into this contract, although it could not lawfully perform it without conforming to the conditions of the Missouri statutes, yet the contract carried by implication the obligation on the part of the company that it would conform to those conditions; and a neglect to do so, resulting in a failure to perform, would have been a breach of the contract. Now, when our statutes say that a foreign corporation shall not "transact business" here until it establishes a public office in this state, where books are kept and process may be served, and until it pays its quasi incorporation tax and takes out its license, do they mean that the corporation must do all those acts before it can lawfully enter into a contract to do any business here? Does our law mean that, when advertisements inviting bids on public or private works in this state are read by foreign corporations, they are to understand that they have not the right to bid and have their bids accepted unless they shall have already complied with the terms of our statute to enable them to transact business here? No; that is not the meaning of our statutes. No such policy of exclusion has ever been shown in any of our legislative acts. Foreign corporations have always been invited and encouraged to come. The obtaining of a desirable contract is sometimes an inducement for a foreign corporation to come into the state. It is not bound to establish itself here before it can obtain such a contract. Entering into a contract like the one in question undoubtedly is "transacting business," within the unlimited meaning of the term, but that is not the sense in which the term is used in the statute just quoted. As there used, it means carrying on the work for which the corporation was organized, and, in its application to the facts of this case, it means performing the work called for by the contract. The Kern Company, under the conditions stated in the petition,

had the right to enter into the contract in question, and we hold it to be a legal and valid contract. These views are sustained by the following authorities cited in the brief of the counsel for the respondents: 6 Thompson on Corp. § 7936; Cone Export & Commission Co. v. Poole (S. C.) 19 S. E. 203, 24 L. R. A., note to page 295 et seq.; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137; Coal & M. Co. v. Ladd, 160 Mo. 435, 61 S. W. 191.

There are other questions discussed in the briefs, but we deem it unnecessary to consider them, because the point above decided is the end of the case.

The judgment is affirmed. All concur.

COWAN v. MUELLER et al.

(Supreme Court of Missouri, Division No. 1.
June 20, 1903.)

MORTGAGES — FORECLOSURE — LIMITATIONS — CLAIMS AGAINST MORTGAGOR'S ESTATE — FAILURE TO PRESENT — STATUTES — CONSTRUCTION — RENTS AND PROFITS.

1. Rev. St. 1899, § 4276, provides that no suit to foreclose shall be maintained after the debt has been barred by limitations. *Held*, that the limitations referred to were the general statute of limitations, not including section 185, providing that all demands against a decedent's estate not exhibited to the administratrix within two years shall be barred, and hence the failure of a mortgagee to present his claim to the deceased mortgagor's administratrix within such time did not bar his right to foreclose the mortgage in an action brought less than two years after maturity.

2. Where defendants in possession of land had no notice of plaintiff's title before suit was begun to recover the same, they were only chargeable with rents and profits from the date of filing the suit till the date of the judgment.

Appeal from St. Louis Circuit Court; D. D. Fisher, Judge.

Ejectment by Pamela H. Cowan against Albert L. V. Mueller and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

S. T. G. Smith, for appellants. Wm. F. Woerner, for respondent.

VALLIANT, J. This is an action of ejectment. Plaintiff claims under a deed of trust executed by A. D. Wilson, the common source of title, to secure a note for \$5,000, dated February 12, 1894, payable in five years. Wilson died in 1896, and administration was duly had on his estate. The note secured by the deed of trust was never exhibited to the administratrix, nor proven up against the estate, although the notice to creditors required by the statute (section 86, Rev. St. 1889; *Id.*, Rev. St. 1899) was duly given, and the two-years limitation prescribed by section 185 for exhibiting demands against the estate had expired. May 26, 1900, when the note was a little more than a year past due, the deed of

trust was foreclosed, and the plaintiff became the purchaser at the sale, and received the trustee's deed, which was duly recorded. That is the plaintiff's title. December 12, 1899, the administrator of Wilson's estate, by order of the probate court, sold the land to the defendants, made them a deed thereto, and they went into possession under that deed July 1, 1900. That is the defendants' title. It was agreed that the monthly rental value of the property was \$6. This suit was begun August 2, 1900. The judgment was for the plaintiff for possession of the premises, \$47 damages, and \$6 monthly rental from date of judgment, February 25, 1901. Defendants appeal.

There is no dispute as to the facts, the only question in the case being one of law. Appellants contend that, because the debt secured by the deed of trust was not exhibited to the administratrix within the two years prescribed by the statute, nor proven up against the estate, it was barred by the statute of limitations, within the meaning of section 4276, Rev. St. 1899, and the right to foreclose the deed of trust was, therefore, barred also, and in consequence the sale by the trustee was invalid, and of no effect. Until the passage of the act of 1891, presently quoted, it was the law of this state that the right to foreclose a mortgage or deed of trust was not barred merely because the debt itself was barred by the statute of limitations. *Cape Girardeau v. Harbison*, 58 Mo. 90; *Lewis v. Schwenn*, 93 Mo. 26, 2 S. W. 391, 3 Am. St. Rep. 511; *Booker v. Armstrong*, 93 Mo. 49, 4 S. W. 727; *Combs v. Goldsworthy*, 109 Mo. 151, 18 S. W. 1130; *Eyerman v. Piron*, 151 Mo. 107, 52 S. W. 229. The law on that subject was changed by an act of the General Assembly entitled "An act to limit the time within which suits may be brought to foreclose mortgages and deeds of trust," approved February 18, 1891, the first section of which is as follows: "No suit, action or proceeding under power of sale to foreclose any mortgage or deed of trust executed hereafter to secure any obligation to pay money or property, shall be had or maintained after such obligation has been barred by the statute of limitations of this state." That is now section 4276, Rev. St. 1899. As the note secured by the deed of trust in question was not much more than one year past due when the deed of trust was foreclosed, it of course was not barred by the general statute limiting the periods within which personal actions might be brought. But the mortgagor, who was the maker of the note, died before the note was due, and the creditor never exhibited the demand to the administratrix, nor proved it up as a claim against the estate in the probate court, and the contention of appellants is that the debt became barred by the terms of section 185 of the law of administration, which (following section 184, which requires that all demands, before being allowed against the estate of a decedent, shall be exhibited to the

administrator) is in these words: "Section 185. All demands not thus exhibited in two years shall be forever barred, saving to infants," etc. The question for decision is, is the debt barred within the meaning of the act of 1891 (section 4276, Rev. St. 1899), above quoted, when it becomes barred within the meaning of section 185 of the law of administration? This is the first case in which this question has appeared in this court, and, so far as our examination has gone, we have not found any discussion of it in the books. The learned counsel on both sides have given us in their briefs the benefit of their researches, but none of the authorities cited quite reach the point. One of the important purposes of our law of administration is to wind up and distribute the estate as soon as possible, consistent with a due observance of the rights of creditors and distributees. For that reason the period of two years was fixed as the limit in which persons not under disability, having claims susceptible of being established, were required to present their claims under penalty of being thereafter excluded from all participation in the assets of the estate. So absolute is the bar of such a one from participation in the assets of the estate that even when all the creditors who have presented and established their claims in the probate court have been paid in full, and a surplus remains in the hands of the administrator for distribution to the next of kin, not only will the probate court not entertain his claim, but no other court can give him such relief. It was so held in *Beekman v. Richardson*, 150 Mo. 430, 51 S. W. 689. To one who neglects to present his claim as therein required, that statute is a complete bar to his satisfaction out of the assets of the estate. But is that a bar to the debt by the statute of limitations within the meaning of that term in section 4276? When the statute of limitations bars a debt in the usual meaning of that term—in the technical meaning in which it is usually used—the effect is to preclude the creditor from recovering a personal judgment against the debtor. When we say that a debt is barred by the statute of limitations, we do not mean that it has been satisfied or otherwise extinguished, but we mean that the man that owes the debt can avoid a personal judgment by pleading the bar of the statute. Before the statute of limitations has run its course, the holder of a mortgage note has two remedies—he may have a judgment against the debtor, and a decree for the sale of the property; the one being a proceeding in personam, the other partaking of the character of a proceeding in rem. But, as we have seen, even when the right to proceed against the person had expired, the law before the act of 1891 recognized the obligation as alive sufficiently to enable the holder to have it enforced against the thing. The act of 1891 was intended to change that condition, and it in effect declared that, when the creditor could no longer

pursue the debtor in person, the mortgagee could no longer pursue the property. But when the debtor dies that is the end of all proceedings in personam for the satisfaction of the debt. The proceedings in the probate court to administer the estate are proceedings in rem. Even where an administrator is sued on a debt of the intestate in the circuit court, the judgment is not against him in person, but against the estate. At common law the execution called for satisfaction *de bonis testatoris*. Under our system there is no execution, but the judgment is certified to the probate court to be satisfied out of the assets of the estate *pro rata* (if there is not sufficient to pay all) with other creditors who have proven their claims in that court. Therefore, when the mortgage debtor dies, the mortgagee's remedy of personal judgment is gone, but for it is substituted another remedy, which is a proceeding in rem. The mortgagee then still has two remedies—one in the probate court against the whole estate, the other in the circuit court against the mortgaged property. But when one proceeding in rem is barred, does it bar the other? The act of 1891 says that when the debt is barred the mortgage is barred. That means when the mortgagee can no longer pursue the debtor, he can no longer pursue the thing mortgaged; that is, when the debt is barred under the general statute of limitations, the mortgage is barred also.

The question is asked in the brief of the learned counsel for appellants, if the special statute of limitation in the administration law does not bar a debt within the meaning of the act of 1891, when is the debt of the intestate barred so as to bar the right to foreclose? The act of 1891 makes no express provision for such case. It refers only to the general statute of limitations, and it means that, when the action on the debt under that general statute is barred, the right to foreclose the mortgage is barred, and that is all that it means. But the argument is that the general statute of limitations has no application to the establishing of a claim or debt against the estate of an intestate, and therefore, if the act of 1891 refers only to that statute, it has no reference to a mortgage debt after the death of the debtor. Whilst the act of 1891 contains no express provision for such case, it covers it by analogy. When the debt would be barred by the general statute if the debtor were alive, the mortgage would be barred. The judgment of the circuit court is in conformity to this interpretation of the statute, and is correct.

There is a mistake, however, to the amount of \$6.40 in the assessment of plaintiff's damages. There is nothing in the record to show that defendants had notice of the plaintiff's title before the suit was begun. They are, therefore, chargeable with rents and profits in the way of damages from the date of filing the suit, which was August 2, 1900, to the date of the judgment, February 25, 1901, at

\$6 a month, according to the agreed statement, which would amount to \$40.60.

The judgment of the circuit court is therefore reversed, and judgment entered here for the plaintiff for possession of the property sued for, \$40.60 damages, and \$6 monthly rental. All concur.

FIENE et al. v. KIRCHOFF et al.*

(Supreme Court of Missouri, Division No. 1.
June 20, 1903.)

JUDGMENTS—RES JUDICATA—PARTIES—INFANTS—DEFENSE BY GUARDIAN—ESTOPPEL.

1. Where, in an action to foreclose a mortgage given by plaintiffs' ancestor and defendant, to which plaintiffs and defendant were parties, it was determined that the deed under which plaintiffs' ancestor claimed title vested the fee of the land conveyed in her, and a judgment, which was unappealed from, was rendered, foreclosing the mortgage as to the entire estate, such judgment was res judicata of such question.

2. That plaintiffs were minors, and defended such prior action by a guardian ad litem, after being personally served with process, did not affect the conclusiveness of such judgment as to them.

3. Where plaintiffs alleged that a prior action, in which a deed to their ancestor under which they claimed title was construed, was brought about by the misconduct of defendant in requiring such ancestor to give a mortgage to secure defendant's debt, and afterwards fraudulently contriving to have the holder of the mortgage bring such prior suit to foreclose the same, in order that defendant might purchase the land, and thereby cut out plaintiffs' rights in the property, plaintiffs were estopped to plead that plaintiffs and defendant were not adversary parties in such prior suit, and that therefore the judgment therein was not res judicata as to them.

Appeal from Circuit Court, Lafayette County; Samuel Davis, Judge.

Action by Amelia Fiene and others against Fritz Kirchoff and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Alexander Graves and John Welborn, for appellants. John E. Burden, for respondents.

MARSHALL, J. This is a bill in equity to divest title out of the defendant, and vest it in the plaintiffs, as to five-sixths of a certain tract of 120 acres of land in Lafayette county. The plaintiffs are the children of the defendant Fritz Kirchoff and his deceased wife, Mary. The case made is this:

On December 27, 1867, Mary Patrick conveyed the land to Fritz Kirchoff for a consideration of \$3,000. Kirchoff paid \$1,100 in cash, and executed a mortgage on the land to Mrs. Patrick to secure the balance of the purchase money, which was evidenced by a note for \$1,000 payable at one year, and a note for \$900 payable at three years. The note for \$1,000 was paid. Fritz Kirchoff

alone signed the mortgage, from which it would seem that he was unmarried at that time. On September 5, 1869, Fritz Kirchoff and his wife, Mary, conveyed the land to his father, Henry Kirchoff, for an alleged consideration of \$1,500, but in fact the conveyance was voluntary. By the same deed they also conveyed "the goods, household furniture, farming utensils, beasts of all kinds in my possession and belonging to me the said Fritz Kirchoff." On August 6, 1872, Henry Kirchoff and his wife conveyed the land to Mary Kirchoff by the following deed:

"Know all men by these presents that we Henry Kirchoff, and Charlotte Kirchoff, wife of the said Henry Kirchoff of the county of Lafayette, in the state of Missouri, have this day for and in consideration of the sum of fifteen hundred dollars, to the said Henry Kirchoff in hand paid by Mary Kirchoff, of the county of Lafayette, in the state of Missouri, granted, bargained and sold, and by these presents do grant, bargain and sell unto the said Mary Kirchoff the following described tracts or parcels of land situate in the county of Lafayette in the state of Missouri, that is to say: the southwest quarter of the southwest quarter of section ten (10) also the northeast quarter of section sixteen (16), also the northwest quarter of the northwest quarter of section fifteen (15) all in township number forty-eight (48), and range number twenty-four (24) containing 120 acres in all more or less.

"Conditioned, however, that the above-mentioned tracts of land shall be the property of Mary Kirchoff for the use of herself and the children of Fritz Kirchoff and herself, and the said Mary Kirchoff shall hereby have no authority to sell the same after the death of her husband Fritz Kirchoff.

"To have and to hold the premises hereby conveyed with all the rights, privileges and appurtenances thereto belonging or in any wise appertaining unto the said Mary Kirchoff, her heirs and assigns, forever.

"We the said Henry Kirchoff and Charlotte Kirchoff hereby covenanting to and with the said Mary Kirchoff her heirs and assigns, for herself her heirs, executors and administrators, to warrant and defend the title to the premises hereby conveyed against the claim of every person whatsoever.

"In witness whereof, we have hereunto subscribed our names, and affixed our seals this 6th day of August A. D. 1872.

his
"Henry X Kirchoff. [Seal.]
mark

her
"Charlotte X Kirchoff. [Seal.]
mark

Thus the matter stood until April 24, 1875, when Fritz Kirchoff and Mary, his wife, borrowed \$1,000 from one Johnson for one year, and gave a mortgage on the land to secure the same. With this money they paid off the balance due on the mortgage to Mrs. Patrick, and she released her mortgage on the

*Rehearing denied July 2, 1903.

margin of the record on April 26, 1875. On April 21, 1877, Fritz and Mary Kirchoff borrowed \$1,000 from G. F. Brockmann, guardian of Carl Brockhoff, payable one day after date, and secured it by giving a mortgage on the land. With this money they paid off the Johnson mortgage, and it was released on the records. Brockmann assigned the note to Mrs. Jeanette J. Tate. Mary Kirchoff died. Fritz quit paying the interest on the loan, and Mrs. Tate instituted a suit to foreclose the mortgage. Fritz and the plaintiffs were made parties defendant, and were all properly served with summons. A guardian ad litem was appointed for the children, who were all minors. The petition charged that the money secured by the mortgage was borrowed by Mary Kirchoff for her own use and that of her children, and to pay off an incumbrance securing a part of the purchase price of the land. The defendants demurred generally. Upon the argument of the demurrer, it was agreed between counsel, in writing, that in order to raise "a pure question of law on the construction of the deeds and notes mentioned and referred to in plaintiffs' petition, and the transactions based thereon," the plaintiffs withdrew the allegation of the petition that the money secured by the mortgage was borrowed partly to pay off the balance due of the purchase money, pending the decision on the demurrer, with leave to reinsert that allegation after the demurrer was passed upon. The demurrer was then argued. Mrs. Tate contended that the whole fee was vested in Mary Kirchoff, and that the mortgage covered the whole fee, and the defendants contended that Mary Kirchoff had only an undivided one-sixth interest in the land, and that the remaining five-sixths were vested in her children, the plaintiffs in the case at bar, and therefore Mary could only mortgage her one-sixth interest. The court overruled the demurrer. The defendants answered over; the answers raising the same question as the demurrer, with a question of fact as to the validity of the assignment of the note by Brockmann to Mrs. Tate. The case was then tried, and resulted on December 16, 1882, in a decree of foreclosure. Among the other findings by the court were, first, that Mary Kirchoff made the mortgage to Brockmann "for the purpose of borrowing money for the use of herself and the children of herself and said Fritz Kirchoff, and for paying off an incumbrance upon the land created thereon by said Mary and Fritz Kirchoff to pay the balance of the purchase money remaining due and unpaid"; and, second, "the court further finds and declares that the fee-simple title in and to said lands aforesaid by reason of the premises aforesaid is bound for and charged with the payment of the balance of said mortgage debt and interest, and that such charge and lien on said lands in equity passed to and vested in plaintiff Jeanette J. Tate by virtue of said assignment

of said note to her as aforesaid." And the court decreed "that the equity of redemption of defendants, and each of them, in and to the lands, be, and is hereby, foreclosed and forever barred," and that the land, or so much as might be necessary, be sold to satisfy the balance found to be due upon the mortgage. There was no appeal taken from this decree. Thereafter, on April 2, 1883, the sheriff sold the land under this foreclosure decree, and Fritz Kirchoff became the purchaser. He afterwards mortgaged the land to secure a loan of \$2,000 from the New England Loan & Trust Company.

Thus the matter rested until this suit was brought on July 16, 1895. The petition sets out nearly all of the facts hereinbefore stated, and asks for an accounting of rents and profits by Fritz Kirchoff; that the sheriff's deed to Fritz be held void and set aside; that the mortgage of Fritz to the New England Loan & Trust Company be decreed to be of no effect, so far as five-sixths of the land is concerned, and that the plaintiffs be decreed to be the owners in fee of an undivided five-sixth interest in the land; and that such interest be decreed to be free from all liens.

The answers set up various defenses, but, in the view hereinafter taken of this case, it is only necessary to specify the defense that the plaintiffs' right, title, and interest in the land was adjudicated in the case of Tate against these plaintiffs and their father, Fritz, and it was there held that the Brockmann mortgage made by Mary Kirchoff covered the fee-simple title to the whole land.

The court entered a judgment for the defendants in this case, and the plaintiffs appealed.

The decisive question in this case is whether the rights here set up by the plaintiffs were adjudicated against them in the case of Tate against these plaintiffs and their father, Fritz. These plaintiffs took the same position in that case that they take here, to wit, that the deed from Henry Kirchoff to Mary Kirchoff, of August 6, 1872, vested only an undivided one-sixth interest in the land in Mary Kirchoff, and that the remaining five-sixths interest was vested in these plaintiffs, and therefore that only Mary's one-sixth passed by the mortgage to Brockmann. And Mrs. Tate denied that such was the meaning or legal effect of the deed, and claimed that under that deed Mary acquired the fee-simple title to the land, and therefore the mortgage to Brockmann, under which she held, covered the whole land. The court construed the deed, first on demurrer, and then upon issue joined, and held that Mary acquired the fee-simple title by the deed to her from her father, Henry, and that her mortgage to Brockmann carried the fee-simple title, and that the plaintiffs, as her heirs at law, succeeded at her death to her equity of redemption in the land, and then foreclosed the mortgage and barred the equity of redemption of these plaintiffs. Thus every conten-

tion that is now made as to the proper construction of the deed of Henry Kirchoff to Mary Kirchoff, and every contention that could have been made with respect to that deed, were made by these plaintiffs in the Tate case. And the court decided all those contentions against these plaintiffs, who were all parties in that case, and no appeal was taken from that judgment. The deed, therefore, has undergone judicial interpretation in a case where the validity, meaning, force, and effect of the deed were necessarily involved, and these plaintiffs were parties to that case. The matter is therefore *res adjudicata*, and it is not competent for any court, at the instance of these plaintiffs or their privies, to consider those matters again. In *Hope v. Blair*, 105 Mo., loc. cit. 93, 16 S. W. 595, 24 Am. St. Rep. 366, Macfarlane, J., aptly stated the law as follows: "When the court has cognizance of the controversy, as it appears from the pleadings, and has the parties before it, then the judgment or order which is authorized by the pleadings, however erroneous, irregular, or informal it may be, is valid until set aside or reversed upon appeal or writ of error. This doctrine is founded upon reason and the 'soundest principles of public policy.' 'It is one,' says the court of Virginia, 'which has been adopted in the interest of the peace of society and the permanent security of titles. If, after the rendition of a judgment by a court of competent jurisdiction, and after the period has elapsed when it becomes irreversible for error, another court may in another suit inquire into the irregularities or errors in such judgment, there would be no end to litigation, and no fixed, established rights.'" See, also, Wells on *Res Adjudicata* & *Stare Decisis*, § 2, p. 2; *Fithlam v. Monks*, 43 Mo., loc. cit. 520; *Tapley v. McPike*, 50 Mo., loc. cit. 588. Am. & Eng. Enc. Law (1st Ed.) vol. 21, p. 201, says: "All those matters are considered within the issue which must necessarily have been either expressly or impliedly decided in order to have arrived at any judgment in the case. Consequently it is not essential that every matter must be formally and directly contested, if it be so connected with the main issue that it could not be ignored or lost sight of."

The fact that these plaintiffs were minors, and defended by a guardian ad litem after being personally served with process, is immaterial. Freeman on Judgments (4th Ed.) § 151, says: "The general tendency is to regard the plea of infancy as a personal plea, which may be waived. And whether such plea is interposed or not, a judgment or decree against an infant properly before the court is as obligatory upon him as though he were an adult, except in cases where he is allowed time, after coming of age, to show cause against the judgment or decree. If an absolute decree is made against an infant, he is as much bound as a person of full age, and will not be permitted to dispute

the decree, except upon the same grounds which would be available if he were an adult." And in *Shields v. Powers*, 29 Mo. 315, Scott, J., held that a judgment against a minor properly before the court was binding upon him, and that he was not entitled to a day in court after becoming of age to show cause against the decree. In *Smith v. Perkins*, 124 Mo., loc. cit. 54, 27 S. W. 574, the point was made that the plaintiff was an infant when the judgment was rendered against him, and therefore he was not bound by it; but this court, per Brace, J., said: "The circuit court having jurisdiction of the subject-matter of the suit, and having thus acquired jurisdiction over the defendant, and its proceedings in the adjudication of the issues being in literal compliance with all the requirements of the statute (article 2, c. 33, Rev. St. 1889) providing for suits by and against infants, the judgment of said court was binding and conclusive upon the plaintiff, although he was an infant; and the deed read in evidence, made in pursuance of a sale under the execution thereon, all in due and regular form, transferred all his interest in the premises to the purchaser, under whom defendant claims, and the finding and judgment should have been for the defendant."

The plaintiffs contend, however, that they and Fritz were not adversary parties in the Tate suit, and therefore the judgment in that case is not *res adjudicata* of the same questions and of the deed in this case. "The doctrine of *res adjudicata* applies so long as the issue is between the same parties; and whether they continue, respectively, as plaintiffs and defendants, or reverse their positions is not material. They must, however, have been and continue to be adversary parties. But when issues between various defendants are actually decided by the court, they become *res judicata*, the same as if they arose between opposing parties." 21 Am. & Eng. Enc. Law (1st Ed.) p. 134.

The cases of *Miller v. Gillespie*, 59 Mo. 220, *McMahan v. Geiger*, 73 Mo. 148, 39 Am. Rep. 489, and *Bank v. Bartle*, 114 Mo. 276, 21 S. W. 816, relied on by the plaintiffs, illustrate the rule above laid down, but do not apply to this case. They were cases where a third party sued both of the parties in the case at bar, claiming on a joint demand against them all, and it was properly held that the judgment in such a case could not settle the liability or extent of liability of the several defendants inter sese. But the case of *Tate* against these parties is not at all like those cases, for, although they were all parties defendant in that case, no personal judgment was asked against any one, but the proceeding was in rem to foreclose a mortgage, and the question was what interest was conveyed by the mortgage. The plaintiffs in this case charge that the Tate case was brought about by the misconduct of the defendant in this case (Fritz) in mak-

ing his wife give a mortgage to secure his debt, and afterwards in not paying even the interest on his debt, and that he failed to do so because he was fraudulently contriving to have Mrs. Tate foreclose the mortgage, so he could buy the land at the sale, and thereby cut out the rights of his children in the land. Under such a plea, it scarcely lies in the mouth of the plaintiffs to say that they and Fritz were not adversary parties in the Tate case and at all times. Under these conditions, no court has a right to again consider or adjudge the meaning of the deed from Henry Kirchoff to Mary Kirchoff at the instance of the plaintiffs herein, nor to say that Mary acquired anything less than the fee-simple title, for all question as to that matter and as to the plaintiff's rights under that deed were foreclosed by the judgment in that case.

The judgment of the circuit court in this case was therefore for the right party, and it is affirmed. All concur.

MURRAY v. ST. LOUIS TRANSIT CO.

(Supreme Court of Missouri, Division No. 1.
June 20, 1903.)

STREET RAILROADS — INJURIES — STREET CROSSINGS—SOUNDING GONG—NEGLIGENCE—EVIDENCE—INSTRUCTIONS—REFUSAL.

1. Where, in an action for injuries in a collision with a street car, plaintiff alleged defendant's negligence in failing to sound the gong, and witnesses who were in a position to have heard the gong, if it had been sounded, testified that they did not hear it, such evidence justified a finding that the bell was not sounded.

2. Where, in an action for injuries sustained in a collision with a street car at a crossing, plaintiff testified that he saw the car coming toward the crossing, half a block away, the failure of defendant's motorman to sound the gong in approaching the crossing was not actionable negligence as to plaintiff.

3. Where, in an action for injuries in a collision with a street car, defendant's evidence justified the inference that plaintiff attempted to cross the track without looking or listening, and, if he had looked after he had passed in front of a furniture van in front of the car, he would have seen the car in time to have stopped before it reached him, it was error to refuse to charge that it was plaintiff's duty, before going on the track, to look and listen, and if by so doing he could have avoided the accident, by ordinary care, but neglected to do so, he could not recover.

4. The fact that the court, in an action for injuries, instructed that it was plaintiff's duty to use ordinary care for his own safety in attempting to cross a street car track, and then defined the term "ordinary care," did not justify the refusal of a requested instruction that if plaintiff failed to look or listen before going on the track, when, if he had done so, he could have avoided injury, he was guilty of contributory negligence.

Appeal from St. Louis Circuit Court; Seldem P. Spencer, Judge.

Action by Michael Murray against the St. Louis Transit Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Boyle, Priest & Lehmann and Lou O. Hocker and Walter H. Saunders, for appellant. Geo. E. Smith, for respondent.

VALLIANT, J. Plaintiff recovered a judgment for \$500 damages for personal injuries received by him in a collision with one of defendant's street cars, caused, as he alleges, by the negligence of defendant's servants. Defendant appeals from the judgment, and as the appeal was taken before this court had passed on the question of the validity of the constitutional amendment authorizing nine jurors in a civil case to return a verdict, and as that question was raised in the trial court in this case, the appeal was brought to this court. Since the appeal in this case was taken, however, that constitutional question has been decided by this court, and it is no longer in doubt. *Gabbert v. C., R. I. & P. R. R.*, 70 S. W. 891.

The petition charges the following acts of negligence: That the servants in charge of the car were inexperienced and unskillful. They were running the car at an unlawful and reckless speed. The motorman in charge saw the plaintiff crossing the track in ample time to have averted the accident, but neglected to do so. The motorman neglected to ring his gong. The answer was a general denial, and a plea that plaintiff was guilty of negligence contributing to the accident, in that he drove on defendant's track without looking or listening, and in such close proximity to the moving car as to prevent those in charge of it from stopping in time to prevent the collision.

The plaintiff's evidence tended to prove as follows: Montgomery street runs east and west, crossing Ninth street at right angles. In the afternoon of August 17, 1900, plaintiff, a man 59 years of age, was driving a one-horse wagon, going west, on Montgomery street. It was a covered wagon, with curtains at the sides, but the curtains were rolled up, and the driver could see to the front and on both sides. Defendant owns a single-track street railroad on Ninth street, the cars over which pass only in one direction—north. As the plaintiff, driving, approached defendant's track, when his horse's head was 6 or 7 feet east of the east rail, he looked to the south, and saw a car approaching about half a block distant, and, judging that he would have sufficient time to cross, drove on slowly; but, before he got across, the car struck the wagon, overturned it, and threw him out, inflicting injuries. Neither the plaintiff nor any of his witnesses heard a gong ring. The defendant's evidence tended to prove as follows: When the car going north had passed about 50 feet north of Warren street, which is the next street south of Montgomery, its movement was impeded by a large furniture wagon on the track, going slowly in the same direction. The motorman rang his bell to signal the driver of the furniture wagon to get off the track, and when that wagon was

about 20 feet from the south line of Montgomery street it moved off the track to the right. The car was then about 15 feet behind it, or about 35 feet from the south line of Montgomery street. The motorman did not see the plaintiff's wagon until the furniture wagon had cleared the track. Then the plaintiff's wagon was within 10 feet of the track. As soon as the motorman saw the plaintiff's wagon, he applied his brake, reversed his motor, and tried to stop the car, but it was too late. The car struck the wagon and turned it over, but did not injure it, and stopped in the intersection of the two streets, three or four feet south of the north line of Montgomery street.

The court, of its own motion, gave the jury the following instruction:

"If, from the evidence, you find and believe that on August 17, 1900, the plaintiff was thrown out of the wagon which he was driving, and was injured, by reason of one of defendant's cars striking said wagon at a public crossing in this city, and that, the plaintiff in approaching the track, and thereafter, exercised reasonable care for his own protection, and that the defendant's servants in charge of said car either ran said car at a rate of speed which was negligent on their part, as hereinafter explained, or that they negligently failed to give any warning of the approach of the car, or that they negligently failed to stop the car in time to avoid the accident after they saw the plaintiff crossing the track, and that one or more of such negligent acts of defendant's servants (if you believe they were negligent) was the direct and proximate cause of plaintiff's injury, then your verdict should be for the plaintiff.

"The burden of proving that the defendant was guilty of any one or more of the acts of negligence hereinabove referred to, and that such negligence was the direct and proximate cause of the plaintiff's injury, is upon the plaintiff; that is, he must establish the truth thereof by a preponderance or greater weight of the evidence.

"Negligence is the absence of ordinary care. Ordinary care is that degree of care which a person of ordinary prudence would, under the same or similar circumstances, exercise. Applying these definitions to this case, the defendant was required to use such ordinary care in regulating the rate of speed of its car, in giving warning of the approach of the car, and in stopping the car after the plaintiff was seen by them to be in peril. If, on the other hand, you believe that the plaintiff failed to exercise ordinary care for his own protection, and that such failure on his part was either the direct and proximate cause of his injury, or that without such failure to exercise ordinary care on his part the injury to himself would not have occurred, even though defendant's servants were negligent, as herein explained, then your verdict should be for the defendant.

"The burden of proving any such negligence on the part of the plaintiff, and that such negligence contributed to the plaintiff's injury, as hereinbefore explained, is upon the defendant; that is, they must establish the truth thereof by a preponderance or greater weight of the evidence.

"If your verdict is for the plaintiff, you will assess his damages at such a sum as, from the evidence, will fairly and reasonably compensate him for any injury to head, legs, or body, pain or suffering, loss of time, and expense, he has suffered or incurred by reason of his injury; and if you believe, from the evidence, he will be wholly or partially disabled from earning a livelihood by reason of the injury, you may consider that fact in determining the amount of his damage. If your verdict is for the defendant, you will simply so state in your verdict."

That was the only instruction given.

Defendant asked several instructions, all of which were refused—among them, the following, the refusal of which defendant assigns as error:

"(2) You are further instructed that it was the duty of plaintiff, before attempting to cross defendant's track, to both look and listen for an approaching car; and if you find that, by looking or listening, the plaintiff would have seen or heard defendant's car in time to have avoided collision with it, then the plaintiff cannot recover, and your verdict must be for defendant.

"(3) The court instructs the jury that, even though they should find that the defendant had been guilty of some one or more of the acts of negligence stated in a former instruction, nevertheless plaintiff is not entitled to recover, if they also find from the evidence that by looking or listening he might have seen or heard the approach of defendant's car in time, by the exercise of ordinary care on his part, to have avoided collision with it."

Exceptions to the giving and refusing of the instructions were duly preserved.

1. Appellant's first point is that the court erred in submitting to the jury the question of defendant's negligence in failing to sound its gong, because, appellant says, there was no evidence to sustain that allegation. The averment in the petition that the gong was not sounded is the statement of a negative, and the proof to sustain it must necessarily be of the same character. Ordinarily the only means of proving that a gong was not sounded is by witnesses who were in position to have heard it if it had been sounded, and who testify that they did not hear it. The conclusion from such evidence is only inferential. Such testimony, when given by intelligent and honest witnesses, is accorded more or less probative effect, according to the attention the witnesses were paying. But the testimony of even a casual bystander, whose attention was not especially drawn to the subject, but who nevertheless was

near enough to have heard, yet did not hear, is some evidence that the gong did not sound. We cannot agree with appellant, therefore, that there was no evidence of that kind in the case. The neglect, however, of the motorman to sound the gong, if he did neglect to sound it, cannot have any influence in this case, unless the plaintiff abandons his own evidence, and seeks to recover on the conditions shown in the defendant's testimony. The plaintiff testified, and repeated the statement several times, that he distinctly saw the car coming towards the crossing. The only purpose in sounding the gong is to attract attention and give warning that the car is approaching. But if one sees the car coming, what advantage will the sounding of the gong be to him? Under the conditions however, which the defendant's evidence tended to prove, it was the duty of the motorman to sound the gong, because under that evidence the fact appears that the furniture wagon shut off the plaintiff's view, and he could not see the car until that wagon had moved off the track to the right, which was the same side the plaintiff was on, and plaintiff had passed in front of it and got within a few feet of the track. If, therefore, the plaintiff had not seen the car a half block away, as he says he did, and did not see it until he had passed into dangerous proximity to it, in that condition, if the gong had been sounded, it might have given him warning which he might have heeded. But the plaintiff was not entitled to go to the jury on that theory, because it impeaches his own testimony, and is contrary to the theory on which he tried his case. The court erred in submitting the issue to the jury.

2. The two instructions refused, of the refusal of which defendant now complains, were to the effect that it was the duty of the plaintiff, before going on the track, to look and listen for the approaching car, and if, by looking or listening, he would have seen or heard the car in time to have avoided the accident by the exercise of ordinary care, but neglected to do so, then, notwithstanding the defendant might also have been guilty of negligence contributing to the accident, the plaintiff could not recover. Those instructions correctly stated the law bearing on those points in the case, under the circumstances which the defendant's evidence tended to prove, and the defendant was entitled to them. If the defendant's evidence is to be believed, the inference may be fairly drawn from it that the plaintiff attempted to cross the railroad track without either looking or listening, and that, if he had looked after he had passed in front of the furniture wagon, he would have seen the car in time to have stopped before it reached him, and that, if he had listened, even while the furniture wagon obstructed his view, he would have heard the gong which the motorman was sounding to warn the driver of the furniture wagon to get off the track. According

to this evidence, when the plaintiff came in view, after crossing in front of the furniture wagon, his horse was six or seven feet from the east rail of the track. It was then that the motorman began to apply his brake and reverse his motor; and, if the plaintiff had been as watchful as the motorman was, he would have at least tried to stop his horse before he went on the track. The fact that when the car struck the wagon it did not break it, but only turned it over, and the car itself stopped before it reached the north crossing, shows that it was at the instant of the collision going very slowly, and sustains the idea that, if the plaintiff had been on the lookout, he could have avoided the accident. What is here said is assuming (as, for the question of the propriety of these instructions, we should assume) that the defendant's evidence is true. The court doubtless considered that it had sufficiently covered that point when it instructed the jury that it was the duty of the plaintiff to have used ordinary care for his own safety in attempting to cross the track, and defined the term "ordinary care." A party, however, has not only the right to have the general principle of law applicable to the case declared, but he is also entitled to have the court instruct the jury that the performance of specific acts devolves as a duty on the party when, as on the theory of the defendant's evidence in this case, those acts are so obviously a duty that there can be no question of fact about it. *Zimmerman v. R. R.*, 71 Mo. 476. The learned circuit judge, in the instructions given, recognized the propriety of pointing out certain acts as constituting a duty demanded by the law of the defendant. After laying down the general principle and defining ordinary care, the instruction continues: "Applying these definitions to this case, the defendant was required to use such ordinary care in regard to the rate of speed of its cars, in giving warning of the approach of the car, and in stopping the car after the plaintiff was seen by them to be in peril." The fact that the plaintiff attempted to cross the track without looking or listening was specifically stated in the answer, and was an issue in the case. The court erred in refusing those instructions.

The judgment is reversed, and the cause remanded, to be retried according to the law as herein declared. All concur.

HALLER v. CITY OF ST. LOUIS.*

(Supreme Court of Missouri, Division No. 1.
May 27, 1903.)

MUNICIPAL CORPORATIONS — STREETS — REPAIR — STEAM ROLLER — FRIGHTENING HORSE — LIABILITY OF CITY — QUESTION FOR JURY — ORDINANCE — VALIDITY — REQUESTED INSTRUCTIONS — APPEAL.

1. Failure to have a flagman to warn plaintiff, driving along a road, of the approach of a

*Rehearing denied July 2, 1903.

steam roller, could not have been the proximate, or even the remote, cause of the injury to her, resulting from her horse taking fright at the roller and running away, where she knew herself of the presence of the roller.

2. Whether a summer road, over which plaintiff was driving when she was injured by reason of her horse taking fright at a steam roller, was a part of the main street alongside of which it ran, and which was being repaired by the city, and had been closed to the public, *held* under the evidence, to be a question for the jury.

3. Whether plaintiff was guilty of contributory negligence in driving along the summer road while the roller was in operation, and whether she assumed the risk, *held*, under the evidence, to be for the jury.

4. A municipal ordinance authorizing the street commissioner, with the approval of the mayor, to close any street and withdraw the same from public use temporarily, and to prohibit its use during such time as public work thereon should make such action necessary, etc., was not void, though, under the charter, power to open and close streets and regulate their use was vested in the municipal assembly.

5. A requested instruction covered by an instruction given by the court of its own motion is properly refused.

6. A verdict on conflicting evidence will not be disturbed on appeal.

Appeal from St. Louis Circuit Court; Jacob Klein, Judge.

Action by Lena Haller against the city of St. Louis. Judgment for defendant. Plaintiff appeals. Affirmed.

Johnson, Houts, Marlatt & Hawes, for appellant. Chas. W. Bates and Carl Unger, for respondent.

MARSHALL, J. This is an action for \$10,000 damages for personal injuries sustained by the plaintiff on May 11, 1898, on Broadway, opposite Bellefontaine Cemetery, and caused, it is alleged, by the negligence of the servants of the city in permitting an unusual amount of steam and smoke to escape from a steam street roller that was being used at that point in repairing the street, thereby making a loud noise, scaring the gentle horse that plaintiff was driving to a light spring wagon, and causing him to run away, turn the wagon over down an embankment, and injure the plaintiff. There was a verdict and judgment for the defendant, and after proper steps the plaintiff appealed.

The negligence charged in the petition is the failure to have a flagman to warn the plaintiff of the approach of the roller, and in allowing or causing the steam to escape and make a loud noise, and thereby scare the plaintiff's horse. The answer is a general denial, and a plea of contributory negligence.

Broadway, at the place of the accident, is 60 feet wide. There is no made sidewalk on either side. On the west side of the street there is a double street railway. From the street car tracks eastwardly the street is macadamized, making an improved street about 40 feet wide. East of the east line of the street, but not forming a part of the street, is what is termed a "summer road."

It is unimproved, and is used by vehicles in dry weather. It is higher than the grade of the street. On the east of the summer road the land lies below the grade of the summer road, and below the grade of the street. To the east of the summer road the land slopes for about 10 feet to a barbed-wire fence. For several weeks before the accident the city had been engaged in the work of repairing Broadway, by putting in new macadam, which was smoothed and crushed with a roller. At first a horse roller was used, but about two weeks before the accident, a steam roller was substituted, and was used thereafter. A block at a time was thus repaired. Some of the blocks were very long, being seven or eight hundred feet long. While the work was being done the street was temporarily closed. This was done by placing a "Street Closed" sign at either end of the block. The "Street Closed" sign consisted of a notice printed on white paper and attached to a stand about 2½ to 3 feet high, and a small red flag at the top of the stand. The notice and the city ordinance recited thereon were as follows:

"Street Closed.

"This street is temporarily withdrawn from public use by authority of Revised Ordinances of 1892:

"Sec. 565. The street commissioner is authorized with the approval of the mayor to close any street, alley, public place or highway and withdraw the same from public use temporarily and during such period as public work thereon shall make such action necessary any person using or attempting to use said street, alley, public place or highway so withdrawn from public use, or driving or attempting to drive any animal or vehicle thereon, shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined not less than ten dollars nor more than fifty dollars for each offense.

"Sec. 566. It shall be the duty of the police within their respective districts to watch for and arrest persons violating the provisions of the above section."

"By order of A. N. Milner, Street Commissioner.

"Approved. Henry Ziegenheim, Mayor."

The plaintiff lived in Woodlawn, about three or four miles north of the place of accident. She had been in the habit of coming to the city two or three times a week to sell vegetables, butter, milk, cheese, and other farm products. Her customers lived generally on Broadway, south of the place where the accident occurred. She says she knew no other way to get to town, but she admits she knew that Calvary avenue runs west from Broadway between Bellefontaine and Calvary Cemeteries, which was north of the place of the accident, and the other evidence in the case, on both sides, shows that Calvary avenue goes to Florissant avenue, and

that Florissant avenue runs north and south, just as Broadway does, and almost parallels Broadway at that point, and is, perhaps, not over half a mile west of Broadway, and that it also furnishes access to the city to the farmers living north of the city. The plaintiff knew that the city was repairing Broadway, and had seen the work progressing, the "Street Closed" signs used as aforesaid, and also the horse roller and the steam roller. She drove a gentle horse, that had been worked around a lumber yard in the city where the steam railroad cars were constantly passing, and he was not afraid of the steam or noise or whistle of such cars. For two weeks before the accident the plaintiff had passed the steam roller in use on Broadway two or three times each week, and the horse showed no signs of fear. On the day of the accident she approached the block where the street repairs were in progress, from the north. She was driving in the street car track on the west side of Broadway. When she got within about 150 feet of the "Street Closed" sign, she saw the steam roller just south of the sign. It was either standing still or moving very slowly. She turned off of the car tracks and drove onto the summer road, and proceeded southwardly. When she got about opposite the steam roller, her horse became suddenly frightened and unmanageable, and gave two or more jumps, and turned the wagon over down the incline on the east side of the summer road, ran into the barbed-wire fence, threw the plaintiff out of the wagon, and injured her.

There is a direct, sharp, and irreconcilable conflict in the evidence upon the question of the negligence charged against the defendant. The plaintiff's evidence is that neither she nor her witnesses saw a flagman before the accident, and that no warning was given to her of the approach of the roller. The defendant's testimony shows that there was a flagman regularly employed, who always went about 100 feet ahead of the roller and waved his red flag when a vehicle was approaching, and that the roller was stopped if the horses showed evidences of fear, and that the roller was stationary and the flagman there at and before the time of the accident, and that when the horse showed signs of fright the "straw boss" went to him and caught him by the bridle, but the horse broke loose from him and ran away and turned the wagon over. It is conceded by the plaintiff, however, that she knew that the repairs were going on, that the steam roller was being used, that the street was straight, and that she saw the roller 600 feet before she got to it, and turned off of the street about 150 feet north of the roller. Hence, having personal knowledge of the presence of the roller, this assignment of negligence becomes unimportant and immaterial, for she knew all that a flagman could or was intended to tell her of; and therefore the

failure to have a flagman, if such was the fact, could not be the proximate, or even the remote, cause of the accident.

The evidence is also irreconcilably in conflict as to the other negligence assigned, to wit, that the city's servants allowed or caused the steam and smoke to escape from the roller and make a loud noise, and thereby frighten her horse. The evidence on both sides shows that when the roller is moving the steam makes a slight noise as it escapes through the exhaust, and that the weight of the roller crushing the macadam also makes a noise, and also that, when the engine is reversed so as to move the roller backwards, it causes the smoke and steam to puff out and to make more noise as its direction is thus being changed than it does when it is moving regularly either forward or backward. As stated, the plaintiff says that when she got within 150 feet of the roller it was near the "Street Closed" sign at the north end of the block that was being repaired, and was either standing still or moving so slowly that its motion was scarcely perceptible. She further says that when she got opposite the roller the steam was allowed to escape and make a special noise, and it scared her horse. In this she is corroborated in more or less degree by the testimony of her witnesses George Repple and Ed Garth. On the other hand, the "straw boss" of the work, Louis Bruning, testified that, when he saw the plaintiff, her horse was standing still, as was also the roller; that he went to him and caught him by the bridle, but he broke loose from him; that there was no noise or escaping of steam, and the horse just seemed to take fright, and he knew no reason for it. Defendant's witness William Steinkamp testified that the roller was standing still, and he heard no noise and saw no steam escaping. Defendant's witness Daniel Miller, who was on the roller, testified that the roller was moving south, and he heard the flagman's whistle, and looked out, and saw him waving the flag for the roller to stop, and he told the operator of the engine and he stopped it, and that by that time the flagman was running down the embankment to where the lady was lying, and he held the horse. He further says: "The engine, when it's running, makes a little noise, like 'Sh-sh-sh-sh.' It was not making any special noise at the time of the accident. The only steam that was escaping was through the smoke pipe."

As before stated, the jury found for the defendant. The plaintiff assigns as error the refusal by the court to give an instruction asked by her to the effect that Broadway was a public street, and that the plaintiff had a legal right to drive thereon at the time and place stated, and that the court erred in submitting the question of contributory negligence to the jury.

The gist of the plaintiff's contention is that the "summer road" was a part of Broadway, and that it had been purposely left open by

the city's servants for people to drive along, which the plaintiff was doing, and therefore it was error to admit the "Street Closed" sign, and the ordinances upon which it was based, in evidence (absque hoc, that the ordinances are void because a delegation of legislative power by the municipal assembly to the mayor and street commissioner), and that, this being so, it was error to submit the question of contributory negligence to the jury, because the plaintiff had a right to be where she was, and did nothing that in any wise contributed to the accident. All of the witnesses agree that Broadway is 60 feet wide. The evidence as to whether or not the summer road was a part of Broadway is as follows: The plaintiff was asked, "Q. At the time your horse became frightened, how far was your buggy from the east side of the road? A. I guess I was about six or ten feet." Plaintiff called as her witness William H. Rudolph, who was an overseer of roads in the employ of the city at that time; and after describing the street car tracks on the west side of Broadway, and saying that they were repairing the street east of the car tracks, and after testifying to the "Street Closed" sign at each end of the block, the plaintiff asked him these questions: "Q. Teams were passing up and down there all day long, weren't they? A. Yes, sir. Q. You did not attempt to stop the teams from passing up and down? A. No, sir; there was a summer road there. There was plenty of room for them. There was at least forty feet of space there between the railroad track and the— Q. (Interrupting.) You left a place expressly for teams to pass up and down? A. No, sir; the summer road. I had nothing to do with the summer road, only to take— When I was raking the mud off with the grading machine, I would run that down, and by that means I was widening the street and raising it up at the same time. I didn't have to haul that dirt away. Q. What I want to get at is this: You did not object or attempt to prevent teams from passing up and down between those two flags, on the east side of the road, did you? A. No, sir; there was plenty of room. Q. You had no intention of stopping teams from going up and down there? A. No, sir." On cross-examination, defendant's witness William Steinkamp testified as follows: "Q. There are a great many people passing up and down the street there? A. People? No; I don't know as so many people pass there. Q. Wagons pass up and down? A. Wagons? Yes, sir. Q. That is what I mean. And there is a summer road on the east side of this—to the east of the road—wasn't there—what Mr. Rudolph calls a 'summer road'? A. Yes; there was a little summer road there. Q. And the people used that, principally, to pass up and down? A. Yes, sir; in the summer time, when it was dry. Q. That is on the east side of the street? A. Yes, sir. Q. And down at the east edge of that summer road there is an

embankment there. The road is raised higher than the street, isn't it—about this much higher? A. The ditch is a little lower than the street. Q. Well, the fact is that the road is above the farms and the balance of the country out there, isn't it? A. Yes, sir. Q. About four feet; and, in making that road, they made the road up to about how far from the wire fence? How far is the wire fence from that embankment? A. Well, I don't know about that. Q. Three or four feet, or five feet? A. Oh, it was further than that. Ten feet from the main road, between the wire fence and the road." On redirect examination the witness testified as follows: "Q. I never saw that place, and I don't quite understand the way it looked. You have spoken about a summer road. I am going to ask you to describe the way the whole road was, and the ditch and the wire fence, and I am going to undertake to describe it the way the picture is in my mind. Now, let us see if this is right: Mr. Johnson: I would rather have the witness describe it. Q. Very well. What is on the west side of the roadway next to the cemetery? A. Well, there is a railroad track. Q. The west side? A. Yes; a double track. Q. Between that and the bank, how is the road made? A. Between the railroad track and the bank, the west side? Q. No; the bank on the east? A. On the east— Well, there comes North Broadway. Q. Made out of what? A. Macadam. Q. How wide would you say it was from the east rail of the east track over to the end of the embankment on the east side of the road? A. I guess about 60 feet. Something like that—the macadam, you mean? Q. The macadam road. A. Well, about 60 feet. Something like that. Q. Now, after the embankment, what comes? Is it level, or does it go down the hill then, or what is it? A. Well, sir, it is— The dirt was scraped off the street, and it is left to one side; with the machine, and kind of a little leveled off; and they call that a 'summer road,' you know. There is no macadam there. It is outside of the line of the road. And in the summer time, of course, it is a little drive without the macadam, and that is called a 'summer road.' Q. And where is the embankment? A. Well, outside of that, yet. Q. And then where is the fence? A. Outside of the embankment. Q. Then, according to your description, we have the two tracks; then about 60 feet of macadam? A. Yes, sir. Q. Then we have the summer road. How wide is that, probably? A. I couldn't state that exactly. Q. Wide enough for a wagon? A. Yes, about." This is all of the testimony in the record bearing upon the character of the summer road. It is not by any means clear from this testimony that the summer road constituted a part of Broadway. The utmost that can be said of it is that it leaves it a question of fact for the jury. The plaintiff's contention depends upon the summer road being a part of Broadway, and the burden was upon her to prove that to be the

fact. If it was not, then it was not within the power of the city to close it up and prevent people from driving along it while the street was being repaired, and therefore it was a question for the jury whether or not the plaintiff was guilty of contributory negligence, or, knowing the conditions, assumed the risk of driving along the summer road while the steam roller was in use repairing the street. The jury found for the defendant, and, in this state of the record, it cannot be said there was no substantial evidence to support the verdict; and, this being true, this court will not disturb the verdict.

But aside from this, the instruction given by the court of its own motion, as well as those asked by plaintiff and refused by the court, as well, also, as those given for the defendant, put the case to the jury upon the theory that the city was bound to repair its streets, and had a right to use the steam roller, and that the plaintiff was on the street, and had a right to be there, and was exercising ordinary care and caution, and that the plaintiff was entitled to recover if the servants of the city "in charge of said roller either knew, or by the exercise of ordinary care could have known, of plaintiff's proximity, and that as the plaintiff was near to said roller the said servants and employes of the city having charge of the said roller did, suddenly and without any warning to the plaintiff, cause steam to escape from said roller and to make a loud noise, and that plaintiff's horse became frightened thereby, and jumped or ran and overturned her wagon," and she was injured. In other words, the case went to the jury upon the only negligence charged in the petition as to which there was any question, to wit, the act of the servants of the city in allowing or causing steam to escape and make a loud noise and scare the plaintiff's horse as she was passing along the street and exercising ordinary care, and the jury found for the defendant, and there was substantial evidence to support the verdict. That verdict can only mean that no such steam was allowed to escape and no such noise was made by the roller as charged. Even if it be true that the plaintiff had a right to pass along the street while it was being repaired, and even if it be conceded that the city or its administrative officers had no right to withdraw the street from use temporarily while being repaired, and even if it be true that the summer road constituted a part of the street, and that the servants of the city left it open for travel, and thereby invited people to drive along there while the street was being repaired, the question was still one for the jury, whether it was contributory negligence for the plaintiff to attempt to drive a horse by the steam roller, and also whether the defendant was guilty of the negligence charged in the petition.

The plaintiff objected to the introduction of the "Street Closed" sign, and to the read-

ing of the city ordinance in evidence, and now contends that the ordinances are void, because, under the charter, the power to open and close streets and to regulate their use is vested in the municipal assembly, and cannot be delegated by that body to the mayor and street commissioner. It will be observed, however, that the power of the city to thus close a street was dropped out of the case when it went to the jury, and it was assumed in all of the instructions that the street was not closed, and that plaintiff was rightfully passing along it. But aside from this, the ordinance is not void either for the reason stated or otherwise. It is true, the power to close or vacate streets, and to regulate their use, is vested in the assembly. But this ordinance does not offend against that charter provision. It is simply a police regulation passed in pursuance to the general welfare clause of the charter (paragraph 14, § 26, art. 3, City Charter), and is in no sense whatever a delegation of legislative power. The cases cited on this proposition by the plaintiff apply to a delegation of legislative powers, and not to prescribing who shall exercise police powers.

There was no error in refusing the plaintiff's seventh instruction, to the effect that Broadway is a public street, and that the plaintiff had a legal right to drive thereon at the time and place where said injury occurred, for the reason that the same idea is fully expressed in the first instruction given by the court of its own motion.

The instructions put the case to the jury as fairly to the plaintiff as it was possible to do so. The case hinged solely upon questions of fact. The testimony was conflicting, and would have supported a verdict either way. Under these circumstances, this court never interferes.

The judgment of the circuit court is affirmed. All concur, except ROBINSON, J., absent.

TUTTLE et al. v. BLOW et al.

(Supreme Court of Missouri, Division No. 1.
June 20, 1903.)

MORTGAGES—PROPRIETARY MEDICINE—RIGHT TO MANUFACTURE—RECEIVERSHIP PENDENTE LITE.

1. Where, in a suit to foreclose a mortgage upon the right to manufacture and sell a certain trade-marked article, made according to a secret formula, plaintiffs alleged that the security was insufficient, that the mortgagors disputed the validity of the mortgage and were using the subject thereof so as to anticipate and discount its income, and that one of them had threatened to disclose the secret formula, it was proper to appoint a receiver pending suit.

2. A mortgage described the mortgaged property as a certain trade-mark for an eye salve, which was duly registered in the Patent Office on a certain date, and also all the mortgagor's right, title, and interest in the patent and proprietary right in and to a certain named eye salve, and with the mortgage the mortgagee received a sealed parcel containing the secret formula of the preparation, to be used in case

It became necessary to foreclose the mortgage. Subsequently the act under which the trade-mark was registered was held unconstitutional. *Held*, that nevertheless the right to manufacture and sell the preparation under the trade-name and according to the formula was conveyed by the mortgage, and was a tangible right, capable of being so incumbered.

3. An instrument purporting to be a mortgage on a certain trade-mark, described it as "certain letters patent for a certain trade-mark," etc., giving the number and date of registration, and stating that the right to manufacture a certain eye salve was thereby granted to the mortgagor, his heirs, etc. *Held*, that though no such right was granted by the certificate of registration, referred to as "letters patent," to the mortgagor, yet, as he had that right independent of the certificate, the mortgage was sufficient to cover the right to manufacture and sell the eye salve in question.

Appeal from St. Louis Circuit Court; H. D. Wood, Judge.

Suit by E. N. Tuttle and others against Julia W. Blow and others. From a decree for plaintiffs, certain defendants appeal. Affirmed.

S. H. King, for appellants. Dawson & Garvin, for respondent Tuttle. Noble & Shields and W. H. Ludwig, for respondent Lueders.

VALLIANT, J. This is the second appeal in this case. It is a suit to foreclose a mortgage, and, ancillary to the main object, the equity powers of the court are invoked to preserve the property by placing it in the hands of a receiver pending the suit, and enjoining the defendants from taking certain action calculated to impair the value of the security. Upon the filing of the petition a receiver was appointed and an injunction granted. There were motions by defendants to vacate the order appointing the receiver and to dissolve the injunction, which motions were overruled, and an appeal taken. Upon the hearing in this court that appeal was dismissed, and the cause was remanded to the circuit court, with directions to proceed to final hearing on the merits, first affording defendants leave to file an amended answer. This court on that appeal held that the only question presented by the record in its then condition was, did the circuit court have jurisdiction to make the orders complained of? and the judgment was that it did have such jurisdiction. *Tuttle v. Blow*, 163 Mo. 623, 63 S. W. 839. When the cause was returned to the circuit court, defendants answered, and a trial on the merits was had, which resulted in a decree for plaintiffs, from which some of the defendants again appeal.

The mortgage which the plaintiffs seek to foreclose was executed by the defendants, the Blows, September 17, 1889, to secure eight notes made by them of that date, aggregating \$25,817.64, bearing 8 per cent. interest, maturing in series running from 18 months to 8 years, payable to the order of Edwin Curd, who is the plaintiffs' assignor. The property mortgaged is thus described in

the granting clause of the instrument: "That said parties of the first part, for and in consideration [describing the notes], do by these presents sell, assign, transfer, and set over to the said party of the second part all their right, title, and interest in a certain trade-mark for eye salve which was duly registered in the Patent Office of the United States by William T. Blow, of St. Louis, Missouri, and recorded in the Patent Office, and declared to be in force for thirty years from 25th February, 1873, which said trade-mark is numbered 1,142, and is for the exclusive right for manufacture and sale of T. L. Stephens' Chemical Eye Salve, as also all our right, title, and interest in the patent and proprietary right in and to T. L. Stephens' Chemical Eye Salve: provided, always, this sale, transfer, and assignment are upon this express condition; that is to say," etc. Then follows the condition that the sale is to become void if the notes are paid; otherwise, the mortgagee is given the power to sell on 10 days' notice.

Upon the trial it was shown that William T. Blow in his lifetime owned a secret formula, according to which a proprietary medicine called "T. L. Stephens' Chemical Eye Salve" was manufactured and sold in the market. Although the sale of this article was quite extensive, and yielded the proprietor an income of \$12,000 a year, yet the article itself was small, and was not of sufficient proportions to require the maintenance of a manufactory; but under the supervision of one man, Michael Fredericks, employed for that purpose, sufficient quantity of the salve to supply the trade for 12 months was made up and put into condition for sale within 6 weeks. The salve was put up in small bottles or vials, on each of which was a small label of particular design, and on each box of a dozen vials was a larger label of the same design. This label had been so long used in connection with the salve that it was well known in the market, and was a mark by which the article was known in the trade. It thus became the trade-mark of the proprietor of the compound. In 1873 Mr. Blow had this trade-mark registered in the Patent Office at Washington, and received a certificate thereof, as was contemplated in the act of Congress of 1870 relating to trade-marks. That act was afterwards declared unconstitutional by the Supreme Court of the United States, and the certificate of registration therefore became of no legal effect. Mr. Blow died in 1877, and his widow and two sons, defendants originally herein, became the owners of the title that he owned to the secret formula, the trade-mark, and the right to manufacture and sell the proprietary medicine. They continued the business as he had done, with some variations in the business methods, and were doing so down to the time that this suit was instituted, when the receiver took the business out of their hands. Under the management of the Blow and sons the business does not seem to have

been as successful in yielding revenues as it had been in the lifetime of Mr. Blow, although it still yielded the proprietors a large income.

On March 1, 1883, Mrs. Blow borrowed of F. W. Mott \$2,000, and of Mrs. Lueders \$3,500, and to secure the same made an assignment of her right in this eye salve and trade-mark to them. In that assignment the thing conveyed was described as a patent right to manufacture and sell the salve under letters patent issued by the United States. The instrument was drawn by a man who was not a lawyer, and who, with the certificate of registration of the trade-mark before him, interpreted it to be letters patent and thus described it: "Whereas letters patent, bearing date the 25th day of February, A. D. 1873, were granted and issued by the government of the United States of America, under the seal thereof, to William T. Blow, of St. Louis, Missouri, for a certain trade-mark for eye salve, styled 'Dr. T. L. Stephens' Celebrated Chemical Eye Salve,' which patent is No. 1,142, and registered February 25, 1873, and to which patent reference is hereby made for a full and particular description of said trade-mark and eye salve, which is annexed to said letters patent, by which letters patent the full and exclusive right and liberty of making and using said invention, and of vending the same to others to be used, was granted to the said Wm. T. Blow, his heirs, executors, administrators, and assigns, for the term of thirty years from the date thereof." The \$2,000 secured by that instrument was afterwards paid, but the \$3,500 was unpaid. The parties interested in that mortgage were made parties defendant. When Mr. Curd took the mortgage under which the plaintiffs claim, he knew of the existence of the mortgage in favor of Mr. Mott and Mrs. Lueders. Upon the execution of the mortgage to Curd, and as a part of the transaction, the secret formula under which the eye salve was compounded was given to him in a sealed package. Up to August 16, 1894, the mortgagor had made payments on the Curd debt amounting to \$8,498.34. Since that date nothing has been paid on it. There were averments in the petition to the effect that the mortgagors in possession were conducting the business in a manner to indicate that they were endeavoring to realize as much as possible at once, and impair the value of the property, and it was upon that showing that the court appointed the receiver and granted the injunction. The evidence at the trial tended to sustain those averments. When the receiver was appointed, the package containing the secret formula was delivered to him, and by order of the court he opened it and continued to conduct the business as nearly on the plan that it had theretofore been conducted as good judgment for the interest of all concerned seemed to dictate. Pending the suit, William T. Blow, Jr., died, and his administrator has entered his appearance, and also,

since the suit was begun, Benj. E. Blow has transferred to S. H. King his interest in the mortgaged property, and Mr. King has answered. It also appeared that since the commencement of the suit Isaac Curd had by purchase become the owner of all the notes covered by the plaintiffs' mortgage.

By the finding of the court there is due Mrs. Lueders \$3,741.67 on her mortgage, and there is due the plaintiff Isaac Curd, as purchaser from Tuttle, assignee of Edwin Curd, on his mortgage, \$55,409.34. The decree takes the form of a judgment for \$3,741.67 in favor of Mrs. Lueders against Mrs. Blow, and for \$55,409.34 in favor of Isaac Curd against Mrs. Blow, Benjamin E. Blow, and the administrator of William T. Blow, Jr., deceased, and in default of payment of the judgments a foreclosure of the mortgage is decreed, and a sale of the secret formula, the trade-mark, and the exclusive right to manufacture and sell the salve mentioned in the name of "Dr. T. L. Stephens' Chemical Eye Salve," and out of the proceeds, after paying costs, one-third, or a sufficient part of one-third, is to be paid to Mrs. Lueders on her mortgage, and the rest, to the extent of his debt, to plaintiff Isaac Curd, and the balance, if any, to be returned into court, to be disposed of as the court may thereafter order.

The learned counsel for defendants has favored us with an elaborate brief, in which he has given us the result of an exhaustive research into the books, and has discussed the case from several standpoints; but all the propositions laid down may be grouped into two, viz.: First, that the court had no authority, under the showing made, to appoint the receiver and issue the injunction when and as he did; second, that the thing or the right attempted to be mortgaged was not susceptible of being incumbered by a mortgage.

1. Upon the former appeal in this case it was decided (Brace, P. J., delivering the opinion) that notwithstanding the fact that the proceeding to foreclose a mortgage, under the terms of our statute (section 4342), was an action at law, yet the circuit court as a court of equity still retained the same jurisdiction to foreclose mortgages and adjust the rights of the parties thereunder which was originally exercised by courts of chancery. Whether in this case the court had properly exercised its judicial discretion in making the appointment of the receiver and issuing the injunction the record then before us did not warrant us in deciding. But as the record is now here, with all the showing made by the plaintiffs, the question is one for decision. The jurisdiction of the court, on proper showing, to make such orders, is not questioned; but it is insisted that the proper showing was not made, and it is complained that the court acted without notice to the defendants, taking their property from them without giving them a hearing.

There were averments in the petition going to show that the property, or the incor-

poreal right conveyed in the mortgage, was insufficient in value to pay the debts for which it was pledged, and that the defendants, the mortgagors, not only disputed the validity of the mortgage, which was a fact in itself tending to depreciate its value, but they were so using the subject of the mortgage as to anticipate and discount its income, and one of them at least threatened to disclose the secret formula, and thus destroy the value of the business. A chancellor could not, under those circumstances, have rightfully refused the prayer of the plaintiff for the preliminary orders looking to the safe custody and preservation of the property in dispute. The court may, under a proper showing, appoint a receiver and issue an injunction without notice to the other side, and it should do so whenever it is made to appear that an act ruinous to the plaintiff's rights is contemplated, and notice given to the defendant would enable him to accomplish it before the court could prevent it. But the appointment of a receiver without notice is the exercise of an extraordinary power, and should be done only in cases of great emergency, and even then the defendant should be afforded a speedy hearing on a motion to vacate the order. *St. L. & C., R. R. v. Wear*, 135 Mo. 230, 36 S. W. 357, 658, 33 L. R. A. 341; *High on Receivers* (3d Ed.) § 111 and following. The only notice required by our statute of an application for an injunction is in case the injunction is sought to stay proceedings at law. Section 3633, Rev. St. 1899. But the court in any case may, and ordinarily should, require reasonable notice before issuing an injunction of any kind. The record in this case shows that the defendants were afforded an opportunity to be heard without delay on a motion to vacate the orders, and they were granted an appeal on the overruling of their motion, and every opportunity was afforded them to right any wrong that was done them. There is nothing in the action of the court in relation to the appointment of the receiver or issuing of the injunction of which the defendants now have any cause to complain.

2. Appellants' main insistence, however, is that the mortgage of plaintiffs is of no force or effect, because the thing or the right attempted to be mortgaged is not susceptible of being so incumbered. The mortgage of plaintiffs describes the trade-mark as "a certain trade-mark for eye salve, which was duly registered in the Patent Office of the United States by William T. Blow, of St. Louis, Missouri, and recorded in the Patent Office, and declared to be in force for thirty years from the 25th day of February, 1873, which said trade-mark is numbered 1,142, and is for the exclusive right for manufacture and sale of T. L. Stephens' Chemical Eye Salve," etc. The act of Congress under which that registration was authorized was afterwards declared to be unconstitutional. Therefore no right was acquired by it. But whilst the registration and the certificate imparted no new right to

the holder of the trade-mark, it did not detract from the right he already had. The terms of the mortgage do not purport to convey to the mortgagee a right acquired under the act of Congress by the registration, but what it does convey in the clause just quoted is the trade-mark; that is, that trade-mark which he had before owned and which he registered. But, in addition to the trade-mark, the mortgage conveyed "also all our right, title, and interest in the patent and proprietary right in and to T. L. Stephens' Chemical Eye Salve," and with the mortgage they gave the mortgagee a sealed parcel containing the secret formula, to be used in case it became necessary to foreclose the mortgage. So that the mortgage conveyed the trade-mark, and the exclusive right to make and sell the eye salve, and to use the trade-mark in connection therewith; and, in order to enable the mortgagee to realize the right conveyed, the formula was also given him.

It may be conceded to appellants that a mere trade-mark, dissociated from the trade or business, is not susceptible of sale or transfer. As such it is of no use, and the law will take no account of it. But a trade-mark as an accessory of property, or as a thing to be used in connection with one's business, and applicable to the product of his manufactory or to his goods in trade, is a subject of the law's care, and is assignable. *Brown on Trade-Marks* (2d Ed.) § 57. As a general rule, any thing or any right that is capable of passing by succession or descent to the personal representatives or heirs of an intestate, or that is capable of passing by absolute sale, is capable of being incumbered by mortgage. The mortgagors themselves claim to own this trade-mark and the proprietary medicine by succession from William T. Blow, deceased. The administrator of William T. Blow, Jr., is here claiming his interest by succession as assets of the estate, and Mr. King is here also claiming a one-third interest by assignment. How, then, can they be heard to say that the right is not assignable? Whilst some of the authorities cited in their brief bear out the appellants' contention that a trade-mark, unconnected with any property or trade, is a mere abstract right of which the law will take no account, none of them sustain the proposition that a trade-mark, connected with the right to make and sell the thing which it indicates, is not susceptible of being transferred by a mortgage.

As to the Lueders mortgage, the only question in its way is in regard to the description of the right or thing mortgaged. The scrivener had before him the certificate of the registration of the trade-mark, he saw that it emanated from the Patent Office, and he concluded that it was a patent right. But the facts all appear on the face of the instrument to show what it really was, in spite of the misnomer. It is the same trade-mark described in the plaintiffs' mortgage, and in attempting to state its legal effect the scriv-

ener says: "By which letters patent [meaning the certificate of registration] the full and exclusive right and liberty of making and using said invention [meaning the eye salve], and in vending the same to others to be used, was granted to William T. Blow, his heirs, executors," etc. No such right was by that certificate granted to Mr. Blow; but he had that right independent of the certificate, and the plain meaning of the mortgage, in spite of its clumsy verbiage, is that that right, together with the trade-mark, is pledged for the payment of the \$5,500 which the mortgagor then borrowed on the faith of it. No other construction can be put upon it without impugning the good faith of the mortgagor, which we have no right to do.

The circuit court took the correct view of this case, and the judgment is affirmed. All concur.

LOESCH v. UNION CASUALTY & SURETY CO.*

(Supreme Court of Missouri, Division No. 1.
June 20, 1903.)

ACCIDENT INSURANCE—ACCIDENTAL INJURY—EVIDENCE—POST MORTEM EXAMINATION—NOTICE TO DEFENDANT—FORFEITURE—WAIVER—PROOF OF LOSS—FURNISHING BLANKS—CONSTRUCTION OF POLICY—QUESTION FOR COURT—EXTRAHAZARDOUS EMPLOYMENT—INSTRUCTIONS.

1. Where, in an action on an accident policy, a witness testified that he went with insured into a car to untie a bull, and that while insured was so engaged he saw the bull throw his head around, and immediately asked insured if the bull caught him, to which insured answered, "Yes, but he did not hurt me," and the same day insured suffered pain in the abdomen from a bruise, and he subsequently died from inflammation caused by such bruise, the evidence was sufficient to justify a finding that insured's death resulted from accidental means.

2. Where defendant, at the time of furnishing blanks for proof of death under an accident policy, stamped the same with the words, "In furnishing this blank, the company reserves all its rights under its policy contract, and waives none of the conditions thereof," the furnishing of such blanks did not constitute a waiver of a forfeiture for violation of a condition declaring that, if a post mortem examination was held without notice to defendant, plaintiff's rights should be forfeited.

3. After insured's death, his physician informed plaintiff that he desired to make a post mortem examination. She testified that she did not know what he meant thereby, and the physician immediately made the examination. After it was finished, plaintiff showed him an accident policy insuring deceased, which provided that it should be void if a post mortem examination of insured's remains was made without notice to insurer, whereupon the physician immediately notified the insurer of the facts, and offered to allow insurer to make a re-examination. Held that, in the absence of any suggestion that a re-examination would not have disclosed anything apparent on the first examination, the holding thereof without notice did not authorize a forfeiture.

4. Where, in an action on an accident policy issued under an application describing de-

ceased's occupation as "stock dealer, not working nor tending in transit," which was classed as a preferred risk, plaintiff's evidence showed that at the time he received the injury from which he died he was in a stock car attending to stock before they were unloaded, and that such occupation was classed as extrahazardous by defendant, an instruction that if, when insured received his injuries, he was a stock dealer visiting yards, not working nor tending in transit, he was entitled to recover the face of his policy, was erroneous, as unsupported by the evidence.

5. Cattle transported by rail were "in transit," within the terms of a policy designating insured's occupation as a "stock dealer, not working nor tending in transit," until they were unloaded from the cars of the company and placed in pens.

6. An accident policy provided that insured agreed that, for any injury received while exposed to a hazard classed by insurer in its manual as more hazardous than that given as his occupation in the application, the company's liability should be limited to the amount that the premium paid by insured would purchase in the more hazardous class. Insured's occupation was stated as a "stock dealer, not working nor tending in transit." The manual classed such occupation as preferred, but classed the risk of a stock dealer tending in transit as extrahazardous. Held, that an instruction that, unless the jury found that the act of untying a bull in a car in which insured was engaged when he was injured was designated in the manual as more hazardous than insured's occupation specified in the application, plaintiff was entitled to recover the face of the policy, was erroneous, as submitting the construction of the manual to the jury.

7. The act of insured in untying the bull while in the car was a more hazardous occupation than that described in the application.

Appeal from St. Louis Circuit Court; John A. Talty, Judge.

Action by Catherine Loesch against the Union Casualty & Surety Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Percy Werner, for appellant. R. M. Nichols, for respondent.

VALLIANT, J. Suit on an accident policy insuring Frederick Loesch against loss by bodily injury sustained through external, violent, and accidental means; in case of his death by that means the defendant agreeing to pay the plaintiff his mother \$5,000. The petition alleged the insured in his lifetime performed all the conditions of the policy, and that while it was in full force, on September 26, 1900, he died by reason of bodily injuries received through external, violent, and accidental means; that due proof of loss was made to defendant, yet defendant refused to pay, etc.

The following summary of the affirmative matter pleaded in the answer is copied from Mr. Werner's brief: "The answer admitted the issuance of the policy in suit, but denied the fact of death through accidental means, as stated. It then set up as a special defense the violation of the following condition of the policy, to wit: 'If the company's representatives are denied the right to make examination of the insured's person or body, in re-

*Rehearing denied July 2, 1903.

† 2. See Insurance, vol. 28, Cent. Dig. § 1071.

spect to alleged injury or cause of death, or if post mortem be held without notifying the company in time to have its medical adviser present, then all claims under this policy shall be forfeited'—alleging that a post mortem examination was held over the body of Frederick Loesch, on or about September 27, 1900, without the knowledge of the defendant, and without notifying the defendant in time to have its medical adviser present, and without any notice to it of any intention to hold such post mortem examination, though the defendant had at the time a medical adviser whom it would have had present, had it been advised of the intention of holding such examination. For further defense the following condition of the policy was pleaded, viz.: '(19) I agree that for any injury, fatal or otherwise, received by me while exposed, temporarily or otherwise, to a hazard classed by the company, in its manual last issued prior to this date, as more hazardous than that given as my occupation in this application, the company's liability shall be limited to the amount that the premium paid by me would purchase in such more hazardous class. I agree that the classifications in said manual shall be and are a part of this contract.' The answer then set out that the deceased, Frederick Loesch, was insured as a 'stock dealer,' whose occupation and duties were in the policy described as 'visiting yards, not working nor tending in transit,' and that the hazard of such occupation was therein classed as 'preferred,' and that the premium of \$25 charged for said policy was the usual and customary charge for such risk; that part of the consideration of the policy sued on were the representations of the deceased, made by the deceased in his written application, relative to the occupation in which he was engaged; that at the time deceased received the alleged accidental injuries he was engaged in working and tending stock in transit, and that the injuries alleged to have been received were so sustained whilst defendant was untying a bull in a car; that said occupation was more hazardous than that stated by deceased in his application and in the policy, and that the said occupation of working and tending stock in transit was classified by defendant, in its manual issued and in force last prior to the issuance of the said policy, as an 'extrahazardous' risk; and that the premium of \$25 paid by deceased, if he had been described as a 'stock dealer and tender in transit,' to which hazard he was exposed at the time he received the alleged accidental injuries, would have purchased for defendant the sum of \$1,250 insurance, and no more, and that, if liable at all under the policy to plaintiff, defendant was not liable for more than \$1,250—the manual in question being filed with the answers as an exhibit thereto."

The reply joined issue on the matters pleaded in the answer. The policy was filed as an exhibit to the petition, and showed that

its terms and conditions, and also those of the application, which was a part of it, were correctly stated in the pleadings.

The testimony on the part of the plaintiff tended to show as follows: About 3:20 o'clock in the morning of September 13, 1900, the insured, Frederick Loesch, was in the stockyards in St. Louis, and called some men who were the regular employes there to assist him in unloading a car of cattle that had just arrived. He went with the men to the switch on which the car was standing, and with their assistance unloaded it. When all the loose cattle had come out, there remained two bulls in the car, which were tied with ropes. Loesch went in with one of the men and untied the bulls. While he was doing this one of the bulls tossed his head around and struck him in the abdomen. One of the men, seeing the motion of the bull, asked Loesch if it caught him, to which he replied, "Yes, but he did not hurt me." After the cattle were unloaded and delivered where they were destined, Loesch went home. After he got home he began to suffer pain in the abdomen, which increased as the time went on. On the 15th a physician attended him, and found him suffering with inflammation of the abdomen apparently caused by a bruise. He grew worse, and died on September 25th. On the next day the physician in attendance told the plaintiff that he desired to hold a post mortem examination, to which she assented, or, at least, made no objection. He called in some other physicians to assist him, and they made a post mortem examination. After it was done, and the body was sewed up, the physicians came out of the room, and then the plaintiff handed the attending physician the policy in suit, and asked him what she should do in regard to it. He examined it, and discovered the clause declaring that, if a post mortem be held without notice to the company in time to have its medical adviser present, all claims under the policy should be forfeited. He went immediately to the office of the company, and notified them of what had occurred, and on behalf of the plaintiff offered to hold another post mortem with their medical adviser, if they so desired. But they expressed no such desire, and the plaintiff, after holding the body until the next day, caused it to be buried. Plaintiff testified that when the physician told her that he desired to make a post mortem examination, she did not know what he meant; that she neither assented nor dissented, and did not know what was done until after it was done. Plaintiff sent an agent, with the policy, to the office of the company to obtain the prescribed blank form on which to make out the proof of loss. Defendant gave this agent the blank requested, first stamping on its face the words, "In furnishing this blank, the company reserves all its rights under its policy contract, and waives none of the conditions thereof."

On the part of defendant the testimony

tended to show as follows: The assured, Loesch, went with one Gerst to Peveley, Mo. There he assisted Gerst, who was the owner of the cattle referred to, in loading them on the car, and left there with the car, in charge of it. The manual of the defendant company, classifying the various hazards in force at the date of this policy, was in evidence, and it showed that the occupation of the assured, as stated in his application, "stock dealer, not working nor tending in transit," was classed as "preferred," limit of risk \$5,000, fee \$25, while "stock dealer, tender in transit," was classed as extrahazardous, limit of risk \$1,000, for which the fee was \$20. At that rate \$25 would buy \$1,250 insurance in that extrahazardous class, if the company could go beyond the \$1,000 limit. When the plaintiff's agent asked for the blank form on which to make proof of loss, the agent of the defendant gave it to him, first stamping it as above stated, and at the same time gave him a letter, addressed to the plaintiff, in which it was said: "In furnishing you this said blank, we do not thereby waive any of the terms or conditions of said policy, or any forfeiture that may have accrued to us thereunder."

At the request of the plaintiff the court gave the following instructions:

"(1) The court instructs the jury that if you believe and find, from the evidence in this case, that Fred Loesch, the insured, on September 18, 1900, received bodily injuries through external, violent, and accidental means, from which injury death resulted on September 26, 1900, and that at the time the said Loesch received such injuries he was a stock dealer, visiting yards, not working nor tending in transit, pursuing the usual and ordinary avocation of a stock dealer; and if you further believe and find, from the evidence, that after the death of the said Loesch defendant was caused to be notified by plaintiff that a post mortem examination was to be held over the body of the said Loesch before the same was held, or in time to hold a post mortem examination over his body on the day after his death and before burial; or if you believe and find, from the evidence, that after a post mortem examination had been held over the body of said Loesch, the defendant, with knowledge of all the facts, furnished to plaintiff blank for proofs of loss, and that these proofs were made and forwarded to the defendant, and that in making such proofs plaintiff incurred expense and trouble, and was required or induced to do so by defendant—then you will find a verdict for the plaintiff in the sum of \$5,000, together with interest thereon at the rate of 6 per cent. per annum from the 25th day of February, 1901, to this date.

"(2) If the jury find, from the evidence, that the said Fred Loesch received the injuries from which death resulted while untying the bull in the car, as heretofore instructed, then the jury are instructed that

unless they find, from the evidence, that the act of untying the bull was designated or classed by defendant in its manual, shown in evidence, as more hazardous than that given as the occupation of said Fred Loesch in his application, viz., stock dealer, visiting the yards, not working nor tending in transit, you must find a verdict for the plaintiff, and assess her damages at the sum of \$5,000, as heretofore instructed."

And of its own motion the court gave the following:

"(6) The court instructs the jury that if you find, from the evidence, that a post mortem examination was held over the body of the deceased, Frederick Loesch, without notice to the defendant in time to have its medical adviser present at the time of such examination, and that no notice was given defendant in time to hold a post mortem over his body on the day after his death, and before burial, then no recovery can be had herein, and your verdict should be for the defendant, unless you find, further, from the evidence, that the defendant waived compliance with such condition, as explained in others of these instructions."

At the request of the defendant the court gave an instruction to the effect that if the jury should find for the plaintiff, and if they should further find that Loesch was insured as a stock dealer, visiting yards, not working nor tending in transit, and that such occupation was classed as preferred, and \$25 would pay for \$5,000 risk, but that when he received the injury he was engaged in working and tending stock in transit, to wit, untying a bull in the car, and that that occupation was more dangerous than that specified in the application, and classed as extrahazardous in the manual, and that \$25 would purchase insurance in that class only to the amount of \$1,250, then the verdict for the plaintiff should be for only \$1,250; also an instruction to the effect that the cattle unloaded from the car were still in transit; and one to the effect that, to constitute a waiver of a condition in the policy, an intention to waive must be shown, or else conduct calculated to mislead the other to her injury. Defendant asked several instructions to the effect that the holding of the post mortem examination without notice to the defendant was a forfeiture of the policy, and a peremptory instruction for a verdict for the defendant, all of which were refused.

To the giving and refusing of instructions exceptions were duly preserved. There was a verdict for the plaintiff for \$5,065, and judgment accordingly, from which the defendant appeals.

1. In support of its claim that the peremptory instructions for a verdict for defendant should have been given, the defendant relies on two propositions: (a) That there was no substantial proof that the death of the insured resulted from accidental means; (b) the holding of the post mortem examination

without notice to the defendant forfeited the policy.

(a) The argument is that as no one actually saw the horn of the bull strike the man, and as he himself said, immediately after the motion of the bull, which the witness saw, that he was not hurt, the conclusion that he was so struck in the abdomen, and that that caused his death, rests on mere conjecture. The witness saw the bull toss his head in the direction of the man, and, whilst he could not just see the result, yet the circumstance immediately excited apprehension in the mind of the witness, and he asked, "Did he catch you?" to which Loesch answered, "Yes, but he did not hurt me." No one can doubt that the bull struck him, and there is no reasonable accounting for the pain in the abdomen which was soon experienced, the bruised condition and consequent inflammation of the intestines that followed, otherwise than that he was struck in the abdomen by the horn of the bull. The triors of the facts were justified in reaching that conclusion. The mere fact that the man did not immediately suffer pain is of no significance. It was a question for the jury at all events, and they were authorized to draw their conclusions from all the circumstances. Even if we were at liberty to weigh the evidence, we could find no fault with the verdict on this question of fact.

(b) On the proposition that the plaintiff's rights under the policy became forfeited because the post mortem was held without notice to the defendant, the plaintiff takes the position that the defendant, by furnishing the blank form for making proof of the loss, waived its rights under that clause. In support of the waiver theory plaintiff cites *Trippie v. Provident F. Society*, 140 N. Y. 28, 35 N. E. 316, 22 L. R. A. 432, 37 Am. St. Rep. 529, and *Unthank v. Trav. Ins. Co.*, 4 Biss. 357, Fed. Cas. No. 16,795. But the circumstances under which the insurance companies were held to have waived the benefits of similar clauses in their policies in those cases were quite different from the circumstances in this case. The instruction given by the court, at the request of the defendant in this case, to the effect that, to constitute a waiver, an intention to waive must appear, or else conduct to mislead the other party into a belief that waiver was intended, stated the law correctly on this point. The conduct of defendant's agent when he furnished the blank as clearly showed an intention not to waive, and not to allow the plaintiff to think that a waiver was intended, as it was possible to show.

But we are satisfied that the holding of the post mortem examination without notice to the company, under the circumstances shown by the evidence in this case, did not have the effect to forfeit the plaintiff's rights under the policy. A clause of forfeiture is not to be strictly construed in favor of the company in such case. *McFarland v. Accident Ass'n*,

124 Mo. 204, 27 S. W. 436. On the contrary, whilst it should be given a reasonable interpretation, yet the inclination of the court should be against the forfeiture. The design of this clause in the policy was to enable the company to learn the cause of the death of the insured, as that cause might be shown by a post mortem examination, if one should be held. Whatever such an examination might show, the defendant was entitled to an opportunity to know. It is a reasonable requirement under reasonable interpretation, and a violation of its terms under circumstances reasonably showing disadvantage to the company would work a forfeiture of the policy. But there is nothing in this case to indicate any such disadvantage. In the first place, it is very doubtful if the plaintiff was responsible for the act. If it occurred without her knowledge or consent, it would be no defense to the suit. She testified that she did not know what the word meant, and did not know what the physicians were doing. But, however that may be, as soon as the attending physician saw the policy and read this clause, which was immediately after the post mortem had been held, he went to the office of the defendant, and informed them what had been done, and offered to allow them to make a re-examination. There is no suggestion in the record of any fact or theory which would tend to show that a re-examination of the body at that time would not disclose to the eye of the defendant's surgeon everything that the first examination disclosed to the physicians who made it. We do not say that the first examination might not have disclosed facts that could have been hidden from one making a second examination; but there is no such suggestion in this record, and we are not led, therefore, into such an inquiry.

We hold that the fact that the post mortem examination was held without notice to the defendant is no bar to the plaintiff's action under the circumstances disclosed by the evidence in this case. The court did not err in refusing the peremptory instruction for a verdict for defendant.

2. We come, now, to the second ground of defense, founded on this clause of the application, which was a part of the contract of insurance: "I agree that for any injury, fatal or otherwise, received by me while exposed, temporarily or otherwise, to a hazard classed by the company, in its manual last issued prior to this date, as more hazardous than that given as my occupation in this application, the company's liability shall be limited to the amount that the premium paid by me would purchase in such more hazardous class. I agree that the classifications in said manual shall be and are a part of this contract." The manual referred to was in evidence, and it showed that the occupation of "stock dealer, not working nor tending in transit," was classed as a preferred risk; that in that class insurance to the lim-

it of \$5,000 could be had for a premium or fee of \$25, whilst the occupation of "stock dealer, tending stock in transit," was classed extrahazardous; that in that class the limit of insurance was \$1,000, and the premium or fee was \$20.

The first instruction for the plaintiff directed the jury to find for the plaintiff in the sum of \$5,000, and interest, if they found, from the evidence (*inter alia*), that when the insured received his injuries he was a stock dealer, visiting yards, not working nor tending in transit; and the second instruction is to the effect that unless the jury should find, from the evidence, that the act of untying the bull was designated in the manual as more hazardous than the occupation of the insured specified in the application, if the verdict was for the plaintiff, it should be for \$5,000. Both of those instructions were erroneous. The first, because there was no evidence to sustain the hypothesis that the insured was only a stock dealer visiting yards, not working nor tending in transit; for the plaintiff's own evidence showed that he was working and tending those cattle in transit. The plaintiff's evidence did not show that he had traveled on the train with the cattle, but it did show that he was in the car attending to them before they were unloaded. Until the cattle were out of the hands of the railroad company and in the pens of the stockyards, they were in transit. The second instruction was erroneous, because it submitted to the jury to interpret the meaning of the contents of the printed manual. It was the duty of the court to interpret the written and printed documents. In this instruction the court interpreted the clause in the contract in question, but left the jury to find what was contained in the manual.

This clause in the contract is clumsily worded. It could not be defended under strict rules of grammar. But courts are often required to discover the meaning of contracts awkwardly expressed. The fault of the sentence is that literally it attempts to draw a comparison between two subjects in reference to a quality which they do not possess in common. In the beginning it refers to a hazard, and in the conclusion compares the hazard to an occupation; that is to say, it speaks of a hazard more hazardous than the occupation. "I agree that, for any injury * * * received by me while exposed * * * to a hazard classed by the company in its manual * * * as more hazardous than that given as my occupation in this application," the company's liability is to be limited, etc. The meaning undoubtedly is that he agrees that, for any injury received by him while exposed to a hazard peculiarly incident to an occupation classed in the manual as more hazardous than that given by him as his occupation in the application, the company's liability should be limited. The court attempted to follow too literally the language of the clause, and thereby fell into the error

of instructing the jury that, unless the manual classified the act of untying the bull as more hazardous than the occupation of a stock dealer, not tending stock in transit, then, if they found for the plaintiff, the verdict should be for the full amount. Taking the plaintiff's evidence alone, there is no doubt that the insured was, at the time he received his injury, exposed to a hazard that was peculiarly incident to an occupation which was classed in the manual as more hazardous than that named in the application as the occupation of the insured, and therefore, by the terms of the contract, the recovery should be limited to the amount of insurance the premium paid would purchase in the more hazardous class, which it is admitted was \$1,250.

We have all the facts before us. Therefore there is no necessity for remanding the cause for a new trial. The judgment of the circuit court is reversed, and judgment will be entered here for the plaintiff for \$1,250 and interest at 6 per cent. from February 20, 1901, and costs in the circuit court; appellant to recover the costs in this court. All concur.

STATE ex rel. CURTICE v. SMITH et al.,
Judges.*

(Supreme Court of Missouri. June 15. 1903.)

MUNICIPAL CORPORATIONS—SPECIAL TAX BILLS—VALIDITY—OBJECTIONS—FAILURE TO FILE WITH BOARD OF PUBLIC WORKS—CITY ORDINANCES—APPLICATION—CONSTITUTIONAL QUESTION—APPEAL JURISDICTION OF SUPREME COURT—PREVIOUS DECISION.

1. Kansas City Charter, art. 9, § 23, authorizes suits to enforce payment of special tax bills for street improvements, and provides that the owner of any land charged with the payment of such bills shall, within 60 days from the date of issuance thereof, file with the board of public works a written statement of all objections which he has to the validity of such tax bills, or the doing of the work, etc., and that in any suit on any tax bill no objection shall be pleaded or proved, other than those that have been filed as required. *Held*, that such section was not limited in its application to tax bills which were merely irregular, but applied as well to bills which were absolutely void.

2. In an action on a special tax bill, defendant, who had failed to file his objections before the board of public works as required by Kansas City Charter, art. 9, § 23, contended that such section, in prohibiting defenses to tax bills unless objections were made before the board of public works, was unconstitutional. The trial court so held, and permitted defendant to litigate various objections to the validity of the bills, which were overruled, and judgment rendered for plaintiff. On appeal to the Court of Appeals, it was held that one of the defenses urged was valid, and that the bills sued on were therefore absolutely void. Plaintiff thereupon prayed an appeal to the Supreme Court on the ground that the constitutionality of the charter provision was involved, which was disallowed. *Held*, that since no judgment could be rendered in favor of defendant unless such charter provision was held unconstitutional, as he had waived all objections by failing to make them before the board of public works as required

*Rehearing denied July 3, 1903.

thereby, the constitutionality of such section was involved, and the Supreme Court had jurisdiction of the appeal.

3. Where the constitutionality of a city ordinance was expressly raised, and determined by the trial court, the right to appeal to the Supreme Court on the ground that the cause involved a constitutional question at once attached, notwithstanding such ordinance had been previously declared unconstitutional by the Supreme Court.

In Bunc. Mandamus by the state, on relation of J. M. Curtice, against Jackson L. Smith and others, judges of Kansas City Court of Appeals. Peremptory writ granted.

Scarritt, Griffith & Jones, for relator. N. F. Heitman, for respondents.

MARSHALL, J. This is an original proceeding by mandamus, seeking to compel the respondents, as judges of the Kansas City Court of Appeals, to transfer to this court the case of J. M. Curtice v. Frank F. Schmidt and Mollie Schmidt, now pending in said Court of Appeals. The return to the alternative writ asserts the jurisdiction of the Kansas City Court of Appeals over said cause, and contests the jurisdiction of this court.

The record discloses the true status of the controversy to be this: J. M. Curtice sued Frank F. and Mollie Schmidt in the circuit court of Jackson county upon a certain tax bill, issued April 29, 1897, by virtue of Ordinance 7599, authorizing the paving of Nineteenth street between Tracy avenue and Olive street; said tax bill being issued against lot 58 of Elder's addition to Kansas City, and owned by defendants therein. The answer of the defendants in that case is: First. A general denial, except as otherwise expressly admitted in the special defenses. Second. An admission that the plaintiff owns the tax bill, and defendants own the land. Third. That the tax bill is void because the work was not completed within the time provided by the contract. Fourth. That the tax bill is void because the contract required the contractor to observe the eight-hour ordinance of Kansas City. Fifth. That the tax bill is void because the ordinance authorizing the paving of the street specified six kinds of materials that might be used in paving the street, and that the owners of a majority in front feet of the lands fronting the improvement selected, as they had a right to do, Trinidad Lake asphalt as the material to be used for such paving (it being one of the six materials mentioned in the ordinance from which a selection was to be made), but that the board of public works disregarded the selection of the property owners, and designated Pittsburg, Kan., Vitrified Brick Company's vitrified brick as the material to be used. Sixth. That, after the said board wrongfully designated such vitrified brick, specifications for work were prepared, and a contract therefor was let, and that the contract was confirmed by ordinances of the city, and that

such designation, specifications, contract, and ordinances are illegal and void (1) because they are contrary to the Kansas City Charter, requiring said pavement to be let to the lowest and best bidder; (2) because they were unauthorized by the Kansas City charter, and in violation thereof, in excluding from use in the pavement in question all vitrified brick of similar quality, except Pittsburg, Kan., Vitrified Brick Company's vitrified brick. Seventh. That, prior to the passage of the ordinance authorizing the improvement, the board of public works made a pretended designation of the materials which the property owners might select from, but that said designation did not comply with the charter of Kansas City, and that the details specified in the said designation of such materials "all specify some particular, special kind of material in such way as to promote monopoly and prevent competition, and that such designation violates the charter of Kansas City, which requires such work to be let to the lowest and best bidder." The reply is a general denial, with a special plea as follows: "Further answering, plaintiff states that none of the defendants nor any owner of the tract of land described in the petition and in the tax bills therein referred to, nor the owner of any interest therein, did within sixty days from the issue of the said tax bills described in the petition file with the board of public works of Kansas City a written statement of each and all objections which he or they had to the validity of such tax bills, the doing of the work mentioned in said tax bills, the furnishing of the materials charged for, the sufficiency of the work or materials therein used, or of any mistake or error in the amount thereof, or a statement of any of the objections of facts alleged in the amended answer, and that by reason of the premises the defendants ought not to be heard to plead or prove all or any of the facts alleged in their amended answer." When the case came on for trial, the plaintiff introduced a resolution of the board of public works relating to the issuance of special tax bills, and the special tax bill sued on, and then rested. The defendants offered in evidence the ordinance authorizing the improvement, and also section 811 of the Revised Ordinances of Kansas City for 1898, regulating the advertising for bids for public work, and requiring the time for the completion of the work to be specified. Thereupon the following proceedings were had: "By Mr. Scarritt: We object to the introduction of any evidence on behalf of defendants relative to objections to the tax bills sued on, for the reason that no objections thereto have been stated in writing and filed with the board of public works of Kansas City by the defendants, or any of them, or those under whom they claim, within sixty days after the date of the issue of such tax bills; and especially we object, for the same reasons, to any evidence as to the petitions addressed to the

board of public works in respect to the material with which the street should be paved, and also as to the time consumed in the execution of the work. (Which objection was by the court overruled, to which ruling of the court plaintiff then duly excepted.) By Mr. Heltman: It is admitted that no objection whatever to the tax bills sued on was stated and filed with the board of public works of Kansas City within sixty days after the issue of those tax bills." The court then permitted the defendants to introduce evidence in support of their several defenses, and also heard evidence offered by the plaintiff bearing upon the several defenses.

At the close of the evidence the plaintiff asked the court to declare the law to be as follows:

"(1) The court declares the law to be that under the pleadings and the evidence the finding and judgment should be for the plaintiff.

"(2) The court finds the facts to be, under the pleadings and admissions of the parties, that none of the defendants, nor any owner of the land described in the petition, or of any interest therein, did, within sixty days after the date of the issue of the tax bill sued on, file with the board of public works of Kansas City a statement of any objections which he or they had to the validity of the tax bill sued on, the doing of the work mentioned therein, the furnishing of the materials charged for, the sufficiency of the said work or materials therein used, or any mistake or error in the amount thereof.

"(3) The court declares the law to be that all the evidence offered and introduced tending to prove that the work of paving Nineteenth street, for which the tax bill sued on was issued, was not completed within ninety days after the contract therefor became binding, is irrelevant and immaterial, under the pleadings and admissions of the parties, and is not considered by the court in determining the issues in this case.

"(4) The court declares the law to be that the contract between Kansas City and Fred Feigel for paving Nineteenth street, in evidence, is a valid contract; that it was confirmed by ordinance of Kansas City November 21, 1896, and defined and established the rights of the respective parties thereto; and that to hold said contract void, in whole or in part, is to deprive the plaintiff of his property without due process of law, and contrary to the terms of the fourteenth amendment to the Constitution of the United States.

"(5) The court declares the law to be that section 23, art. 9, of the charter of Kansas City, is constitutional and valid, and is to be taken and considered as incorporated in and forming a part of the ordinance authorizing the improvement in question, and the contract therefor, which are in evidence, as though written into each of them, and that to hold such section void, and permit the defendants in this suit to plead or prove any objection or objections to the tax bills sued

on, when no such objection or objections have been stated in writing and filed with the board of public works of said city within sixty days from the date of the issue of the tax bill sued on, is to violate the obligation of the said contract, and to deprive the plaintiff of his property without due process of law, contrary to section 10, art. 1, of the Constitution of the United States, and article 14 of the amendments to the said Constitution, and contrary to the provisions of sections 15 and 30, art. 2, of the Constitution of Missouri.

"(6) The court finds that the contract for the work in question provides that said work shall be begun within ten days after said contract binds and takes effect, and shall be prosecuted regularly and uninterruptedly thereafter (unless the engineer shall specially direct otherwise in writing), with such force as to secure its full completion within ninety days from the date of its confirmation, and that, within said ten days after said contract bound and took effect, the said engineer did specially direct, in writing, that, owing to freezing weather and the lateness of the season, the contractor for said work 'is hereby ordered to cease operations until further notice'; that said contractor was not notified by said engineer to proceed with the said work before February 20, 1897, and that the said work was completed on April 23, 1897; and that, deducting the period of the suspension of the said work as ordered by the said engineer, the same was completed within ninety days after the confirmation of the contract for said work."

The court gave all of these instructions, except the fifth, and refused that. The defendants asked 16 instructions, covering all the phases of their several defenses, but the court refused them all. The court then entered judgment for the plaintiff, and the defendants appeal. The appeal was allowed to the Kansas City Court of Appeals. The plaintiff moved that court to transfer the case to this court, but the court overruled the motion, proceeded with the case, and reversed the judgment of the circuit court, without remanding the case.

The opinion of the Kansas City Court of Appeals, per Broadbuss, J., is as follows:

"This is an action to enforce the collection of an installment tax bill issued by Kansas City, dated April 20, 1897, against defendants' land, in part payment of the price of constructing a brick pavement on Nineteenth street, from Tracy avenue to Olive street. The improvement was authorized under section 2, art. 9, of the Kansas City charter. The judgment was for the plaintiff. In said article provision is made for the paving of streets by the city council passing a resolution declaring it to be necessary, and, if no remonstrance from a majority of property owners is thereafter presented in a designated time, by passing an ordinance directing a contract for the work. And said section also

provides as follows: 'Provided further, however, that if the board of public works shall unanimously recommend to the city council that any business street or part thereof be paved * * * and the payment thereof is to be made in special tax bills, and the common council shall by ordinance order such work to be done by a vote of two-thirds of the members elect of each house of the common council, then such work may be done without any resolution as hereinbefore provided and regardless of such remonstrance. When the work shall be so recommended by the board of public works and so ordered by the common council as last above mentioned, the resident owners of the city who own a majority in front feet of the lands belonging to such residents and fronting on such street or part thereof to be improved shall have the right to select the material with which such street * * * or part thereof shall be paved, from not less than two kinds of materials, to be designated by the board of public works. Such selection to be made within ten days after such ordinance shall have taken effect and been published for ten days in the newspaper at the time doing the city printing, which selection shall be by petition addressed and delivered to the board of public works. If such selection be not made within such time, then the board of public works shall designate the material with which said street * * * or part thereof shall be improved.' The said board of public works, as so authorized, unanimously recommended that the street in controversy be paved as a business street. Said board designated six different kinds of material for such pavement, among which was the following: 'Vitrified brick as manufactured by the Pittsburg (Kansas) Vitrified Brick Company, on concrete, to be laid according to detail 1 of brick pavement, approved by said board August 11, 1896, and on file in the office of the board.' And also the following: 'Trinidad Lake asphalt on concrete to be laid according to detail 4 of asphalt pavement, approved by said board August 11, 1896, and on file in the office of said board.' The ordinance for the paving in controversy was approved September 9, 1896, and publication thereof as required was first made September 14, 1896. Appellants claim that a petition of the majority of the resident property holders was addressed and delivered to the board October 5, 1896, selecting Trinidad Lake asphalt for the pavement. It was denied that said petition was filed within the time required by said charter, which reads: 'Such selection to be made by them [a majority of the resident property holders] within 10 days after such ordinance shall take effect and been published for ten days,' etc. This petition was not filed in time, unless we exclude Sunday in computing time, but the law is otherwise. *St. Joseph v. Bank*, 54 Mo. App. 315; *State v. Green*, 66 Mo. 631. The property owners having failed to exercise their right to select

the material for the paving of said street, that duty devolved upon the board of public works, which made the following selection: 'Vitrified brick as manufactured by the Pittsburg (Kansas) Vitrified Brick Company.'

"This case is like that of *Schoenberg v. Field* (decided by this court June 2, 1902) 68 S. W. 945. The opinion there states the point in issue in the following language, which is precisely the same here: 'The question thus presented is this: Had the board of public works the power, under the charter, to arbitrarily select a paving material that was manufactured by one company, to the exclusion of the same material manufactured by other companies? The case shows that vitrified brick as manufactured by the Diamond Brick & Tile Company was not a patented article, and was not thus a monopoly by reason of being patented. On the contrary, several other companies in and near Kansas City manufactured such brick for paving, which had passed the standard tests for street paving. The general policy in Kansas City is that, in letting public work, opportunity must be given for competition. The very fact that the work is let on public notice at public bidding discloses this. Section 12, art. 17, Charter; *Galbreath v. Newton*, 30 Mo. App. 380; *McQuiddy v. Brannock*, 70 Mo. App. 535, 548.' No good cause has been assigned for overruling said case, and we feel constrained to adhere to it, for the sound reasoning upon which it is founded.

"The appellants claim that the ordinance of the city prescribing the number of hours that shall constitute a legal day's work is invalid, and has a tendency to stifle competition, and thereby increase the cost of public work. We think not. The state of Missouri has a law prescribing the number of hours for a legal day's work. See section 8136, Rev. St. 1899. This statute is founded on public policy. Other states have a similar statute, and so has the United States. In *St. Louis Quarry Co. v. Frost*, 90 Mo. App. 677, a similar ordinance of the city of St. Louis was upheld.

"Many other questions are raised, but as from what has been said, the plaintiff was not entitled to recover, they need not be noticed.

"However, the respondent asks that the cause be certified to the Supreme Court because there are constitutional questions involved. At the close of the trial, plaintiff requested the court to declare section 23 of article 9 of the charter of Kansas City valid. The court refused this request. Said section, amongst other things, provides that 'the owner or owners of real estate charged with tax bills shall, within sixty days from the date of the issue of the tax bills, file with the board of public works a written statement of each and all objections which he or they may have to the validity of such tax bills; * * * and in any suit on any tax bill issued pursuant to this section, no objection or objections

to it shall be pleaded or proved other than those that have been filed with the board of public works within the period aforesaid.' In *Richter v. Merrill*, 84 Mo. App. 150, it was held that said provision did not apply to a case where the tax bill was void. In *Barber Asphalt Co. v. Ridge*, 68 S. W. 1043, the Supreme Court of Missouri held that said provision was void, as it was 'a violation of the constitutional inhibition against deprivation of private property without due process of law.' But the argument is made here that, as said decision was by only one division of the court, plaintiff is entitled to have the question again considered and reviewed by said court. And it was held, in *State ex rel. v. Kansas City Court of Appeals*, 105 Mo. 299, 16 S. W. 863, that 'the decision of this court that the act was constitutional could not have the effect of eliminating from a subsequent case involving the same question the jurisdictional fact.' But however that may be, the decision in this case is not based upon the conclusion that said charter provision is unconstitutional, but that it has no application in a suit upon a void tax bill. And this holding was approved in *Barber Asphalt Co. v. Ridge*, supra. It would be a nugatory act to certify this case to the Supreme Court, to determine a constitutional question, which, when determined, could have no effect on the holding here.

"It is also claimed that defendants raised a question as to the constitutionality of the eight-hour ordinance in controversy, for which the case should also be certified to the Supreme Court. The appellant raises no such question in this court, but he does insist, not that the ordinance is unconstitutional, but that it violates section 12, art. 17, of the Kansas City charter. There was no assertion or denial of any constitutional right of plaintiff, and, as defendants have not appealed from a decision against them, the plaintiff has in no way been adversely affected. In fact, the decision in the trial court was in his favor. He is not, therefore, entitled to have the case certified for such reason. *Ash v. City of Independence*, 145 Mo. 120, 46 S. W. 749. The plaintiff's application to have the case certified to the Supreme Court is therefore overruled. For the reasons given, the cause is reversed. All concur."

This decision may be epitomized as follows: First, the defense that the board of public works had no right to designate vitrified brick, because the property owners had selected Trinidad Lake asphalt, is decided against the defendants, because they did not file their selection of material with the board within the time allowed by the city charter for the property owners to make a selection; second, the eight-hour provision of the contract and ordinance is held to be valid, so this point is decided against the defendants and in favor of the plaintiff; third, the designation of Pittsburg, Kan., Vitrified Brick Company's vitrified brick, when such brick is

not covered by a patent, and when other companies in and near Kansas City manufacture paving brick which has passed the standard tests for street paving, destroys competition, and the general policy of Kansas City in letting public work is that opportunity must be given for competition. Hence the tax bill is void. And the Court of Appeals refused to transfer the case to this court because that court had decided that the provisions of section 23 of article 9 of the City Charter, which requires the property owner to file written objections to the tax bill with the board of public works within 60 days after the tax bill is issued, do not apply where the tax bill is void, but apply only where the objections refer to some error or irregularity in the tax bill which may be corrected. And the return to the alternative writ proceeds along the same lines.

The crucial question in this case is whether any court could decide the case of *Curtice v. Schmidt* in favor of the defendants without necessarily deciding that section 23 of article 9 of the charter of Kansas City is unconstitutional. The validity of the charter provision was brought into the case in this way: The suit is upon a special tax bill, payable in installments. The answer sets up various defenses. The reply denies the right of defendants to interpose any defense, of any nature or character, because the defendants are cut off by the said provision of the charter from making any defense, for the reason that they failed to file any written objections to the tax bill within 60 days after it was issued. On the trial the plaintiff introduced the special tax bill, which, under the charter, made out a prima facie case, and rested. The defendants then offered evidence in support of their special defenses. The plaintiff objected to the introduction of any evidence on the part of the defendants, because, under said charter provision, they were not entitled to introduce any evidence or to make any defense to the tax bill whatever. The trial court overruled the objection, and heard the evidence offered. The plaintiff saved proper exception to this ruling of the trial court. The plaintiff called the trial court's attention to the point again, by asking an instruction declaring the charter provision to be a valid and constitutional enactment, and that it cut off the defendants' right to make any defense whatever. The court refused the instruction. It is claimed now that, as the plaintiff saved no exception to this ruling, the point is not in the case; but this is a misapprehension, for the point had been made and ruled against the plaintiff, and exception properly saved, at the opening of the defendants' case, and the question, therefore, was expressly raised, and exception saved. If the judgment had been for the defendants, the appeal would clearly have been to this court, for the case would then have been in practically the same shape as was the case of

Barber Asphalt Paving Co. v. Ridge, 169 Mo. 376, 68 S. W. 1043, and this court entertained jurisdiction of said case. In the *Ridge Case* the trial court, on motion of the plaintiff, struck out the special defense, because, under the charter, the defendants were cut off from making any defense. The defendants claimed in the motion for new trial that the charter provision was unconstitutional. This court held that the charter provision was unconstitutional. But this court only had jurisdiction of that case because the constitutionality of the charter provision was involved. In that case the question of the constitutionality of the charter provision was expressly raised by the motion for a new trial. In this case the charter provision was invoked by the plaintiff, and its protection denied to the plaintiff. This could only have been done by holding that the charter provision was unconstitutional. The trial court, however, found that the special defenses of the defendants were not well founded, and therefore entered a judgment for the plaintiff. The defendants appealed to the Kansas City Court of Appeals. That court held that the defense of monopoly was well taken, and reversed the judgment of the circuit court, without remanding the cause, on the ground that the monopoly feature rendered the tax bill and the ordinance under which the work was done void, and therefore the plaintiff could never make out a case. And the Court of Appeals held, as it had held in *Richter v. Merrill*, 84 Mo. App. 150, that the charter provision did not apply where the tax bill was void, but only applied where the defense rested upon an error or irregularity in the proceedings upon which the tax bill rested, and which could have been corrected, and therefore refused to transfer the case to this court. Thus it appears that the trial court denied the plaintiff the benefit of the charter provision because it was unconstitutional, and that the Court of Appeals denied the plaintiff the benefit of the charter provision because it held that it did not apply where the tax bill was void, and hence the constitutionality of the charter provision was not involved.

The Kansas City Court of Appeals did decide, in *Richter v. Merrill*, 84 Mo. App. 150, that the charter provision did not apply where the tax bill was void, but only applied where there were errors or irregularities in the tax bill, or the proceedings upon which it rested, that might be corrected. And in that case it is said: "Merely as illustrative of this, see *Girvin v. Simon*, 116 Cal. 610, 48 Pac. 720, and authorities cited." The illustrative case, however, is essentially different, and the reasons upon which it rests are exactly the converse of those employed by the Kansas City Court of Appeals. The California case arose under a statutory provision in reference to street improvements, which provided that if the property owner, contractor, or any other person interested,

felt aggrieved by any act or determination of the street superintendent, or claimed that the work had not been performed according to the contract, in a good and substantial manner, or who had any objection to the correctness or legality of the assessment or other act, determination, or proceeding of the superintendent of streets, he should appeal to the city council within 30 days. Provision is then made for a hearing before the council, and full authority is given to the council to correct all irregularities and errors, and the decision of the council is made final and conclusive "as to all errors and irregularities which the council might have remedied and avoided." It is further provided by the act that no assessment shall be held invalid, except upon appeal to the council, for errors or informalities or other defects prior to the assessment, or in the assessment itself, in cases where notice of intention to do the work has been duly published as by law required, before the passage of the resolution ordering the work to be done. The Supreme Court of California very properly held that the council had power, on appeal, to correct errors and irregularities which might have been remedied or avoided, but had no power under this act to pass on the question whether or not the whole proceeding was void, and hence such defense was open to the defendant, without having first appealed to the council. This is plainly right, for no appeal to the council was allowed by the act, except as to mere correctible errors or irregularities, and therefore the defendant had been provided with no forum outside of the courts in which to contest the inherent invalidity or illegality of the tax bill. The court was also clearly right in holding that the act could not cut off a person's right to contest in the courts the inherent invalidity of a tax bill, by the mere publication of a notice of intention to do the work. Such provision of the act was properly limited to mere correctible errors or irregularities. A competent forum was provided for the correction of such errors or irregularities, but the attempt of the act to foreclose absolutely all defense upon the more serious grounds of the invalidity of the whole proceeding was manifestly futile, for every man is entitled to a day in some competent court in which to try all questions relating to life, liberty, or property. The California court properly held, therefore, that the courts and not the council, had jurisdiction to hear and decide all questions that went to the legality or validity of the tax bill; that "a void contract does not become valid by failure to appeal to the board of supervisors," "but as to all matters which may lawfully be corrected on appeal to the city council or other governing body of the municipality, and for which an appeal is provided by the statute, the property owner deeming himself aggrieved must prosecute his appeal, failing in which he is

estopped." It will be observed that the court thus upheld the validity of the act, so far as it made it necessary for any one to appeal to a constituted forum on questions affecting correctible errors or irregularities, and limited the operation of the act to such cases only, and held, in effect, the act to be unconstitutional so far as it attempted to foreclose more serious defenses without a judicial inquiry. This case affords no foundation, however, for the position taken by the Kansas City Court of Appeals in the case of Richter v. Merrill, supra—and in this case—that the charter provision of Kansas City does not apply to an objection that a special tax bill is void, but only applies where the objection goes to an error in, or irregularity in, the tax bill. This idea is evidently borrowed from the California case quoted. But the Court of Appeals overlooked the radical differences between the California act and the provision of the Kansas City charter. When those differences are noted, it will at once be apparent that the California case is the exact antithesis of the decisions of the Kansas City Court of Appeals. Thus, as already pointed out, the California act provided a forum in which questions of error or irregularity in the tax bills could be tried, and such matters corrected, but gave that forum no power to pass upon questions going to the fundamental illegality of the tax bills, and sought to foreclose all judicial inquiry as to such grave questions by the publication, in advance, of notice of intention to do the work. The first provision of the act was held to be legal and binding, while the second was held to be unconstitutional—not in so many words, but that is the necessary meaning of the opinion. Section 23 of article 9 of the Kansas City charter is very different. It is as follows: "Suits may be brought to enforce the payment of such tax bills or any installment or installments thereof, with all interest thereon, in the manner herein provided for the bringing of suits on other tax bills: provided, however, that the owner or owners of any tract or parcel of real estate charged with payment of such bills, or the owner or owners of any interest in such tract or parcel of real estate shall, within sixty days from date of issue of the tax bills, file with the board of public works a written statement of *each and all objections* which he or they may have to the *validity of such tax bills, the doing of the work, the furnishing of the materials charged for, the sufficiency of the work or materials therein used and any mistake or error in the amount thereof* [the italics are superadded to mark the differences between this provision and the California act]; and in any suit on any tax bill issued pursuant to this section, no objection or objections to it shall be pleaded or proved other than those that have been filed with the board of public works within the period aforesaid." The

California act affords a tribunal for the correction of errors and irregularities, and attempts to foreclose all inquiry as to the essentials—the validity of the tax bills. The charter does not take away any person's right to be heard in the courts upon any question, whether of error, irregularity, invalidity, mistake, or of any kind whatever, but requires that, as a prerequisite to such right to be heard, a party must file his objections with the board of public works within 60 days after the tax bill is issued. The distinction drawn by the California court between a void and an irregular or erroneous tax bill was a proper distinction, under the act, for the act itself drew such a distinction. But there is no foundation whatever for such a distinction under the charter provisions, for that provision expressly applies to objections which go to, first, the validity of the tax bills; second, to the doing of the work; third, to the materials furnished; fourth, to the sufficiency of the work or materials used; fifth, to any mistake or error in the amount. The Kansas City Court of Appeals evidently adopted the distinction drawn by the California court between irregular and void tax bills, which was a proper distinction, under their law, without noticing the differences between the California law and the charter of Kansas City. Otherwise the Court of Appeals could not have fallen into the error of saying that the charter did not apply to void tax bills, when the charter provision requires the objection to the validity of the tax bill to be filed, as well as all objections to other essentials and irregularities. The charter requires a party to file all of his objections to a tax bill, whether they go to show that the tax bill is void, or only irregular or erroneous, and cuts off all right to plead or defend on any ground not specified in the objections filed. No distinction is made in the charter between the character or nature of the objections or of the defenses. All objections are required to be filed, and the courts pass on all kinds of objections. This being true, no court has a right, by construction, to change the plain provisions of the charter. No court can construe away the express requirement of the charter that all objections to the validity of the tax bill must be filed. No court has a right to differentiate between objections that go to show that the tax bill is void, and objections that go to show that it is erroneous or irregular. The charter makes no such distinction, and the courts cannot do so. The provision of the charter is either wholly good or wholly bad. It cannot be held good as to errors or irregularities, and bad as to essentials. It cannot be distinguished so as to apply to errors or irregularities, and not apply as to objections going to the validity of the tax bill.

If the charter provision is a valid provision, the defendants in this case are not entitled to make any defense of any kind whatever, for

they did not comply with the requirements of the charter. Or otherwise stated, the defendants can only be heard to defend this case for any reason on the ground that the charter provision is invalid because it is unconstitutional—because it deprives a party of his day in court, and therefore is not due process of law. This case, therefore, cannot be decided in favor of the defendants without first deciding that the charter provision is unconstitutional, and the Kansas City Court of Appeals has no power to decide that question; the appellate jurisdiction to decide that constitutional question being vested solely in this court. In *State ex rel. v. Smith*, 152 Mo. 444, 54 S. W. 218, this court, per Valliant, J., held that a constitutional question is necessarily involved whenever the conclusion reached could only be arrived at after a construction of the Constitution. In *State ex rel. v. Smith*, 141 Mo. 1, 41 S. W. 906, this court, per Barclay, J., held that, "when the judgment of a court on agreed facts obviously and necessarily comprehends a decision on a question of constitutional right, that question is 'involved' in the judgment. *Kaukauna Co. v. Green Bay, etc., Co.*, 142 U. S. 254 [12 Sup. Ct. 173, 35 L. Ed. 1004]." In *Kirkwood v. Meramec Highlands Co.*, 160 Mo., loc. cit. 118, 60 S. W. 1072, Burgess, J., said: "To confer upon the Supreme Court jurisdiction upon an appeal from the circuit court upon the ground that a constitutional question is involved, it must appear that the decision is necessary to the determination of the case," etc. In the federal case cited, the Supreme Court of the United States, speaking through Mr. Justice Brown, said: "Notwithstanding the inhibition of the Constitution is not distinctly put in issue by the pleadings, nor directly passed upon in the opinion of the court, it is evident that the court could not have reached a conclusion adverse to the defendant company without holding either that none of its property had been taken, or that it was not entitled to compensation therefor, which is equivalent to saying that it had not been deprived of its property without due process of law. This court has had frequent occasion to hold that it is not always necessary that the federal question should appear affirmatively on the record or in the opinion, if an adjudication of such question were necessarily involved in the disposition of the case by the state court. *Wilson v. Blackbird Creek Marsh Co.*, 2 Pet. 245 [7 L. Ed. 412]; *Armstrong v. Athens County*, 16 Pet. 281 [10 L. Ed. 965]; *Chicago L. Ins. Co. v. Needles*, 113 U. S. 574 [5 Sup. Ct. 681, 28 L. Ed. 1084]; *Eureka Lake & Y. Canal Co. v. Yuba County Super. Ct.*, 116 U. S. 410 [6 Sup. Ct. 429, 29 L. Ed. 671]." This doctrine rests upon quite a different principle from that announced in *Ash v. Independence*, 145 Mo. 120, 46 S. W. 749. The rule there laid down applies to cases which can be decided without in any manner infringing upon or construing the Constitution, but where a

litigant may or may not, as he chooses, inject a constitutional question in the case, which does not necessarily present itself, while cases like those just cited apply to cases where no such judgment as was rendered could possibly be rendered without meeting at the threshold of the investigation a constitutional question, and deciding it against the party losing in that court. This case is an apt illustration of the latter rule. Here the trial court decided the constitutional question against the plaintiff, but gave judgment in his favor. He had no cause of complaint as to the result of the whole case, therefore. It was possible for the court to thus decide the constitutional question against the plaintiff without cutting off the plaintiff's right to recover, for the plaintiff might still recover on the merits. But it was not possible to decide the constitutional question in favor of the plaintiff, and then give judgment for the defendant, for, if the constitutional question was decided in favor of the plaintiff, it cut out the defendant's right to defend the case at all, and therefore cut off his right to a judgment. In other words, in order to decide in favor of the defendants in this case, or even to permit them to introduce any evidence in support of their answer, the court would have first to decide that the charter provision invoked by the plaintiff is invalid, and it could only be invalid because it is unconstitutional. Hence it is absolutely necessary to consider and decide the constitutional question before any defense of the defendants can even be considered. A constitutional question is therefore necessarily involved in this case, and necessarily stands in the defendant's pathway to a judgment. The Kansas City Court of Appeals has no jurisdiction to decide that question.

The case of *Hilgert v. Paving Co.* (Mo. Sup.) 72 S. W. 1070, lays down no rule inconsistent with what is here said.

But the defendants invoke the rule of practice of the Supreme Court of the United States announced in *New Orleans Waterworks v. Louisiana*, 185 U. S. 336, 22 Sup. Ct. 691, 46 L. Ed. 936, and *Equitable Life Ins. Co. v. Brown*, 23 Sup. Ct. 123, 47 L. Ed. —, that, when the constitutional question raised or necessarily involved has been explicitly decided in another case, it will not be regarded as properly in a subsequent case. This practice in this court is exactly the reverse. In *State ex rel. Dugan v. Smith*, 105 Mo. 299, 16 S. W. 853, the constitutionality of the local option laws was challenged, and it was contended that their constitutionality had been decided by this court, and therefore the attempt to again raise that question was a mere pretense and a sham. But this court, per Macfarlane, J., said: "The decision of this court that the act was constitutional could not have the effect of eliminating from a subsequent case, involving the same question, the jurisdictional fact. The subject-matter (that is, the question to be decided),

and not the result of the decision, gives the jurisdiction. The subject-matter of the suit attaches itself to the case the moment it is directly raised in the circuit court, and continues with the case, and is a part of it, unless subsequently withdrawn, until the case is finally determined. If an appeal is taken, the jurisdiction is indelibly stamped upon the case, and cannot be expunged by previous decisions of the court upon the same question." The same contention was made in *State ex rel. v. Smith*, 150 Mo., loc. cit. 81, 51 S. W. 713; and this court, per Burgess, J., reached the same conclusion as was reached by Macfarlane, J., in the case quoted from. The same rule was announced by this court in *Brown v. M., K. & T. R. Co.* (No. 10,772, not yet officially reported) 74 S. W. 973. The fact, therefore, that in *Barber Asphalt Paving Co. v. Ridge*, 169 Mo. 376, 68 S. W. 1043, this court held the provision of the Kansas City charter to be unconstitutional, does not take the question out of this case, and does not confer jurisdiction upon the Kansas City Court of Appeals. This court alone has jurisdiction to decide that question. The case of *Curtice v. Schmidt* could not be decided in favor of the defendants without first holding that the charter provision invoked by the plaintiff is unconstitutional; and therefore a constitutional question is necessarily involved in that case, and this court, and not the Kansas City Court of Appeals, has jurisdiction.

The alternative writ of mandamus will therefore be made peremptory, commanding the respondents, as judges of the Kansas City Court of Appeals, to certify and transfer to this court the case of *J. M. Curtice v. Frank F. Schmidt and Mollie Schmidt*, for adjudication by this court. All concur.

MEDDIS v. KENNEY et al.

(Supreme Court of Missouri, Division No. 1.
June 20, 1903.)

EXECUTORS AND ADMINISTRATORS—SALE OF LAND—PAYMENT OF DEBTS—HOMESTEAD—OCCUPATION BY WIDOW—ADVERSE POSSESSION—COURTS—JURISDICTION—PRESUMPTIONS—FOREIGN CORPORATION—RIGHT TO PURCHASE LAND—APPEAL—OBJECTIONS NOT RAISED AT TRIAL.

1. Where land in controversy was sold for the payment of testator's debts, a declaration of law that if testator's widow took the same under the will, which devised the property to her, subject to the payment of testator's debts, she took the same cum onere, and her heirs were estopped to deny that the land was subject to sale for testator's debts, was proper.

2. Where an heir received his distributive share arising from the proceeds of the sale of lands by the executor for the payment of debts, as did also his brothers and sisters, through whose deeds such heir claimed title to the property, he was estopped to assert such title as against the title conveyed by the deed executed in pursuance of the executor's sale.

3. A declaration of law that, if property in

question was used by testator's wife after his death as her homestead, her possession was not adverse to the heirs or purchasers at an administration sale of the property for payment of testator's debts, and that during the time she occupied the property as a homesteader she could not enlarge her estate by a claim of adverse possession, was proper.

4. Where, on an application to the court of common pleas in which the administration of testator's estate was pending for the sale of land to pay debts, the judge of the court was disqualified, and thereupon certified the cause to the circuit court, as authorized by Rev. St. 1899, § 1760, such court had jurisdiction to order a sale of the land in question.

5. In the absence of countervailing circumstances, it will be presumed that the circuit court—a court of general jurisdiction—in ordering a sale of testator's real estate to pay debts, acted within its jurisdiction.

6. Rev. St. 1899, §§ 1024–1028, prohibiting foreign corporations from transacting business within the state until they complied with such sections in establishing a place of business within the state where process might be served, etc., did not prohibit a foreign corporation, which in the course of its business in its home state had become the holder in trust of a claim against a citizen of Missouri, from purchasing real estate sold by an administrator of the latter for the payment of debts.

7. An objection that a notice of an administrator's sale of decedent's real estate to pay debts was not published for the requisite period of time cannot be made for the first time on appeal.

Appeal from Circuit Court, Cape Girardeau County; Henry C. Riley, Judge.

Action by Curtiss J. Meddis against Nancy R. Kenney and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

J. W. Limbaugh, for appellants. Angelo Dempsey and Robert L. Wilson, for respondent.

ROBINSON, J. This is an action of ejectment, in statutory form, to secure possession of the north half of lot 3, range A, in the city of Cape Girardeau, Mo., known as the "John Albert Homestead." The suit was originally begun in the Cape Girardeau court of common pleas against the defendant Nancy R. Kenney, the tenant in possession. Afterwards H. H. Albert, the landlord of the defendant Kenney, was, on his own application, made a party defendant, and the venue changed to the Cape Girardeau circuit court, where the cause was tried by the court without a jury, resulting in a judgment for the plaintiff, from which defendants have appealed to this court. The petition is in the usual form, and the answer a general denial.

The record shows that John Albert died testate in Cape Girardeau county, Mo., in August, 1881, leaving surviving him his widow, Teresa Albert, and the following children, to wit: Anna, William, Robert, Clement, Jules, and the defendant H. H. Albert; that John Albert at the time of his death was seised of the land in suit, and occupied it as his homestead. Both parties claim through him, as the common source of title. By the last will of John Albert, which was duly pro-

§ 3. See *Adverse Possession*, vol. 1, Cent. Dig. § 329.

bated in that county, Linus Sanford was appointed executor. After giving to each of his children the sum of \$1, the will provides: "To my wife, Teresa Albert, I give and bequeath all the balance of my property of every kind, whether real or personal, after the payment of my debts." Sanford qualified and proceeded to administer on the estate. In 1897 Sanford, as such executor, filed his petition in the Cape Girardeau court of common pleas, a court possessing original probate jurisdiction, setting forth the facts that the personal property was insufficient to pay the debts of the estate, and prayed for an order authorizing him to sell the land in question. At the next term thereof, it appearing that the newly elected judge of the court, having been of counsel for H. H. Albert and his brother and sister, was disqualified to act in the matter, an order of record was made, certifying the cause to the Cape Girardeau circuit court, as provided by section 1760, Rev. St. 1899, and the clerk was directed to transfer all of the original papers therein to the circuit court. Thereupon the circuit court, at its May term, 1897, made an order authorizing the executor to sell at public outcry the lot in question for the payment of debts; the terms of sale being one-fourth cash, and the balance payable in six months. The order was renewed at the August term, 1897, and on the 5th day of June, 1898, the executor, after having the lot appraised, sold the same at public sale in pursuance of the order aforesaid, at which sale the Fidelity Trust & Safety Vault Company, a Kentucky corporation, became the purchaser, for the sum of \$2,005. The estate of Teresa Albert, the administration of which was pending in the city of St. Louis, Mo., held fifth-class demands against the estate of John Albert, amounting in the aggregate to about \$1,800, and the Fidelity Trust & Safety Vault Company held a sixth-class demand, as trustee against said estate, for \$1,500. Shortly prior to the sale the executor represented to the agent of the Fidelity Trust & Safety Vault Company that he did not desire to handle any of the purchase money to be paid for this property, except an amount necessary to pay the expense of the sale, and that, if the Fidelity Company would purchase these demands against the estate, he would accept them as cash. Thereupon the Fidelity Company purchased all the outstanding demands against the estate, except the one held by it as trustee, and paid the costs of the sale, including the executor's commission. The money derived from the proceeds of the sale of the lot in question was paid to the defendant H. H. Albert, and his brothers and sisters. Upon these facts the circuit court, at the next term thereafter, approved the sale, and ordered the executor to make a deed to the purchaser. Afterwards, one of the securities on the executor's bond having died, the circuit court, upon the application of a creditor of the estate, ordered the exe-

cutor to give a new bond. Having failed to comply with this order, the executor's letters were revoked, and Leon J. Albert was appointed as administrator de bonis non with the will annexed, and duly qualified as such. On the 8th day of February, 1899, the Fidelity Company having assigned its bid to the plaintiff herein, a deed was made by the administrator, at the request of the Fidelity Company, to the plaintiff, in pursuance of the sale, which was duly approved by the court. This deed constitutes plaintiff's claim of title to the land in question. The record further shows that after John Albert's death the lot in question was occupied by his widow, Teresa Albert, until her death, which occurred in September, 1894, and that thereafter her children occupied the premises until May 26, 1898, when they, after receiving their share of the proceeds of the sale, conveyed the lot by quitclaim deed to the defendant H. H. Albert, whose tenants have been in the possession thereof since, and he claiming title to the premises from that time by virtue of the deed so procured from his brothers and sisters.

At the close of the case the following declarations of law were given at plaintiff's request:

"First. The court declares the law to be that if Teresa Albert took the real estate in controversy under the will of John Albert, and the will devised the property to her subject to the payment of his debts, then she took the real estate in controversy cum onere, and her heirs are estopped denying that the real estate is subject to sale for the payment of said debts of said John Albert, deceased.

"Second. The court declares the law to be that if the children of John and Teresa Albert accepted the proceeds of the sale of the real estate made by the executor of John Albert, knowing it to be so, on the allowance to the estate of Teresa Albert, then it was a ratification of said sale, and they are estopped now from contesting said sale, or the conveyance made by the administrator by virtue of said sale.

"Third. The court declares the law to be that the property in controversy was used and occupied by John Albert as a homestead in his lifetime, and was so used at the time of his death, and at his death his widow took a homestead interest, and that as a homesteader her occupancy and possession of said premises was not adverse to the heirs or purchasers at administration sale, nor did the statute of limitations run against them; nor during the time she occupied said premises as a homesteader could she enlarge her estate from a homestead or life estate by claim of adverse possession."

The defendants asked the court to give the following declarations of law, numbered 1, 2, 3, and 4:

"First. The court declares the law to be that, under the evidence in this cause, plaintiff is not entitled to recover, and the find

ing and judgment of the court should be for defendants.

"Second. The court declares the law to be that if the court shall find from the evidence that defendant H. H. Albert, and those under whom he claims, have held the property in controversy for a period of more than ten years prior to the commencement of the proceedings in the estate of John Albert by the executor to have the land sold for the payment of debts of said John Albert, and that said holding of said property has been open, notorious, and adverse to all the world, said occupants claiming title thereto, then the finding and judgment should be for defendants.

"Third. The court declares the law to be that the circuit court of Cape Girardeau county had no jurisdiction to order or adjudge the sale of the real estate in controversy, and that said order, judgment of sale, and the deed made thereunder to plaintiff, was and is void, and plaintiff acquired no title thereunder in or to the real estate in controversy, and the finding should be for defendants.

"Fourth. The court declares the law to be that the Fidelity Trust & Safety Vault Company could not become the purchaser of the property in suit, nor take nor hold the legal title thereto; and the court further declares the law to be that plaintiff herein could not become the purchaser of said property, nor acquire the title thereto for the use or benefit of said Fidelity Trust & Safety Vault Company, and that the deed to plaintiff is wholly void and vests no title in plaintiff, and the finding and verdict should be for the defendants."

The court gave defendants' declaration numbered 2, but refused those numbered 1, 3, and 4. The defendants complain of the action of the court in respect to the giving and refusing of declarations asked.

The objection urged against plaintiff's first declaration is that it is unsupported by evidence. This objection is obviously based upon a misapprehension of the facts of the case. The record shows that the lot in question was sold for the payments of debts. This instruction announced a correct proposition of law, and is predicated upon facts in testimony, and was properly given.

Plaintiff's second declaration of law given, although not as accurately framed as it might have been, is in harmony with the principles of law dominating the case. The defendant, H. H. Albert, in receiving his distributive share arising from the proceeds of the sale of the land by the executor, as did also his brothers and sisters, through whose deeds he now claims title to the property, is clearly estopped from asserting that title, as against the title conveyed by the administrator's deed. The declaration shows the thought in the mind of the court in deciding the case. It was in no way prejudicial to defendant.

No error is perceived in the action of the court in giving plaintiff's third declaration. It is firmly settled in this state that the widow's possession and occupancy of the homestead is, in its inception, perfectly friendly, and not adverse to the heirs of the deceased husband or their assigns, and will be regarded as continuing so until disclaimed by hostile acts or declarations. *Chouteau v. Biddle*, 110 Mo. 336, 19 S. W. 814; *Hickman v. Link*, 97 Mo. 462, 10 S. W. 600.

We are unable to find anything in the criticism of the declaration of law given in behalf of plaintiff to indicate that the case has been tried upon a wrong theory, or that an improper judgment has been produced on account of them.

The next assignment of error relates to the refused declarations of law requested by defendant. His first declaration of law asked was in the nature of a demurrer to the evidence, and was properly refused. The testimony amply justified a finding for the plaintiff. There was also no error in refusing defendant's declaration numbered 3. This declaration was predicated upon the theory that the order of the Cape Girardeau court of common pleas transferring the case for the sale of the real estate of John Albert's estate to the circuit court did not have the effect of conferring jurisdiction on that court to order the sale of the real estate in question, as it did in that proceeding. This position, we think, cannot be maintained. While it is true the record does not show the antecedent steps leading up to the order certifying the case to the circuit court, yet it very clearly appears that an order was duly made by the Cape Girardeau court of common pleas certifying the cause to the circuit court, which, under section 1760, Rev. St. 1899, the Cape Girardeau court of common pleas was authorized to do; and this, too, when the judge is disqualified of his own motion, without any formal application or affidavit therefor. Moreover, it will be presumed, in the absence of countervailing circumstances, that the circuit court, in ordering the sale of the land in question, being a court of general jurisdiction, by right, and not from wrong. *State ex rel. v. Bank*, 120 Mo. 161, 25 S. W. 372. We therefore hold that the order certifying the cause to the circuit court conferred upon that court jurisdiction to order the sale of the land in question.

The fourth declaration asked by defendant was properly denied. There is nothing in sections 1024-1026, Rev. St. 1899, to which we are referred by appellant as his authority for asking declaration of law numbered 4, that was denied by the trial court, that can in any way be said to deny a foreign corporation, such as the Fidelity Trust & Safety Vault Company, that in the course of business in its home state has become the assignee or holder in trust of a claim against a citizen of this state, the right to come into this state and pursue every remedy and re-

sort to every means that a citizen of this state might do to collect or secure the benefit of that claim. The section of the statute above referred to only applies to those corporations who have or desire to become established here as "resident foreign corporations," and do not apply to foreign corporations not established in this state; and a discussion of those sections and the requirements thereof will serve no good purpose here. The declaration was properly denied by the trial court.

The defendant further assails the judgment rendered herein for the reason, as he now asserts, that it appears in the deed from the executor to respondent, under which he claims to own the lot in controversy, that the notice of sale of the property was not published for the requisite period of time. This question was not raised in the trial court, but is made here for the first time on this appeal. No objection was made in the trial court in reference to the sufficiency or validity of the notice of sale, and inasmuch as no point was there made, either at the trial or in the motion for a new trial, in reference to the advertisement of the sale, or that proper notice of sale had not been given, it cannot be taken advantage of here. The case must be disposed of here on the same lines it was heard in the circuit court. Rev. St. 1899, § 864; *Gorham v. Ry.*, 113 Mo. 408, 20 S. W. 1060; *City of St. Louis v. Seiferer*, 111 Mo. 663, 20 S. W. 318; *Haniford v. City of Kansas City*, 103 Mo. 172, 15 S. W. 753.

No error prejudicial to defendant appearing, the judgment of the trial court will be affirmed. All concur.

STATE ex rel. O'BRIANT, Collector of Revenue, v. KEOKUK & W. R. CO.*

(Supreme Court of Missouri, Division No. 2.
May 19, 1903.)

TAX SUITS—ATTORNEY'S FEES—ALLOWANCE—MOTION AFTER EXPIRATION OF TERM.

1. Under Rev. St. 1899, § 9378, providing that county collectors shall have power to employ attorneys to assist in conducting suits for taxes, and that the court shall, if plaintiff obtain a judgment, allow such attorneys a reasonable fee, etc., the court cannot, on motion, allow such a fee three years after termination of the term of court at which judgment was rendered.

Appeal from Circuit Court, Schuyler County; N. A. Franklin, Special Judge.

Proceedings by the state, on the relation of Henry W. O'Briant, collector of revenue of Schuyler county, against the Keokuk & Western Railroad Company, in which C. C. Fogle and E. L. French, as attorneys for relator, filed a motion for the allowance of attorney's fees under the provisions of Rev. St. 1899, § 9378. From an order overruling the motion, movants appeal. Affirmed.

Smoot, Fogle & Eason and Mr. French, for appellants. F. T. Hughes and Higbee & Mills, for respondent.

FOX, J. The appeal in this case is from the action of the Schuyler circuit court in overruling a motion filed by the plaintiff to allow the attorneys for the collector a reasonable fee for bringing and prosecuting a suit for taxes against the respondent, it being the same case as appears reported in 153 Mo. 157, 54 S. W. 559, 77 Am. St. Rep. 704, as provided for by section 7746, Rev. St. 1889, which is section 9378, Rev. St. 1899. Said motion was filed in said court on the 5th day of June, 1900, and states, in substance, that one Henry W. O'Briant, now deceased, was collector of the revenue of Schuyler county in 1895, and, as such collector appointed, in writing, C. C. Fogle and E. L. French, attorneys at law, as his attorneys to aid and assist the prosecuting attorney in prosecuting suits for taxes against railroad companies in said county; that the county court of said county, by an order duly entered of record at the February term, 1895, approved the said written appointment of said attorneys, all of which was according to the provisions of section 7746 of the Revised Statutes of 1889 of Missouri, which provides that the court in which suit is brought shall, if plaintiff obtains judgment, allow such attorneys as shall be employed under its provisions a reasonable fee, which shall be taxed as other costs in the case; that this action was brought to recover the Liberty township (in Schuyler county) railroad interest tax, amounting to \$113.23, and the county railroad interest tax, amounting to \$804.50, for the year 1894, due upon the property of the defendant; that plaintiff obtained judgment in the circuit court on the 12th day of November, 1896, for the full amount of taxes for which suit was brought, amounting in the aggregate to \$1,128.81, from which judgment an appeal was taken to the Supreme Court of Missouri, where the judgment was affirmed on the 19th day of December, 1899, and same is reported in 54 S. W. 559; that defendant, in resisting the payment of said taxes, sought thereby to obtain a decision of the Supreme Court of this state by which the defendant would avoid the payment in the future of any taxes levied on its property to pay the railroad bonded debts of Schuyler, Scotland, and Clark counties, in the state of Missouri, through which defendant's road runs, which debt, in Schuyler county alone, amounts to about \$175,000, and represents a debt created by said Schuyler county to aid in the construction of defendant's railroad, which runs through the counties above named; that said attorneys have rendered valuable services in this cause; that other cases involving the taxes of other years depended upon the result in this cause; that the sum of \$2,500 would be a reasonable fee for the services of

*Rehearing denied July 3, 1903.

said attorneys in the courts in this case. The motion concludes with a prayer to the court to allow said attorneys for the collector the sum of \$2,500 for their professional services, and that the same be taxed as costs in the case. The trial upon this motion was begun on the 12th of November, 1900. There was evidence introduced by both the relator and the defendant; but, in the view we take of the law that must control the questions involved, it is unnecessary to burden this opinion with a statement of such evidence. The motion was submitted to the court upon the testimony introduced, and the court, on the 20th day of November, 1900, overruled the motion. From this action of the court in respect to such motion this appeal is prosecuted.

It will be observed that the original suit by the collector for the recovery of certain taxes, in which the services of the attorneys were rendered that are sought to be recovered upon this motion, was tried, and final judgment rendered in the circuit court of Schuyler county, on the 12th day of November, 1896. At the very inception of this controversy we are confronted with the vital question involved in this case—as to the right under the law to maintain this proceeding, after the lapse of so many years, and not only after the termination of the term at which the final judgment was rendered, but after the lapse of many terms of that court. This is a proceeding, by motion, to have taxed as cost against the defendant a reasonable attorney's fee, the services of the attorneys having been rendered in the original tax proceeding in 1896. The statute upon which this attorney's fee is predicated provides (section 9378): "It shall be the duty of the prosecuting attorney of each county to prosecute all suits for taxes under this article. County collectors shall have power, with the approval of the county court, or, in St. Louis city, the approval of the mayor thereof, to employ such attorneys as may be deemed necessary to aid and assist the prosecuting attorney in conducting and managing such suits; and the court in which suit is brought shall, if plaintiff obtain judgment, allow such attorneys a reasonable fee for bringing and conducting such suit, which shall be taxed against the defendant and paid as other costs in the case. At the request of the collector, the Governor may direct the Attorney General to assist in the prosecution of any such suits." It will be noted that upon the rendition of judgment for the plaintiff in such tax proceeding "the court in which suit is brought shall, if plaintiff obtain judgment, allow such attorneys a reasonable fee for bringing and conducting such suit, which shall be taxed against the defendant and paid as other costs in the case." It is apparent from this statute that judicial action is required by the court in fixing the reasonable amount to be allowed the attorneys for their services in the tax proceeding.

In the case of *Briggs v. St. Louis & S. F. Ry. Co.*, 111 Mo. 168, 20 S. W. 32, in construing section 2613, which provided: "If the owner of any live stock, including horses, mules, asses, cattle, sheep and hogs, whenever the same shall have been injured or killed, as in section 2612 described, shall be compelled to bring suit in court to recover the damage so sustained, it shall be the duty of every court in which such suit may be heard to tax a reasonable attorney's fee in such suit in favor of the complainant, if he recovers judgment, which shall be paid as other costs by the defendant"—it was held, under the provisions of that section, that not only judicial action was required, but that the defendant was entitled to a trial by jury upon the issue as to the amount to be taxed as an attorney's fee as cost in the proceeding. In the case of *Berberet v. Berberet*, 136 Mo. 671, 38 S. W. 551, the court very clearly announces the rule, and reviews the authorities as to applications for the taxation of cost at a term subsequent to the one at which the final judgment was rendered. The court in that case, speaking through Gantt, J., says: "It was ruled in *Dulle v. Diemler*, 28 Mo. 583, that the courts of this state might retax costs at a subsequent term under judgments made at prior terms. That opinion was predicated upon the fact that the court had adjudged the costs, and the subsequent retaxing was not a revision or alteration of the judgment, but was the act of the court correcting the mere ministerial act of the clerk, who had, through misapprehension of the court's order, improperly taxed the adjudged costs. Subsequently, in *Ladd v. Couzins*, 52 Mo. 454, it was held that an allowance to a garnishee cannot be taxed after the lapse of the term at which final judgment is rendered in a cause. The statute required the court to allow the garnishee a sum sufficient to indemnify him for his time and expense and a reasonable attorney's fee. It was evident that this allowance called for judicial action, and this the court could not exercise before the adjournment of the term at which final judgment was rendered. To the same effect is *Jackson v. Railroad*, 89 Mo. 104, 1 S. W. 224. The allowance for printing is very similar to an allowance to a garnishee. It requires judicial action, and can only be had during the term.

We have been confirmed in our view of this section by the very satisfactory and thorough discussion of the same point by the Kansas City Court of Appeals in *Wilson v. Stark*, 47 Mo. App. 116, in which the majority of that court reached the conclusion to which we have come. "The application for costs to be allowed for the first time, and the amount of which must be first determined by the court, must be made during the term at which final judgment is rendered, or in this court within the ten days allowed for filing motions for rehearing and modification of judgment, which time is *pro hac vice* an

extension of the term for those purposes." It will be noted that the court, in the case last cited, fully approves the announcement of the rule on this subject in the cases of *Ladd v. Cousins*, 52 Mo. 454, *Jackson v. Railroad*, 89 Mo. 104, 1 S. W. 224, and *Willson v. Stark*, 47 Mo. App. 116. It will be observed that all the cases treating of applications to tax costs at a term subsequent to the one at which final judgment was rendered make clear the distinction of taxing costs which are definite and fixed by law and costs which require judicial action in determining the amount.

Appellant earnestly invites our attention to the cases of *Turner v. Butler*, 66 Mo. App. 880; *State v. R. R. Co.*, 78 Mo. 575; *Clark v. Hill*, 33 Mo. App. 116; and *Dulle v. Diemler*, 28 Mo. 583; and insists that they furnish support for his position that the trial court committed error in refusing to tax the attorney's fees as cost, upon the motion filed for that purpose. A careful examination of those cases will demonstrate that they keep in view the distinction herein mentioned as to the taxation of costs definitely fixed by statute and those costs which require judicial action by the court. In the *Turner Case*, supra, the learned judge disclaims that the views expressed conflict with the rule announced in the case of *Ladd v. Cousins*, supra, and emphasizes that fact by calling attention to his separate opinion in the case of *Willson v. Stark*, 47 Mo. App. 116, in which the distinction of the two classes of costs is clearly drawn and approved. In the case of *Dulle v. Diemler*, 28 Mo. 583, what was said by Gantt, J., in the case of *Berberet v. Berberet*, supra, heretofore quoted, fully demonstrates that it is not applicable to the questions here presented. The case of *State ex rel. Clinton v. R. R. Co.*, 78 Mo. 575, is in perfect accord with the distinction drawn in all the cases. In that case, which involved the assessment of an attorney's fee in a suit for the collection of back taxes, that suit was instituted under the law of 1875. The statute definitely fixed the amount to be allowed the attorney for his services, the same as other items are fixed for other officers. It is apparent in that case that no judicial action of the court was required; hence it is not applicable to the question presented in this record. The section of the statute (section 9378, Rev. St. 1899) which provides for the taxing of fees of the attorneys for services rendered in obtaining the judgment for taxes requires the court to judicially ascertain before the amount is taxed as to what would be a reasonable amount for the services performed. The amount to be allowed for such services was not ascertained and taxed at the term of court in Schuyler county, when the final judgment was rendered in the original tax proceeding, nor was it attempted to be taxed at the term of this court in which such judgment was affirmed; and we are clearly of

the opinion, in view of the adjudications on that subject, that it cannot be done, as is sought by this motion to do, taxed three years after the final judgment was rendered, of which the attorney's fees formed a component part.

Having reached the conclusion that the action of the trial court in respect to this motion was correct, it is unnecessary to discuss the question as to the constitutionality of the statute providing for the taxing of attorney's fees in cases of that character. Upon this appeal we are dealing with the result of the action of the trial court, and not with the reasons for its action. This course has been approved and adopted by this court. *State ex rel. v. Smith*, 141 Mo. 1, 41 S. W. 906, and cases cited.

With the views as herein expressed, the judgment of the trial court in overruling the motion will be affirmed. All concur.

MARSHALL & MICHEL GRAIN CO. v. KANSAS CITY, FT. S. & M. R. CO.*

(Supreme Court of Missouri, Division No. 2.
June 9, 1903.)

CARRIERS—THROUGH SHIPMENTS—BILL OF LADING—LIMITATION OF LIABILITY TO OWN LINE—STATUTES—CONSTRUCTION—CONSTITUTIONALITY—CONVERSION—EVIDENCE—CUSTOM.

1. Rev. St. 1899, § 5222, providing that, when a railroad company issues bills of lading in Missouri, it shall be liable for any loss, damage, or injury to the property caused by its negligence, or the negligence of any other carrier to which the property may be delivered, or over whose lines it may pass, etc., when construed as depriving a carrier of the right to contract for a limitation of liability beyond its own line with respect to a through shipment, is not unconstitutional.

2. Where a carrier issued a bill of lading in Missouri for a through shipment beyond its own line to a point in Arkansas, it could not exempt itself from liability for a conversion of the property by a connecting carrier by a provision in the bill limiting its liability to its own line.

3. Grain was delivered to a carrier for shipment to a destination beyond its own line under a through bill of lading. A sight draft, with the bill of lading attached, was forwarded through certain banks for collection from the consignee, who refused to accept the same because of the nonarrival of the grain. The draft was protested and returned to the shippers, and thereafter the connecting carrier delivered the grain to the consignee on a bond, without presentation of the bill of lading, and without payment of the draft. *Held*, that such delivery constituted a conversion of the grain by the connecting carrier.

4. Evidence that after the conversion plaintiff was notified from time to time and knew that the grain was in a certain place, at his final disposal, was immaterial.

5. Where grain shipped had been converted by a carrier in delivering the same to the consignee without presentation of the bill of lading, and was thereafter redelivered to the carrier, and by it stored in a warehouse, evidence, in an action for the conversion, that it was customary for the carrier to store grain in a warehouse while awaiting demand or the bill of lading, was immaterial.

*Rehearing denied July 3, 1903.

† 2. See *Carriers*, vol. 9, Cent. Dig. § 812.

Appeal from Circuit Court, Jasper County.

Action by the Marshall & Michel Grain Company against the Kansas City, Ft. Scott & Memphis Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

L. F. Parker and Pratt, Dana & Black, for appellant. Thomas Dolan, for respondent.

BURGESS, J. On August 5, 1895, Marshall & Antles, of whom plaintiffs are successors, delivered to the defendant a car of corn for shipment over its railroad from Joplin to Little Rock, Ark., with instructions on the bill of lading to notify the Little Rock Grain Company. Little Rock was not on the line of defendant's road, but the agent of defendant at Joplin, having authority to so do, contracted with the shippers to transport said car of corn to Little Rock, and received therefor the entire freight charge and rate between Joplin and Little Rock, and delivered to the shippers a bill of lading for said car of corn. The bill of lading showed the receipt by defendant from Marshall & Antles of one car of corn, said to weigh 33,375 pounds, "to be transported over the line of this [defendant's] railway to ———, and delivered after payment of freight and advance charges in like good order to the consignee, or a connecting carrier if the same are to be forwarded beyond the line of this company's road, to be carried to the place of destination; it being expressly agreed that the responsibility of this company shall not extend beyond its own line." The bill of lading also showed that the corn was consigned "S. O. notify Little Rock Grain Company, Little Rock, Arkansas." The distance from Joplin, Mo., to Little Rock, Ark., by the route which the car was to travel (that is, over defendant's road to Jonesboro, and from there over the St. Louis Southwestern Railroad, commonly spoken of as the Cotton Belt Road), was about 400 miles. A reasonable time for the transit would be from four to six days, and the car reached Little Rock, August 10, 1895. The shippers had sold the corn to the Little Rock Grain Company for \$268.20, and, upon receiving said bill of lading from appellant's agent, drew a draft through their bank at Joplin upon the Little Rock Grain Company for that amount. The draft was deposited in said bank at Joplin, with the bill of lading attached, and went through regular collection channels by way of Kansas City to Little Rock, where, on August 9, 1895, it was presented by the clerk of the German National Bank in that city to the Little Rock Grain Company for acceptance. The drawee refused to accept the draft because the corn had not arrived. The clerk thereupon protested the draft for nonacceptance for that reason, and notified plaintiffs. The draft was returned to plaintiffs through their bank at Joplin, and the protest fees,

amounting to \$3.46, were charged to them. Plaintiffs had defendant's agent trace the corn, and on August 18th said agent (Conley) received from the Cotton Belt agent at Little Rock a telegram, which was at once shown to plaintiffs, reading: "Car F. S. & M. 2194 arrived 10th; delivered Little Rock Grain Co., Aug. 12th." The same day (August 18th) plaintiffs drew another draft on the grain company for the amount of the first one plus the protest fees, and deposited it in the same Joplin bank, with the same bill of lading attached. This draft on August 17, 1895, was presented by the same bank clerk at Little Rock to the grain company there for acceptance. Thereupon the grain company telegraphed plaintiffs: "Your draft with protest fees added is here. Is subject to protest. Will pay only invoice face. This ultimatum." The plaintiffs having made no reply, the grain company refused to accept the draft because "the amount was not correct," and the bank clerk protested it, and notified the plaintiffs thereof. The second draft, with original bill of lading attached, was returned through the same channels to the shippers, who kept the bill. They made no effort to secure the corn; gave no directions for its disposition; nor was the bill of lading ever presented to appellant or its connecting line, the Cotton Belt Railway Company; nor was any demand ever made by the shippers, or anybody for them, upon either of said railroad companies for the corn. Nor did they ever give the purchaser any chance to pay the price agreed on and get the corn. Instead, they held onto their shipper's order bill of lading, and refused to give any directions for the disposal of the corn, though frequently asked to do so. After the arrival of the corn at Little Rock, the car was placed upon the warehouse track of the grain company, where it was unloaded by that company (its identity being preserved) as a warehouseman, under a general bond given by the Cotton Belt Railway Company. A few days afterwards, the bill of lading not having been presented by the grain company, the Cotton Belt Company's agent at Little Rock demanded the surrender of the bill or of the corn. The bill of lading not being produced, for the reasons already stated, the corn was at once reloaded into a car furnished by the Cotton Belt Company; being the identical corn which plaintiffs had shipped, and in exactly the same condition as when it reached Little Rock; there being no claim or pretense that it had sustained any damage whatever. On August 22, 1895, the shippers were asked by the Cotton Belt Company for directions as to the disposition of the corn, whereupon they replied: "Yours 1st. Have just notified Memphis Road we would not accept car since it has been delivered once. Our draft now amounts to \$275.12, and will take matter up with G. F. A. Memphis Road and get protection, and you to protect your-

self had better wire authority to make draft at once. As to terms, etc., it is quite evident that we know as much, or more, about terms than you do about S. O. shipments, and advise you to act promptly in this matter before it is out of our reach." Repeated demands were made by the Cotton Belt Company, in correspondence with the shippers, to induce them to receive the corn or direct its disposition, which they refused to do; and it was finally stored with a warehouseman at Little Rock, and the shippers were advised of that fact, and that it would still be delivered to them on presentation of the original bill of lading. The grain was subsequently, about a year after its shipment, and long after this action was begun, sold by the shippers to the highest bidder at Little Rock; the net proceeds of the sale, after deducting warehouse charges, amounting to \$128.50. These charges were for storage at the rate of one-quarter of 1 cent per bushel per month, and were only for the charges of the second warehouseman. February 22, 1896, this action was begun before a justice of the peace to recover the value of the corn at the selling price above stated, upon the ground that defendant had received the corn for shipment to the shippers at Little Rock, Ark., "and to there deliver it to said Marshall & Antles, or their order, but said defendant company, its officers and agents, instead of so delivering said corn, wrongfully converted the same to their own use." From a judgment for plaintiff, defendant appealed to the circuit court, where a jury was waived, and on trial a judgment rendered by that court in favor of defendant, from which plaintiff appealed to the Kansas City Court of Appeals, which reversed the judgment, remanding the cause, after which it was tried before the circuit court and a jury, and a judgment rendered for plaintiff for \$137.70, from which this appeal has been prosecuted by defendant. The appeal was taken to this court because constitutional and federal questions are claimed to be involved.

At the close of the evidence on the part of plaintiffs, and again at the close of all the evidence, defendant asked an instruction in the nature of a demurrer to the evidence which was refused, and the action of the court in this regard is assigned for error. The argument is that, since the contract of carriage expressed in the bill of lading was, on defendant's part, to carry only over its own line, as the alleged conversion (if there was any) occurred at Little Rock, on the line of a connecting carrier, it was the act of that carrier, hence there was no evidence of any failure on the part of defendant, under the contract, to discharge its duty to plaintiff, and that section 5222, Rev. St. 1899, when construed and applied to the bill of lading in evidence, as the trial court construed and applied it, is repugnant to article 1, § 8, of the federal Constitution, and denied the

defendant the freedom of contracting in such matters. That section of the statute reads as follows: "Whenever any property is received by a common carrier to be transferred from one place to another, within or without this state, or when a railroad or other transportation company issues receipts or bills of lading in this state, the common carrier, railroad, or transportation company issuing such bill of lading shall be liable for any loss, damage, or injury to such property, caused by its negligence or the negligence of any other common carrier, railroad or transportation company to which such property may be delivered, or over whose line such property may pass; and the common carrier, railroad, or transportation company issuing any such receipt or bill of lading shall be entitled to recover, in a proper action, the amount of any loss, damage, or injury it may be required to pay to the owner of such property, from the common carrier, railroad, or transportation company, through whose negligence the loss, damage, or injury may be sustained." In support of this contention, defendant relies upon *Dimmitt v. Railroad*, 103 Mo. 440, 15 S. W. 761, *McCann v. Eddy*, 133 Mo. 59, 33 S. W. 71, 35 L. R. A. 110, and *Missouri, Kansas & Texas R. R. v. McCann*, 174 U. S. 580, 19 Sup. Ct. 755, 43 L. Ed. 1093, and says that in all these cases it was plainly intimated that while the statute was not repugnant to the Constitution, as applied to the facts of the case then under consideration, it might be applied in such way as to become so, by a construction which denied to an interstate carrier the right and power to limit its contract of carriage, and consequent liability, in case of an interstate shipment, to its own line. We think those cases were properly interpreted by the Kansas City Court of Appeals in the case of *Bank v. C. G. W. Ry. Co.*, 72 Mo. App. 82, wherein it was said: "A carrier receiving freight destined beyond its own line may stipulate that it will not be liable for negligence of the connecting carrier if its contract of carriage is limited to the end of its own route. But if the receiving carrier's contract is to transport the freight to point of destination, it cannot so limit its liability, and must answer for the negligence of the connecting carrier. Those cases further hold that the receiving carrier, in receiving freight and issuing a bill of lading therefor to a point beyond its own line, prima facie agrees to carry to such point, and, to prevent such construction of the contract, it will be necessary that it stipulate it is only to carry to the end of its own line." That case was followed with approval in this case. 74 Mo. App. 81. Moreover, *McCann's Case* was affirmed by the Supreme Court of the United States in 174 U. S. 580, 19 Sup. Ct. 755, 43 L. Ed. 1093, wherein it was held that the statute, as interpreted by this court in that case, could not be held to be repugnant to the Constitution of the United States.

It will be observed, from the bill of lading, that the point of destination to which the grain was to be shipped was left blank; hence there was no express agreement with respect thereto. But it was clearly shown by indorsement at the end of the bill of lading that the place to which it was to be, and was in fact, shipped, was Little Rock, Ark. And defendant, having received and issued a bill of lading for the corn to a point beyond its own line, *prima facie* agreed to carry to such point, in the absence of a stipulation that it was only to carry to the end of its own line. But defendant claims that, as it was expressly agreed by the bill of lading that its responsibility should not extend beyond its own line, it cannot be held liable for the negligence of the connecting carrier. There being no evidence to the contrary, it is clear, we think, that the contract was for a through shipment; and, this being the case, could the defendant at the same time by contract exempt itself from liability on account of the negligence of the connecting carrier? In *McCann v. Eddy*, *supra*, it was said: "We cannot, therefore, give such an interpretation to the statute as would permit a carrier to contract for a through shipment, and at the same time exempt himself from liability on account of the negligence of connecting carriers. Such an interpretation would, in effect, operate as a repeal of the vital provisions of the law which declares a conclusive liability in such case. The statute does not undertake to change the law in respect to liability of a carrier for his own negligence, but to extend it to connecting carriers as well, and declare a liability for negligence, without regard to which was in fault. Under these views of the law, no difficulty is found in giving construction to the contract. The agreement to carry from Stoutsville to Chicago is absolute and unconditional. The thirteenth condition or covenant can only be regarded as an attempt on the part of defendant to relieve itself from the responsibility of answering for the negligence of the carrier by which it undertook to complete the contract. The statute forbids such a qualification of the contract. It can only be held to relieve defendant from its common-law liability of an insurer." In that case it is held that, in a case where property is received by a carrier for transportation from one place to another, such carrier may be held liable for the negligence of any other carrier to which such property may be delivered, unless it limits its duty and obligation to transportation over its own route, which it may lawfully do, but that such carrier cannot contract for a through shipment, as in the case at bar, to a point beyond its line, and at the same time exempt itself from liability for the negligence of the connecting carrier which completes the transportation. It was held in *Railroad v. McCann*, *supra*, that the statute, as interpreted by this court in the same case, could not be held to be

repugnant to the Constitution of the United States.

It is said that there was no conversion of the corn by defendant's connecting carrier, and that the verdict should have been for defendant. The evidence, however, showed that Marshall & Anties had sold the corn to the Little Rock Grain Company, and, not having been paid for it, and not wishing the corn delivered without receiving pay, attached a sight draft to the bill of lading, and sent said draft, with the bill of lading attached, to a bank in Little Rock for collection from the Little Rock Grain Company, so that the grain company could not get the car of corn without paying the draft. But when the car of corn arrived at Little Rock the agent of the Cotton Belt Line, which line of road the defendant selected as its connecting carrier to Little Rock, delivered the car of corn to the Little Rock Grain Company, when the Little Rock Grain Company did not hold the bill of lading for the same; said bill of lading having been attached to the sight draft, which had not been taken up by the Little Rock Grain Company; the Little Rock Grain Company having refused to pay the draft. The Cotton Belt Road was protected by a bond of the Little Rock Grain Company, so that, if it became liable on account of delivery without the bill of lading, it would be indemnified. After inquiries had been made of defendant railroad company, plaintiff was notified by the local agent of the defendant company that the corn had been delivered to the Little Rock Grain Company. It refused then to have anything further to do with the corn, which was afterwards redelivered by the Little Rock Grain Company to the Cotton Belt Railroad Company, which company stored it in a public warehouse. There can be no question but that the shipper of goods has the right to designate the consignee, or, in other words, the person to whom they are to be delivered, and that the carrier is bound to obey the direction of the shipper, or to comply with the terms of his contract of shipment in this respect, and, if he disobeys them, he is liable as for a conversion. *Wiggins Ferry Co. v. C. & A. Ry. Co.*, 128 Mo. 224, 27 S. W. 568, 30 S. W. 430; *Jeffersonville R. Co. v. White*, 6 Bush, 251. A misdelivery by a carrier of an article intrusted to him to be carried is a conversion. *Claffin v. Boston & Lowell Railroad Company*, 7 Allen, 341; *Bishop on Noncontract Law*, § 405. Nor does the fact that the railroad company offered to return the corn after it had been redelivered back again into the cars furnish any justification for the conversion, though it might be considered in mitigation of damages. *Sparks v. Purdy*, 11 Mo. 219.

A final contention is that the court erred in excluding competent and relevant testimony offered by defendant, and in admitting, over defendant's objection, incompetent and irrelevant testimony offered by plaintiff. The first contention is predicated of the fact that

upon the cross-examination of the plaintiff Marshall, who testified as a witness in behalf of plaintiffs, defendant's attorney asked him if he was not notified from time to time, or if he did not know, that the car of corn was still at Little Rock, at his final disposal. This was objected to by plaintiff's attorney as immaterial, and the objection sustained. The objection was, we think, well taken, for, as we have held, when the corn was once converted by defendant, nothing that was thereafter done or offered to be done by defendant could have the effect of relieving it from its liability for the conversion. Nor was error committed, for like reason, in excluding evidence offered by defendant to the effect that it was customary for defendant's connecting line at Little Rock to store corn in a warehouse, awaiting the demand of the bill of lading. It was immaterial. On the redirect examination of plaintiff Marshall, his attorney asked him what was meant by "free time," as used by railroads and shippers of grain. This question was objected to upon the ground that it was immaterial, but the objection overruled, and the witness answered. That this testimony was immaterial, and should not have been admitted, we think clear, but we are unable to see in what way the jury could have been misled or the defendant prejudiced by it, and do not, therefore, think the judgment should be reversed upon that ground.

Our conclusion is that the judgment should be affirmed, and it is so ordered. All concur.

SPRATT v. LAWSON et al.

(Supreme Court of Missouri, Division No. 1.
June 20, 1903.)

WILLS—RIGHTS OF WIDOW—RENOUNCEMENT OF WILL—ESTOPPEL—AGREEMENT—CONSIDERATION—PARTITION.

1. A widow was not estopped from renouncing the provisions made for her in her husband's will, and electing to take under the statute, by signing at the time of the execution of the will a statement indorsed thereon reciting that she accepted the bequest in lieu of dower or other interest, and by accepting from the executors a part of such bequest, where the bequest was less than the amount given her by statute.

2. The widow had the right to renounce the provisions of the will, notwithstanding Rev. St. 1899, § 4335, which confers on a married woman the right to contract and be contracted with, because the acceptance of the will, when considered as a contract, was not supported by any consideration.

3. A widow renouncing the provisions in her husband's will, and electing to take under the statute, could maintain a suit for the partition of the estate without waiting for the expiration of five years from the date of the probate of the will.

Appeal from Circuit Court, Audrain County; E. M. Hughes, Judge.

Suit for partition by Nannie S. Spratt against Assinia Lawson and others. From a judgment for plaintiff, defendants appeal. **Affirmed.**

T. S. Carter and W. W. Fry, for appellants. Geo. Robertson, for respondent.

ROBINSON, J. Suit by plaintiff, the widow of A. D. Spratt, deceased, against the executors of her husband's will, and the legatees named therein, to have partitioned certain lots in the village of Clark, in Randolph county, and about 490 acres of land in Audrain county, in this state. The petition sets out the fact that plaintiff is the widow of A. D. Spratt, who died May 31, 1899, childless, leaving a will by which all the land in question was deeded to his sister Assinia Lawson and to the children and grandchildren of Hall W. Spratt, a brother of deceased, and that, after said will had been duly admitted to probate, plaintiff, on the 5th day of June, 1899, filed in the office of the probate court of Audrain county her election to be endowed of one-half of all the real and personal estate of which her husband died possessed; that plaintiff was entitled to one-half of all the land sought to be partitioned, and that the defendants were entitled to the other half; and that none of the land named will be required for the purpose of paying debts, as the estate of her deceased husband also consists of a large amount of personal property, and is practically free of debt. Upon the issue joined, a decree was made in compliance with the prayer of plaintiff's petition. To the judgment entered therein, two objections are made by appellant; the first being that partition of the land in controversy cannot be made until after the lapse of five years from the date of the probate of the will of plaintiff's deceased husband, wherein said land had been devised; and, second, it is contended that plaintiff has no interest in the land sought to be partitioned. This last contention by appellant is made upon the assumption that plaintiff should be denied the right to renounce the provisions of her deceased husband's will, wherein said land in controversy was devised to others than plaintiff, and claim under the laws the undivided one-half interest therein, as was done in this suit, for the reason, as alleged, that plaintiff signed her acceptance of the will's provisions in lieu of all dower or other interests in the estate of her husband at the time said will was executed, and that after his death, with full knowledge of the provisions of the will, she had accepted \$1,000 from the executors, as part of the \$7,000 legacy left to her under said will in lieu of dower.

Do these facts in any way operate to abridge the right of renunciation and election in plaintiff? Certain it is that, under the facts of this case, it should not be said, as contended by appellant, that plaintiff is estopped from asserting her statutory right of renunciation and election, on the ground that her conduct at the time of the execution of the will induced the testator, in the making of the will in question, to devise to her prop-

erty that otherwise, by operation of law, would have gone to them, had the will not been made. On the contrary, plaintiff not only did not get by the will anything that would have gone to defendant, had no will been made, but by it she got less in value than one-fourth of the personal estate of her deceased husband, and that legacy was coupled with the condition that it be accepted in lieu of all dower or other interest in the estate of said husband. The acceptance of the will by plaintiff at the time of its execution in the following language: "I, Nannie S. Spratt, hereby accept this above bequest in lieu of all dower or other interest in the estate of my husband A. D. Spratt. In witness whereof I have hereunto set my hand and seal this February 3rd, 1894. Nannie S. Spratt. [Seal.]"—not only resulted in no harm or injury to defendants, or any of them, to warrant the invocation of the doctrine of estoppel against her renunciation of the will's provision, but the act was wholly without consideration, and had no force as a contract, however it might be considered. In *Bretz v. Matney*, 60 Mo. 444, under circumstances quite similar to the facts of this case, the right of the widow to renounce the will of her deceased husband at any time within 12 months after its proof, in accordance with the terms of sections 15, 16, p. 541, Wag. St. 1872 (the same as sections 2948 and 2949, Rev. St. 1899) came up for determination; and this court at that time said: "She [the widow] is entitled to the 12 months allowed her by statute, although she may have formally accepted the will every day in the year previous to the last. Such acceptance is purely voluntary, and made within the period during which our statute holds her irresponsible for her acts." This declaration of the court was made for the simple reason, as obvious now as it was apparent then, that the statute had so ordained, and it must yet be enforced, except under circumstances where the acceptance by the widow has operated to induce others to have acted in such a way that its after renouncement would result in their injury—a condition wholly absent from the facts of this case. In the same case it was further said: "The year is given to her to renounce for reasons which are obvious. Her acceptance, however repeated, amounts to nothing. She has a year within which to make up her final intention, and there is nothing in our statute to deprive her of this right." This ruling of the court has been repeatedly approved, and has never been overruled or criticised, so far as we are advised, and it will be adhered to in the present case, in so far as it is invoked to sustain the contention of respondent herein. The right of a husband to make a will, or bequeath any part of his estate to his wife in lieu of dower, is always qualified by her right to make her election, within 12 months after the probate of the will, to reject its terms, and to claim her rights under

the statutes. All wills must be considered as made with reference to this statutory right of the wife, however much the testator may attempt to thwart its purpose, or however solemn may be the wife's renunciation of its privileges at any time prior to the last moment of the 12 months after the probate of the will, when she may elect to take under the law. In executing the will in question, the plaintiff's husband could do nothing to deprive her of her statutory right to exercise her election after his death to renounce its provisions and take her interest under the law; and in executing the written acceptance by the plaintiff herein, found at the bottom of the will, nothing was done by her to forfeit that right, notwithstanding the contention of appellants that since the enactment of section 4335, Rev. St. 1899, part of the married woman's act, the plaintiff has had the right to transact business on her own account, and to contract and be contracted with as a feme sole, including the right to contract with her husband. Whatever may be thought of section 4335, *supra*, as conferring upon the plaintiff the right, as a feme sole, to contract with her husband in his lifetime, and if the written acceptance indorsed by the plaintiff to the bottom of the will in question at the time of its execution by her husband be considered in the light of a contract between the plaintiff and her husband, it would nevertheless be worthless as a bar to prevent her after repudiation of the will, whose provisions she agreed to accept, because of the utter want of consideration for the act done, if for no other reason. By signing her written acceptance of the provisions of the will at the time of its execution, plaintiff got nothing therefor or thereby which the law would not cast upon her if the acceptance had remained unsigned and unacknowledged. In fact, plaintiff's act of acceptance, if she could be held by its terms, was but the surrender of her rights to a one-half interest in a personal estate of \$30,000, to which she would have been entitled, and the surrender of a one-half interest in her husband's real estate, valued at \$15,000 or \$20,000 more, for absolutely nothing. By the will, plaintiff was to have \$7,000 paid to her in seven annual installments, of \$1,000 each, out of a personal estate of the value of \$28,000 or \$30,000, and from which estate, without a will, she would have been entitled at once to double that amount or more.

All that need be said in answer to appellant's first contention, that partition of the land in controversy cannot be had until after the lapse of five years from the date of the probate of the will under which the land in suit has been devised to defendants, is that plaintiff is not claiming her interest in the land sought to be partitioned, under the will of her deceased husband, and that that interest could not in any way be affected by a contest over the will. She claims her interest in the land as a result of her election to

take under the law an undivided one-half interest in all the land of which her husband died seised, and that interest the will of the husband could not alter; nor could a contest over its provisions change, modify, or disturb her election of the interest in the land to which she was entitled under it. The only limitation upon the right to partition real estate affected by a will is that the court cannot order a partition contrary to the provisions of a will (that is, it will not disturb the relative claims of the respective parties named in a will to their distributive share of the land devised); but whether the interest in the land devised was that of an entire estate, or only an undivided interest therein, the court must, in partition, determine, that a proper judgment may be entered establishing the rights of all interested parties.

Finding no error in the action of the trial court, its judgment is affirmed. All concur.

D. R. VIVION MFG. CO. v. ROBERTSON.

(Supreme Court of Missouri, Division No. 1.
June 20, 1903.)

CONTRACTS—INTERPRETATION—SALES—FLUCTUATING PRICE—FAILURE TO STATE CAUSE OF ACTION—DETERMINATION ON APPEAL.

1. On objection that the petition does not state a cause of action, made for the first time on appeal, the pleading will be construed so as to state a cause of action, if susceptible of such construction; the rule that it is to be construed most strongly against the pleader having then no application.

2. The petition in an action on a contract for the sale of goods "f. o. b. cars in St. Louis" is not fatally defective for failure to allege the meaning of the quoted phrase.

3. A contract for the sale of manufactured articles provided that the price was to be increased or diminished in proportion to the rise or fall of the price of material of which the articles were made, and that settlement was to be made July 1st of each year for all the goods furnished during the year. *Held*, that the seller was not required to notify the buyer of an increase in price, caused by an increase in the price of material, in order to hold him for such increase.

4. The fact that the seller at the time of the increase in price of material had on hand sufficient material to manufacture the goods ordered by the buyer did not entitle the latter to receive them without paying the increase in price.

5. A contract for the sale of patented articles provided that it should remain in force during the life of the patent, or unless one of the parties should violate it, in which event the other might terminate it within a reasonable time, and also provided that the buyer was to have the sole right to sell the articles in the state where he resided. After a dispute had arisen as to the amount due the seller under the contract, the buyer wrote, complaining that other persons were selling the same goods in his territory, and stated that he was willing to pay the amount which he claimed was due for goods already furnished, provided the seller would guaranty to protect him against sales of other parties in his territory, and further stated that, if the seller did not make arrangements promptly, he would arrange for the manufacturing of the goods. It appeared on trial that the only sales made in the buyer's territory were made by a

concern to which goods had been sold in another state, and which had, without the consent of the seller, sold the articles in the state where the buyer resided. *Held*, that the buyer's letter justified the seller in terminating the contract.

Appeal from Circuit Court, Audrain County; E. M. Hughes, Judge.

Action by the D. R. Vivion Manufacturing Company against G. W. Robertson. From a judgment for plaintiff, defendant appeals. *Affirmed*.

Geo. Robertson, for appellant. James A. Yantis and J. S. McIntyre, for respondent.

VALLIANT, J. This suit grows out of a contract between the plaintiffs and defendant for the sale of a certain patented article known as the "Hoe & Gauge Attachment for Corn Planters." Plaintiffs were the owners of the patent. In December, 1898, they made a contract in writing with defendant, under which he was to have the exclusive sale of the attachments in Missouri and Kansas. Plaintiffs were to manufacture and sell the articles to defendant at the price of \$1.75 a set, but, if there was a rise or fall as much as 10 per cent. in the market price of the materials of which the attachments were made, there was to be a corresponding rise or fall in the price of the attachments sold by plaintiffs to defendant. Defendant was to pay on July 1st of each year for all the attachments sold him that year. It was stipulated in the contract that it was to remain in full force during the life of the patent, unless sooner terminated by mutual consent, or unless one of the parties should violate the terms, in which event the other, at his option, might terminate it by giving written notice within a reasonable time after hearing of the breach. The patent will expire December 6, 1904. Between March 9, 1899, and May 13th of the same year plaintiffs sold and delivered to defendant 768 sets of attachments. Between those dates there was a rise in the market price of the material; that is to say, up to April 1st the price had risen 14 per cent., and up to May 1st it had risen 29 per cent., increasing the cost of the attachments 25 cents and 52 cents per set, respectively. On April 15th plaintiffs gave written notice to defendant that he would have to pay the advanced prices. The petition asks judgment for all the attachments delivered before April 15th at the original price, \$1.75, for those delivered after that date up to May 1st \$2 a set, and for those delivered after that date \$2.27 a set. The answer admits the contract as stated in the petition, and that under it defendant purchased the number of attachments stated, but it says that of the 768 sets of attachments sued for all but 22 were ordered before April 15th, and that he owes for all ordered before that date only \$1.75 a set, and for the 22 sets ordered after that date \$2 a set. Then the answer goes on to state that the plaintiffs violated the contract by selling the attach-

¶ 1. See Pleading, vol. 39, Cent. Dig. § 74.

ments to other persons in Missouri, and thus interfered with defendant's trade, and caused him to lose \$2,500, for which he asks judgment. And for a second counterclaim the answer states that on September 13, 1899, the plaintiffs refused longer to furnish the attachments, and refused to allow him the exclusive right to sell the same in that agreed territory, and broke the contract, to the defendant's damage \$10,000, for which he prays judgment. The cause was tried by the court, jury waived. There was a finding for plaintiffs in the sum of \$1,286.23 on their cause of action, and for the plaintiffs on both counterclaims, and judgment accordingly, from which the defendant appeals.

1. Appellant makes the point that the petition does not state facts sufficient to constitute a cause of action. This point was made at the beginning of the trial in the form of an objection to the introduction of any evidence to support the petition. But the particular defect to which attention is called in the briefs for appellant now was not called to the attention of the trial court. In such case, if the statements of the petition are susceptible of a construction that will constitute a cause of action, they will be so construed. The rule that a pleading is to be construed most strongly against the pleader will not be applied in the appellate court when the supposed defect was not called to the attention of the trial court. The alleged defect in this petition is that it states that by the terms of the contract the goods were to be delivered "f. o. b. cars in St. Louis," and does not state what that means. So far as concerns the matters in controversy between the parties here, that criticised term is entirely unnecessary. If it is unintelligible, as appellant thinks it is, it adds nothing to the plaintiffs' case; and, if it is stricken out or disregarded as surplusage, it does not impair the remaining statements in the petition.

2. The grounds on which the defendant contests the plaintiffs' claim are (a) that he had ordered the goods before he received notice from the plaintiffs that there would be an increase in the price; and (b) the plaintiffs had on hand, before the rise in the market price of the material, sufficient material to manufacture all the goods ordered. These two defenses rest upon the defendant's interpretation of the contract. The language of the contract that bears on this subject is: "All future orders to be purchased from party of first part at their factory at one and seventy-five hundredths (\$1.75) dollars per set, f. o. b. cars at St. Louis, payable July 1st of the year they are ordered. This price (\$1.75) is to be increased or diminished in proportion to the rise or fall of price of material of which they are made when the rise or fall of price of material is as much as ten per cent. of the price." The standard by which the price of the goods was to be determined was fixed by the contract. No notice was required by the terms expressed, and none

was contemplated. Both parties were in the market, and one knew as much as the other about the fluctuation of the price of iron and steel. It no more devolved on the plaintiffs to notify defendant that the price had gone up than it would have devolved on the defendant to notify the plaintiffs that the price had gone down. When July 1st came, and the bill was due, either party had a right to demand that the price \$1.75 should be scaled up or down according to the market at the several dates of the deliveries. The testimony showed that the goods were delivered as defendant ordered delivery. Under those circumstances the sale was complete when the goods were delivered. *Collins v. Wayne L. Co.*, 128 Mo. 451, 31 S. W. 24; *Scharff v. Meyer*, 133 Mo. 428, 34 S. W. 858, 54 Am. St. Rep. 672. The evidence is conflicting as to whether plaintiffs had on hand from the beginning sufficient material with which to fill the orders for the season. But that is immaterial. The contract regulated the price of the manufactured article; not by what the plaintiffs paid for the material, but by its market price. The steel the plaintiffs may have had on hand was worth as much to them as the money they would have had to pay for it if they had not had it on hand, and its market value was the same on a given day as if it had been purchased that day. The circuit court took the correct view of that subject.

3. The defendant's first counterclaim rests on the statement that plaintiffs, in violation of their contract, sold these attachments to a rival concern in St. Louis, to compete in the trade with defendant in the territory in which plaintiffs had contracted to give defendant the exclusive right. The most that can be said for defendant on this point is that his testimony tended to prove the allegations. The court took the defendant's view of the law, and gave an instruction asked by him, under which, if it had found the facts as his evidence tended to prove, the finding on that issue would have been for the defendant. But the plaintiffs introduced evidence to the contrary, and the court, after weighing the evidence on both sides, found the facts for the plaintiffs. Under those conditions, in an action at law this court finds nothing to review.

4. The second counterclaim is based on the fact that in September, 1899, the plaintiffs declared the contract terminated, and refused any further performance of it. The evidence shows that a dispute arose between the plaintiffs and defendant concerning the account sued on in the petition, and that defendant refused to pay it. On September 12, 1899, defendant wrote to plaintiffs, in which he urged his opinion that he was not bound to pay the higher price except for goods ordered after receipt of the notice contained in the letter of April 15th, and complained of defective construction of the attachments, and of the fact that other jobbers were sell-

ing the same goods in his territory, and underselling him; and then he said: "As I said before, I am very anxious to get to work now amicably, and try to regain what we have lost along this line, and, under the circumstances, I am willing to pay you \$1.75 per set for all those ordered up to the time we received notice of the advance in price, and \$2.00 per set for the 40 sets that were shipped and ordered after that time, conditional that you will agree to fully protect me in my territory in the future, and will agree to add a clause to our contract that will be acceptable to both your attorney and mine that will provide a suitable indemnity for failure to protect us. It is now time that we should go right into the harness at work, and should be getting out new and attractive business, bringing printed matter, and get the matter prominently before the trade for the coming year, whether or not we can settle this matter without going into the courts. You must advise me immediately what your arrangements are for supplying the goods for another season, and, if there are any advances in the cost of material since the last invoices. This should be arranged at once, so we may know exactly on what basis to place our cost. We must hear from you regarding this at once, and, if you do not make arrangements promptly to supply us, we shall arrange for the manufacture of the goods." On the next day—September 13th—plaintiffs wrote a letter to defendant in answer to the above, in which, after some argument of their side of the matters in dispute, they said: "We hereby, under the provisions of article 6 of the contract between you and us of date December 30th, 1898, declare the said contract entered into between you and us on said December 30th, 1898, terminated, and under its provisions we have no further dealings with you. Should you attempt to manufacture or sell the articles covered by patent No. 374,218, we shall hold you liable for infringement under the patent law." The argument of appellant is that the mere refusal to pay for the goods theretofore sold did not furnish justification to the plaintiffs to terminate the contract. In support of this proposition we are referred to Beach on the Modern Law of Contracts, wherein the author says (section 619): "In contracts for work or skill, and the materials upon which it is to be bestowed, a statement fixing the time of performance of the contract is not ordinarily of its essence, and a failure to perform within the time stipulated, followed by substantial performance after a short delay, will not justify the aggrieved party in repudiating the entire contract, but will simply give him his action for damages for the breach of the stipulation." And again (section 849): "In a contract for the sale of goods, to be executed by a series of deliveries and payments, default of either party with reference to one or more of the stipulated acts will not, ordinarily, discharge the

other party from his obligation, and entitle him to rescind the contract, unless the conduct of the party in default be such as to evince an intention to abandon the contract, or a design no longer to be bound by its terms." The law, as there quoted, is not in conflict with the following from Benjamin on Sales (7th Am. Ed.) 605, quoted in the brief of respondent: "On the other hand, there is abundant authority in America as in England that, if the buyer not only refuses to pay for one installment, but puts his refusal on such ground as justifies the inference that he repudiates the contract, or insists upon new terms different from the original agreement, the vendor may be released from any subsequent delivery." In his letter of September 12th, above quoted, the defendant not only refused to pay the bill for the goods sold that year at the prices charged, but made it a condition to his paying even what he acknowledged to be due according to his own interpretation of the contract that the plaintiffs should indemnify him against loss by any future invasion of his territory. In the trial of the issues on the first counterclaim it came out in the evidence that the plaintiffs had sold these attachments to a concern to be sold in Texas, and that that concern, without the knowledge or consent of the plaintiffs, had sold the articles in Missouri, and had seriously interfered with the defendant's trade. The meaning of defendant's letter was that he would comply with his part of the contract as he himself interpreted it, provided the plaintiffs would indemnify him against any such invasion of his territory in the future—a matter over which the plaintiffs had no control. And the letter concluded with a threat that, unless the plaintiffs made arrangements to supply the defendant (by which we understand he meant supply him on the terms he proposed), he would arrange for the manufacturing of the goods himself. The contract expressly provided that, if either party should violate its terms, the other party, at his option, might terminate it by giving written notice. Under these circumstances the plaintiffs were justified in terminating the contract. The judgment of the court on the defendant's second counterclaim was right.

The judgment is affirmed. All concur.

BATES COUNTY BANK v. GAILEY et al.*
SAME v. HENSLEY et ux.

(Supreme Court of Missouri, Division No. 2.
 May 19, 1903.)

FRAUDULENT CONVEYANCES—EVIDENCE—SECURITY FOR BONA FIDE INDEBTEDNESS.

1. In a suit to set aside a trust deed as in fraud of creditors, evidence considered, and held sufficient to show that the amount of the deed was greater than the amount to which the grantor was indebted to the beneficiary.

*Opinion modified and rehearing denied July 3, 1903.

2. Where a trust deed was given to secure an existing indebtedness from the grantor to the beneficiary, but, with intent to defraud creditors, the deed was made to secure a greater sum than that actually owing, it was void as a whole.

3. In an action to set aside a trust deed as in fraud of creditors, evidence considered, and held sufficient to show that the beneficiary had knowledge of the fraudulent purpose of the grantor.

Appeals from Circuit Court, Bates County; H. C. Timmonds, Judge.

Separate suits by the Bates County Bank against H. M. Galley and others and J. T. Hensley and wife. From judgment for defendants in each case, plaintiff appeals. Reversed.

Thos. J. Smith, for appellant. Silvers & Silvers, for respondents.

BURGESS, J. These are suits in equity, and were begun on the 29th day of April, 1890. The purpose of one of them, to wit, that of the bank against Galley and others, is to have a certain deed of trust executed by the defendants on the east half of the northeast quarter and the northwest quarter of the northeast quarter of section 14, township 40, range 33, in Bates county, declared fraudulent and canceled on the ground that the defendant John T. Hensley did not owe to the defendant Galley the amount recited in the deed of trust, \$2,800, or any other amount. Another ground upon which the suit is predicated is that if in fact the defendant Hensley was owing the defendant Galley any amount, which was secured by said deed of trust, it was a sum much less than the amount for which said deed of trust was taken. The deed of trust bears date May 4, 1892, but it was not recorded until the 3d day of September, 1892. The other suit is against John T. Hensley and his wife, M. B. Hensley, to have set aside and declared fraudulent a warranty deed made by said Hensley and his wife, of date March 16, 1897, recorded April 26, 1897, by which the land in controversy above described was conveyed to W. D. Orear, who was the father-in-law of defendant John T. Hensley, and also to have set aside and decreed as fraudulent a deed from W. D. Orear and wife to the defendant M. B. Hensley, who is the wife of the defendant John T. Hensley, which deed bears date May 26, 1897, but was not recorded until April 8, 1898. The ground upon which the plaintiff predicated its rights of recovery in these two actions, in addition to the alleged fraudulent character of the conveyances made, was the fact that at the June term, 1897, of the circuit court of Bates county, Mo., the plaintiff had recovered judgment against the defendant John T. Hensley for the sum of \$1,154.25, with costs, amounting to \$9.45, on which judgment an execution had been issued and delivered to the sheriff

of Bates county in October of 1897, and the real estate above described had been sold under levy made under said execution, and purchased by the plaintiff, as well as upon the fact that the plaintiff was still a judgment creditor under said judgment against the defendant John T. Hensley; there being, as alleged in the petition, more than \$1,100 still due the plaintiff on said judgment, which was alleged to be a lien against this real estate.

Immediately upon the serving of the writ of summons on the defendants Hensley and Galley in the first-entitled suit, the real estate covered by said deed of trust was advertised for sale thereunder by the defendant Galley in the name of W. C. Brown; the sale being set for the 12th day of June, 1899, and before the convening of the June term of the Bates circuit court, to which the writs in this suit were returnable. Thereupon, on the 5th day of June, 1899, the plaintiff in this case filed a petition for a temporary restraining order in said court, and on that date sued out from the judge of said court, at chambers, an order enjoining the sale of said real estate under said deed of trust until the final hearing of the case of the bank against Galley.

The testimony of the defendant W. C. Brown, as given in his deposition, showed that he knew personally nothing at all about the existence of the alleged debt referred to in the deed of trust from the defendant John T. Hensley to W. C. Brown as trustee for defendant Galley, in the sum of \$2,800, until he was called upon by Galley to take necessary steps to foreclose the deed of trust. This was after Galley and Hensley had been served with the writ of summons in the suit against them to set aside this deed of trust for fraud.

Brown, testifying, said: "Mr. Galley told me he wanted me to push the claim. * * * Mr. Galley told me to have the sale just as soon as we could get it, and my idea was to have it just as soon as it could legally be made." Brown also testified that he told Galley to go ahead and have Mr. Silvers insert the necessary notice, which the evidence shows was done by having it published in the Butler Free Press; the first issue in which it appeared being May 12, 1899, while the record in the case shows that Galley was served with process on the 8th day of May, 1899.

The defendant John T. Hensley, in his deposition, testified that he was not at home when the writ of summons was left there with his family, but "when I came back my wife gave it to me, a day or so after it was left. Q. How long after that did you have any talk with Mr. Galley? A. I can't say, it was several days after that. * * * Q. When did you learn that this land was advertised for sale under the deed of trust? A. About the first or second copy, but I don't take the paper it was in. Q. Did you have any talk with Mr. Galley? A. No, sir. Q.

¶ 2. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. §§ 323, 324.

Ever talk with him about it? A. Yes, sir; he talked to me about it before he advertised it. Q. How long? A. A short time. Q. What did he say? A. He wanted to wait, if I could pay him so much money. Q. Where did you have this talk? A. I can't say. I spoke to him several times about it. I told him I couldn't raise it." Hensley further testified that he had been intimately acquainted with Gailey for 30 years, and during all this time had been borrowing more or less money from him, and that from the time the Kansas City, Pittsburg & Gulf Railroad had been built through Bates county, in 1890, he had been, with his brother Cole Hensley, buying and shipping stock to market from Amoret on this road, and always in the name of the defendant H. M. Gailey; Gailey furnishing the money to the persons from whom stock was bought, taking his money out of the proceeds, and turning over to the defendant John Hensley, or his brother Cole, whatever of profits were left to them. With reference to the note secured by the deed of trust in question, Hensley testified as follows on direct examination: "Q. What was the amount of the note to Mr. Gailey? A. \$2,800, I think. Q. What was that note given for? A. Borrowed money and notes; money that I got at different times; old notes that had been standing for a number of years—got at different times a long time ago. Q. What notes did you owe him at the time of giving the deed? A. We owed him several. I think I owed him one for \$900, with interest on it that amounted to \$1,000. Q. Then at the time this note was given you owed him one thousand dollars? A. I think I owed him \$2,300 when the mortgage was given. Q. How was that—in coin and notes? A. It was part money and part notes. Q. How much in notes did you owe him? A. I couldn't tell, it had been so long. I know I owed him \$900 that amounted to \$1,000." He further testified that this \$900 was borrowed to help his brother Joe, and that he secured the \$900 by giving to the defendant H. M. Gailey a deed of trust on 120 acres of land in Bates county, known as the "Forsythe Place," being the north half of the northeast quarter and the southwest quarter of the northeast quarter of section 26, township 40, of range 32, in Bates county, Mo., which was afterwards sold on the 20th day of November, 1891, to Wm. A. Downey for \$3,000, in which deed of conveyance is found the recital, "subject to a certain deed of trust for \$1,500 which the grantee herein assumes and agrees to pay." He further testified that this land which he testified his brother Joe owned, and which he used this \$900 in paying incumbrance against, was real estate that he himself sold and got the proceeds therefor, selling one 80 acres to Thos. Wright, who was his son-in-law, and the other 80 acres was conveyed by his brother Joe, as shown by the deeds introduced in evidence, to his nephew Charles H. Hensley, by

whom it was afterwards, by title bond, sold to David A. Bean, and conveyance made to the wife of David A. Bean by Chas. H. Hensley, but which Mr. Hensley, in his deposition, admits that he sold, and got the proceeds therefrom. "Q. How about Tom Wright? How did he pay? A. Why, he shouldered the Eastern loan, which amounted to \$1,400, I think. Q. What was he to pay you in addition to the mortgage on it? A. \$26 an acre, I think. There were 80 acres, and he gave me a note for the difference. I sold the note to James Rush, who lives west of Amoret, in the state of Kansas. This note was for \$720, I think, or something like that." With regard to this same loan, he testified: "I was paying interest on the loan right along, and am paying the Eastern Loan Company now. Whenever interest comes due, I pay it." And further testifying with regard to the amount which he was owing defendant Gailey when this \$2,800 note and the deed of trust were given, he testified: "Q. Going back to the original \$900 note you owed Mr. Gailey, what else did you get from him? A. When we fixed up, we fixed up that \$900 note and another old note that had been standing for years and had doubled itself. They all amounted to \$2,300. Q. What was there to make \$2,300? A. Other notes. Q. What were they given for? A. Different things. Some of them were twenty-five years old. Whenever I wanted money, I went to Mr. Gailey. I can't remember the amount of any of them but the \$900 note. They were small, and were not secured by anything. I paid him once in a while. I have been doing business with him pretty much for thirty years, and I never asked him for a dollar, that I didn't get it. Q. Did you get any money from him? A. He gave me his note for \$500, and I was to buy stock with it just when I wanted to. Q. You didn't buy stock with the note, did you? A. I just gave tickets to the men on him, and he paid them. Q. What did you do with the note? A. I gave it back to him when the stock was bought. Q. How long was that? A. A year or so. Well, whenever I wanted it, he gave it to me. Q. How did you happen to give him a mortgage for \$2,800, when you only owed him \$2,300? A. I wanted money to work on. The note was on demand, and whenever I wanted it he would give the money to me. I have no idea how long I kept the note." Cross-examination: "Q. Finally you owed him several small notes, and one note for nine hundred dollars, with interest on it, and all these notes together amounted to \$2,300? A. Yes, sir; that's my recollection. Q. At the time you gave him this mortgage? A. Yes, sir. Q. This mortgage was to cover a \$900 note, with interest on it, and several small notes, and the interest on them, that were unsecured, and also to cover \$500 that you wanted to use. That's your recollection? A. Yes, sir. Q. At that time he did not pay you

five hundred dollars at all, but gave you this note? A. Yes, sir. Q. That made up the consideration for this mortgage? A. Yes, sir."

H. M. Gailey, in his deposition, testified with reference to his dealings with the Hensleys—that he had always checked on the Farmers' Bank at Butler, Mo., whenever he drew any checks at all—saying: "Yes; since I became interested in the Farmers' Bank, I believe I am safe in saying that I never got any stock—never checked any for Hensleys—in any other bank than the Farmers' Bank." With reference to the taking of the deed of trust in dispute, he testified that he knew the same was subject to a prior deed of trust for \$500, and was taken on land that he knew the defendant Hensley and his wife had lived upon for a great number of years, there being 120 acres of it, and that the land was then worth, in his judgment, \$33 per acre; the wife of John T. Hensley not joining him in the trust deed. "Q. You knew that during all these years Mr. Hensley was in strained circumstances? A. No, sir, I didn't; but then I knew that, since he was tardy in paying me, he must be using his money for something else, or was hard up. Q. You knew that before you took this mortgage? A. No, sir; not serious circumstances. Q. Did you think he was prompt and straight at the time? A. I thought he was all right; yes, sir. I understood that he had several pieces of land, and was getting rent from them. Q. What pieces of land did you understand him to own? A. The 120 acres that was called the 'Forsythe Place,' if I am not mistaken. I had nine hundred or a thousand dollars against it. It was worth thirty dollars an acre. He also had some other land over there. That is, I understood that, but didn't look up the records to see. I always found Mr. Hensley straight with me, and I believed he owned what he said he did. I always found that when I insisted on any money I got it—he and Cole both. Q. What was the place over this way—the other place? A. Joe Hensley's place. Q. Did you know what he was going to do with the nine hundred dollars? A. Yes; he wanted to settle something or other. I think it was with regard to Joe's place. He wanted me to take a deed of trust on that land. I knew Joe's circumstances were not the best, and I didn't want to have anything to do with it. Q. What was the Forsythe place, you spoke of, how much was there of it? A. 120 acres, I think. Q. You still have that mortgage? A. No sir. * * * Q. Was this a first mortgage? A. No, sir; a second mortgage. Q. What was there on it? A. Fifteen hundred dollars, is my recollection. There was 120 acres of that. That is my recollection. I am not positive. Mr. Downey knows. He bought it from Mr. Hensley. Q. Then you carried that along to what time? A. Why, it was two or three— It was put on that land in 1889, some time, and taken off. I

received the money some time just shortly previous to or about the time I took this mortgage on Mr. Hensley's home place. I think it was the selfsame money that I got off Mr. Downey's place that went back on Mr. Hensley's place. I had a number of notes against Mr. Hensley previous to that time. Q. Old notes? A. Yes, sir; some had run until the interest had doubled the amount of the note. One was running thirteen years, with not a credit on it. Q. Notwithstanding, you regarded him in good circumstances? A. I thought he was perfectly safe until I wanted myself secured. Q. How many of these notes did you have? A. Maybe half a dozen. Q. What did the thirteen-year note amount to? A. It started at one hundred dollars. Q. Not a credit on it? A. No, sir; not at all. Some had credits on them, but I do not remember the amounts. This \$900 note had \$110 interest on it due at the time I took the mortgage on Mr. Hensley's place. I gave him these notes at different times, and some money, not much at a time, and altogether it amounted to \$2,300, and I gave him a note payable on demand. That I took up about a month or six weeks after it was given. Q. To whom did Mr. Hensley sell his Forsythe place? A. To Mr. W. A. Downey. Q. What did he sell it for? A. It seems to me it was thirty dollars, but I won't be sure. Q. Did he sell it before or after he gave you this deed of trust in dispute? A. Before. Q. How long? A. I can't say. I think the two transactions were close together. At least, my money came close there. I can't say. I never charge my memory with anything. I generally keep an account of my dealings in a book. I have a very poor memory, and have had for several years." Gailey further testified that he had lived within three miles of Hensley all this time, and saw him on an average of two or three times a week, and had sustained very intimate business relations with him all this while. With regard to the payments made on the \$2,800 note, he testified that the payment was in "cash, the proceeds of the sale of some stock."

The plaintiff introduced in evidence certain deeds of conveyance, by which it was shown that, of the 160 acres of land which the defendant H. M. Gailey referred to in his deposition as being land which the defendant John T. Hensley had purchased from his brother Joe, 80 acres only was conveyed to defendant John Hensley by Joe Hensley, which was thereupon by defendant Hensley conveyed to his son-in-law Thos. A. Wright, the consideration for which, as testified by defendant Hensley in his deposition, was a note for \$720 given by Wright to him, and which he afterwards sold to Rush, and the fact that Wright "shouldered the Eastern loan" on this land. In this same deposition, Hensley testified that, as stated, he himself had been paying, and was then still paying, the interest on this loan. The other 80 acres of this 160 acres of land was conveyed by

Joe Hensley to Charles H. Hensley, a nephew of defendant John Hensley, for an expressed consideration of \$1,200; said Hensley assuming the mortgage debts against said real estate. The defendant John Hensley, when his deposition was taken, testified that he himself sold this land to Dave Bean, and received the purchase price therefor, while the records introduced in evidence show that this nephew of defendant Hensley made to Dave Bean his bond for title to this land, and afterwards conveyed it to the wife of David Bean for the expressed consideration of \$2,240, subject to the deed of trust for \$1,200. These several conveyances were made along from 1890 to 1895. In 1897 the defendant John Hensley and his wife conveyed their home place, of 120 acres, to W. D. Orear for the alleged consideration of \$3,600, a portion of which consisted in the assumption of incumbrances, stated to be \$3,300, by the grantee, who thereupon in turn conveyed this land back to the wife of defendant Hensley, but which deed was not recorded until after the death of W. D. Orear. The evidence showed that Mr. Orear was an old man, without occupation, possessing a little home in the village of Virginia worth not exceeding \$400 or \$500, the whole of his remaining estate not being worth exceeding \$700; that he continued to live on his village place, and in fact did not pay for the equity which was conveyed to him by his son-in-law, never took possession of the land, and never received any rent therefor, and never had any agreement as to the receipt of the rent. The other evidence in the case showed that John Hensley was at the time of these conveyances, and long prior thereto, insolvent; doing business, as stated, in the name of H. M. Gailey, the defendant. It was shown by the deed of conveyance made to W. A. Downey by the defendant Hensley in October, 1891, of the Forsythe land, on which this \$900 mortgage from Hensley to Gailey was made, that it was conveyed to Downey subject to incumbrance, and that instead of Hensley owing Gailey this \$900 on the 4th day of May, 1892, the date when the deed of trust for \$2,800 from Hensley to Gailey is alleged to have been made, although it was not recorded until September 8d thereafter, this \$900, with interest, was paid off by a draft given by W. A. Downey to defendant H. M. Gailey, and the note assigned by Gailey to Downey, and by Downey, as assignee, released on the margin of the record of the deed of trust on the 8th day of March, 1892. With respect to this \$900, Gailey testified: "In the spring of 1892 Mr. Hensley wanted to know if I had in the meantime let Mr. Hensley have \$900 that I took a deed of trust on what we called the 'Forsythe Place'—the place Mr. Downey afterwards bought. That was in 1888 or 1889. I am not sure now which, but the records will show. And Mr. Downey bought that, and he assumed it in the payment of the land."

Plaintiff also offered in evidence tax list made out by H. M. Gailey, and sworn to by him, for the years 1894, 1895, 1896, 1897, 1898, and 1899. From these it appears that on the 1st day of June, 1894, Gailey, on his oath, returned for taxation under the head of "solvent notes secured by mortgage or deed of trust," nothing; for the year 1895, nothing; for the year 1896, \$600; for the year 1897, nothing; for the year 1898, \$690; and for the year 1899, after this suit had been brought against him, \$2,700. The evidence showed that the debt due the Bates County Bank, under which the real estate in question was sold, was contracted by defendant Hensley in January, 1886, and that title to 80 acres of the real estate in question had been acquired by him prior to that time, and occupied by him as a homestead, and that title to the remaining 40 acres was acquired by him in 1888, about 2½ years after the debt was contracted.

Upon the part of the defendants the evidence showed that H. M. Gailey was a man of considerable property, living in the western portion of Bates county, Mo.; that he had formerly been a farmer; that, when the little town of Amoret was laid out, he moved to Amoret; that, in addition to his farming, he loaned considerable money of his own; that he had loaned money to defendant Hensley for a number of years prior to the giving of this deed of trust; that defendant Hensley was a farmer living in the western portion of Bates county, Mo.; that he and his brother Cole Hensley were engaged in the purchase and shipment of stock from Bates county to Kansas City, Mo.; that John T. Hensley borrowed money from H. M. Gailey; and that Cole Hensley borrowed from the Bates County Bank. It tended to show that John T. Hensley had been in fair circumstances, financially, up to 1896 or 1897; that on March 9, 1892, he took from Mr. W. A. Downey a trust deed on land he had sold to him for \$494.15; that this left him 80 acres, which he sold to T. A. Wright in 1895, out of which he realized \$729; that he handled Joe Hensley's land, which he sold for \$2,240, the equity being \$1,040 (this was in March, 1896); that in 1886 he signed a note with one Short, payable to the Bates County Bank; that this note was carried along by Short until Short's death; that, after Short's death, Hensley paid the interest on the note for nearly 11 years, and until 1897; that in 1897 the bank brought suit on the note, and recovered judgment against Hensley; that Hensley made several payments on the \$2,800 note, but did not keep it reduced to the original amount; that, when pressed by Mr. Gailey for a payment sufficient to reduce it to its original amount, he informed Gailey that he could not make such a payment; that thereupon Gailey instituted foreclosure proceedings; that about the same time the Bates County Bank commenced this action to set aside the deed of trust, claiming that it was fraudulent; that

the consideration for the \$2,800 note consisted in several old notes which Hensley had given to Galley at different times previous to the execution of the deed of trust, and which at that time amounted to \$1,300, also about \$1,000 in money, and a duebill for \$500, which Galley gave to Hensley, and which he paid off in about 30 days after the giving of the deed of trust. The evidence further tended to show that, prior to the time when this deed of trust was given, Galley had loaned Hensley \$900; at that time Galley took as security a deed of trust on some land which was afterwards sold to the witness Downey; that when Downey bought this land he assumed the payment of the \$900; that in March, before this \$2,800 loan was made, Downey paid off the \$900, which, with interest, amounted to \$1,000; that Hensley applied to Galley for this money, and that it was reloaned to Hensley, and became a part of the \$2,800, consideration for the deed of trust in question; that the consideration therefor consisted of \$1,300, old notes, \$1,000 paid by Downey and reloaned to Hensley, and \$500 duebill given by Galley to Hensley, and taken up 30 days later. In this case the court found for defendants.

Under the evidence, the court found in the case of the bank against Hensley and wife that the conveyances from Hensley and wife to Orear and from Orear and wife to Mrs. Hensley were fraudulent, and set the same aside, as to the 40 acres of the real estate which was conveyed to Hensley after the debt in question had been contracted; but as to the other 80 acres, which the court found to be of the value of \$2,400, the court refused to set the same aside. In the case of the bank against Galley et al., the finding of the court was for the defendants. The plaintiff in each of the cases filed its motion for a new trial. These motions were overruled, and an appeal regularly taken to this court.

It is claimed by plaintiff that the fraudulent intent of the defendant Hensley to dispose of his property in such a way as to place it beyond the reach of his creditors—especially the plaintiff—is established beyond any question by the evidence in this case. And it is argued that this contention finds support in the fact that the finding and judgment of the court in the case of the bank against Hensley and wife, which has not been appealed from by defendants, are based upon the fact of a fraudulent conveyance of the land in controversy by defendant to W. D. Orear, and by him back to the defendant M. B. Hensley, the wife of John T. Hensley, who was the owner of the real estate in question. But it is conceded by plaintiff that this conveyance was declared by the court to be fraudulent, and set aside for that reason, only as to a portion of the real estate in controversy; the court concluding that as to the 80 acres of land the defendant had a home-
stead right, which, with the incumbrances

found by the court to be valid, did not exceed the value of the 80 acres, as to which the finding of the court was against the plaintiff in the suit of the bank against Hensley.

The record discloses that the debt of the plaintiff which is the basis of these suits was contracted January 26, 1886, and that from that time Hensley was owing to the defendant Galley debts that were unsecured which amounted in May, 1892, to about \$1,300, some of which were 25 years old, and, among others, one note which was at that time 13 years old, upon which there had never been made a payment. The evidence shows that there were incumbrances amounting to \$1,400 against the Forsythe place, containing 120 acres, which Hensley owed, and the 160 acres known as the "Joe Hensley Place" was incumbered for about \$2,500. One half of this place was conveyed to the defendant John Hensley, who thereafter conveyed the same to his son-in-law Thomas Wright, and the other half was conveyed to Charles H. Hensley, a nephew, which was sold by defendant Hensley for \$700, for his own benefit, subject to a mortgage for \$1,200, and the conveyance made by his nephew Charles H. Hensley to Mrs. Lida W. Bean therefor. The conveyance by defendant Hensley to his son-in-law Thomas Wright was upon the consideration that Wright was to assume the payment of incumbrance against it, and to execute to defendant Hensley his note for \$720, which he did. Notwithstanding that, by the terms of this transaction, Wright assumed the payment of the incumbrances on this land, Hensley continued to pay the interest on the incumbrance as it became due. This fact seems to us to be inconsistent with fair dealing upon the part of defendant Hensley, and clearly indicated a purpose upon his part to cover up and place beyond the reach of his creditors, and especially the plaintiff, his property. But this is not all. At once upon the institution of the suit for the purpose of having declared fraudulent and void against creditors, and especially this plaintiff, the deed of trust by Hensley and wife of date May 4, 1892, to Brown, trustee, for the use and benefit of defendant Galley, they at once proceeded to sell the land therein described at public sale, but, at the instance of plaintiff, were enjoined from proceeding therewith. Brown, the trustee, was requested by Galley to push the matter as fast as he could, and have the sale at the earliest day possible. It seems that the depositions of Hensley and Galley were taken before the trial of this case. Hensley then testified that at the time the note and deed of trust were executed he was owing the defendant Galley old notes, one of which was at least 25 years old, which were unsecured, and which amounted to about \$1,300, and in addition to that he was owing him \$900, with interest, which amounted to \$110, that was secured by a deed of trust on 120 acres of land, known as the "Forsythe Place," which was afterwards sold

by him to W. A. Downey, and that these debts which he then owed the defendant, Gailey, amounting to \$2,300, together with \$500 for which Mr. Gailey gave him his duebill, made the \$2,800, the amount of the note secured by this deed of trust which he gave to Gailey; that he got no money at the time the deed of trust was given, but that Mr. Gailey gave him a duebill for \$500, the understanding being that he should buy some young stock, and give orders therefor upon Mr. Gailey, who would pay the parties, and the amounts were credited upon the duebill until the same, as testified by Hensley, was taken up, a year or two after it had been given. Gailey testified that, at or about the time the deed of trust was given, he may have paid Mr. Hensley some small sum of money; that Mr. Hensley wanted \$500 with which to buy some young stock, and, as he could not spare the money at the time, he gave Mr. Hensley his duebill for \$500, which, together with the unsecured notes which he held at the time, and the \$1,000 due on the note secured on the Forsythe place, then amounted to \$2,800; that he took Hensley's note for \$2,800, payable five years thereafter, giving, as stated, his duebill for \$500 to Hensley, on which he paid Hensley some money, and paid orders that Hensley gave upon him for the balance.

At the trial the plaintiff introduced in evidence the deed from Hensley to Downey to the real estate covered by the \$900 mortgage to Gailey, which showed that in October, 1891, more than six months before the date of the deed of trust in question, Downey purchased this real estate, and assumed the payment of the note to Gailey. The deed of trust securing this \$900, made in 1890, with the marginal indorsements thereon, was also introduced in evidence by plaintiff, and showed that on the 9th of March, 1892, about two months before the date of this last deed of trust, this \$900 deed of trust was released of record by W. A. Downey, assignee. The plaintiff read in evidence the assessment lists that were made and sworn to by the defendant Gailey from the year 1894 up to and including 1899; those prior to 1894 having, under the law, been destroyed. In these lists, with the exception of the years of 1896, 1898, and 1899, he returned, under oath, that he had no solvent notes secured by mortgage or deed of trust; and for the year 1896 he returned \$600 under that head; and 1898, \$960; but in the year 1899, after this suit was brought, he returned of such notes the sum of \$2,700.

The evidence shows that for years prior to the time this deed of trust was taken, up to the time of the trial, the defendant Gailey, who testified that for 30 years he had been on very intimate relations with defendant John Hensley, and had seen him generally on an average of two or three times a week, had been shipping stock bought by the Hensleys, but paid for by himself, in his

own name; the method of doing business being that the Hensleys would go around and make contracts for the purchase of stock, which would be brought into Amoret, where they were loaded on the train, paid for by the defendant Gailey, and shipped as his stock. The remittances were made to him by the Bank of Commerce at Kansas City through his bank—the Farmers' Bank of Butler, Mo.

The facts thus disclosed conclusively show (indeed, Gailey and Hensley so testified) that Hensley was not indebted to Gailey at the time of the execution of the deed of trust in question exceeding the sum of \$2,300, at most, while it purports to be executed to secure the payment of a note for \$2,800 (being \$500 in excess of the amount of the indebtedness of Hensley to Gailey at the time), and was to that extent fraudulent as to the creditors, and, under repeated rulings of this court, vitiates the entire mortgage. *State ex rel. v. Hope*, 102 Mo. 410, 14 S. W. 985; *Boland v. Ross*, 120 Mo. 208, 25 S. W. 524; *Barton v. Sitlington*, 128 Mo. 164, 30 S. W. 514; *Imhoff v. McArthur*, 148 Mo. 371, 48 S. W. 456. It is true that Gailey undertakes to explain this discrepancy by testifying that he gave to Hensley his duebill for \$500 at the time, which was taken up in 30 days. But this did not relieve the transaction of its fraudulent feature with which it became inoculated at the time. It is well settled that, in case of the conveyance of land with a fraudulent design on the part of the debtor, a creditor receiving the same in security for a bona fide indebtedness, the creditor will not be affected, although he is aware that the transaction itself hinders or delays other creditors in the collection of their demands against the fraudulent grantor, and that such was the purpose of the debtor, provided the creditor does not further participate in such purpose than taking security for his debt. But upon the other hand, if any part of the debt secured by the conveyance is not bona fide, or does not exist at the time of the conveyance, or the conveyance is made by the debtor for the purpose of hindering, delaying, and defrauding his creditors in the enforcement of their claims, and the creditor thus preferred either knew of or participated in the purpose of the debtor when the transaction was consummated, it will be held to be fraudulent as to other creditors. Now, it is perfectly clear from the evidence that Hensley conveyed the land in question to Brown, trustee for Gailey, for the purpose of defrauding his creditors, and especially the plaintiff; and it is equally clear that Gailey knew of his fraudulent purpose, and participated in it. This is evidenced not only by his taking a deed of trust for at least \$500 more than Hensley owed him, but his knowledge of Hensley's insolvency, and his anxiety to have the land sold by the trustee in the deed of trust as soon as it could possibly be done,

after plaintiff had sued Hensley on the note which it held against them. It is inconceivable that Gailey did not know of Hensley's insolvency and his straightened circumstances at the time of, and for many years before, the execution of the deed of trust, for he was in the habit of loaning him sums of money, some of which ran for 13 to 25 years without the interest being paid upon them. Would not such circumstances of themselves satisfy any money lender that his customer was insolvent, or at least not prompt in meeting his obligations? It is idle to say that Gailey did not know of Hensley's insolvency at the time of the execution of the deed of trust in question, and of his intent to defraud, hinder, and delay his creditors in so doing, and that Gailey was not a party to, and did not participate in, his fraudulent purpose. From these considerations, it must logically follow that, in the case of Bates County Bank against J. T. Hensley and M. B. Hensley, the deeds from Hensley and wife to Orear, and from Orear back to Mrs. Hensley, are fraudulent and void as to the plaintiff, as to that part of said 80-acre tract in section 14 described in the petition in that case which may be found to be in excess of the homestead exemption right. We therefore reverse both judgments, and remand the causes, that they may be proceeded with in accordance with the views herein expressed. All concur.

COLBERN v. YANTIS et al.*

(Supreme Court of Missouri, Division No. 1.
May 27, 1903.)

EJECTMENT — RESTITUTION — SALE UNDER PARAMOUNT DEED OF TRUST — PURCHASER NOT PARTY — DISCHARGE OF RECEIVER — WAIVER OF ILLEGALITY — APPOINTMENT OF RECEIVER — PROPERTY — PAYMENTS UNDER JUDGMENT — REVERSAL — REPAYMENT — SUMMARY REMEDY.

1. The appointment of a receiver in ejectment on plaintiff's showing that there is a deed of trust on the property on which interest is unpaid, that the taxes are delinquent, and that the holder of the trust deed is threatening to foreclose, is erroneous.

2. Where a receiver appointed in ejectment sells the property in his character of trustee in a deed of trust, and the purchaser is not a party to the ejectment suit, restitution of the property to defendant on his securing a reversal of plaintiff's judgment cannot be ordered.

3. Where a receiver appointed in ejectment sells the property in his character as trustee in a deed of trust which is paramount to the title of either of the parties, restitution to defendant on his securing a reversal of plaintiff's judgment cannot be ordered.

4. Where a receiver appointed in ejectment has been discharged, after selling the property in his character as trustee in a deed of trust, without presenting the deed to the court or securing an order for the sale, the regularity of his act cannot be determined on an appeal by defendant from the refusal of a writ of restitution after a reversal of plaintiff's judgment, and hence restitution cannot be ordered.

5. Where a receiver appointed in ejectment sells the property in his character of trustee in a deed of trust, and the defendant is present, and objects to the sale only on the ground that the obligation secured by the deed is not due, he cannot afterwards, and after securing a reversal of plaintiff's judgment, have restitution on the ground that the receiver had not secured leave of court for the sale.

6. Where, in ejectment, a receiver is appointed, sells the property, and gives possession, defendant is not liable to plaintiff for rents accruing subsequent to the receiver's possession, and, having paid such rents to plaintiff to avoid execution, is entitled to a recovery thereof on securing a reversal of plaintiff's judgment, which itself did not assess any rents to be paid after the receiver's possession.

7. Where plaintiff in ejectment secures a judgment by virtue of which receiver pays to him the proceeds of a sale, representing the equity of redemption in the land in suit, the defendant, on securing a reversal of the judgment, is entitled to a recovery thereof.

8. Where a judgment plaintiff in ejectment, by threat of execution, secures the payment of money on the judgment, and also the proceeds of a sale, representing the equity of redemption in the land in suit, the defendant, on securing a reversal, is entitled to summary restitution in the ejectment action, and is not relegated to a separate suit.

Appeal from Circuit Court, Cass County;
H. C. Timmonds, Special Judge.

Action by D. M. Colbern against S. A. Yantis and others. From a judgment refusing restitution to defendants after reversal of plaintiff's judgment, defendants appeal. Reversed.

R. T. Railey, Chas. W. Sloan, and Chas. H. Winston, for appellants. Willard P. Hall, for respondent.

MARSHALL, J. This is an action of ejectment. It is the second appeal in the case. The decision on former appeal is reported in 167 Mo. 562, 67 S. W. 1100. As therein stated, the conclusion then reached was the necessary and logical result of the decision in *Walter v. Scofield*, 167 Mo. 537, 67 S. W. 276. The origin, nature, and proceedings in the controversy over the land are set out in those two cases, which must be read in connection with this case, and need not be repeated here. It is only necessary to set out in this opinion such matters as did not then appear to this court, or have occurred since the former decision.

It now appears that while this cause was pending in the circuit court, and before any judgment had been rendered in the case, and while the defendants were in possession of the land, the plaintiff showed to the court that there was a deed of trust upon the land for some \$3,000, which was superior to the title of either of the parties to the case and to that of those under whom these parties claim, and that the interest on said deed of trust was unpaid, and the taxes were delinquent, and that the holder of the deed of trust was threatening to foreclose the deed of trust, and prayed the court for these reasons to appoint a receiver to take possession of the property. The court thereupon on

*Rehearing denied July 2, 1903.

¶ 1. See Ejectment, vol. 17, Cent. Dig. § 462.

October 19, 1895, appointed Frank Huber receiver of said property, ousted the defendants from the possession, and put the receiver in possession. The action of the court in so appointing a receiver upon such a showing was clearly erroneous. *Pullis v. Pullis*, 157 Mo., loc. cit. 580, 57 S. W. 1095. But such error is immaterial in this case upon the present state of the record, and, furthermore, was acquiesced in by all parties. The receiver took possession of the land, and also of the growing crops, and sold the crops for \$145. Thereafter, on the 4th of February, 1896, the circuit court entered judgment against the defendants for possession and for \$40 per month rents and profits from the date of the institution of the suit until the receiver took possession, amounting in the aggregate to \$200. From this judgment the defendants appealed, giving a supersedeas bond. The appeal was dismissed on April 17, 1899, and a writ of error sued out on the same day. Under threats of seizure of their property the defendants thereafter, on September 14, 1899, paid to the plaintiff the sum of \$826 in full of the damages and monthly rents and profits from February 4, 1896, to September 14, 1899, and also paid \$43.25, the costs in the case. It will be observed that the defendants had been ousted from the possession by the court and the receiver put into possession in October, 1895, and it does not appear why the defendants paid the plaintiff the rents and profits from February 4, 1896, to September 14, 1899, but is perfectly apparent that the defendants could not have been held liable therefor, for they were not in possession of the premises during that time, but the receiver, who was appointed on the plaintiff's motion, was in possession from September 21, 1895, until February 8, 1897, and other persons were in possession under a superior title, to wit, the foreclosure of the deed of trust, from February 8, 1897, until September 14, 1899, and that they or those claiming under them are still in possession.

It further appears that Frank Huber, who had been appointed receiver as aforesaid, was also the trustee under the deed of trust aforesaid. The note secured by the deed of trust was owned by John Bachman, who resided in Pennsylvania. He died intestate in 1894, and on May 30, 1895, Frank Huber was appointed the administrator of his estate by the probate court of Cass county, Mo. He had no estate in Missouri, except as it arose from owning the note, secured by said deed of trust on this land, and the note was in Pennsylvania at the time of his death and at the time Huber was appointed administrator. On February 8, 1897, at the instance of the heirs of Bachman, Huber, as trustee, foreclosed the deed of trust to satisfy the note which he held as administrator, and sold the land which he held as trustee. At that sale Lloyd S. Walter, acting as attorney in fact for Jacob Walter, read to the persons present at said sale a letter written to him by

John Bachman, extending the time for the payment of the deed of trust upon condition that the interest should be kept paid up, which time had not then expired, and thereupon Lloyd S. Walter tendered to the trustee and administrator, Huber, all unpaid interest and costs, and objected to and forbade the sale under the deed of trust. Huber refused the tender, and proceeded with the sale, with the result that Lloyd S. Walter purchased the property for his wife, Ada S. Walter, for \$5,810, and paid \$500 cash as a part payment. Ada S. Walter then sold the south half of the premises to Porter I. Wallingford for \$2,750. On February 18, 1897, Ada S. Walter and Lloyd S. Walter, her husband, and the plaintiff's attorney, met Huber to close the sale. Mrs. Walter paid Huber \$3,644.42 in cash (which was made up in part by the \$2,750 she had received from Wallingford), that being the amount due under the deed of trust, with interest and costs; and on account of the balance due on her bid, to wit, the sum of \$1,558.50, she gave Huber a note made by herself and her husband, and payable at 30 days. No provision was made for the payment of the balance due on the bid, amounting to \$107.08, nor does it appear whether or not it was ever paid. Afterwards Ada S. Walter sold the north half of the property to Porter I. Wallingford, so that he became the owner of the whole tract, and has been ever since in possession thereof.

After the appeal was dismissed, the plaintiff requested Huber, as receiver, to make a report, which he did on June 2, 1899, showing that he had sold the land, and, after paying the mortgage, he had loaned the balance realized from the sale, amounting to \$1,558.50, upon real estate security, and that he had the note in his possession. At that time Hon. H. C. Timmonds, Judge of the Twenty-Sixth Judicial Circuit Court, was holding the Cass circuit court for the purpose of trying certain cases wherein the regular Judge, Hon. W. L. Jarrott, had been of counsel. Although called on to try certain cases, for some unexplained reason the report of the receiver in this case was called up by the plaintiff without any notice to the defendants, and in their absence, and an order was procured from Hon. H. C. Timmonds on the receiver to turn over the note aforesaid to the plaintiff. The receiver was allowed \$47.86 for his services, and he was discharged. The receiver turned over the note to the plaintiff. He sold it to the Bank of Harrisonville for \$1,828.84 (the principal and interest) on July 5, 1899, and deposited one half of the proceeds to the credit of Geo. B. Strother, and the other half to the credit of John W. Scott. On November 28, 1899, Ada S. Walter paid the note in full, amounting to \$1,865.21, to the Bank of Harrisonville. The deed of trust was not exhibited to the court, nor was any leave of court asked or obtained to sell under the deed of trust while the property was in

the hands of the receiver. After the sale, Huber put Mrs. Walter and her grantee, Wallingford, in possession. Huber received about 2,000 bushels of corn as rent for the year from March 1, 1896, to March 1, 1897, and, so far as appears, no account has ever been taken thereof, nor in fact of any rent he collected while he was receiver.

After the judgment in this case was reversed on former appeal, in April, 1902, the case came on for further proceedings in the circuit court on May 23, 1902, before Hon. H. C. Timmonds, sitting for Hon. W. L. Jarrott, who had been of counsel in the case, and the court held that under the opinion and mandate of this court it was limited to the duty to ascertain whether the plaintiff, or any one under him, was or had been in possession of the premises under the judgment in the case, and, if so, to oust him or them, and to put the defendants back into possession; and that it could not ascertain nor restore to the defendants anything they had lost by virtue of the original judgment of the circuit court in the case. Thereupon the court heard testimony upon the question whether the plaintiff, or any one under him, had ever been in possession of the land under the original judgment of the circuit court, and found the fact to be that such was not the case, and accordingly refused to issue a writ of restitution to the defendants. There were no motions or written pleadings filed. The claims made by the parties were *ore tenus*. The defendants contended that they were entitled to be restored to the possession of the land, and to a judgment against the plaintiff for rents and profits at \$40 per month from the date they were put out of possession and the receiver put into possession on September 21, 1895, until such restitution occurred; or, at any rate, that they are entitled to recover the \$826, with interest, paid to the plaintiff on September 14, 1899, together with \$43.25 costs and \$82.50 other expenses incurred and paid in the case, and also the \$1,588.50, with interest, paid to the plaintiff by the receiver. The court denied all these claims, and the defendants appealed.

1. The first contention of the defendants is that they are entitled to the possession of the property, with a judgment for the rents and profits from September 14, 1895, when they were put out of possession. This contention is based upon the theory that the plaintiff caused the receiver to be appointed, and is responsible for all loss to the defendants that was occasioned thereby; that, the land being in the custody of the court through the instrumentality of the receiver, no one had any right to meddle with it, and it could not be sold without the permission of the court; that, if any one had any claim to the land, whether under or superior to the claim of the parties to the suit, it was necessary for them to exhibit their claim to the court and ask proper relief, and that a sale of the land, even under a superior title, was void, and

conveyed no title, unless it was thus permitted by the court. Hence the receiver is still in possession, and it is the duty of the court to restore to the defendants all they have lost by the former judgment by putting them back into possession, and by giving them a judgment against the plaintiff for the rents and profits since they were ousted by the appointment of the receiver.

The general rule of law is that upon a reversal of a judgment the prevailing party in the appellate court is entitled to be restored to all he has lost by reason of the judgment of the lower court, which is thus reversed. The Enc. of Pl. & Pr. vol. 18, p. 871, thus states the rule: "Where a judgment or decree of an inferior court is reversed by a final judgment in a court of review, a party is in general entitled to restitution of all things lost by reason of the judgment in the lower court, and accordingly the courts will, where justice requires it, promptly, and as far as practicable, place him as nearly as may be in the same condition he stood in previously." In support of the text many cases in America and England are cited; among them *Ming v. Suggett*, 34 Mo. 384, 86 Am. Dec. 112, which fully sustains the text. In *Crispen v. Hannoran*, 86 Mo. 100, the plaintiff obtained judgment in ejectment for possession and rents and profits. The defendant appealed. The plaintiff obtained possession under the judgment. This court reversed the judgment, and remanded the cause, with the usual mandate that the defendant be restored to all he had lost by virtue of the judgment. The defendant then filed a motion in the circuit court asking to be restored to possession and for the rents and profits he had lost while out of possession. The circuit court sustained the motion, and restored the defendant to possession, and gave him a judgment against the plaintiff for rents and profits. The plaintiff appealed. This court held that the effect of the reversal of the former judgment was to restore the parties to the same condition in which they were prior to the rendition of the judgment, but reversed the judgment, for the reason, *inter alia*, that there was no evidence to support the finding and judgment as to the rents and profits.

It will be observed that in the case of *Crispen v. Hannoran*, supra, the judgment of this court was not final or conclusive of the rights of the parties, whereas in the case at bar the judgment of reversal was final and conclusive. There is a difference as to a right of restitution upon a reversal of a judgment where the decision of the appellate court is final and where it is not. 18 Enc. Pl. & Pr. p. 877, states the rule to be: "Where the judgment of reversal is not final, and it appears that the court of review has not decided anything which renders it certain that the plaintiff has not rightly received payment under the reversed judgment, and that on a new trial the plaintiff may be

finally adjudged entitled to hold it, restitution will, as a rule, be refused until the rights of the parties have been ascertained, or the plaintiff may be ordered to bring the money into court to await further directions." The case of *Crispen v. Hannoran*, *supra*, falls within this rule, but the case at bar does not.

To this general rule of law there are, however, these limitations: That "restitution on reversal of a judgment can be compelled only from parties to the record, or from their beneficial assignees, or, in case of the death of the plaintiff, from his executor or administrator. Restitution cannot be compelled from third persons who were bona fide purchasers at a sale under an execution dependent upon a judgment subsequently reversed, or who acquired bona fide collateral rights thereunder, and their rights are in no way affected by the subsequent reversal of the judgment." 18 Enc. Pl. & Pr. pp. 880-881. And this is the rule in Missouri. *Gott v. Powell*, 41 Mo. 416; *Vogler v. Montgomery*, 54 Mo. 577; *Jones v. Hart*, 60 Mo. 362. In *Gott v. Powell*, *supra*, this court said: "The restitution to which the party is entitled upon the reversal of an erroneous judgment is everything which is still in the possession of his adversary. Where a man recovers land in a real action, and takes possession or acquires title to land or goods by sale under execution, and the judgment is afterwards reversed, so far as he is concerned his title is at an end, and the land or goods must be restored in specie; not the value of them, but the things themselves. There is an exception where the sale is to a stranger bona fide, or where a third person has bona fide acquired some collateral right before reversal [citing authorities]. Upon the reversal of the judgment in the Montgomery circuit court Powell was entitled to full restitution of the land, the equity of no stranger having intervened, and Gott's title entirely ceased." In *Vogler v. Montgomery*, *supra*, the plaintiff in ejectment caused the land to be sold under execution, pending an appeal without supersedeas, and became the purchaser of the land, and thereafter sold it to a third person. Afterwards the judgment was reversed, and it was held that, while the defendant would have been entitled to restitution if the land still stood in the plaintiff, he was not entitled to restitution against the purchaser in good faith from the plaintiff. In *Jones v. Hart*, *supra*, it was said: "While all rights which have been acquired bona fide by any third person under an execution issued on this judgment, which execution has not been impugned as irregular or invalid, will be respected and preserved, the defendant, whose property has been sold, is entitled to the fruits of the sale. *Shields v. Powers*, 29 Mo. 317. If the property itself is in the hands of the sheriff, or has been transferred to the possession of the plaintiff through the instrumentality of the execution, he is entitled to be restored to that. *Gott v. Powell*,

41 Mo. 420; *Hannibal & St. Jo. R. R. Co. v. Brown*, 43 Mo. 294."

It is clear that the plaintiff is not, and never was, in possession of this land by virtue of the reversed judgment, or in any other manner. When the court appointed the receiver and ousted the defendants and put the receiver into possession, the res passed into the custody of the court. But the plaintiff was not put into possession. It is the law that, when property is in the possession or custody of the court through the instrumentality of a receiver, the court will not permit any one, even one claiming under a title paramount to that of either party litigant, to interfere with it, but will require all persons claiming any title or interest therein to submit their claims to the court for adjudication, and will then direct what disposition shall be made of the property. *Smith v. Railroad*, 151 Mo. 402, 52 S. W. 48 L. R. A. 368; *Neun v. Blackstone B. & L. Ass'n*, 149 Mo. 74, 50 S. W. 436; *Wiswall v. Sampson*, 14 How. 51, 14 L. Ed. 322; *Ex parte Tyler*, 149 U. S. 164, 13 Sup. Ct. 793, 37 L. Ed. 698; *Porter v. Saben*, 149 U. S. 480, 13 Sup. Ct. 1008, 37 L. Ed. 815.

But while this is the law it does not sustain the defendants' contention in this case, for the following reasons: First. This is not a proceeding to recover possession from the person who acquired title and obtained title under the foreclosure of the deed of trust, and that person is not a party to this case, and therefore his rights cannot be determined in this case. Second. The person in possession is not in possession under the plaintiff, nor by virtue of the reversed judgment, but under the deed of trust, which is a superior title to that of either of the parties herein. Third. If Huber, as trustee, improperly sold property that was in his possession as receiver, the court that appointed him can settle with him; but Huber is not a party to this case, and does not even appear to have had any notice of this proceeding, but, on the contrary, has been discharged—whether regularly or erroneously is immaterial in this state of the case, for he is not in court, and hence the question of the regularity or legality of his acts as receiver cannot be adjudicated in this kind of a proceeding or without giving him a day in court. Fourth. The defendants knew that Huber, as trustee, was foreclosing the deed of trust; and the real defendant, Jacob Walter, was present at that foreclosure sale in the person of his attorney in fact, Lloyd S. Walter, and stood by and saw the land sold, and never asserted any such claim as is now set up, and never notified purchasers that he would contest the sale on the ground that the property was in custodia legis, and that the trustee had no power to foreclose the deed of trust without leave of court. On the contrary, he objected to the sale solely on the ground that the cestui que trust had extended the time for the

payment of the debt, upon condition that the interest was kept paid up, and he then tendered the arrears of interest and the costs. Under these circumstances the defendants are not entitled to restitution of the premises, and especially not in this proceeding.

2. The plaintiff never had any title or right to the land. The defendant Jacob Walter owned the equity of redemption, which was subject to the deed of trust. The plaintiff caused the defendants to be ousted from possession and caused the receiver to be put into possession on September 14, 1895. Thereafter, on February 4, 1896, the plaintiff obtained a judgment against the defendants for possession and for the rents and profits at the rate of \$40 per month up to the time the receiver took possession, aggregating \$200. The defendants appealed, with a supersedeas. The appeal was dismissed on April 17, 1899. Thereafter, under threat of an execution, the plaintiff collected from the defendants \$826, which consisted of the \$200 and \$40 a month from February 4, 1896, to September 14, 1899. It is hard to understand how the defendants ever made the mistake of paying any rents and profits after February 4, 1896, for the property was in the hands of the receiver after February 4, 1896, until the sale under the deed of trust on February 8, 1897, and thereafter was in the possession of the purchaser at that foreclosure sale and her grantee, and, in addition to all this, the judgment itself did not assess any rents and profits to be paid after the receiver was put into possession. However the mistake occurred, the fact is that the plaintiff asserted a right to collect the \$826 from the defendants under the judgment, and threatened to enforce it by execution, and the defendants paid it. Thus the plaintiff received \$826 from the defendants to which he was not entitled, and which he should restore to the defendants, with legal interest. The plaintiff also received from the receiver the note for \$1,588.50, dated February 27, 1897, and sold it to the bank for \$1,828.84, being the principal with interest to July 5, 1899; and that note was afterwards paid to the bank. That note represented the value of the equity of redemption in the land. The plaintiff had no right to the equity of redemption, and therefore he had no right to the money or note which represented the equity of redemption. That belonged to the defendant Jacob Walter. The plaintiff was enabled to collect that sum by virtue of the proceedings had in this case. The defendants lost that sum by virtue of the proceedings had in this case. The defendants are, therefore, entitled to recover from the plaintiff \$1,588.50, with legal interest from February 27, 1897. That amount constitutes the fruits of the sale under the deed of trust, to which defendants are entitled to restitution instead or in lieu of the land itself. *Jones v. Hart*, 60 Mo., loc. cit. 364. The defendants are also entitled to have taxed as

costs against the plaintiff all sums expended by them in payment of court costs, and also all taxable expenses in appealing the case both on former appeal and on this appeal.

It is objected that the defendants' remedy is not summary as a part of this case, but that it is by a separate action. The defendants are undoubtedly entitled to recover in a separate action, but they are also entitled to restitution in a summary manner in this action. It would be a peculiar law that would take away property by a judgment, and then, when, on appeal, the judgment was reversed, the defendant should be turned out of court, and told to come in again in another suit against the same plaintiff. All the parties to be affected by the restitution are now before the court, and it is the duty of the court to right the wrong done with all possible speed. It is urged, however, that the defendants can only proceed by motion or *scire facias*. Inasmuch as the case must be reversed, the defendants will be granted leave to file a motion in the circuit court asking for the restitution of the items hereinbefore specified.

The judgment of the circuit court is reversed, and the cause remanded to that court, with directions to hear and determine the case in accordance herewith, and to enter judgment for the defendants and against the plaintiff for all those amounts and sums that the plaintiff has heretofore received by reason of any proceeding in this cause, and which sums so received by the plaintiff have been lost to the defendants by any such proceedings; and also to tax all the costs in the case against the plaintiff, and to enter judgment for the defendants and against the plaintiff for all costs and taxable expenses of appeals which have heretofore been paid by the defendant. All concur, except ROBINSON, J., absent.

SEARCY v. CLAY COUNTY et al.*

(Supreme Court of Missouri. Division No. 2
June 9, 1908.)

JUDGMENTS—OPENING HIGHWAY—ATTACK IN EQUITY—SURVEYOR'S ERROR—DEMURRER TO BILL—REMEDY BY APPEAL—FAILURE TO PURSUE—COUNTY AS PARTY—PRAYER FOR DAMAGES—MISJOINDER OF CAUSES OF ACTION—PRESENCE OF LANDOWNER—PRESUMPTION.

1. A landowner having due notice of proceedings for the opening of a highway adjoining his property is presumed to have been present during the survey and to have seen the road marked out.

2. A bill by a landowner to set aside proceedings for the opening of a highway and to enjoin the same, which alleges a valid judgment of the county court decreeing the opening, but avers that the surveyor's report in fact, though not on its face, departed from the petition for the highway, without averring any fraud or misrepresentation, is demurrable, the allegation as to the judgment precluding plaintiff from pleading the surveyor's error.

*Rehearing denied July 2, 1908.

3. As Rev. St. 1890, § 9419, provides an appeal from the judgment of the county court ordering the opening of a highway, an adjoining landowner, failing to appeal, cannot sue in equity to vacate the proceedings.

4. The county is improperly made a party to a bill by an adjoining landowner to vacate proceedings by the county court for the opening of a highway, the court not being the agent of the county, nor the county a party to the original proceedings.

5. Where a bill in equity seeks to set aside a judgment of the county court opening a highway, and also asks damages against road overseers, there is an improper joinder of matters of equitable jurisdiction with those cognizable at law.

Appeal from Circuit Court, Clay County;
T. J. Broadbuss, Judge.

Bill by Charles G. Searcy against Clay county and others. From a judgment for defendants entered on sustaining a demurrer to the bill, plaintiff appeals. Affirmed.

D. C. Allen, for appellant. Simrall & Trimble, for respondents.

GANTT, P. J. This is a suit in equity, commenced in the circuit court of Clay county. The amended petition, to which a demurrer was sustained, omitting caption, is in the words following:

"And now comes Charles G. Searcy, the plaintiff in the above-entitled cause, by his attorney, and in this, his first amended petition therein, states the facts following constituting his cause of action against the defendants in said cause, to wit:

"That before and during all the times mentioned herein he was, and ever since has been, and now is, the owner in fee and in possession of the following described lands, situate in Clay county, Missouri, to wit: The west half of the northwest quarter of section No. 15, in township No. 52, of range No. 31; the east half of the northeast quarter of section No. 16, in said township and range, except the parts thereof, embracing five acres, cut off by the right of way of the Hannibal and St. Joseph Railroad Company, and occupied by said railroad company as right of way, and ten acres off the north end of the west half of the southwest quarter of section No. 16 in said township and range—the whole of said lands so owned and possessed by plaintiff comprising 165 acres. That said defendants Abram W. Gross, George W. Sexton, and John C. Cooper were, at the time of the institution of this suit and the service of summons herein upon them, and ever since have been, and now are, justices of the county court of Clay county, Missouri, duly commissioned, qualified, and acting as such. That said defendant Daniel J. Mathews was at the time of the institution of this suit and the service of summons herein upon him road overseer of road district No. 9 in township No. 31 in Clay county, Missouri, duly appointed, qualified, and acting as such. That said defendant Joseph Carroll was at the time of the institution of this suit and the

service of summons herein upon him road overseer of road district No. 8 in township No. 52 of range No. 31, in Clay county, Missouri, duly appointed, qualified, and acting as such. That on the 7th day of November, 1898, J. R. Agnew and more than eleven other freeholders of Liberty and Kearney townships, in said Clay county, filed their application in the county court of Clay county, Missouri, after notice thereof given in accordance with law, for the establishment of a new public road and for the widening of an old public road—the two to aggregate 40 feet in width—laid off to the extent of 20 feet in width on each side of the center line of such proposed new public road and widening of an old public road between the termini and along the line thus described, to wit, beginning at a point on the east line of section No. 10 in township No. 52 of range No. 31, in Clay county, Missouri, which point is 20 and $\frac{80}{100}$ chains north of the southeast corner of said section No. 10, and running thence west 20 and $\frac{28}{100}$ chains to a point, thence south 20 and $\frac{80}{100}$ chains to the southwest corner of the southeast quarter of the southeast quarter of said section No. 10, thence west to a point 2 and $\frac{41}{100}$ chains east of the quarter section corner on the south side of said section No. 10, thence south 1 and $\frac{32}{100}$ chains, thence west 2 and $\frac{61}{100}$ chains, thence north 1 and $\frac{32}{100}$ chains to a point 18 feet west of said quarter section corner, thence west to the southwest corner of said section No. 10, thence west to the southwest corner of section No. 9 in said township and range, thence south to the quarter section corner on the west side of section No. 16 in said township and range, thence west to the northeast corner of the west half of the southeast quarter of section No. 17 in said township and range, thence south to the southeast corner of said half quarter section last aforesaid, thence west to the southeast corner of the west half of the southwest quarter of said section No. 17 in said township and range, the southern terminus of such proposed road. That the part of such proposed road to be in said application established as a new road is described as follows: Beginning at a point 20 and $\frac{28}{100}$ chains west of the beginning point above described, thence running south 20 and $\frac{80}{100}$ chains to the southwest corner of the southeast quarter of the southeast quarter of said section No. 10. That the remainder of said proposed road by said application was to be widened to 20 feet on each side of the center line above described. That said old public road had been located and established (on said 7th day of November, 1898) for a period of near 43 years in its location and establishment. A strip 20 feet in width for the purpose of such old public road had been taken off the north end of the said lands now owned and possessed by plaintiff, and such strip 20 feet in width had ever after the location and establishment of such old public

road been in the ownership and use of the public. That on said 7th day of November, 1898, after filing of said application and proof of the publication of notice of its presentment for further consideration, the same was continued to its January adjournment in the year 1899 by said county court, to wit, to January 3, 1899, and thereupon on said day said county court, by its order of record, made and entered on said day, required Charles L. Leitch, county surveyor, and ex officio road commissioner of said Clay county, to view, survey, and mark out the road so applied for by said J. R. Agnew and others, and otherwise to proceed therein according to law, and to make report of his execution of said order at its February term, 1899. That said Leitch, county surveyor and road commissioner, under said order of January 3, 1899, made report in writing to said county court at its February term, 1899, and in making such report reported a conformity therewith, whereas in point of fact he did not conform therewith in his view, survey, and marking out of said road applied for by said J. R. Agnew and others, but erroneously and unlawfully disobeyed the same, and deviated therefrom in the following particular, to wit: Instead of viewing, surveying, and marking out said road along the center line named in said application by J. R. Agnew and others, and mentioned in said order, between the southwest corner of said section No. 9 and the beginning thereof on the east line of said section No. 10, he deviated from said center line along that distance, and erroneously and unlawfully viewed, surveyed, and marked out such road along an erroneous and unlawful center line, thus described, to wit: Beginning at the southwest corner of said section No. 9; thence running east, bearing south, to a point 35 links south from the southeast corner of said section No. 9; thence east, bearing north, to a point on the south line of said section No. 10, which is 13 feet west from the quarter-section corner on the south side of said section No. 10; thence south 1 and $\frac{82}{100}$ chains to a point; thence east, bearing south, along a line which, if prolonged to the east line of section No. 15 in said township and range, will intersect such east line 75 links from the southeast corner of said section No. 10, 2 and $\frac{81}{100}$ chains to a point; thence north 1 and $\frac{82}{100}$ chains; thence east 17 and $\frac{67}{100}$ chains; thence north, 30 minutes west, 20 and $\frac{60}{100}$ chains; and thence east 20 and $\frac{28}{100}$ chains to a point on the east line of said section No. 10, which is 75 links south from the point of beginning named in said application and order. That because of the fact that said Leitch, as surveyor and road commissioner as aforesaid, reported a conformity with said order in viewing, surveying, and marking out said road, whereas in point of fact he disobeyed said order and erroneously deviated from the center line named in it in the particular above described, the said diso-

bedience and deviation lay concealed under the form of said report; nor did plaintiff know the truth of the matter of said error, disobedience, and deviation until many months after the filing of said report, to wit, not until late in the summer of 1899. That among other matters reported by said Leitch in his said report was the fact that this plaintiff refused to relinquish the right of way over his said lands for the said road applied for by said J. R. Agnew and others. That said report of said Leitch was by said county court (after the filing thereof), by its order of record made and dated February 8, 1899 (including therein said disobedience, error, and deviation), unwittingly approved, and ordered to be recorded, and now remains among the records of said county court. That afterwards, on said 8th day of February, 1899, said county court, by its order of record, made and dated said 8th day of February, 1899, unwittingly appointed three disinterested freeholders of said Clay county to act as a board of commissioners to view the premises, hear complaints, and assess damages in case of citizens who claimed damages on account of the establishment and opening of said road, so, as aforesaid, applied for by J. R. Agnew and others, and directing them to perform said functions, ordered them to make report to the May term of said county court, 1899. That the order of the appointment of said commissioners was, in words, in conformity with the route and center line of said road as applied for by said Agnew and others; but that said commissioners in proceeding under said order were misled by said erroneous and illegal view, survey, and marking out of said Leitch, and therefore proceeded to assess damages, and did assess the same, where claimed by landowners, on account of the establishment and opening of said road, between said southwest corner of said section No. 9 and the eastern terminus of such road, along the route and center line of said erroneous survey, view, and marking out of said Leitch, including said deviation, and not along the route and center line between said points named in said application and directed in said order. That said commissioners made report of their proceedings under said order to the May term of said county court, 1899, showing therein that they assessed damages in the sum of \$1 to the plaintiff herein on account of the establishment and opening of said road over his said land; but such report in words conforming to said order as to route and center line between said points of fact included said error and deviation, but under the verbiage of said report the said error and deviation were concealed from said county court, this plaintiff, and all others. That said county court, by its order of record, made during said May term, 1899, to wit, on the 1st day of May, 1899, unwittingly approved said report of said commissioners, including said error

and deviation, and thereafter, to wit, about July 3, 1899, caused said \$1 assessed to plaintiff as damages to be tendered to plaintiff, which he then and there refused to accept, and which he ever since has refused, and now refuses, to accept. That said county court during its August term, 1899, to wit, on the 8th day of August, 1899, by its order of record of that date, ordered Daniel J. Mathews, road overseer of said road district No. 9 in said township and range, in accordance with law, to open said road, as widened and established, 40 feet in width, in words, along the route and center line indicated in said application and said orders of said county court hereinbefore mentioned, but, in point of fact, unwittingly, between said southwest corner of said section No. 9 and the eastern terminus of said road, because of said error and deviation of said Leitch, along the erroneous center line indicated in said erroneous and illegal view, survey, and marking out of said Leitch, including said deviation; and said order of August 8, 1899, directed said road overseer to make report of his proceedings under said order at the next term of said county court, to which term the said matter was continued. That said road overseer, under said order of August 8, 1899, made report to said county court on October 2, 1899, during the session of said court, of his proceedings under said order of August 8, 1899, and therein reported that he had, since August 8, 1899, opened, properly cleared, and put in a condition for travel the whole of said road applied for by said Agnew and others, which report, although not true in fact as to the amount of work done by said road overseer, was by said county court, by its order of record made and dated October 2, 1899, unwittingly approved and ordered to be recorded, and the same is recorded among the records of said county court. That said road overseer, in so far as he executed said order of August 8, 1899, between said southwest corner of section No. 9 and the eastern terminus of said road, followed the route and center line indicated in said erroneous and unlawful survey, view, and marking out of said Leitch between said points, and made the same deviations.

"And plaintiff further alleges as follows: That on said 7th day of November, 1898, one R. M. Massey and more than eleven other freeholders of said Kearney and Liberty townships in said Clay county filed their application in said county court, after notice thereof given in accordance with law, for the establishment of a new road and the widening of an old road, 40 feet in width, between the terminus and along the center line thus described, to wit: Beginning at the northwest corner of the southwest quarter of the southeast quarter of section No. 10 in township No. 52 of range No. 31 in Clay county, Missouri, thence running south 17 and $\frac{4}{100}$ chains; thence south, 45 degrees west,

18 feet; thence south 2 and $\frac{80}{100}$ chains to a point 13 feet west from the quarter section corner in the south line of said section No. 10; thence west 39 and $\frac{8}{100}$ chains to the southwest corner of said section No. 10; and thence west 59 and $\frac{70}{100}$ chains to the southwest corner of the southeast quarter of the southwest quarter of said section No. 9 in said township and range. That the center line of said road applied for by R. M. Massey and others is identical with the center line of said road applied for by said Agnew and others from said point 13 feet west from the quarter-section corner in the south line of said section No. 10; thence west to said southwest corner of the southeast quarter of the southwest quarter of said section No. 9. That in the matter of the application of said road by R. M. Massey and others, the same procedure as to orders on said Leitch, as county surveyor and road commissioner, for commissioners to assess damages, for the road overseer to open the road, with the same character of reports and the same orders of confirmation, were contemporaneously made as in the said road applied for by Agnew and others, to the extent of the identity of the center lines of the two roads applied for. That the commissioners in said road applied for by R. M. Massey and others also assessed plaintiff's damages in the sum of \$1 on account of the establishment and opening of said road applied for by R. M. Massey and others, which sum of \$1 was duly tendered to this plaintiff on or about July 3, 1899, and which plaintiff then refused, ever since has refused, and now refuses to accept. That the several orders and reports made in said road applied for by R. M. Massey and others as to route and center lines therein between said point 13 feet west from the quarter-section corner on the south line of said section No. 10 and said southwest corner of the southeast quarter of the southwest quarter of said section No. 9, were in conformity in words with the application therefor of said R. M. Massey, but said Leitch, in viewing, surveying, and marking out said road applied for by Massey and others, erroneously and unlawfully abandoned said order directing the survey, view, and marking out, and, instead of following the route and center line directed in said order, followed the same erroneous and unlawful center line and route—between said points wherein there is identity—which he followed in said road applied for by Agnew and others, and made the same deviation from the order directing him to view, survey, and mark out. But because he reported a conformity with said order, whereas in fact he disobeyed the same, and varied from the center line indicated in that order, his error was concealed in his report, and said county court unwittingly approved the same, and under the verbiage of the reports and orders aforesaid the said error and deviation escaped the attention of said county court and all others

till long after. That because of such concealment the plaintiff did not discover the truth of the matter until late in the summer of 1899, when he had careful survey made of all the lines and corners in controversy. That by reason of said errors, mistakes, and deviations in the views, surveys, and markings out of said roads the same have been unlawfully located on his lands, and, instead of taking and occupying for public use a strip 20 feet in width off the north end of his said lands, they everywhere will take—if said roads be not held unlawful—over 20 feet, and in a portion of the way across his said lands over 40 feet. That by means of the premises and through the said errors and deviations plaintiff's lands and possession thereof have been unlawfully trespassed on and invaded by defendants, and he damaged in the sum of \$500. That said road over-seers, at the time of the institution of this suit and the service of summons herein on them, had a joint jurisdiction extending over a line of road thus described, to wit: Beginning at the southwest corner of said section No. 9, and thence running east to the quarter-section corner on the south side of said section No. 9. That at said time and said service said Daniel J. Mathews had jurisdiction over such road over a line thus described, to wit: Beginning at the point of the beginning of said road applied for by Agnew and others, and thence westward along the center line of the said road applied for by said Agnew and others to the quarter-section corner on the south side of said section No. 9; and that at said time and service said Joseph Carroll had jurisdiction over such road over a line thus described, to wit: Beginning at the southwest corner of said section No. 9, and thence running southerly along the center line of said road applied for by Agnew and others to the southern terminus thereof. That after the discovery by plaintiff of the said error, mistake, and deviation in the views, surveys, and markings out, to wit, on December 5, 1899, and again on the 2d day of January, 1900, he appeared before said county court—when the same was in session—and asked the judges thereof by proper orders and otherwise to remedy said errors and deviations, but the said court and judges refused to do so. That said defendants say and threaten that they will enforce the said unlawful orders for the opening of said roads, and will invade plaintiff's premises, and will, in the opening and repairing of said roads, dig up and excavate and plow his said lands; and said officers threaten and say they will obey and execute the said orders and will invade plaintiff's premises, to his damage and injury, and in contempt of the law and plaintiff's rights. Wherefore plaintiff alleges that he has no remedy at law, but only through the equitable jurisdiction of said circuit court and the conscience of the judge thereof; wherefore plaintiff prays the order,

judgment, decree, and relief of said circuit court as follows:

"(1) That said views, surveys, and markings out of said road made by said Leitch be held erroneous, and made in mistake and disobedience of the orders of said county court directing views, surveys, and markings out of said roads, and be held null and void; that all orders of said court made in the application for said roads after November 7, 1898, and all reports filed in said matters after said date, be held null and void, and be set aside.

"(2) That in aid of his main action herein he have a temporary injunction restraining defendants and all others from executing said unlawful orders and from invading and trespassing on plaintiff's said lands, which he prays to be made perpetual on final hearing of this cause.

"(3) That his damages herein be assessed, and he be awarded execution therefor against such parties defendant as by law he may appear entitled to.

"(4) That he recover of defendants all his costs herein.

"(5) That plaintiff have such other, further, or different judgment, decree, and relief as he shall appear entitled to in equity and good conscience."

The demurrer of Clay county is as follows, omitting caption: "(1) Because the petition does not state facts sufficient to constitute a cause of action against the said defendant Clay county. (2) Because on the face of the petition plaintiff is not entitled to recover. (3) Because the petition on its face shows that plaintiff has no cause of action against the defendant. (4) Because there is no law authorizing the rendition of a judgment against said county in a case of this kind, and hence in this case the circuit court has no jurisdiction of this defendant, nor authority to try this cause. (5) Because this defendant is not a necessary party to the determination of this action, if plaintiff has any cause of action."

The other defendants other than Clay county also filed a demurrer in the following words: "(1) Because said petition does not state facts sufficient to constitute a cause of action. (2) Because there is a misjoinder of parties defendant. (3) Because on the face of the petition plaintiff has no right to recover, and has no cause of action. (4) Because there are joined in this cause parties defendant who are not necessary to a complete determination of the same, if any right of action exists."

Upon a hearing the circuit court sustained the demurrers, and, plaintiff declining to plead further, final judgment was rendered dismissing the bill, and plaintiff appeals.

1. The propriety or impropriety of sustaining the demurrers and dismissing plaintiff's bill is the sole question for our consideration. We understand from the petition (and, of

course, we have nothing else before us) that for some 43 years prior to the proceedings in the county court of Clay county which plaintiff seeks to set aside by this suit there had existed in said county an old county road about 20 feet wide, which ran from the northeast corner of the southeast quarter of the southeast quarter of section 10, township 52, range 31 west, a distance of half mile to the north and south center line of said section 10, and thence south on said center line of said section 10 to the quarter-section corner on the south of said section 10, veering about 10 feet to the west at this last point to avoid striking the line of a cemetery located there; and from this point it ran west on the line between sections 10 and 15 and sections 9 and 10 to the southwest corner of section 9, and thence west. From both sides we understand plaintiff owns the west half of the northwest quarter of section 15 and the east half of the northeast quarter of section 16, township 52, range 31. We gather also from the petition that the center line of the new road established in 1899 was the section line between sections 10 and 15 and 9 and 16; that, while this center line was in the old road, this center section line did not at all points coincide with the center line of this old road running east and west. This old road was deemed insufficient, and accordingly, on the 7th day of November, 1898, the county court was petitioned to widen this old road to 40 feet, and in doing so to make the center section line the center line of the proposed 40-foot road. In so doing all of the old road would be utilized, and enough more on the north and south of it appropriated to make it 40 feet wide. It appears, moreover, that, owing to a desire to make certain changes east of the center of said section 10, two petitions were filed on the same day, but both of them asked to widen the old road west from a point 13 feet west of the quarter-section corner on the south line of section 10 in precisely the same way. One application was made by J. R. Agnew et al., and the other by R. M. Massey et al. The opening of the road west from 13 feet west of the center line on the south of section 10 is the only portion of which plaintiff complains. These two petitions were duly filed, notices given according to law, and surveys made, and commissioners appointed, damages assessed and paid or tendered, and judgments establishing the desired changes were duly entered. No defect whatever is pointed out in any of these proceedings, and they must be assumed to have been correct in these respects. After a careful reading of the petition and brief of counsel for plaintiff, we conclude that he desires to set aside these two judgments of the county court and the proceedings of the officers acting under its direction for the reason that he insists that, as a matter of fact, the county surveyor made a mistake in locating these new lines of the new road.

To use the language of his counsel, "It is the departure in the actual location by the county surveyor of which plaintiff complains." He says further: "The county surveyor, in the actual location of the road applied for by Agnew et al. between the southwest corner of section 9, departed from the petition or application and order, and made the actual location along the following line, to wit, beginning at the southwest corner of section 9; thence east, bearing south, to a point 35 links (23 and $\frac{5}{100}$ feet) south from the S. E. corner of said section 9; thence east, bearing north, to a point 13 feet west of the quarter-section corner on the south line of said section 10, etc." Counsel then proceeds to say that at the southeast corner of section 9 the center line of actual location is 23 and $\frac{5}{100}$ feet distant from the corner. The same errors, he insists, was made by the surveyor in locating the road asked for by Massey et al., so that, as counsel contends, the road dips from the north on his lands 43 and $\frac{5}{100}$ feet, whereas, if it had been located as called for by the petition and orders of the court, no additional land beyond that already occupied by the old road would have been required of plaintiff. Thus, it will be seen, that this controversy is narrowed down to the assertion that the petition to and orders of the county court are regular, and call for a center line of the new or widened road which shall coincide with the section line between sections 9 and 16 and sections 10 and 15, and that the report of the surveyor shows he so located the line, and the commissioners assessed damages on the assumption that he correctly located the road as directed, whereas in truth and in fact by subsequent surveys plaintiff has ascertained the surveyor did not locate and mark out the road as required by the petition of Agnew et al. and by the orders of the county court, and therefore he invokes the aid of a court of equity to correct these errors committed by the surveyor and the county court, which are concealed beneath an apparent conformity to the petitions and orders of the county court, and therefore he prays that said views, surveys, and markings out of said road be held erroneous, and made in mistake and disobedience, and that they be held null and void, and set aside.

It is insisted by plaintiff that the demurrers admit the truth of all the facts alleged, and hence admit the several errors and deviations charged in the bill. The demurrers admit facts that are well pleaded, but in determining the legal effect of the demurrers we must look to the whole petition. He states that the judgments which he seeks to overturn in this way were rendered by a court that unquestionably had jurisdiction over the subject-matter, and in a proceeding of which he was duly notified; that all of its orders were made in strict conformity to the petitions filed before it, and to the report of the county surveyor. It is true he alleged that

this officer of the court made a mistake in locating the road, but it appears from his petition that this location was made in a proceeding to which he was a party, and he is presumed to have been present and to have seen the survey made on his land and the road marked out. Instead of calling the county court's attention to that fact at the proper time, he permitted the county court to judicially approve this report, and to thus determine that as a matter of fact the survey was made in accordance with its orders, and, in effect, that no deviation was made. In a word, he pleads a judgment of a court of competent jurisdiction in a matter of which it had jurisdiction, and to which he was a party, and in the next breath says the facts which it judicially found and determined in fact did not exist. How are we to reconcile these two allegations? Which is admitted? If, as he alleges, a proper petition was filed, due notice given, the petition heard, the surveyor ordered to view and mark out the road and report, and the surveyor did locate the road, and reported that he had obeyed the orders of the court, and the plaintiff stood by and made no objection, and the court found the surveyor had properly obeyed its orders, that judgment is a finality as to all parties to that proceeding, in the absence of fraud practiced upon the court in procuring the judgment to be entered as it was. Having alleged all these facts, must the allegation of plaintiff be accepted as true, so as to overturn all the averments which conclusively estop him from saying the surveyor's location was not as he reported it. There is no allegation of any fraud practiced on the court in the procurement of the judgments. At most it is the assertion of a surveyor against the judgment of a court whose duty it was to require a lawful survey to be made of the section line, which it had determined should be the center line of the widened road. It cannot be maintained that a demurrer admits a fact which the plaintiff's petition contradicts. While the plaintiff, in his petition, does not say in so many words that his statement that the surveyor did not locate the road as directed by the orders of the county court was not true, he does make that allegation after having pleaded the solemn judgment of a court which had jurisdiction to establish and open that road, and he was in law and in fact a party to that proceeding, and, as the law devolved the duty on that court, the right and duty of determining the correctness of that survey and the truth of the report of its commissioner, its finding and judgment approving the same is just as binding and conclusive within the sphere of its jurisdiction as that of a court of general jurisdiction, and it must be ruled that when plaintiff pleaded that judgment he was conclusively estopped from alleging the survey was 23 and $\frac{5}{100}$ feet south of said center line, instead of being on the true line, unless he had first charged that a fraud was perpetrated on that court in pro-

curing said judgment. This, it will be observed, is not done. Plaintiff, having been duly notified of the filing of the petition, was bound, like every other litigant, to take notice of the various steps leading up to the appropriation of his land for the widening of the road. If he was satisfied there was error in the location of the road, or a deviation from the line designated by the court, it was his duty to call that fact to the attention of the court by timely action, and, if it overruled his contention, he was entitled to appeal; but it appears he took no appeal, and permitted the judgment to become final. To permit him to do this, and now to say that the whole public highway thus solemnly established is based upon an error which could have been corrected by the court if its attention had been called to it, but which he negligently failed to do, would controvert the whole theory of the conclusiveness of judgments upon the parties and privies thereto. The establishment of the center line of the road coincident with the section line was one of the essential things which the county court was asked to do. It ordered this to be done. Its surveyor reported he had so located the road, and it was his duty to find the true line, and locate the road with reference to it. The court approved his survey, and the road was established accordingly. So far, at least, as plaintiff is concerned, that location must stand until that judgment is overturned by alleging and proving that it was fraudulently procured, or the road is changed by a proper petition and proceeding in that court. But it is apparent that this suit cannot be maintained, because it seeks to set aside judgments which the plaintiff confesses were correct and just in themselves. He complains only of an incident—a mistake, of which he concedes the court knew nothing, but which he should have brought to the attention of the court. *Mitchell v. Ry. Co.*, 138 Mo. 330-331, 39 S. W. 790. If plaintiff had been sued on a forged note, and he had been duly summoned, and, knowing the note was forged, he had neglected to plead non est factum, can it be doubted that the judgment would have been conclusive that he did sign and execute it, and can there be any doubt that a court of equity would not relieve him upon a mere statement that in fact he did not sign it? Every fact which was required to be established in the establishment of the road was concluded by the judgment, and the ascertainment of the line on which the road was to be located was one of these facts.

Plaintiff could have appealed from the judgment of the county court. Section 9419, Rev. St. 1899. Having had an opportunity to appeal, and not having availed himself of it, plaintiff is in no position to ask relief from a court of equity. The demurrers were properly sustained on the grounds that the petition on its face disclosed judgments which were conclusive on plaintiff as a party thereto, and that he had his remedy by appeal, of

which he neglected to avail himself. The demurrers were also well taken because Clay county was no proper party to the suit. The county had no control over the court, and was not a party to the original proceedings. The county court, in exercising its jurisdiction in opening and establishing public roads, acts under the general laws of the state, and not as an agent of the county. *Reardon v. St. Louis County*, 36 Mo. 555.

It is quite obvious, also, that the bill improperly joined a suit to set aside two judgments affecting different parts of the road with a suit at law for damages against the two road overseers.

In our judgment, the circuit court properly sustained the demurrers and rendered judgment for defendants, and its judgment is affirmed. All concur.

NICHOLS et al. v. MUTUAL LIFE INS. CO. OF NEW YORK.*

(Supreme Court of Missouri, Division No. 2.
June 9, 1903.)

LIFE INSURANCE—NONPAYMENT OF PREMIUMS—RIGHTS OF INSURED—FOREIGN COMPANY—"PAID-UP INSURANCE"—MEANING OF TERM.

1. Rev. St. 1889, § 5859, as amended in 1895, provides that the three preceding sections, relating to the rights of insured on forfeiture of policy after payment of two annual premiums, shall not be applicable "if the policy shall have been issued by any company authorized to do business in this state and organized under the laws of another state * * * which prescribes a surrender value or paid-up or temporary insurance in case of default in payment of premiums, and shall contain an agreement for such surrender value, temporary or paid-up insurance as prescribed by such other state as a part of said policy, * * *" etc. *Held* that, if the law of the foreign state and the policy provide for either of the methods of insurance on default in the payment of premiums, it is a substantial compliance with section 5859, and the three preceding sections are inapplicable.

2. The fact that the policy makes it optional with insured as to the character of insurance he will accept is immaterial.

3. The proviso to section 5859, Rev. St. 1889, declares that "in no instance shall a policy be forfeited for nonpayment of premiums after the payment of three annual premiums thereon; but in all instances where three annual premiums shall have been paid on a policy of insurance, the holder of such policy shall be entitled to paid-up insurance, the net value of which shall be equal to that provided for in section 5856 of this article." *Held*, that by the term "paid-up insurance" was meant insurance for life, fully paid up, and not paid-up temporary insurance.

4. The words in the proviso, "the net value of which shall be equal to that provided for in section 5856," Rev. St. 1889, have reference solely to the computation of the net value of the policy, so as to ascertain the amount of paid-up insurance which can be bought.

Appeal from St. Louis Circuit Court; H. D. Wood, Judge.

Action by William Nichols and others, trustees of the Commercial National Bank of St. Louis, against the Mutual Life Insurance

Company of New York. Judgment for plaintiffs, granting insufficient relief, and they appeal. Affirmed.

Stewart, Cunningham & Elliot, for appellants. Seddon & Blair, Nathaniel S. Brown, James L. Blair, and Edw. L. Short, for respondent.

FOX, J. This is a suit upon a policy of life insurance issued and delivered April 9, 1896, in Missouri, to a citizen of Missouri, by the defendant (respondent), a corporation of the state of New York, then doing a life insurance business in Missouri. A jury was waived, and the case was tried by the circuit court upon the petition, the amended answer, the application for insurance, the policy of insurance, and a stipulation of facts. The petition sets forth the issue and delivery of the policy in Missouri on the 9th of April, 1896, to one Samuel Harris, subject to the laws of Missouri, the payment by said Harris of three annual premiums, sufficient, under the statutes of Missouri, to keep the policy in force long after the death of said Harris; the assignment and transfer of the policy by Harris, the assured, to the plaintiffs, who were and are his creditors; the death of said Harris on the 28th of November, 1899; the making and delivery to defendant of proofs of death, and demand of payment of \$5,000; and the failure and refusal of defendant to pay the same. The petition prays judgment for \$5,000, the full amount of the policy, with interest and special damages. The answer sets up a default by Harris in the payment of the fourth annual premium on this policy, and contends that by reason of such default the policy became void and of no effect, and that the plaintiffs, as his assignees, had and have no right to recover on the policy, but that defendant is liable to the plaintiffs only for the amount of a new paid-up policy of insurance in the sum of \$305, which sum defendant says it is ready and willing to pay.

This cause was submitted to the court upon the following agreed statement of facts.

"For the purpose of the trial of this cause and at said trial the plaintiffs and defendant stipulate and agree upon the following facts, viz.:

"First. Prior to the year 1898, and until January 27, 1899, the Commercial Bank of St. Louis was a banking corporation of the state of Missouri, transacting business at the city of St. Louis. Said corporation was dissolved January 27, 1899, and plaintiffs then were the president and directors and managers of the affairs of said corporation, and then became, and now are, the trustees of the Commercial Bank of St. Louis, and entitled to sue as such upon causes of action accrued or accruing to said bank.

"Second. Prior to April 9, 1896, defendant, the Mutual Life Insurance Company of New York, was, and still is, a corporation of the state of New York, authorized and licensed under the provisions of the laws of Missouri

*Rehearing denied July 3, 1903.

to carry on the business of life insurance in Missouri, and then was, and ever since then has been, and still is, carrying on said business in Missouri under the license and authority of the state of Missouri, subject to and in conformity with all the requirements and provisions of statutes of Missouri in that behalf provided.

"Third. In the prosecution of its said business under its said license, defendant on or about April 9, 1890, delivered at St. Louis, Missouri, to Samuel Harris, a citizen and resident of Missouri, its certain policy of insurance, numbered 764,369, hereto attached, with the application therefor, also attached and made part hereof, and then and there accepted and received from said Harris \$110.50—one full annual premium on said policy. Subsequently, on or before April 9, 1897, defendant, at St. Louis, accepted and received from said Harris \$110.50, the second full annual premium on said policy, which payment operated to keep said policy in force till April 9, 1898. Subsequently, on or before April 9, 1898, defendant, at St. Louis, accepted and received from said Harris \$110.50, the third full annual premium on said policy, which payment operated to keep said policy in force till the 9th day of April, 1899, at noon.

"Fourth. Said Harris failed to pay the premium falling due April 9, 1899, and never paid, nor did any one for him ever pay, any premium on said policy, other than the first three annual premiums above mentioned. Said Samuel Harris died on the 28th day of November, 1899, at St. Louis.

"Fifth. On April 9, 1899, when the fourth annual premium fell due and was not paid, the net value of said policy, computed upon the American Experience Table of Mortality, with $4\frac{1}{2}$ per cent. interest per annum, was one hundred and thirty-eight dollars and seventy-five cents (\$138.75), three-fourths of which sum was one hundred and four dollars and four cents (\$104.04). There were no notes or other indebtedness to the defendant given or existing on account of past premiums on said policy. One hundred and four dollars and four cents (\$104.04), taken as a net single premium for temporary insurance for \$5,000 written in said policy, would keep said policy in force for the term of two (2) years and eighteen (18) days after April 9, 1899.

"Sixth. During the life of said Samuel Harris and of said policy, said Harris, for value received, while said Commercial Bank was his creditor to the amount of about \$6,000, assigned, transferred, and set over said policy to the Commercial Bank of St. Louis as collateral security to secure the indebtedness of said Harris to said bank. Plaintiffs are still the holders of said policy, and are creditors of said Samuel Harris in manner aforesaid to the amount of about \$6,000, as aforesaid.

"Seventh. Plaintiffs, within due time after the death of said Samuel Harris, gave defendant notice thereof, and on or about Decem-

ber 15, 1899, submitted and delivered to defendant proofs as required by said policy. Defendant thereupon offered and was ready to issue to plaintiff a paid-up policy for \$305, being the amount of paid-up insurance purchasable by the life reserve of said policy according to the provisions of section 88, chapter 690, p. 1969, of the Laws of the State of New York of 1892, but has refused and still refuses to pay or do more.

"Eighth. Section 88, c. 690, p. 1969, of the Laws of the State of New York of 1892, in force at the date of said policy as a law of New York, is in the following words and figures, to wit: 'Sec. 88. Surrender Value of Lapsed or Forfeited Policies. Whenever any policy of life insurance issued after January first, eighteen hundred and eighty, by any domestic life insurance corporation after being in force three full years, shall, by its terms, lapse or become forfeited for the non-payment of any premium or any note given for a premium or loan made in cash on such policy as security, or of any interest on such note or loan, the reserve on such policy computed according to the American Experience Table of Mortality at the rate of four and one-half per cent. per annum, shall on demand made, with surrender of the policy within six months after such lapse or forfeiture, be taken as a net single premium of life insurance at the published rates of the corporation at the time the policy was issued, and shall be applied, as shall have been agreed in the application or policy, either to continue the insurance of the policy in force at its full amount so long as such single premium will purchase temporary insurance for that amount at the age of the insured at the time of lapse or forfeiture, or to purchase upon the same life at the same age, paid up insurance payable to the same time and under the same conditions, except as to payment of premium as the original policy. If no such agreement be expressed in the application or policy, such single premium may be applied in either of the modes above specified at the option of the owner of the policy, notice of such option to be contained in the demand hereinbefore required to be made to prevent the forfeiture of the policy. The reserve hereinbefore specified shall include dividend additions calculated at the date of the failure to make any of the payments above described according to the American Experience Table of Mortality, with interest at the rate of four and one-half per cent. per annum after deducting any indebtedness of the insured on account of any annual or semi-annual or quarterly premium then due and any loan made in cash on such policy, evidence of which is acknowledged by the insured in writing. The net value of the insurance given for such single premium under this section, computed by the standard of this state, shall in no case be less than two-thirds of the entire reserve computed according to the rule prescribed in this

section, after deducting the indebtedness as specified; but such insurance shall not participate in the profits of the corporation. If the reserve upon any endowment policy applied according to the provisions of this section as a single premium of temporary insurance be more than sufficient to continue the insurance to the end of the endowment term named in the policy, and if the insured survive that term, the excess shall be paid in cash at the end of such term, on the conditions on which the original policy was issued. This section shall not apply to any case where the provisions of this section are specifically waived in the application and notice of such waiver is written or printed in red ink on the margin of the face of the policy when issued."

The court, sitting as a jury, upon the agreed statement of facts as herein quoted, rendered judgment for the plaintiffs in the sum as admitted to be due by the answer—\$305. After an unsuccessful motion for new trial on the part of the plaintiffs, this cause is brought here by appeal.

The learned trial judge, in disposing of this case, filed a written opinion, expressing his views upon the law, as applicable to the facts agreed upon. That we may fully comprehend and appreciate the position taken by the trial court, we here quote the opinion.

"This is an action upon a policy of insurance, in which plaintiffs claim that they are entitled to recover the sum of \$5,000, and defendant admits a liability of \$305. The question is to be determined by a construction of the statute of this state with reference to temporary insurance. I know of no decision that has ever been rendered in this state or elsewhere upon the particular points of law involved in this case, and the industry of counsel has failed to produce any case exactly like the one which I am now considering. Section 5856 of the Statutes of 1889 provides that no policies of life insurance issued by any life insurance company authorized to do business in this state on and after the 1st day of August, 1879, shall, after payment of two full annual premiums, be forfeited or become void by reason of nonpayment of premium thereon, but it shall be subject to the following rules of commutation, to wit: 'The net value of the policy when the premium becomes due and is not paid, shall be computed upon the American Experience Table of Mortality, with four and one-half per cent. interest per annum, and after deducting from three-fourths of such net value any notes or other indebtedness to the company, on account of past premium payments on said policy issued to the insured, which indebtedness shall be canceled, the balance shall be taken as a net single premium for temporary insurance, for the full amount written in the policy, and the term for which such temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of

premium and the assumption of mortality and interest aforesaid.'

"It is conceded by both parties to the case that, were it not for the amendment, passed in the year 1895, of section 5859 of the Statutes of 1889, the plaintiffs would be entitled to recover the full amount of \$5,000 in this case. This is an action against the Mutual Life Insurance Company of New York, a company organized under the laws of another state, doing business in this state. It is therefore one of the insurance companies referred to in section 5856. Three premiums were paid. It will be noticed that this amendment provides that, in case of default in (i. e., after) the payment of two premiums, the policy shall not be forfeited, but if the value of the policy at the time of the default, computed as stated in section 5856, is sufficient to procure temporary insurance for the time stated therein, if that runs past the date of the death of the deceased, then, as a matter of course, the assured would be entitled to recover the full amount of the policy, \$5,000. It is conceded that, if said computation is made in this case, it would procure temporary insurance sufficient to carry the policy for the full amount beyond the date of the death of the deceased. But the defendant invokes the amendment of section 5859, which was passed in the year 1895, to be found in Session Acts of 1895 (page 197). The amendment of that section is as follows: 'Sec. 5859. The Foregoing Provisions not Applicable When: The three preceding sections shall not be applicable in the following cases, to-wit: If the policy shall have been issued by any company authorized to do business in this state and organized under the laws of another state of the United States, which prescribes a surrender value or paid-up or temporary insurance in case of default in payment of premiums and shall contain an agreement for such surrender value, temporary or paid-up insurance as prescribed by such other state as a part of said policy: * * * provided, that in no instance shall a policy be forfeited for nonpayment of premiums after the payment of three annual premiums thereon; but in all instances where three annual premiums shall have been paid on a policy of insurance, the holder of such policy shall be entitled to paid-up insurance, the net value of which shall be equal to that provided for in section 5856 of this article.' It is admitted by the agreed statement of facts that \$305 is the amount of paid-up insurance which plaintiffs would be entitled to under this clause prior to the passage of this act. Previous to this amendment, the Supreme Court of this State (*Cravens v. New York Life Ins. Co.*, 148 Mo. 583, 50 S. W. 519, 53 L. R. A. 305, 71 Am. St. Rep. 628), and the Supreme Court of the United States, in *Equitable Life Soc. v. Clements*, 140 U. S. 226, 11 Sup. Ct. 822, 35 L. Ed. 497, held that notwithstanding policy holders may contract with reference to

the laws of the state where the policy is issued, notwithstanding they may agree that the laws of such state may be taken and deemed to be portions of the policy, notwithstanding they may waive any provision—for instance, such a provision for temporary insurance under section 5856—yet such agreement as that is null and void, and the policy is construed according to the laws of the state of Missouri, which forbid and prevent forfeiture. It seems to me that this section 5859 is a legislative recognition of the right of parties to contract with reference to the insurance laws of other states, and in that respect it may be regarded as repealing legislatively, we might say, the decisions which I have mentioned. That is, it recognizes and gives parties the right to contract with reference to laws of another state. Therefore the question to be determined in this case is whether or not the policy in question falls within the purview of section 5859, which provides that section 5856, which gives temporary insurance, shall not be applicable if the policy shall have been issued by any company organized to do business in this state that is organized under the laws of another state, which prescribes a surrender value or paid-up or temporary insurance in case of default in the payment of premiums—the laws of New York provide for paid-up insurance and for temporary insurance. Then the section goes on further and says, 'and shall contain an agreement for surrender value, temporary or paid-up insurance, as prescribed by such other state as a part of said policy.' The policy in question contains a provision for paid-up insurance in accordance with the laws of New York. It seems to me, therefore, that the policy falls within section 5859, as amended. This section provides, in the latter part, 'provided that in no instance shall a policy be forfeited for nonpayment of premium after the payment of three annual premiums thereon; but in all instances where three annual premiums shall have been paid on a policy of insurance, the holder of such policy shall be entitled to paid-up insurance, the net value of which shall be equal to that provided for in section 5856 of this article.' Under the laws of New York, they could not have obtained temporary insurance in this case, for the reason that the law provides for demand for such temporary insurance being made within a certain time, which, it appears, was not done. This policy was assigned to William Nichols and others, trustees of the Commercial Bank. If such demand were not made under the laws of New York, they would not have been able to recover anything whatever in this case, were it not for the saving clause in the amendment of section 5859, which provides that, in all cases where three premiums have been paid, the then holder of the policy shall be entitled to paid-up insurance. Under that provision or proviso of this amendment, the defendant

in this case has tendered the amount of \$305—it has tendered a paid-up policy for that amount. Judgment, therefore, will be rendered in favor of the plaintiffs for \$305."

We are of the opinion that the trial court very appropriately and sharply presents the question for determination in this controversy, where it says: "Therefore the question to be determined in this case is whether or not the policy in question falls within the purview of section 5859, which provides that section 5856, which gives temporary insurance, shall not be applicable if the policy shall have been issued by any company organized to do business in this state that is organized under the laws of another state, which prescribes a surrender value or paid-up or temporary insurance in case of default in the payment of premiums." In 1895 the Legislature amended section 5859, Rev. St. 1889, by striking out all of that section, and inserting in lieu thereof the following section:

"Sec. 5859. The Foregoing Provisions not Applicable, When. The three preceding sections shall not be applicable in the following cases, to-wit: If the policy shall have been issued by any company authorized to do business in this state, and organized under the laws of another state of the United States which prescribes a surrender value or paid-up or temporary insurance in case of default in payment of premiums, and shall contain an agreement for such surrender value, temporary or paid-up insurance, as prescribed by such other state as a part of said policy, or if the policy shall contain a provision for an unconditional cash surrender value at least equal to the net single premium for the temporary insurance provided hereinbefore, or for the unconditional commutation of the policy for non-forfeitable paid-up insurance, or if the legal holder of the policy shall, within sixty days after default of premium, surrender the policy and accept from the company another form of policy, or if the policy shall be surrendered to the company for a consideration adequate in the judgment of the legal holder thereof, then, and in any of the foregoing cases, this act shall not be applicable: provided, that in no instance shall a policy be forfeited for nonpayment of premiums after the payment of three annual premiums thereon; but in all instances where three annual premiums shall have been paid on a policy of insurance, the holder of such policy shall be entitled to paid-up insurance, the net value of which shall be equal to that provided for in section 5856 of this article. Approved April 19, 1895."

The preceding sections, upon which section 5859 was to operate, were sections 5856, 5857, 5858, Rev. St. 1889, which were as follows:

"Sec. 5856. No policies of insurance on life hereafter issued by any life insurance company authorized to do business in this state, on and after the first day of August,

A. D. 1879, shall, after payment upon it of two full annual premiums, be forfeited or become void by reason of the non-payment of premium thereon, but it shall be subject to the following rules of commutation, to-wit: The net value of the policy, when the premium becomes due and is not paid, shall be computed upon the American Experience Table of Mortality, with four and one-half per cent. interest per annum, and after deducting from three-fourths of such net value any notes or other indebtedness to the company, given on account of past premium payments on said policy issued to the insured, which indebtedness shall then be cancelled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy and the term for which such temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of premium and the assumption of mortality and interest aforesaid; but if the policy shall be an endowment, payable at a certain time, or at death if it should occur previously, then if what remains as aforesaid shall exceed the net single premium of temporary insurance for the remainder of the endowment term for the full amount of the policy, such excess shall be considered as a net single premium for a pure endowment of so much as such premium will purchase, determined by the age of the insured at date of defaulting the payment of premium on the original policy, and the table of mortality and interest as aforesaid, which amount shall be paid at end of the original term of endowment, if the insured shall then be alive.

"Sec. 5857. At any time after the payment of two or more full annual premiums, and not later than sixty days from the beginning of the extended insurance provided in the preceding section, the legal holder of the policy may demand of the company, and the company shall issue, its paid-up policy, which, in case of an ordinary life policy, shall be for such an amount as the net value of the original policy at the age and date of lapse, computed according to the actuaries' or combined experience table of mortality, with interest at the rate of four per cent. per annum, without deduction of indebtedness on account of said policy, will purchase, applied as a single premium upon the table rates of the company; and in case of a limited payment life policy, or of a continued payment endowment policy, payable at a certain time, or at death, it shall be for an amount bearing such proportion to the amount of the original policy as the number of complete annual premiums actually paid shall bear to the number of such annual premiums stipulated to be paid: provided, that from such amount the company shall have the right to deduct the net reversionary value of all indebtedness to the company on account of such policy; and provided,

further, that the policy-holder shall, at the time of making demand for such paid-up policy, surrender the original policy, legally discharged, at the parent office of the company.

"Sec. 5858. If the death of the insured occur within the term of temporary insurance covered by the value of the policy as determined in section 5856, and if no condition of the insurance other than the payment of premiums shall have been violated by the insured, the company shall be bound to pay the amount of the policy, the same as if there had been no default in the payment of premium, anything in the policy to the contrary notwithstanding: provided, however, that notice of the claim and proof of the death shall be submitted to the company in the same manner as provided by the terms of the policy within ninety days after the decease of the insured; and provided also, that the company shall have the right to deduct from the amount insured in the policy the amount compounded at six per cent. interest per annum of all the premiums that had been forborne at the time of the decease, including the whole of the year's premium in which the death occurs, but such premiums shall in no case exceed the ordinary life premium for the age at issue, with interest as last aforesaid."

The questions presented in this controversy are sharply in dispute: First, it is contended by appellants that this policy falls within the provisions of section 5856, supra; second, if it does not fall directly within the provisions of that section, three full annual premiums having been paid, the proviso in section 5859, p. 197, Laws 1895, as herein quoted, is applicable, and that "paid-up insurance," as mentioned in the proviso, contemplates temporary insurance, as provided for in section 5856, supra. On the part of the respondent, it is contended that this policy falls within the provision of the body of section 5859, supra, and hence section 5856 has no application to it, other than merely furnishing the basis for the calculation of the amount of paid-up insurance the assured was entitled to, as provided for in the proviso of section 5859. These conflicting contentions are very earnestly and ably presented by counsel for appellants and respondent. Will say, however, for this court to undertake to discuss and review every phase of the questions to which our attention is directed, would make a volume. This is a new question, and one of first impression. This court, nor the courts of any of the other states, so far as we have been able to discover, have never been called upon to determine the precise question involved in this case.

The policy upon which this suit is predicated was issued and delivered April 9, 1896, in Missouri, to a citizen in Missouri. It was issued by a corporation of the state of New York, then doing a life insurance business in

Missouri. It is conceded by both parties that this policy of insurance is a Missouri contract. In the application for insurance in this case, which by the policy is made a part of the contract, it was agreed between the parties that the contract of insurance should be subject to and based upon the laws of the state of New York. Until the enactment of section 5859, *supra*, the law was well settled by this court, as well as the Supreme Court of the United States, that provisions in a policy similar to the provisions contained in the policy before us could be of no avail to the insurer; that, notwithstanding the provisions in the contract, the policy of insurance would be construed under the statutes of Missouri. See cases of *Cravens v. New York Life Ins. Co.*, 148 Mo. 583, 50 S. W. 519, 53 L. R. A. 305, 71 Am. St. Rep. 628 (which was affirmed by the Supreme Court of the United States in 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116), and *Equitable Life Society v. Clements*, 140 U. S. 226, 11 Sup. Ct. 822, 35 L. Ed. 497. We are now confronted with a statute, for construction, which extends the contractual powers of the parties in a contract for insurance, and authorizes them, in respect to this particular subject, to insert provisions in an insurance policy that, under the cases cited, were of no effect under the law in force at the time the conclusions were reached in those cases. Hence the remark of the trial judge in his opinion was very appropriate when he said: "It seems to me that this section 5859 is a legislative recognition of the rights of parties to contract with reference to the insurance laws of other states, and in that respect it may be regarded as repealing legislatively, we might say, the decisions which I have mentioned." In the case of *Epperson v. Insurance Co.*, 90 Mo. App. 436, section 5859 was directly in judgment before that court. Ellison, J., speaking for the court, said: "It will be seen that this act materially changes the old section, for, in the first part thereof, it clearly relieves the policy of a company organized in a foreign state from the effect or application of section 5856, if the laws of that state prescribe a surrender value or paid-up or temporary insurance in case of default in payment of premiums, and the policy shall contain an agreement for these things as they are prescribed by said laws. And the last part of said act, by proviso, makes a material addition to the old section. It extends the period in which a policy may be forfeited from two years, as provided in section 5856, to three years. The first part of the act * * * has, by its terms, application only to policies issued by foreign companies. The balance of the act, including the proviso, applies to all policies, whether foreign or local. In this case it was shown at the trial that the laws of the state of New York did prescribe a surrender value or paid-up or temporary insurance in case of default in the payment of premiums. It was

shown that the policy in suit contained an agreement for such surrender value, temporary, or paid-up insurance as thus prescribed by the laws of said state. And it was also shown that the deceased had not made three payments of premium. It is therefore clear that the policy sued on was forfeited and void at the death of deceased." The conclusion reached by Judge Ellison in that case is in harmony with our views as to the proper construction of that statute. The Legislature, by the enactment of section 5859, clearly contemplated the extension or broadening of the powers of the contracting parties in respect to insurance. This policy, from its provisions, clearly falls within the terms of section 5859, and the liability of the respondent must flow from the application of the terms of that section.

It is insisted by appellants that section 5859 should be construed as though the words "after payment of two annual premiums" were written into each prescription of the agreements. In other words, it is contended that this court should so interpret and read that section that those words would be added to it. "Courts do not sit to say what the law ought to be, but it is their duty to declare the law as they find it, leaving its wisdom and policy to the Legislature." In the exercise of our judicial power, it is our duty to so interpret the law as to make it harmonize with the intent of the lawmakers; but we are limited, even in the application of this principle, to a judicial interpretation, which by no means contemplates the power to amend the law as handed us for construction. This section is not ambiguous. It is simply to be construed as meaning what it says. Parties are not compelled to contract under its provisions, but, if they do, the liabilities are to be determined from giving the terms of the statute their ordinary and familiar signification and import.

It is next insisted that this policy does not fall within the body of section 5859, so as to render inapplicable the three preceding sections referred to, for the reason that the New York statute does not contain the necessary provisions to bring it within the purview of the requirements of section 5859; and it is also urged that the policy does not contain the required agreements in respect to surrender value, temporary or paid-up insurance, upon default being made in the payment of premiums. Will say, in respect to such contention, that we have carefully examined the policy and the law of New York, as admitted in the stipulation, and from such examination we have reached the conclusion that both the law of New York and the policy sued upon contain all the necessary provisions to bring this policy within the body of section 5859, and render inapplicable to it the three preceding sections (5856, 5857, and 5858), except so far as the proviso makes section 5856 applicable. It will be observed that section 5859, in its requirements of what

the other states shall prescribe, and as to the agreement in respect thereto to be inserted in the policy, uses the terms disjunctively; that is to say, it provides that the foreign companies doing business in this state shall "prescribe a surrender value or paid-up or temporary insurance, in case of default of payment of premiums." It is apparent, under the requirements of that section, that, if the law of the foreign state and the policy provided for either of the methods of insurance upon default in the payment of premiums, it was a substantial compliance with that section. It will be noted, by reference to the law of New York and to the terms of the policy, that provision was made for paid-up insurance, as well as temporary insurance. The fact that the policy made it optional with the insured, as to the character of insurance he would accept, did not place it outside the bounds of that section.

This brings us to the last contention of appellants; that is, that, even if the policy does fall within section 5859, the proviso entitles plaintiffs to recover the full face of the policy under the provisions of section 5856. We are unable to reach the conclusion that the Legislature, by the proviso in section 5859, undertook to destroy the force and effect of the body of the act. If the policy in suit falls within the provisions of the body of the act of section 5859, then section 5856, by the express terms of the statute, is not applicable; but appellants insist on the proviso, which says: "Provided, that in no instance shall a policy be forfeited for non-payment of premiums after the payment of three annual premiums thereon; but in all instances where three annual premiums shall have been paid on a policy of insurance, the holder of such policy shall be entitled to paid-up insurance, the net value of which shall be equal to that provided for in section 5856 of this article." It is clear that, if the Legislature intended to destroy the force and power of the body of the act of section 5859, it would have used terms which would more clearly indicate such intent than are used in such proviso. If such was the intention, it could have avoided all confusion by simply saying that, in cases where three annual premiums are paid and default is made, then the holder of the policy shall be entitled to such character of insurance as is provided by section 5856. Instead, we have in the proviso, where three annual payments are made, the holder of the policy is entitled to "paid-up insurance, the net value of which shall be equal to that provided for in section 5856." It will be noted that section 5856 provides how the net value of the policy shall be computed when the premium becomes due and is not paid. It says: "The net value of the policy, when the premium becomes due and is not paid, shall be computed upon the American Experience Table of Mortality, with four and one-half per cent. interest per annum, and after deducting from three-

fourths of such net value any notes or other indebtedness to the company, given on account of past payments on said policy issued to the insured, which indebtedness shall then be cancelled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy, and the term for which such temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of premium and the assumption of mortality and interest aforesaid." Here we have provided for, in express terms, temporary insurance for the full amount written in the policy; and it is insisted and very ably argued that this is the character of insurance intended by the term "paid-up insurance," in the proviso of section 5859. We are unable to agree to this contention. It must be admitted that the science of life insurance is in an advanced state in this country, and in the management of the immense increased business—in fact, in conducting any business involving the application of thorough business principles—certain terms are used, as applying to certain subdivisions of the business. We find upon the subject now before us that not only individuals, but, as well, Legislatures and courts, have recognized the application of certain terms to special classes of the business transaction. An examination of the laws of Missouri will demonstrate that the Legislature keeps clearly the distinction between paid-up insurance and temporary and extended insurance. The very term "paid-up insurance" conveys the meaning that no more payments are required, and we are of the opinion that when the Legislature is dealing with the subject of life insurance, and uses the term "paid-up insurance," it means an insurance for life, fully paid up. Section 5857, Rev. St. 1889, recognizes very clearly the distinction between paid-up insurance and extended insurance. Upon that subject it provides: "At any time after the payment of two or more full annual premiums, and not later than sixty days from the beginning of the extended insurance provided in the preceding section, the legal holder of the policy may demand of the company, and the company shall issue, its paid-up policy, which, in case of an ordinary life policy, shall be for such an amount as the net value of the original policy at the age and date of lapse, computed according to the actuaries' or combined experience table of mortality, with interest at the rate of four per cent. per annum, without deduction of indebtedness on account of said policy, will purchase, applied as a single premium upon the table rates of the company." In the case of *Cravens v. Ins. Co.*, supra, the court fully recognizes the distinction heretofore mentioned. Burgess, J., in that case, says: "This section, we think, has reference solely to 'paid-up' policies, and gives the holder of a policy who is entitled to extended insurance under section

5963 the right to compel the company, within a limited time from the beginning of such extended insurance, to convert the extended insurance into a paid-up policy of a prescribed value, if he so desires." The very terms of the section under discussion (section 5859) make the distinction, in its requirement of the foreign state "to prescribe paid-up or temporary insurance." It becomes more apparent that the term "paid-up insurance," as used in the proviso, was not intended to refer to temporary insurance, as mentioned in section 5856, when we look at the amendment of section 5859, as contained in section 7900, Rev. St. 1899, which provides: "Sec. 7900. The three preceding sections shall not be applicable in the following cases, to-wit: If the policy shall contain a provision for an unconditional surrender value, at least equal to the net single premium, for the temporary insurance provided for hereinbefore, or for the unconditional commutation of the policy for non-forfeitable paid-up insurance, or if the legal holder of the policy shall, within sixty days after default of premium, surrender the policy and accept from the company another form of policy, or if the policy shall be surrendered to the company for a consideration adequate in the judgment of the legal holder thereof, then, and in any of the foregoing cases, this article shall not be applicable: provided, that in no instance shall a policy be forfeited for non-payment of premiums after the payment of three annual premiums thereon; but in all instances where three annual premiums shall have been paid on a policy of insurance, the holder of such policy shall be entitled to paid-up or extended insurance, the net value of which shall be equal to that provided for in this article." It will be specially noted that the contrast is maintained all through the section between temporary and paid-up insurance, and finally this is emphasized in the proviso, which provides for "paid-up or extended insurance, the net value of which shall be equal to that provided for in this article."

It is urged that "paid-up insurance," as used in the proviso of section 5859, should be construed to mean "paid-up temporary insurance." To give it this construction would simply require judicial legislation by amending the section in that respect, and, in order to make it fully fall within the provisions of section 5856, we would be required to make the additional amendment; that is to say, "paid-up temporary insurance, for the full amount written in the policy." This amendment by judicial construction we are not willing to add to the proviso of section 5859. We take it that the words in the proviso, "the net value of which shall be equal to that provided for in section 5856," have reference solely to the computation of the net

value of the policy, so as to ascertain the amount of paid-up insurance which can be bought. In other words, that reference to section 5856 in the proviso means that you shall compute the net value of the policy, in accordance with the provisions of section 5856, but it does not mean that the result of such computation shall purchase temporary insurance for the full amount written in the policy. If it had been so intended, it would have so stated, and would not have used the term "paid-up insurance," which has such a well-understood meaning under the laws of this state, as well as nearly every other state in the Union.

It is insisted that the terms in the proviso cannot refer to computation of the net value, as provided in section 5856, alone, for the reason, it is urged, that the computation under that section cannot be made applicable to paid-up insurance for life, as mentioned in the proviso. If a computation can be made, so as to invest the result in temporary insurance, the same calculation will produce the same result to invest in paid-up insurance. It will not answer the conclusion reached as to this policy to say that this construction is unfavorable to the policy holder. We are not prepared to say as to which construction would be most beneficial to the insured. The terms of the statute, and not the interests of either party, must control in the construction. We will say, however, that, while in this particular case it may operate unfavorably to the insured, had he lived beyond the period to which his temporary insurance, contended for, extended, and then been unable to further pay the premiums, his temporary insurance, even for the full amount of the policy, would be of little benefit to him.

The adjudications upon insurance policies, even as numerous as they are, shed but little light upon the construction and application of this comparatively new statute; hence we have been left to apply to the terms of the statute under discussion the common and approved use of such terms.

We have reached the conclusion that the policy upon which this suit is based falls within the provisions of section 5859, Laws 1895, p. 197, and that section 5856, Rev. St. 1889, is inapplicable, except so far as the proviso in said section renders its application necessary in the computation of the amount to be applied to the payment of paid-up insurance. With these views, we are of the opinion there was no error in the judgment by the trial court, and that the learned trial judge correctly interpreted the law, as applicable to this case, in his written opinion, and the judgment will be affirmed. All concur.

MOORE v. LINDELL RY. CO.*

(Supreme Court of Missouri, Division No. 1.
May 27, 1903.)

STREET RAILROADS—INJURIES TO PEDESTRIAN AT CROSSING—CONTRIBUTORY NEGLIGENCE—NEW TRIAL.

1. A decedent's contributory negligence in knowingly attempting to pass in front of an approaching street car at a street crossing, in such close proximity thereto as to make the danger of collision imminent, bars a recovery, though the street railway company was negligent in failing to sound the gong of the approaching car running at an excessive rate of speed, and even though it also failed to use proper care to stop the car after the dangerous position of the decedent became known to it.

2. Where the verdict of the jury is for the right party and in accordance with the law, it will not be disturbed, though the court gave erroneous instructions.

3. Plaintiff's decedent was killed by a street car at a crossing. The street was clear of obstructions, and there was plenty of light to see distinctly. There was no evidence that decedent looked or listened before going on the track, except that of the motorman, who testified that when he saw her he hit his gong, but she continued until she got on the south-bound track; that at that time the car, which was on the north-bound track, was within probably 20 feet from her; that she paused for an instant, and when the car got within five feet of her she deliberately walked on the north-bound track in front of the car and attempted to cross, when the car killed her. *Held*, as a matter of law, that decedent was guilty of contributory negligence.

Appeal from Circuit Court, St. Louis County; Rudolph Hirtzel, Judge.

Action by Thomas Moore against the Lindell Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

A. R. Taylor, for appellant. Geo. W. Easley and Boyle, Priest & Lehmann, for respondent.

MARSHALL, J. This is an action, under the statute, to recover \$5,000 damages for the death of the plaintiff's wife, on the 14th of October, 1896, caused by being run into and injured by one of the defendant's electric cars on Fourteenth street, opposite the termination of Belmont street, in the city of St. Louis. There was a verdict and judgment for the defendant, and the plaintiff appealed.

The petition charges that the plaintiff's wife was crossing Fourteenth street, "on the north crossing of Belmont street" (the evidence on both sides showed she was crossing on the south crossing), and that the car, without any warning being given of its approach by ringing the bell or otherwise, ran upon her, knocked her down, and so injured her as to cause her death. The petition assigns as further negligence that there was a city ordinance in force which required motormen and conductors to keep a vigilant watch for vehicles and persons on foot, especially children, either upon the track or moving towards it, and upon the first appear-

ance of danger to stop the car within the shortest time and space possible, and that the defendant's motorman and conductor failed to obey the requirements of this ordinance. The petition assigns as further negligence that there was a city ordinance in force which prohibits the defendant from running its cars at a greater rate of speed than 10 miles an hour, and that the car that struck the plaintiff's wife was running at a greater rate of speed than 10 miles an hour. The petition charges that, in consideration of the grant by the city of the right to operate its cars, the defendant undertook and bound itself to observe and obey the provisions of the ordinances herein referred to. The answer is a general denial, and a plea of contributory negligence, in that the plaintiff's wife walked "upon defendant's track in front of its car, without looking or listening for an approaching car, in such proximity to the car that it was impossible to stop the car and avoid the collision and injury."

The locus in quo was this: Fourteenth street runs north and south, and is 80 feet wide, and the defendant has a double track thereon, near the center of the street, the west track being used by the south-bound cars, and the east track by the north-bound cars. Belmont street is 25 feet wide, and intersects Fourteenth street on its west side. It stops at Fourteenth street. East of Fourteenth street, but not on a direct prolongation of Belmont street, there is an alley 15 feet wide. The next street south of Belmont is Spruce street, and the distance between the two is only 150 feet. The next street north of Belmont is Clark avenue, and the distance between these two is also only 150 feet.

The undisputed facts in the case are that the deceased was the wife of the plaintiff; that they lived at 1411 Belmont street; that about 10 o'clock on the night of October 14, 1896, she left the house to get the plaintiff something to eat; that she went east to Fourteenth street, and then started across Fourteenth street, at the south crossing of what would be the prolongation of the south side of Belmont street; that the street was free of obstruction, and, while there were no lights at that point, there were lights at Spruce street on the south, and at Clark avenue on the north; that the night was clear; that there was plenty of light there, and an approaching car could have been easily seen as far south as Spruce street and as far north as Clark avenue; that the plaintiff's wife was proceeding across Fourteenth street, going in an easterly direction, when she was injured; and that Fourteenth street, at the point of the accident, is slightly up grade.

The disputed facts are as follows: The evidence on the part of the plaintiff tended to show that she was walking very slowly; that the car was running very rapidly, as much as 15 miles an hour; that no gong was sounded; that she was struck by a

*Rehearing denied July 2, 1903.

* 2. See Appeal and Error, vol. 3, Cent. Dig. § 4225.

north-bound car just as she was about to step off the east track; that the car did not slacken its speed before it struck her; that the car was stopped at a point about 30 feet beyond the point of the accident; that a car running at the rate of six miles an hour could be stopped by means of the brakes in about 10 feet, and by using the reverse power in 3 to 4 feet; that running 8 or 10 miles an hour it could be stopped in 30 feet by using the brakes; that running 15 miles an hour it could be stopped in a car length and a half by using the reverse power.

The witnesses for the plaintiff were standing at the northwest corner of Fourteenth and Spruce streets at the time of the accident. Because the car was between them and the plaintiff's wife, they did not see the car strike her. But they said when she was between the sidewalk on the west side of Fourteenth street and the railroad track the car was at Spruce street.

The city ordinances pleaded were offered in evidence, and it was admitted that the defendant had accepted them.

The evidence of the defendant's motorman was that he saw the plaintiff's wife when the car was about 30 feet north of Spruce street; that she was then between the curb on the west side of Fourteenth street and the south-bound car track; that the car was then running about five miles an hour; that he sounded the gong when he first saw her, and reduced the speed of the car to four miles an hour; that she continued on her way until she got to the south-bound track; that "at that time when she stepped there I was within probably perhaps 20 feet of her; she paused for an instant, and when I got within five feet of her she just deliberately walked over the track. I reversed my car, but she was too close, and it hit her. Ques. Which part of the car hit her. Ans. The east side of the car—the opposite side—she almost cleared the track. It was the fender hit her about at the ankle, and she fell down on the street." This witness testified that, if the reverse current is applied to a car going at the rate of five miles an hour on a slight grade, the car will slide 30 feet. The conductor of the car testified that the car was running about five miles an hour, and that the motorman rang the gong continuously as he approached Belmont street; that it was foot bell; that the car stopped with the rear platform "alongside" of where the plaintiff's wife laid. The superintendent of the defendant testified that the car weighed eight tons, and that it would take $4\frac{1}{2}$ seconds to stop the car if it was running at a rate of four or five miles an hour, and that the car will slide from five to ten feet even on a slight up grade. The assistant superintendent of the City Hospital testified that when the plaintiff reached the hospital she had a contusion of the skull, and was under the influence of liquor. "She had the odor of alcohol on her breath."

1. Under this state of the record, counsel for the appellant very properly says: "For the purpose of this hearing we will concede that there was evidence for the defendant tending to sustain the answer and make the issue for the jury, and we claim a reversal of the case upon the grounds herein stated"—that is, that the trial court erred in a matter of law in giving the defendant's instructions. To fully understand the case, it is necessary to set out all the instructions bearing upon the question of the liability of the defendant and the duty of the deceased that were given at the request of either the plaintiff or the defendant, and by the court of its own motion.

The instructions given for the plaintiff are as follows: "(1) If the jury find from the evidence in this case that on the 13th day of October, 1896, the defendant was operating the railway and car herein mentioned, as a public conveyance, for the purpose of transporting persons for hire from one point to another, within the city of St. Louis, as a street railway; and if the jury further find from the evidence that at said time Fourteenth and Belmont streets, at the place mentioned in the evidence, were public streets within the city of St. Louis; and if the jury find from the evidence that Jennie Moore, mentioned in the evidence, was the lawful wife of the plaintiff; and if the jury find from the evidence that on the night of October 13, 1896, the plaintiff's wife, Jennie Moore, was passing over the south crossing of Belmont and Fourteenth streets, and whilst doing so the defendant's car ran against her and so injured her that she died from said injuries; and if the jury find from the evidence that said car was, by the defendant's servants in charge of same, being run at a greater rate of speed than 10 miles per hour at said time; and if the jury further find from the evidence that such excessive rate of speed, over 10 miles per hour, directly contributed to cause said car to so strike and injure plaintiff's said wife; and if the jury further find from the evidence that plaintiff's wife exercised ordinary care to look and listen for an approaching car while going upon and over defendant's track—then plaintiff is entitled to recover. (2) If the jury find from the evidence that on the 13th day of October, 1896, the defendant was operating the railway and car, mentioned in the evidence, for the purpose of transporting persons for hire from one point to another within the city of St. Louis, as a street railway; and if the jury find from the evidence that at said time Fourteenth and Belmont streets were public streets, within the city of St. Louis, at the place mentioned in the evidence; and if the jury further find from the evidence that on the night of said day the plaintiff's wife, Jennie Moore, was on the south crossing of said streets, passing from the west side of Fourteenth street to the east side thereof across defendant's tracks;

and if the jury further find from the evidence that, as the plaintiff's wife moved towards and across defendant's tracks, defendant's motorman saw her; and if the jury further find from the evidence that as plaintiff's wife approached and went upon defendant's track she was in danger of being injured by defendant's north-bound car; and if the jury further find from the evidence that defendant's motorman on the north-bound car saw, or by keeping a vigilant watch could have seen, that the plaintiff's wife, as she approached and went upon defendant's north-bound track, was in danger of injury from said car, and therefore could have averted injury to plaintiff's wife by stopping said car within the shortest time and space possible, and neglected to do so—then plaintiff is entitled to recover five thousand dollars. (3) If the jury find from the evidence that, as the defendant's car, moving northward, approached the south crossing of Belmont street, the plaintiff's wife was passing over said crossing; and if the jury further find from the evidence that said crossing was a public crossing for pedestrians; and if the jury further find from the evidence that as plaintiff's wife was so passing over said crossing she was struck and injured by defendant's north-bound car so that she died from said injuries; and if the jury further find from the evidence that as said car approached said crossing defendant's servants in charge of the car failed to give any signal, by bell or otherwise, of the approach of said car to said crossing; and if the jury further find from the evidence that said failure to give said signal directly contributed to cause the injury and death of plaintiff's wife; and if the jury find from the evidence that plaintiff's wife was exercising ordinary care whilst approaching and passing over said track—then plaintiff is entitled to recover five thousand dollars; provided the jury believe from the evidence that such failure to give such signal was negligence on the part of the servants of the defendant. (4) By the term 'ordinary care,' as used in the instructions, is meant that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances. A failure to exercise ordinary care as thus defined would be negligence. (5) The court instructs the jury that if they find from the evidence that the deceased, Jennie Moore, did see the approach of defendant's car before it struck and injured her, yet if said car was distant from her a sufficient distance to have enabled her to cross the track ahead of the car in safety by the exercise of ordinary care and expedition, if said car was running not exceeding 10 miles per hour, then she had the right to proceed to cross defendant's track, if she used ordinary care and expedition in doing so, and if she did not know or have reason to believe said car was in fact running more than 10 miles per hour (if, in fact, said car

was running more than 10 miles per hour)."

The instructions given at the request of defendant are as follows: "(1) The jury are instructed that the negligence alleged against the defendant is: First, that the defendant failed to give warning of the approach of the car by sounding the bell or otherwise; second, that the defendant did not keep a vigilant watch for persons on foot upon the tracks or moving towards them, and did not, upon the first appearance of danger, stop the car within the shortest time and space possible; and, third, that the defendant ran its car at the time in question at a rate of speed exceeding 10 miles an hour. And the court instructs the jury that it is incumbent upon the plaintiff to prove that the defendant was guilty of one or the other of these specified acts of negligence, and that such negligence on its part caused the injury complained of. And even though the jury find that the defendant was guilty of one or the other of the acts charged, and even if they find that such negligence contributed to the injury complained of, still, if they further find that the deceased, Mrs. Moore, was negligent in attempting to cross the track of defendant as she did, and that such negligence on her part contributed to the accident, then the plaintiff is not entitled to recover. (2) The court instructs the jury that, although they may believe and find from the evidence that the defendant, through its agents and servants in charge of its said car, was negligent in failing to sound the gong, and that it was negligent in running said car at a rapid rate of speed, yet the plaintiff is nevertheless not entitled to recover if you further believe that the deceased knowingly tried, by hurrying, to pass in front of said moving car, in such close proximity thereto as to make the danger of collision imminent; and this is true even though you may further find that the agents and servants of the defendant failed to use proper care to stop said car after such dangerous position of the deceased became known to them. (3) The court instructs the jury that, although they may believe and find from the evidence that the motorman of defendant's car saw the deceased wife of plaintiff approaching the track, on which said car was moving, afoot, and with said car in view, said motorman nevertheless had the right to assume that said deceased would not pass in front of said car, but that she would stop before passing onto the same, and that, under such assumption, he had the right to proceed with the speed of said car unabated, unless you believe that the same was being run at an unlawful or negligent rate. (4) Even though the motorman saw Mrs. Moore crossing the street and moving toward the track along which this car was moving, still he had the right to assume that she knew the car was approaching and would have regard for her own safety, and not attempt to pass in front of the same if it was obviously dangerous to attempt to do so. And the motor-

man had the right to assume that she would stop when she came to the track, and not attempt to cross in front of his car if it was manifestly unsafe to do so. And the motorman had the right to proceed at a lawful rate of speed, and was not bound to stop his car until she placed herself in a position of peril by coming upon the track, or so close to it as to endanger her."

The court of its own motion gave to the jury the following instruction: "The jury are instructed that the negligence alleged against the defendant is: (1) That at the time in question the defendant failed to give warning of the approach of the car by sounding the bell or otherwise. (2) That the defendant did not keep a vigilant watch for persons on foot upon the tracks or moving towards them, and did not, upon the first appearance of danger, stop the car within the shortest time and space possible. (3) That the defendant ran its car at the time in question at a rate of speed exceeding 10 miles per hour. And the court instructs the jury that it is incumbent upon the plaintiff to prove that the defendant was guilty of one or the other of these special acts of negligence, and that such negligence on its part caused the injury complained of. And even though the jury find that the defendant was guilty of one or the other of the acts charged, and even though they find that such negligence contributed to the injury complained of, still, if they further find that the deceased, Mrs. Moore, was negligent in attempting to cross the track of defendant as she did, and that such negligence on her part contributed to the accident, then the plaintiff is not entitled to recover, unless you further find from the evidence that the defendant motorman saw, or by the exercise of reasonable care might have seen, that the plaintiff's wife was in a position of danger or peril, and that the said motorman thereafter could have averted the injury to plaintiff's wife by the exercise of reasonable or ordinary care, but negligently failed to do so."

It is unnecessary to notice the first instruction given for the plaintiff, further than to say that there is no evidence whatever in the record that the deceased looked or listened for an approaching car while going upon or over the defendant's track. The plaintiff introduced no evidence whatever bearing upon this proposition, and the defendant's evidence shows that she paused an instant while on the south-bound track when the car was 20 feet from her, and then deliberately stepped upon the north-bound track when the car was within 5 feet of her.

The plaintiff's second instruction predicates a right of recovery upon a violation of the pleaded and accepted city ordinance, and read in connection with the defendant's third and fourth instructions, and with the instruction given by the court of its own motion, the jury could not fail to understand the law of the case as made.

The appellant, however, attacks the second instruction given for the defendant. The dominant idea expressed by this instruction is that, notwithstanding the defendant may have been primarily negligent, nevertheless the plaintiff cannot recover if thereafter both the defendant and the deceased were guilty of concurrent, subsequent negligence, nor can the plaintiff recover if both were guilty of negligence of such kind, character, or degree as to constitute it recklessness or wantonness. The rule is thus stated in 7 Am. & Eng. Enc. Law (2d Ed.) pp. 385, 386: "And so when the negligence of the person inflicting the injury is subsequent to, and independent of, the carelessness of the person injured, and ordinary care on the part of the person inflicting the injury would have discovered the carelessness of the person injured in time to avoid its effects and prevent injuring him, there is no contributory negligence, because the fault of the injured party becomes remote in the chain of causation. In such a case the want of ordinary care on the part of the injured person is not held a juridical cause of his injury, but only a condition of its occurrence. Conversely, when the carelessness of the person inflicting the injury is antecedent to the negligence of the person injured, and the latter might by ordinary care have discovered the failure of the former to use such care, in time to avoid the injury, there can be no recovery, because the intervening negligence of the injured person is the direct and proximate cause of his injury." Judge Cooley states the law with his usual force and clearness, as follows: "Regarding the case of a negligent injury, the general result of the authorities seems to be that if the plaintiff or party injured, by the exercise of ordinary care under the circumstances, might have avoided the consequences of defendant's negligence, but did not, the case is one of mutual failure, and the law will neither cast all of the consequences upon the defendant, nor will it attempt any apportionment thereof." Cooley on Torts (2d Ed.) 812. The rule, however, is nowhere more clearly or accurately stated than in the recent work of Nellis on the Law of Street Surface Railroads, pp. 383, 384, where he says: "It may be stated as a rule that a plaintiff who, by his own negligence, has placed himself in a dangerous position where an injury was likely to result, may still recover for such injury, if the defendant, with knowledge, or such notice as is equivalent to knowledge, of plaintiff's danger, failed to exercise reasonable care by which the injury might have been avoided, unless the injury was the result of concurrent negligence of both parties." In *Murphy v. Railway Co.*, 153 Mo., loc. cit. 261, 54 S. W. 442, the court, speaking through Brace, J., said: "The violation of an ordinance by the defendant could not be the proximate cause of an injury which was the product of such negligence and the concurrent negligence of

the plaintiff. The concurrent negligence of both in such a case is the proximate cause of the injury, and the plaintiff cannot recover. This is the law universally prevalent in this country, and to it there is but one exception in this state made on the score of humanity, and that is, if sufficient time and opportunity intervene between the concurrent acts of negligence which produced the dangerous situation and the injury to have enabled the defendant by the exercise of ordinary care to have prevented the injury, and he fails to exercise such care, then he will not be protected by this rule, but to the failure to exercise such care will the injury be attributed as the proximate cause thereof, and for such failure the plaintiff may recover." To this rule I add the logical and necessary corollary that, if both parties are guilty of recklessness or wantonness, there can be no recovery. For, if the injured party is guilty of recklessness or wantonness, he is no more entitled to recover for the defendant's recklessness or wantonness than he would be if it was the plain case of negligence and contributory negligence in the first degree. *Holwerson v. Railroad*, 157 Mo. 216, 57 S. W. 770, 50 L. R. A. 850.

It has always been the law in this state that it is such gross negligence as precludes a recovery for a person to step on a railroad track directly in front of an approaching train, and so close to it as to render it impossible to stop the train in time to avoid injury. *Boyd v. Railroad*, 105 Mo. 317, 16 S. W. 909; *Watson v. Railroad*, 133 Mo., loc. cit. 250, 34 S. W. 573; *Kelly v. Railroad*, 75 Mo., loc. cit. 140; *Sinclair v. Railroad*, 133 Mo., loc. cit. 241, 34 S. W. 76; *Kries v. Railroad*, 148 Mo. 321, 49 S. W. 877; *Holwerson v. Railroad*, 157 Mo. 216, 57 S. W. 770, 50 L. R. A. 850; *Hook v. Railroad*, 162 Mo. 569, 63 S. W. 360; *Tanner v. Railroad*, 161 Mo. 497, 61 S. W. 826; *Van Bach v. Railroad* (Mo. Sup.) 71 S. W. 358. And this is true even if the train was running at a rate of speed in excess of the maximum rate permitted by law. *Tanner v. Railroad*, 161 Mo. 497, 61 S. W. 826. For in such case the negligence of the injured party, and not the rate of speed of the train, is the proximate cause of the injury. To go upon a track in front of an approaching train, and so close to it as to render it impossible to stop the train in time to avoid injury, is negligence, whether the train is moving rapidly or slowly; and the only question in any case is whether, notwithstanding such negligence of the injured party, the train could have been stopped in time to have avoided the injury; and if the plaintiff bases a right to recover upon the failure of the defendant to exercise ordinary care to prevent the injury after the peril of the plaintiff, or party injured, was known, or could have been known by the exercise of ordinary care, the burden of alleging and proving that such was the fact rests upon the plaintiff. If, however, the undisputed

facts show that the injured party was guilty of such contributory negligence as will preclude a recovery, and if there is no evidence of a willful, reckless, or wanton disregard of human life on the part of the operatives of the train, there is nothing for a jury to pass upon, and the court should sustain a demurrer to the evidence. *Tanner v. Railroad*, 161 Mo. 497, 61 S. W. 826; *Kelly v. Railroad*, 101 Mo. 67, 13 S. W. 806, 8 L. R. A. 783; *Holwerson v. Railroad*, 157 Mo. 216, 57 S. W. 770, 50 L. R. A. 850; *Van Bach v. Railway* (Mo. Sup.) 71 S. W. 358; *Guyser v. Railroad* (No. 10,634, not yet officially reported) 73 S. W. 584. If, instead of so doing, the trial court submits the case to the jury, and gives improper and erroneous instructions, and the jury find for the defendant, the verdict will not be disturbed, notwithstanding such misdirection, because it is in consonance with the true law, and is for the right party, and because the plaintiff would not be entitled to a verdict at all upon such a showing. *Hill v. Wilkins*, 4 Mo., loc. cit. 88; *Orth v. Dorschlein*, 32 Mo. 366; *Kelly v. Railroad*, 88 Mo. 534; *Ellerbe v. Bank*, 109 Mo. 445, 19 S. W. 241; *Homuth v. Railroad*, 129 Mo., loc. cit. 642, 31 S. W. 903; *Haven v. Railroad*, 155 Mo., loc. cit. 223, 224, 55 S. W. 1035, and cases cited.

In this case there is no evidence whatever that the deceased looked or listened for a car before going upon the track. All the evidence there is in the record is that furnished by the defendant's motorman, and he says that: "When I just saw her I hit my gong, and she kept coming until she got on the south-bound track. At that time when she stepped there, I was within probably perhaps 20 feet of her. She paused for an instant, and when I got within five feet of her she just deliberately walked over the track. I reversed my car, but she was too close, and it hit her." If the deceased saw the car coming, as her pausing on the south-bound track would indicate, and if the car was then within 20 feet of her, it was negligence for her to go upon the north-bound track in front of the approaching car and when it was within five feet of her, whether the car was running at 4, 5, 8, 10, or 15 miles an hour. The street was clear of obstruction, and there was plenty of light to see distinctly. The motorman saw the deceased. She saw the car, or could have done so if she had looked. The motorman saw her approaching the track. He sounded the gong. She continued to approach until she reached the south-bound track. There she paused. The car was then 20 feet from her. The motorman had a right to believe that she intended to remain in her then place of safety until the car passed. Instead of doing so, however, when the car was within five feet of her, she stepped on the track in front of the car, and attempted to cross the track. Then for the first time she placed herself in a place of imminent peril. Then it was too late to

stop the car in time to avoid the injury, and this, too, whether the car was running at the rate of 4 miles an hour, as the defendant's evidence shows, or at the rate of 15 miles an hour, as the plaintiff's evidence shows. There is no evidence whatever of willfulness, recklessness, or wantonness on the part of the operatives of the car. The operatives of the car kept a vigilant watch for persons approaching or on the track, and on the first appearance of danger stopped the car in the shortest time and space possible, and therefore obeyed the city ordinances. The accident was painful and shocking. But it would not have occurred except for the negligence of the deceased in going upon the track when the car was within five feet of her. The plaintiff, therefore, made out no case for the jury, and the court should have so declared. The verdict of the jury is for the right party, and in harmony with the true law. The verdict will not, therefore, be disturbed, no matter whether the court misdirected the jury or not.

This conclusion makes it unnecessary to consider the other points urged for a reversal, further than to say that the facts upon which such points rest were sharply contested in the trial court, and that court found them in favor of the defendant, and, as no abuse of discretion appears, this court will not disturb the finding of the trial court in this regard.

The judgment of the circuit court is affirmed.

BRACE, P. J., concurs. VALLIANT, J., concurs in the result. ROBINSON, J., absent.

GRIFFIN et al. v. McINTOSH.*

(Supreme Court of Missouri. Division No. 2.
June 9, 1903.)

DEEDS—CONSTRUCTION—TESTAMENTARY DISPOSITION—ATTESTATION—DELIVERY—EVIDENCE.

1. A deed from father to son reciting that it was on the express condition that the grantor and his wife were to live on the farm conveyed until their death as "one of the family," and to hold the deed in their possession until their death, when it was to be delivered to the grantee or his heirs, was a testamentary disposition of the land to the son, and did not pass a present interest in the property.

2. Defendant's father executed a deed to defendant, which was not to take effect until the death of defendant's father and mother, when it was to be delivered to defendant or his heirs. Shortly before the father's death he stated to a witness, in defendant's presence, that he would give the deed up to defendant, that defendant "could take care of it," and that he would give it into defendant's "care to take care of it." The witness then procured the deed and delivered the same to defendant. Held, that such declarations were insufficient to show an intent of the father to waive the provisions of the deed and vest a present interest in the grantee.

3. A deed which was in effect a testamentary disposition of the property could not operate as a will after the grantor's death, where not properly attested as such.

Appeal from Circuit Court, Polk County; Argus Cox, Judge.

Action by Susan B. Griffin and others against James H. McIntosh. From a judgment in favor of defendant, plaintiffs appeal. Reversed.

Ross & Sea, for appellants. J. B. Upton and C. H. Skinner, for respondent.

GANTT, P. J. This is an action by two of the daughters of Collon McIntosh, deceased, to recover each one undivided one-eighth of certain real estate in Polk county from the defendant, James H. McIntosh, their brother, who is a son of said Collon McIntosh, deceased. Collon McIntosh left surviving him at his death, March 23, 1896, his widow, Jane McIntosh, who afterwards died January 7, 1898, and eight children. After the death of the widow the plaintiffs brought this action of ejectment to be let into possession with their brother, the defendant, of two-eighths of the lands owned by their father in his lifetime, and of which defendant was and had been in the exclusive possession since the death of his mother, January 7, 1898. The defendant claimed title through a deed from his father and mother of date February 15, 1895, which is in words and figures following:

"This indenture, Made on the 15th day of February, A. D., One Thousand Eight Hundred and Ninety-five, by and between Collon McIntosh and Jane McIntosh his wife of the County of Polk and State of Missouri, parties of the First Part, and James H. McIntosh of the County of Polk and State of Missouri, party of the Second Part.

"Witnesseth, That the said parties of the First Part, in consideration of the sum of One Dollar, to us paid by the said party of the Second Part, the receipt of which is hereby acknowledged do by these presents Grant, Bargain and Sell, Convey and Confirm unto the said party of the Second Part, his heirs and assigns, the following described lots, tracts or parcels of land, lying, being and situate in the County of Polk and State of Missouri, to-wit: The northeast quarter of the northeast quarter of section No. Eighteen (18) also the northwest quarter of the northwest quarter Section No. Seventeen (17) less ten acres off the east side, and the southeast fourth of the northeast quarter Section No. Eighteen (18) all in Township Thirty-three (33) of Range No. Twenty-four (24) containing in all one hundred and ten acres.

"Upon this express condition that the said Collon McIntosh and Jane McIntosh is to live on the farm till their death as one of the family and to hold the deed in their possession till their death then this deed is to be delivered to James H. McIntosh or his heirs.

"To Have and to Hold the premises afore-

*Rehearing denied July 8, 1903.

said, with all and singular the rights, privileges, appurtenances and immunities thereto belonging, or in anywise appertaining unto the said party of the Second Part, and unto his heirs and assigns forever, the said Collon McIntosh hereby covenanting that they lawfully seized of an indefeasible estate in fee in the premises herein conveyed, that they have good right to convey the same, that the said premises are free and clear of any incumbrance done or suffered by them or those under whom they claim; and that they will warrant and defend the title to the said premises unto the said party of the Second Part, and unto his heirs and assigns forever, against the lawful claims and demands of all persons whomsoever.

In witness Whereof, The said parties of the First Part have hereunto set their hands and seals the day and year first above written.

"[Seal.]

Collon McIntosh.

her

"Jane X McIntosh.

mark.

"Signed, sealed and delivered in presence of us: John W. Crow, Ida A. McIntosh, witnesses to mark.

"State of Missouri, County of Polk,—ss. On this 15th day of February, 1895, before me personally appeared Collon McIntosh and Jane McIntosh, his wife, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

"In testimony whereof, I have hereunto set my hand and affixed my official seal at my office in Madison township the day and year first above written.

"Jno. W. Crow, Justice of the Peace.

"Filed for record, This 2nd day of April A. D. 1896, at 9 o'clock 30 minutes a. m. Arthur Griffin, Recorder. By Otis Mosler, Deputy."

Plaintiff objected to this deed on the ground that it was void on its face. The defendant offered parol evidence that this deed was delivered to him about two weeks before his father's death. To this evidence plaintiff objected on the ground that it would contradict the intention of the grantor as shown on the face of the instrument, and that defendant was bound by the recitals therein. These objections were by the court overruled, and plaintiff duly excepted.

The construction to be given this instrument is the controlling point on this appeal. The instrument is an ordinary warranty deed in form, except the clause immediately following the description, which is as follows: "Upon this express condition that the said Collon McIntosh and Jane McIntosh is to live on the farm till their death as one of the family and to hold the deed in their possession till their death, then this deed is to be delivered to James H. McIntosh or his heirs." What effect must be given this instrument? It is beyond conjecture that

Collon McIntosh and his wife executed this instrument with the intention of conferring at some time the title to the lands therein described on his son James, and, looking to this condition, it would appear to be equally clear that the time when the title was to vest in the son was after the death of the father and the mother. In the absence of this condition written into the deed, the instrument could have had no effect to convey the title until it was delivered. The grantor and his scrivener were evidently under the impression that the deed could be delivered after the death of the parents to the son, but, of course, delivery is essential to make a deed effectual, and it must occur in the lifetime of the grantor. We are not left entirely to this expression of the intention of the father. This instrument was executed and acknowledged on the 15th day of February, 1895, and Collon McIntosh, the grantor therein, lived until March 23, 1896, more than a year after its execution; and it appears from the testimony of Mrs. Crain, one of his daughters and a witness for defendant, that the old gentleman retained this instrument in his own possession in his wife's trunk up to a fortnight before his death. This retention of the deed was in exact accordance with the condition above noted. John McIntosh, a son, also testified that he had a conversation several months after the deed was executed, in which he told the witness that "he had the deed there in his possession." Crow, the justice of the peace, also testified that the deed was not delivered the day of its execution, although James McIntosh, the grantee, was present in the room when it was written, and heard it read over. The written condition, and the subsequent conduct of the grantor in retaining the deed, all indicate that at that time it was not the purpose of the maker to part with the dominion over his estate or this instrument during his lifetime.

The instrument, taken as a whole, was a testamentary disposition of the land to his son, and did not pass a present interest in the property to his son. As said by this court in *Murphy v. Gabbert*, 166 Mo. 596, 66 S. W. 536, 89 Am. St. Rep. 733, the test by which we determine whether an instrument is a deed or a will is whether it takes effect in present or after the death of the maker. The cases are collated by Burgess, J., in that case, and it will be observed that the cases of *Turner v. Scott*, 51 Pa. 126, and *Leaver v. Gauss*, 62 Iowa, 314, 17 N. W. 522, were both constructions of warranty deeds, with conditions therein indicating they were not to take effect until after the death of the grantors, and they were held inoperative as deeds. So far we have little trouble in reaching the conclusion that this instrument was not good as a deed, because on its face it was not to take effect until after the death of both the father and mother of defendant, and such was the intention of the father. Doubtless

the father and the justice of the peace and the defendant all were of the impression that this was a valid conveyance, but the law is otherwise, and, while courts seek diligently for the intention of the maker of an instrument, it cannot give effect to that intention if it contravenes some inflexible principle of law.

But, notwithstanding the father expressly stipulated this instrument was not to be delivered, defendant insists he waived that condition and delivered it in his lifetime, and that it became effectual from the moment of its delivery some two weeks prior to the father's death, and the court, by its declaration of law, took that view, and "declared the law to be that if the deed from Collon McIntosh and wife was actually delivered by the grantors in their lifetime to defendant, then the clause in the deed with regard to delivery after death must be disregarded, and said deed passed the title to defendant."

On the other hand, the plaintiff prayed the court to exclude all the parol evidence tending to contradict or vary the intention of the grantor as shown therein, and to declare that there was no evidence of title in defendant. No witness except Mrs. Crain testified to a delivery of the deed in the lifetime of the father and mother. Her testimony was to the effect that about two weeks before her father's death she was at his house. He was very feeble. He was 78 years old. She was sitting on his bed, and he was leaning against her. No one was present but her mother, father, brother Tom, the defendant, and herself. Her father said he had made a deed to Tom, and he thought he would be up and would have it recorded before now. "He just said to my mother, 'I will just give it up to Tom.' He says, 'He can take care of it,' and her mother got it and gave it to him. He said he 'would just give it in Tom's care to take care of it.'" "She [meaning her mother] just went and got it, and gave it to Tom to take care of." Giving this testimony its full effect, did it amount to an unequivocal delivery and relinquishment of all dominion over the deed, and a waiver of the plain condition therein written? We think not. *Powell v. Bank*, 146 Mo. 632, 48 S. W. 664. Few questions have received more careful consideration by this court than what will constitute a delivery of a deed. It is well said in *Sneathen v. Sneathen*, 104 Mo. 210, 16 S. W. 497, 24 Am. St. Rep. 326, that "the rule that the grantor must part with all dominion and control over the deed does not mean that he must put it out of his physical power to procure possession of it. It is sufficient that the deed is delivered * * * without reservation, and with the intention that it shall take effect, and from that time operate as a transfer of the title." "This intention may be manifested by acts or by words, or by both words and acts." See, also, *Tobin v. Bass*, 85 Mo. 654, 55 Am. Rep. 392; *Standiford v. Standiford*, 97 Mo. 231, 10 S. W. 836, 3 L. R.

A. 299; *Crowder v. Searcy*, 103 Mo. 117, 118, 15 S. W. 346.

Taking Mrs. Crain's evidence altogether, and in the light of the terms of the instrument and the relationship of the parties, we think it falls short of waiving the express conditions of the deed. The defendant was present, and heard his father say that defendant had said "he could take care of it," and her father's statement that "he would give it in Tom's care to take care of it." These expressions only made the defendant the custodian of the deed to take care of it for his father and mother, for the purposes therein expressed, and defendant's assent must be presumed. The grantor at no time expressed an intention to waive its retention and to vest the title at once in defendant. The mere manual delivery under such circumstances was not a waiver of his plainly expressed intention as to the retention of the deed during his lifetime and that of his wife. This was not delivering it without reservation, and with intent to vest the title at once. In our opinion, the court erred in holding that the grantor waived the condition, and in declaring that Mrs. Crain's evidence showed a delivery of the deed, and there was no other evidence even tending to show such a waiver and delivery. We think it was competent for the father to have waived the delivery, but we hold there was no substantial evidence that he did. The instrument upon which defendant relied as a muniment of title was inoperative as a deed in the lifetime of Collon McIntosh, and was not attested so as to make a valid will.

The judgment is reversed, and the cause remanded to be tried in accordance with the views herein expressed. All concur.

KING'S LAKE DRAINAGE & LEVEE DIST. v. JAMISON.*

(Supreme Court of Missouri, Division No. 1.
May 27, 1903.)

DRAINS—ESTABLISHMENT—COMPETENCY OF
COMMISSIONERS—WAIVER OF OBJECTIONS—
VALIDITY OF PROCEEDINGS—RIGHTS OF AP-
PEAL.

1. Rev. St. 1899, § 8331, authorizes a property owner affected by the creation of a drainage district to except to the report of the commissioners; provides for a jury trial in the county court to determine the damages and benefits; requires all other issues to be tried by the court, which is given power to order a modification of commissioners' report; and then provides that, if the proceedings be found valid, the court shall, after having made required modifications, confirm the report, and that "the order of confirmation shall be final and conclusive, and the proposed work be established and authorized, and the proposed assessments approved, subject to the right of appeal to the Supreme Court." Held, that the words "subject to the right of appeal" apply to the whole section, and not only to their immediate antecedent, and hence the right of appeal is not limited to the assessment of damages and benefits, but applies to the whole case.

*Rehearing denied July 2, 1903.

2. Rev. St. 1899, § 3318, authorizes appeals from the county court to the circuit court in all cases not expressly prohibited. Section 3434 provides that such appeals shall be tried de novo in the circuit court. *Held*, that the provision in Rev. St. 1899, § 8331, giving a property owner affected by the creation of a drainage district the right to "appeal to the Supreme Court, as in other actions," does not provide for a direct appeal to the Supreme Court, but for an appeal through the circuit court, where the issues are to be tried de novo.

3. Under Acts 1893, p. 189, § 5, providing for the appointment by the county court of three "competent" commissioners to lay out and construct a proposed drainage system, a person who had an inchoate right to land owned by his wife, which land was subject to overflow, and was excluded from the district laid out by the commissioners, though included in the original petition, was incompetent to act as a commissioner.

4. Though two of the three commissioners appointed to lay out a new drainage district are competent to act, their action will be void if the third is incompetent.

5. An objection to the competency of a commissioner appointed to lay out a drainage district may be raised for the first time on appeal.

Appeal from St. Louis Circuit Court; Jas. E. Withrow, Judge.

Proceedings for the establishment of King's Lake Drainage & Levee District. Wm. D. Jamison excepted to the report of W. J. Seaman and others as commissioners. From a judgment of the county court approving the report, Jamison appealed to the circuit court, where a judgment was rendered setting aside the report, and the district prosecutes a further appeal. *Affirmed*.

John H. Overall, for appellant. Charles Martin and F. N. Judson, for respondent.

MARSHALL, J. This is a proceeding to establish a drainage and levee district, under the provisions of the act of 1893 (Acts 1893, p. 188), being now article 5, of chapter 122, Rev. St. 1899, § 8318 et seq. The proceeding was commenced in the county court of Lincoln county. The land proposed to be included in the drainage district lies partly in Lincoln county and partly in Pike county, the larger part being in Lincoln county. A petition purporting to be signed by the "adult owners of more than one-half of the lands thereafter described" was presented to the county court, accompanied by an affidavit of three of the signers to the effect that they had examined the petition and were acquainted with the locality of said district, "and that said petition is signed by the adult owners of more than one-half of the lands embraced in said district." The defendant was one of the petitioners, but afterwards, by a letter addressed to the attorney for the remonstrants, attempted to withdraw his name from the petition. Remonstrances were filed by certain owners of land in the district. Notice was given by setting up handbills in five public places in the district, by delivering a copy to the owner of each tract of land, or by leaving a copy at the last usual place of abode of such owners, and by publi-

cation for three weeks in certain newspapers in Lincoln and Pike counties. The petition and remonstrance were heard by the county court at its May term, 1894, to wit, on July 9, 1894, and taken under advisement till the regular August term, 1894, when the county court granted the prayer of the petition, and appointed W. J. Seaman, W. H. Baskett, and Frank L. Wilson commissioners to lay out and construct the work, and required them to give a bond for \$80,000. During the same term the commissioners made their report, by which they changed the boundaries of the district as proposed in the petition, and assessed the total damages at \$2,731.67, and the total benefits at \$36,253.79, and, inter alia, omitted from the district certain land belonging to Fannie Seaman, the wife of the commissioner W. J. Seaman. The defendant, Jamison, was allowed \$205.56 damages and charged with \$5,728 benefits to his 1,577 acres of land lying in the district. He filed nine exceptions to the report of the commissioners, the fifth of which was as follows: "Fifth. Because one of commissioners appointed by the court, namely, W. J. Seaman, was not a competent person to act, in that he was then and now is interested in lands within the limits of said proposed district." At the May term, 1895, the county court overruled the exceptions, and entered judgment approving the report of the commissioners establishing the drainage district under the name of "King's Lake Drainage and Levee District," and declaring it to be a body corporate. The defendant, Jamison, filed an affidavit for an appeal, and gave bond in the sum of \$100, and was allowed an appeal to the circuit court of Lincoln county. In December, 1895, the circuit court of Lincoln county ordered the venue changed to the circuit court of St. Louis, for the reason that the judge of the circuit court of Lincoln county had become interested in land in the district. On the 7th of January, 1897, the plaintiff moved the circuit court to dismiss the appeal, assigning as grounds: "First. The county court of Lincoln county, Missouri, having found in favor of the validity herein, and having entered an order confirming the report of the commissioners herein, the same is final and conclusive. Second. This appeal is not from proposed assessments of benefits or damages, from which alone appeal lies. Third. An appeal lies only to the Supreme Court." The circuit court overruled the motion to dismiss on the 22d of December, 1897. The case came on for trial on June 12, 1899, and the exceptor, to sustain the issues on his part, introduced the transcript of the cause from the Lincoln county circuit court which embraced the record of the proceedings before the county court of Lincoln county, and testimony as to the Ashbaugh land, which will be referred to later. The plaintiff then introduced parol testimony which showed that the commissioner W. J. Seaman owned no property within either the

proposed of established drainage district, but that his wife owned 270 acres of land in the proposed drainage district, a part of which was subject to overflow, and that the commissioners excluded said land from the district in their report, and that there was one child born of the marriage of the commissioner Seaman and his wife, which is still living. The circuit court sustained the fifth exception above quoted, and set aside the report of the commissioners on that ground, and overruled all the other exceptions. From this judgment the plaintiff appealed to this court.

1. The first error assigned is the overruling of the motion to dismiss the defendant's appeal from the county court to the circuit court. This contention involves a construction of section 14, p. 193, of the act of 1893 (being section 8331, Rev. St. 1899). That section authorizes any owner of land in the district to except to the report of the commissioners; provides for a trial by jury, if demanded, upon the question of the assessment of damages and benefits; requires all other issues to be tried by the court; authorizes the court to order a modification of the report of the commissioners, and then adds: "If the finding of the court be in favor of the validity of the proceedings, the court, after the report shall have been modified to conform to the findings, or, if there be no remonstrance, the court shall confirm the same, and the order of confirmation shall be final and conclusive, and the proposed work be established and authorized and the proposed assessments approved, subject to the right of appeal to the Supreme Court, as in other actions." Upon this the plaintiff claims that the judgment of the county court is final and conclusive as to all matters except as to the assessment of damages and benefits, and that as to them only an appeal lies, but lies directly from the county court to the Supreme Court. In support of this contention counsel cite cases of which *State ex rel. v. Clark County*, 41 Mo. 44, *Foster et al. v. Dunklin*, 44 Mo. 216, *Sheridan v. Fleming*, 93 Mo. 321, 5 S. W. 813, and *Scott Co. v. Leftwich*, 145 Mo. 26, 48 S. W. 963, are types. An examination of those cases, however, will show that they only go to the extent of holding that, where the county court acts as the agent of the county, and the particular judgment does not affect the rights of any particular citizen, but affects the common rights of all citizens of the county, no appeal by a citizen will lie. Whenever, however, the judgment imposes any special burden upon any citizen, he has a right to appeal. In *re Big Hollow Road*, 111 Mo. 326, 19 S. W. 947. And generally a right of appeal exists under the general law, whether given or not by the special act or charter under which the proceeding is had, whenever a burden is imposed upon the property of a citizen. *Railroad v. Lackland*, 25 Mo. 515; *Bridge Co. v. Scaubacker*, 49 Mo. 555; *Ring v. Bridge Co.*, 57 Mo. 496; *Railroad v.*

Campbell, 62 Mo. 585; *Railroad v. Evans*, etc., *Brick Co.*, 85 Mo. 323. For this reason appeals have been allowed from judgments of the circuit court in condemnation proceedings under the charter of St. Louis, notwithstanding there is no provision of the charter regulating such proceedings which provides for an appeal. *St. Louis v. Thomas*, 100 Mo. 223, 13 S. W. 685.

It is claimed, however, that by virtue of the language employed in section 14, p. 193, of the act of 1893 an appeal is allowed only as to the assessment of damages and benefits, and that as to all other matters the judgment of the county court is expressly made final and conclusive, and that in this case no appeal was taken from the assessment of damages or benefits, and hence the appeal should be dismissed. The language of the section in question is that "the order of confirmation shall be final and conclusive, and the proposed work be established and authorized and the proposed assessments approved, subject to the right of appeal to the Supreme Court, as in other actions." The contention is that the words "subject to the right of appeal to the Supreme Court, as in other actions," apply, grammatically and legally, only to their immediate antecedent, which is said to be, "and the proposed assessments approved." The proper construction to place upon limiting or qualifying words or phrases found at the end of a section has lately undergone adjudication by this court in the case of *State ex rel. Atty. Gen. v. St. Louis* (No. 10,504, not yet officially reported) 73 S. W. 623, and it was there held that such words or phrases, no matter where they appear in a section, may apply to the whole section. And this is manifestly the intention of the law-makers in this case, for there could be no good reason given for holding that the judgment of the county court as to assessments for damages or benefits, which is purely a matter of fact, and not of law, should be subject to the right of appeal, but that as to all other matters, which would be matters of law, no such right of appeal should exist. Such a construction would reverse all appellate practice, for it would make findings of fact depending upon conflicting testimony reviewable by the Supreme Court, and deny the power of that court to review the judgment of the county courts as to all matters of law. Moreover, cases appealed from a county court to a circuit court are tried de novo in the circuit court (section 3434, Rev. St. 1889), and there is nothing in the nature or character of cases like this which would indicate that such case should be treated differently from other cases. It follows, therefore, that the right of appeal applies to the whole case, and is not limited as claimed.

Under section 3318, Rev. St. 1889, appeals lay from the county court to the circuit in all cases not expressly prohibited, and under section 3434 such appeals are required to be tried in the circuit court as though the case

had originated in that court without regarding any error, defect, or informality in the proceeding in the county court. When the Legislature passed the act of 1893, and made the provision quoted in section 14, providing for an appeal to the Supreme Court, it must be presumed to have had in mind the provisions of sections 3318 and 3434 of the Revised Statutes of 1889 aforesaid, and to have intended that the appeal from the county court should be taken to the circuit court, and from that court to the Supreme Court, and not directly to the Supreme Court, as the plaintiff contends. This is made clear by the last words of the sentence, to wit, "as in other actions." In other actions the appeal from the county court to this court comes only through the circuit court, as provided by the sections of the statute referred to. The motion to dismiss the appeal was, therefore, properly overruled by the circuit court.

2. When the cause came on for trial in the circuit court, the defendant (the exceptor), to sustain the issues on his part, offered the transcript of the cause that had been sent up from the county court, which embraces the record of proceedings before the county court, and then showed that Andrew Ashbaugh died in 1871, leaving a wife and nine children, and that by the terms of his will his land (which is excluded from this drainage district) was devised to his wife for life, with a remainder in fee to his children; and then showed that the children were not made parties defendant herein, nor served with notice, although it appeared that they employed counsel, and he was defending on their account as well as on account of their mother. The plaintiff then showed that the commissioner Seaman had no interest in the 26 acres lying in the west half of the northeast quarter of section 36, township 51, range 2 east, which appeared from the petition and assessment to belong to him, but that it belonged to R. H. Norton. From the cross-examination by the defendant of the commissioner Seaman, however, it did appear that his wife owns 270 acres "in the bottom," a part of which was subject to overflow, and that such land was embraced in the drainage district described in the petition, but that it was excluded from the drainage district by the commissioners (of whom her husband was one); and, further, that there was a living child born of their marriage. Upon this showing the circuit court sustained the fifth exception, which was that Seaman was not a competent person to act, in that he was then and is now interested in lands within the limits of the proposed district, and set aside the report, but overruled all of the other exceptions. From this order the plaintiff appealed. The defendant did not appeal.

The 270 acres belonging to the wife of the commissioner Seaman was subject, or partly subject, to overflow, and was embraced in the drainage district described in the petition, and would be reclaimed, protected, and ren-

dered valuable by the drains and levee. It was, therefore, very properly included in the proposed district. Her husband was appointed one of the commissioners, with the result that her land was excluded from the drainage district, with the result, according to the uncontradicted testimony as disclosed by this record, that her land would be benefited, reclaimed, protected, and rendered valuable, and she would not be charged with any part of the original cost of the work, nor with any part of the recurring annual expense of keeping the work in repair; the result of all which is that by as much as her land was benefited and she was exempted from paying therefor the burden thus taken off of her land was necessarily added to the burden placed upon the lands of the other owners of land in the district, of whom the defendant is one. This was clearly unjust and wrong. The commissioner Seaman had a marital right to the land during the life of his wife, and, if he survived her, he would have an estate by the curtesy in the land. He was, therefore, directly and personally interested in the case, both as to benefits received and to be received and as to burdens taken off of the land. He therefore sat as a commissioner in a case wherein he was personally interested, and by the report of the commissioners was enabled to derive the benefits of the proposed drains and levee, but relieved from the burden of paying anything therefor. It was for this reason that the circuit court sustained the fifth exception, and set aside the report and the judgment.

It is contended by the plaintiff that this was error, because by section 5, p. 189, of the act of 1893, it is provided that the court "shall appoint three competent persons as commissioners," and that the statute does not disqualify a commissioner because he is interested in the matter, and that any person is a competent commissioner who possesses skill and intelligence enough to do the work required of a commissioner, which qualification Commissioner Seaman filled. It is further contended that whenever the Legislature intended a commissioner to be disqualified by reason of interest in the subject-matter it has expressly so provided; in support whereof reference is made to the following provisions of the statutes: First, that section 1266, Rev. St. 1899, provides that in condemnation cases the court "shall appoint three disinterested commissioners, who shall be freeholders," etc.; second, that section 9641, Rev. St. 1899, concerning roads and highways, provides that the court shall appoint "three disinterested freeholders of the county, who are not interested in or of kin to any of the parties," etc.; third, that section 72, Rev. St. 1899, concerning administration, requires the court to appoint two respectable householders of the vicinity, "who are disinterested and of no kin to the administrator or executor," and that section 162, concerning the sale of real estate by the

executor, requires that he "shall have it appraised by three disinterested householders"; fourth, that section 326, concerning voluntary assignments, requires the court to appoint "two or more disinterested and competent persons to appraise the property"; fifth, that section 2900, concerning dower, requires the court to appoint "three competent persons as commissioners to assign and admeasure such dower"; sixth, that section 3163, concerning executions, requires the officer to summon from the neighborhood "three disinterested householders"; seventh, that section 4390, concerning partition, requires the court to appoint "not less than three nor more than five competent persons, as commissioners, residents of the county," etc. It is further contended that, as two of the three commissioners appointed were unquestionably competent and disinterested, and as they constituted a majority, the fact, if it be a fact, that Commissioner Seaman was incompetent, does not affect the case, nor justify the action of the circuit court in setting aside the report. It is further contended that the defendant knew whether or not Seaman was competent at the time the commissioners were appointed, and that he did not object at that time to his appointment, and therefore he waived the question of his competency. In support of these contentions the plaintiff cites *Wilbraham v. Com'rs*, 11 Pick. 322; *Phillips v. Com'rs*, 122 Mass. 258; *In re Southern Boulevard*, 3 Abb. Prac. (N. S.) 447; and *Doddridge v. Stout*, 9 W. Va. 703. Webster's International Dictionary defines the word "competent" to mean "(1) answering to all requirements; adequate; sufficient; suitable; capable; legally qualified; fit." The common law excluded as incompetent witnesses, first, parties; second, persons deficient in understanding; third, persons insensible to the obligations of an oath; and, fourth, persons whose pecuniary interest is directly involved in the matter in issue. All such persons were held not to be "competent" witnesses. 1 Greenleaf on Ev. (16th Ed.) § 327. In *Freleigh v. State*, 8 Mo. 606, it was said that all persons who are disinterested, and not infamous, have always been competent witnesses in this state, and are presumed to be competent until the contrary appears. Competency and credibility are held to be entirely distinct. *Rose v. Bates*, 12 Mo. 30; *Deer v. State*, 14 Mo. 348. Incompetency because of being interested and because of being a party has been removed by our statute, but the statute makes the following persons incompetent to testify: First, insane persons; second, a child under 10 years of age, who appears incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly; third, an attorney, concerning communications made to him by his client in that relation or his advice thereon, without the consent of such client; fourth, a minister or priest concerning a confession

made to him in his professional character, etc.; fifth, a physician or surgeon concerning any information which may have been acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon. Rev. St. 1899, § 4659. The term "competent," as applied to witnesses, has always embraced something more than mere unfitness, or, as the plaintiff puts it, lack of sufficient skill or intelligence. As to judges the Am. & Eng. Enc. Law (2d Ed.) vol. 8, p. 26, says: "The judge must have no interest in the result of the trial; otherwise he is incompetent to sit in the cause." And among the many cases cited in the note in support of the text is *Bowman's Case*, 67 Mo. 146, wherein the competency of the judge was challenged because he was an honorary member of the St. Louis Bar Association, whose committee was prosecuting Bowman for disbarment. It was held in that case that the judge was not disqualified or incompetent, and the decision was based entirely upon the ground that he was only an honorary member, paid no dues, was not entitled to a vote, and "he had not a particle of pecuniary interest involved." In 17 Am. & Eng. Enc. Law (2d Ed.) p. 732, it is said: "The principle that a man may not be a judge in his own cause is of universal acceptance, and has been established since the earliest periods of the common law." The English and American cases cited in the note to the text are too numerous to be even mentioned here. The same book (page 733) adds: "The maxim just set out that no man may be a judge in his own cause was always applied at common law where the judge had an interest in the cause." And English cases and cases in Florida, Maine, Texas, and Wisconsin are cited in support of the text. The same book and page says at common law neither relationship of the judge to a party nor the fact that the judge had been of counsel for one of the parties disqualified him as judge. Yet in *State ex rel. Sansone v. Wofford*, 111 Mo., loc. cit. 529, 20 S. W. 236, the court, speaking through Macfarlane, J., said: "It is a maxim of common law, the wisdom and propriety of which will not be questioned, that 'no man should be a judge in his own cause.' Provision has always been made, in case of the disqualification of a judge to sit in any case by reason of his interest therein, to supply a substitute to hear and determine the cause. This interest which disqualifies a judge is always made to include that which an attorney had in a case in which he has professionally acted. Our statute, following this rule, declares that no judge 'who shall have been counsel in any suit or proceeding pending before him shall, without the express consent of the parties thereto, sit on the trial or determination thereof.'" In civil cases the statute (Rev. St. 1899, § 818) permits a change

of venue on the ground "that the judge is interested or prejudiced, or is related to either party, or has been of counsel in the cause." And in criminal cases section 2594 provides that: "The judge of said court shall be deemed incompetent to hear and try said cause in either of the following cases: First, when the judge of the court in which said case is pending is near of kin to the defendant by blood or marriage; or, second, when the offense charged is alleged to have been committed against the person or property of such judge, or some person near of kin to him by blood or marriage; or, third, when the judge is in any wise interested or prejudiced, or shall have been counsel in the cause," etc. Thus it appears that the whole spirit and genius of the common law and of our law is that no judge is competent to sit in a case who has a personal, pecuniary interest in the case, and this is true, as a general proposition of law, even where there is no statutory regulation on the subject. And wherever a witness or a judge has a personal pecuniary interest in a cause, he is designated as not "competent." The term "competent," as used in the fifth section of the act of 1893, therefore is of much broader signification than the plaintiff construes it, and means a commissioner who is not only possessed of sufficient skill and intelligence to properly discharge the duties to be performed by a commissioner under the statute, but who is also disinterested, and not near of kin to any party to the cause. The commissioner Seaman was, therefore, not a competent commissioner, because he had a personal pecuniary interest in the cause. He had a marital right to the possession of his wife's land (so far as the record shows), and an inchoate estate by the curtesy. If the land was included in the drainage district—as upon his own testimony it should have been because it was at least in part subject to overflow, and would be benefited by the drains and levee—it would be assessed with its proportionate part of the benefits conferred, and have to bear its part of the original cost of construction, and also of the recurring annual expense of repairs. By omitting the land from the district, the land got the benefits, and was exempted from the burdens, and those burdens were improperly imposed upon other land owners. The commissioner, therefore, derived a personal pecuniary benefit by having the boundaries of the district changed by the commissioners so as to exclude his wife's land. He therefore not only sat in judgment in a cause where he had a pecuniary interest, but he profited by the judgment that was rendered, and others suffered correspondingly thereby. In this respect this case is unlike the case of *Wilbraham v. Com'rs*, 11 Pick. 322, relied on by plaintiff, for there the commissioner had no personal pecuniary interest, and was interested in the establishment of the road only in the same degree as any taxpayer of the

county. The case of *Phillips v. Com'rs*, 122 Mass. 258, also relied on by plaintiff, arose under an act relating to the drainage of the towns of Malden and Melrose, and the question was whether a member of the board of county commissioners and a resident of Malden was disqualified by reason of a statute which provided that, "if either of the county commissioners is interested in a question before the board, or if any part of the road upon which they are to act lies within the city or town in which either of them resides," then a special commissioner should be called in. The court said: "We are of opinion that the clause which prohibits a commissioner from acting upon a road question arising in the same town is not applicable to these proceedings. The judgment of the commissioners is to be exercised on an entirely different question, and, if it had been intended to disqualify the residents of the towns named, there would have been an express provision to that effect." It thus appears that the statute in reference to the establishment of roads was attempted to be applied to the drainage laws of that state, and the court held it did not apply. The court also held that mere residence in the town did not of itself, outside of any statutory provision, create such an interest in the cause as to make such a resident incompetent to act as a commissioner. But that is very different from the case at bar. There the commissioners had no personal pecuniary interest. In the case at bar he had. Hence the inapplicability of that case to the case at bar. In the case of *In re Southern Boulevard*, 8 Abb. Prac. (N. S.) 447, also relied on by the plaintiff, it was held that a commissioner who owned some lots that were taken by the proceeding was not thereby an incompetent commissioner, upon the maxim that no man can be a judge in his own cause. The decision is placed upon the grounds that the court was not aware of that fact when it appointed the commissioners; that no special injury appeared to have resulted to any one because of such interest, but that the affidavits filed in support of the application to confirm the report showed the reverse to be true, and that, even if these things were not sufficient in law, still the maxim did not apply, because it applies only to judicial officers, and not to quasi judicial officers, like commissioners; and that the commissioner did not act in the appraisal of his own land; and that the objection was waived because it was not made at the time the appointment was made. Of this case it is only necessary to say that it is not in harmony with the analogous decisions of this court, hereinbefore referred to. Furthermore, it is not in line with the great weight of authority in England and America. 17 Am. & Eng. Ency. Law (2d Ed.) p. 732, and cases cited in notes. In *Doddridge v. Stout*, 9 W. Va. 703, it appeared that the statute required the commissioners to be freeholders, and that one of those who was

appointed and acted was not a freeholder, and it was held that there was nothing in the record to show that the defendant was prejudiced thereby, and that he waived the objection by not urging it when the commissioner was appointed. The rule laid down by Hurlbut, J., in *Oakley v. Aspinwall*, 3 N. Y. 547, rests upon a much better and sounder basis than that announced in the *West Virginia* case. In the *New York* case the learned judge said: "It is of great importance that the courts should be free from reproach or suspicion of unfairness. The party may be interested only that his particular suit should be justly determined, but the state—the community—is concerned not only for that, but that the judiciary shall enjoy an elevated rank in the estimation of mankind. The party who desired it ought to be permitted to take the hazard of a bias decision if he alone were to suffer for his folly, but the state cannot endure the scandal and disgrace which will be visited upon the judiciary in consequence." Judge Cooley, in his work on *Constitutional Limitations* (6th Ed.) p. 207, says: "And for similar reasons a legislative act which should undertake to make a judge the arbiter in his own controversies, would be void, because, though in form a provision for the exercise of judicial power, in substance it would be the creation of an arbitrary and irresponsible authority, neither legislative, executive, nor judicial, and wholly unknown to constitutional government." The learned judge further says (page 506 et seq.): "There is also a maxim of law regarding judicial action which may have an important bearing upon the constitutional validity of judgments in some cases. No one ought to be a judge in his own cause; and so inflexible and so manifestly just is this rule, that Lord Coke laid it down that 'even an act of Parliament, made against natural equity, as to make a man a judge in his own case, is void in itself; for *jura naturæ sunt immutabilia*, and they are *leges legum*.' This maxim applies in all cases where judicial functions are to be exercised, and excludes all who are interested, however remotely, from taking part in their exercise. It is not left to the discretion of a judge, or to his sense of decency, to decide whether he shall act or not. All his powers are subject to this absolute limitation, and, when his own rights are in question, he has no authority to determine the cause. Nor is it essential that the judge be a party named in the record. If the suit is brought or defended in his interest, or if he is a corporator in a corporation which is a party, or which will be benefited or damaged by the judgment, he is equally excluded as if he were the party named. Accordingly, where the Lord Chancellor, who was a shareholder in a company in whose favor the vice chancellor had rendered a decree, affirmed this decree, the House of Lords reversed the decree on this ground, Lord Campbell observing: 'It

is of the last importance that the maxim that "no man is to be a judge in his own cause" should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest.' 'We have again and again set aside proceedings in inferior tribunals because an individual who had an interest in a cause took a part in the decision. And it will have a most salutary effect on these tribunals when it is known that this high court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care, not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of laboring under such an influence.' It is matter of some interest to know whether the legislatures of the American states can set aside this maxim of the common law, and by express enactment permit one to act judicially when interested in the controversy. The maxim itself, it is said, in some cases does not apply, where, from necessity, the judge must proceed in the case, there being no other tribunal authorized to act; but we prefer the opinion of Chancellor Sandford of New York that in such case it belongs to the power which created such a court to provide another in which this judge may be a party, and, whether another tribunal is established or not, he at least is not intrusted with authority to determine his own rights or his own wrongs. It has been held that, where the interest was that of corporator in a municipal corporation, the Legislature might provide that it should constitute no disqualification where the corporation was a party. But the ground of this ruling appears to be that the interest is so remote and insignificant that it may fairly be supposed to be incapable of affecting the judgment or of influencing the conduct of an individual. And where penalties are imposed, to be recovered only in a municipal court, the judges or jurors in which would be interested as corporators in the recovery, the law providing for such recovery must be regarded as precluding the objection of interest. And it is very common in a certain class of cases for the law to provide that certain township and county officers shall audit their own accounts for services rendered the public; but in such case there is no adversary party, unless the state, which passes the law, or the municipalities, which are its component parts and subject to its control, can be regarded as such. But except in such cases resting upon such reasons, we do not see how the Legislature can have any power to abolish a maxim which is among the fundamentals of judicial authority. The people of the state, when framing their Constitution, may possibly establish so great an anomaly, if they see fit; but, if the Legis-

lature is intrusted with apportioning and providing for the exercise of the judicial power, we cannot understand it to be authorized, in the execution of this trust, to do that which has never been recognized as being within the province of the judicial authority. To empower one party to a controversy to decide it for himself is not within the legislative authority, because it is not the establishment of any rule of action or decision, but is a placing of the other party, so far as that controversy is concerned, out of the protection of the law, and submitting him to the control of one whose interest it will be to decide arbitrarily and unjustly. Nor do we see how the objection of interest can be waived by the other party. If not taken before the decision is rendered, it will avail in an appellate court, and the suit may there be dismissed on that ground. The judge acting in such a case is not simply proceeding irregularly, but he is acting without jurisdiction. And, if one of the judges constituting a court is disqualified on this ground, the judgment will be void, even though the proper number may have concurred in the result, not reckoning the interested party." In addition to the cases cited in support of the text; other English and American cases holding that it is beyond the power of Parliament or of a legislature to confer upon a person the right to act as judge in any controversy in which he is personally and peculiarly interested are collated in 17 Am. & Eng. Enc. Law (2d Ed.) p. 733, and notes.

Without further elaboration, it follows that Seaman was not a competent commissioner, and that the circuit court was right in so holding, and in setting aside the report of the commissioners and the judgment of the county court.

The judgment of the circuit court must, therefore, be affirmed, and the cause remanded to the county court of Lincoln county, to be by it taken up and tried as if the original petition was presented to it for the first time, and to proceed with the cause without regard to anything that has heretofore been done in the cause, but in conformity herewith and with the statute. All concur, except ROBINSON, J., absent.

BOWEN v. CITY OF HOLDEN.

(Court of Appeals at Kansas City, Mo. Dec. 2, 1901.)

EXECUTION—EXEMPTIONS—JUDGMENTS—SET-OFF.

1. Rev. St. 1899, § 3162, provides that each head of a family may, in lieu of other statutory exemptions, select and hold free from execution any property or debts or wages, not exceeding \$300 in value. Section 4495 provides for the set-off of final judgments between parties to a suit, and the credit of execution with the amount of such set-off. *Held*, that the statutes must be construed together, and a judg-

ment for costs in favor of defendant could not be set off against a \$300 personal injury judgment recovered by plaintiff, who was the head of a family, had no other property, and claimed such judgment as an exemption.

Appeal from Circuit Court, Johnson County; Wm. L. Jarrott, Judge.

Action by one Bowen against the city of Holden. There was a judgment of recovery for plaintiff, and for costs for defendant, and defendant paid the amount of plaintiff's judgment into court, and moved to have the judgment for costs satisfied out of such amount. From a judgment denying the motion, defendant appeals. Affirmed.

Frank B. Fulkerson, for appellant. Jas. A. Kemper, for respondent.

SMITH, P. J. Plaintiff sued defendant to recover damages for personal injuries sustained in consequence of the negligence of the latter. There was a trial, resulting in a judgment for plaintiff for \$300, with costs. Five days after this judgment was rendered, the court, on the motion of the defendant, set aside said judgment as to costs, and, instead thereof, entered a judgment in favor of defendant against plaintiff for the costs. The ground upon which it changed the original judgment, as just stated, was that the plaintiff had not presented his claim to the city council before commencing his suit, as required by statute in such cases. After the defendant was given a judgment for costs against plaintiff, it paid into the hands of the clerk the amount of said judgment, and interest thereon, and then filed a motion to require the clerk to satisfy the judgment in its favor for the costs out of the amount it had paid into his hands in satisfaction of the plaintiff's judgment. At the hearing of this latter motion, it was shown that plaintiff was the head of a family, and had no property except the said \$300 judgment against defendant, and that he claimed said judgment as exempt, and not subject to set-off. The trial court adopted the plaintiff's view, and so overruled the defendant's motion. Defendant thereupon appealed.

There was an unsuccessful attempt "to kill two birds with one stone," or to satisfy two judgments with one payment, and which would, no doubt, have succeeded, but for the statute of exemptions. It seems to us that the plaintiff, under these statutes, as we have several times construed them, was entitled to hold as exempt \$300 of whatever judgment he recovered against defendant on his claim. Nor do we think that the plaintiff could be deprived of his exemption by the statute of set-off or counterclaim. The statute of exemptions (sections 3159-3162, Rev. St. 1899) and that of set-off (section 4495, Rev. St. 1899) must be construed together, and the latter should not be so construed as to nullify the former. *State v. Hudson*, 86 Mo. App. 501; *Lewis v. Gill*, 76 Mo. App. 504; *Wagner v. Furniture Co.*, 63 Mo. App. 211. The first of the above cases was where

¶ 1. See Exemptions, vol. 23, Cent. Dig. § 134.

the Vermont Marble Company held the notes of Kendrick & Wagie, on which it brought suit by attachment, which failed, but judgment was rendered on the notes against Kendrick. The latter then sued the sureties on the attachment bond for damages. The marble company was made party defendant, and was permitted to plead its judgment as a set-off against the claim of Kendrick arising out of the wrongful attachment. While the right of the marble company to its set-off against the claim of Kendrick was upheld, it was subject to Kendrick's right of exemption under the statute, or, in other words, it was held that Kendrick was entitled to hold as exempt from the set-off \$300 of the amount of any judgment obtained on the attachment bond. So, in the present case, we must think that the plaintiff was entitled to hold as exempt the first \$300 that he recovered on his claim against defendant. This right attached to the claim, and the fact that such claim was merged into a judgment did not alter the plaintiff's rights. When the judgment was rendered in plaintiff's favor, \$300 of it was exempt, and his right thereto could not be impaired by any of the provisions of the statute in relation to set-off. If, as was the case, the defendant afterwards obtained a judgment against plaintiff for costs, we cannot see that for that reason it was different than if it had been based on any other claim. It could no more override the plaintiff's right of exemption with a judgment of that kind than it could with any other. Of course, if the plaintiff had recovered an amount in excess of \$300, then the defendant's judgment for costs would have been available as set-off. The case is not one of mutual credits, nor that where two persons had trusted each other, nor that where a presumption of law arises that the defendant was induced to trust the plaintiff by having a pledge or credit in his hands. It is no more than one where the defendant, by its negligence, subjected plaintiff to grievous personal injuries, for which it was legally liable to pay him an indemnity. This indemnity, to the extent of \$300, was, we think, exempt from any claim against plaintiff, whether asserted by way of set-off, counterclaim, or otherwise. Any other construction would destroy the very intention and object of the statute, the wisdom of which is doubtless well illustrated by the present case.

We think the judgment of the circuit court should be affirmed, and it is so ordered. All concur.

SHINN v. WOODERSON et al.

(Court of Appeals at Kansas City, Mo. Jan. 20, 1902.)

INTEREST—RECOVERY—PLEADING—DEMAND.

1. Where there was no agreement to pay interest on a loan, demand for the amount due

and the date of such demand must be alleged and proved in order to justify a judgment for interest.

Appeal from Circuit Court, Clinton County; A. D. Burnes, Judge.

Action by George W. Shinn against J. I. Wooderson and others. There was judgment for plaintiff, which was set aside on motion in arrest, and plaintiff appeals. Reversed, and rehearing granted. Affirmed on rehearing.

F. B. Ellis, for appellant. Jno. A. Cross & Sons and E. C. Hall, for respondents.

BROADDUS, J. The petition in this case was filed in the office of the circuit clerk of Clinton county, Mo., on the 12th day of August, 1899, and on the same day service was had on the defendants mentioned in the caption. On the 20th day of September, 1899, and on the ninth day of the regular term of said court, the plaintiff was allowed to amend his petition by making Valentine Harmon and Richard Wear defendants, and the judgment then and there rendered shows that said Harmon and Wear entered their appearance, and that the defendants Wooderson, Maret, and Kenney made default, and the defendants' (without specifying which defendants) "demurrer to the petition is taken up and overruled, and all and singular the matters and things are submitted to the court upon the pleadings and the proof," etc., and the court finds for the plaintiff a balance due on his account \$272.81, with interest at 6 per cent. from March 22, 1894, and declares a lien on the premises described in the petition to the extent of his judgment. On September 23, 1899, the defendants Harmon and Wear filed their motion to set aside the judgment by default, and the other defendants also filed motion to set aside judgment by default and motion in arrest of judgment. On the 29th day of March, 1900, on the twelfth day of the regular term of said court, the court sustained the motion of defendants Harmon and Wear to set aside said judgment of default, and leave was given them to plead in 20 days after the adjournment of court, and the plaintiff was allowed 10 days after adjournment to amend his petition by interlineation, and the cause was continued until the next term. At the next term, 1900, the case was continued until the next term upon the application and at the cost of the plaintiff. On the 12th day of September, 1900, the plaintiff dismissed his suit against defendants Harmon and Wear. On the 25th day of September the motion in arrest of judgment filed by the remaining and original defendants to the suit was taken up and sustained. It is from this judgment that the plaintiff has appealed. The petition reads as follows: "George W. Shinn, Plaintiff, against J. I. Wooderson, D. H. Maret, E. G. Kenney, Richard Wear, and Valentine Harmon, Trustees for the Calvary Baptist Church of Lathrop, Missouri,

Defendants. Plaintiff states that on the 7th day of October, 1892, George W. Shinn, this plaintiff, and Valentine Harmon and Richard Wear, James B. Scott, Willmana Scott, his wife, Ed. L. Scott and Anna May Scott, his wife, conveyed to J. I. Wooderson, D. H. Maret, and Geo. W. Shinn lot 8 in block 24 in the city of Lathrop, Clinton county, Missouri, for the purpose of erecting and building thereon a church to be known as the 'Calvary Baptist Church of Lathrop.' That on the ——— day of ———, 1896, the members of said Calvary Baptist Church duly elected the above-named defendants Wooderson, Maret, and Kenney as the successors of the said Shinn, Wear, and Harmon, who are now the trustees for said church for the purpose of holding the title thereof and for the management of the business affairs thereof. That for the purpose of purchasing said lot and the erection of said church the plaintiff furnished to said trustees the sum of \$1,812.96. That there has been paid on said sum by defendants the sum of \$1,540.15, the amount of which will more fully appear by an itemized account which is herewith filed and made a part of this petition and marked 'Exhibit A.' That out of said sum so paid by plaintiff there remains due plaintiff \$272.81, together with six per cent. interest thereon from March 22, 1894, the date of the last item in said account. Plaintiff says that it was understood and agreed by and between the plaintiff and the said other trustees and members of said congregation that, if plaintiff would pay off and discharge the obligations of said church as aforesaid, the plaintiff should, in case of the failure of said trustees to pay said sum as aforesaid, then the said officers were to execute and deliver to plaintiff a mortgage upon said lot for the balance of said sum. That the defendants have failed and refused to pay said sum, although the same is now past due and has been demanded. Wherefore plaintiff prays judgment for the sum of \$272.81, with six per cent. interest thereon from March 22, 1894, and that the same be declared a mortgage and lien upon said lot and church building, and, in case of the failure of defendants to pay said sum, the same to be sold to satisfy said debt and interest, and for such other and further relief as plaintiff in equity may be entitled to have. F. B. Ellis, Att'y for Plaintiff." An itemized account of moneys laid out and expended in behalf of the trustees of the church is attached to the petition. The last item, according to the account, was furnished March 22, 1895, but the petition alleges the date to have been March 22, 1894; and, as it is the petition that we will have to consider, and not the account, the latter date will be held as the true date. The court arrested the judgment on the following motion, viz.: "(1) That upon the record the judgment is erroneous. (2) That the petition does not

state facts sufficient to constitute a cause of action against the defendants. (3) That the judgment and finding of the court are not responsive to the issue made by the pleadings. (4) That the judgment is not sustained by the pleadings. (5) That upon the face of the petition it is shown that plaintiff's cause of action is barred by the statute of limitation."

It is claimed by the defendants that the petition shows that the account sued on is barred by the statute of limitation, the last item of the account having been furnished more than five years before the beginning of the suit; and, as it is a matter that appears on the face of the petition, advantage can be taken of it by a motion in arrest of judgment. If this suit was upon an open account, the position of the defendants is right, and the judgment of the circuit court sustaining the motion in arrest of judgment should be affirmed. But is this a suit upon an account as a legal proposition? The petition alleges that in 1896 the members of the Calvary Baptist Church at Lathrop, Mo., purposed to purchase a lot and build a church thereon, whereupon, through the trustees of the church, it was agreed between them and plaintiff that plaintiff would furnish them the sum of \$1,812.96 to pay for the lot and erect the church building thereon; that plaintiff furnished said amount; that the defendants agreed to repay said amount to the plaintiff, and that there still remains due to him the sum of \$354.15, which the said trustees have failed and refused to pay; that said sum, with interest, amounting to \$354.41, is now due him. Plaintiff further alleges that it was understood and agreed by and between the plaintiff and the said other trustees and members of said congregation that, if plaintiff would pay off and discharge the obligations of said church as aforesaid, then the said officers were to execute and deliver to plaintiff a mortgage upon said lot for the balance of said sum; and that the defendants have failed and refused to pay said sum, although the same is now past due, and has been demanded. The lot on which the lien is sought to be enforced is lot 8, block 24, in the city of Lathrop, Clinton county, Mo. An inspection of the petition will show that it is artificially drawn, and is somewhat vague and indefinite, but it is sufficiently definite to gather the purpose of the pleader. It may be properly characterized as a defective pleading. In other words, it is a defective statement of a good cause of action, which is an objection that must be taken before trial and judgment, or the defect is waived.

The main question, however, remains, viz., is this a suit upon an account as the term is understood in law? It is true that the plaintiff filed an itemized account of the amount of money he expended, but, in view of the other allegations of the petition, we do not think it is a suit upon an account. The peti-

tion alleges that plaintiff agreed to furnish, for the use of the trustees in the purchase of the lot and for the purpose of building the church thereon, \$1,812.96, upon an agreement that upon failure of the trustees to reimburse him he was to have a mortgage upon the lot in question. The rendition of the account by items will be treated merely as evidence offered upon the part of plaintiff to show that in good faith he did pay out the amount he agreed with defendants to advance. The petition sets out that he furnished that amount to the trustees upon the understanding that, if he was not repaid, he was to have his lien upon the lot. The amount that he was to let the trustees have was agreed upon and fixed at the sum stated. It follows, then, this is not a suit upon an account, but a suit upon an agreement. Is the agreement itself barred by the statute of limitation? If it was not in writing, it would be. As we have only the record proper before us, there is no means of determining whether it was or not. However, the rule of law in this state is: "That when a petition declares on a contract, without disclosing whether it is in writing or rests in parol, it will be presumed to be the allegation of a valid contract. When the contract is not denied, the statute must be specifically pleaded, but, if the contract is denied, the statute may be invoked at the trial, but, if not then invoked, it will be waived, as it is an affirmative defense." See *Van Idour & Co. v. Nelson, Webb & Aylor*, 60 Mo. App. 523, and cases therein cited. The contract in said suit, not being denied by any answer (there being a judgment by default), must be taken as a valid contract; that is, a contract in writing. If, then, the presumption must prevail under the foregoing rule of pleading that the contract was a valid one—that is, in writing—neither the statute of frauds nor the statute of limitation can be invoked against the judgment. If in writing, it is a valid contract, and one which may be enforced at any time within 10 years. See *Rev. St. 1899, § 4272*.

It may not be amiss to state further that, as the agreement of the trustees to repay the plaintiff the sum of money advanced by him for them to pay for the lot and erect the church in question, being presumed to be in writing, in order to defeat the statute of frauds, independent of any other or further agreement, would entitle him to a judgment against the defendants as trustees for the amount they failed to repay him. Therefore that part of the judgment for the amount of his claim, as well as that part enforcing his agreement for a lien on the lot, are each upheld as good in law. We can discover no good cause for the arrest of judgment herein.

It is therefore ordered that the cause be remanded, with directions to the circuit court to set aside its judgment of arrest, and that said original judgment be restored in all particulars. All concur.

On Rehearing.

(March 3, 1902.)

On motion for rehearing it is suggested that the original judgment, which allowed plaintiff interest on the principal sum from the 22d day of March, 1894, was in that respect erroneous, because there was no date of demand alleged in the petition. Upon examination we find that the petition alleges that plaintiff did make demand for his claim, but does not state at what time it was made. It is the law that demand (where, of course, there is no agreement to pay interest) must be alleged and proved before interest can be allowed. *Phillips v. Laclede County*, 76 Mo. 68, *Southgate v. Railroad*, 61 Mo. 89, and other cases. As the petition does not allege that payment was demanded at any particular date, it is, in effect, as if no demand had been made at any time. Not knowing what grounds the trial court had for setting aside the judgment, as the point was not called to our attention when the case was originally submitted, we did not notice this defect in the judgment. As the suit was not commenced until the 12th day of August, 1899, the amount of interest allowed from the 22d day of March, 1894, was in excess of what the plaintiff was entitled to under the allegations of his petition. This case illustrates the necessity of submitting to the appellate courts all questions upon which a party relies for either reversing or sustaining the judgment of a trial court. And, if this question was raised for the first time for the purpose of overturning the judgment of a circuit court, it would be disregarded, but, as it is our duty to uphold such judgments when correct, we do not feel at liberty even now to decline to do so.

It follows, therefore, that the motion for a rehearing should be sustained, and the cause affirmed.

WENDALL v. CHICAGO & A. RY. CO.*

(Court of Appeals at Kansas City, Mo. May 25, 1903.)

MASTER-SERVANT'S INJURIES—SAFE PLACE TO WORK—DIRECTING VERDICT.

1. Plaintiff was employed by defendant as a car cleaner, working on a plank platform built out of 3x10-inch yellow pine laid longitudinally, and uncovered, and which, as to material and structure, conformed to that which was usual and customary among railroads. The surface of the platform had, while comparatively new, become somewhat splintery by exposure to the weather and constant trundling done over it, but was otherwise in good condition. Plaintiff was injured while walking on the platform by a splinter penetrating through the sole of his shoe into his foot. *Held*, that the platform was a reasonably safe place for plaintiff to work in, and he could not recover for his injury.

2. In an action for personal injuries to a servant, where plaintiff alleges that the master failed to furnish a reasonably safe place to work, and the evidence is undisputed as to the

*Rehearing denied June 22, 1903.

facts, the question of the safety of such place is for the court.

Appeal from Circuit Court, Jackson County; James Gibson, Judge.

Action by Albert A. Wendall against the Chicago & Alton Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

Franklin Houston and T. B. Buckner, for appellant, cited 2 Rorer on Railroads, 1038, 1039, and authorities there cited; Kelly v. Union Railway & Transit Co., 11 Mo. App. 1; Yancey v. Wabash, St. L. & P. R. R. Co., 90 Mo. 433, 6 S. W. 272; Bell v. H. & St. J. R. R. Co., 86 Mo. 599; Zimmerman v. H. & St. J. R. R. Co., 71 Mo. 476; Lenix v. Railroad, 76 Mo. 86; Harris v. Mo. Pac. R. R. Co., 40 Mo. App. 255; Jackson v. Mo. Pac. Ry. Co., 104 Mo. 448, 16 S. W. 413; Hyde v. M. P. Ry. Co., 110 Mo. 272, 19 S. W. 483; Drake v. C. & A. R. R. Co., 51 Mo. App. 562; Weaver v. Bellefontaine R. R. Co., 60 Mo. App. 207; Weber v. Railroad, 100 Mo. 194, 12 S. W. 804, 13 S. W. 587, 7 L. R. A. 819, 18 Am. St. Rep. 541.

Frank P. Walsh, for respondent.

SMITH, P. J. The defendant is an incorporated railway company, which had and maintained in its yard at Kansas City a track known as "No. 7 Track," and abutting against it on the north side for a distance of about 300 feet was a plank platform, the width of which was about 9 feet. On the other side of the platform were two small buildings, about 25 feet apart, which extended up to and opened upon it. In one was a hydrant, where the employes performed their ablutions, after which they went into the other, where there were lockers in which they kept their clothes. The platform had been constructed, three or four months previous to the accident, out of 3x10-inch yellow pine plank laid down longitudinally, and was uncovered. It was built for the benefit of the coach cleaners and car repairers, who cleaned coaches from it. It was also used to run wheelbarrows and trucks over in hauling ice and coal, and in jacking up cars, etc. Both as to material and structure it conformed to that which was usual and customary among railroads. At the time of the accident the upper surface of the platform was in a more or less splintery condition—a condition brought into existence by exposure to meteorological vicissitudes and the constant trundling done over it. The plaintiff, at the time he was hurt, had been in the employ of the defendant in the capacity of car cleaner for upwards of a month. One of the duties of his employment was to daily sweep off the platform, and while in the performance of this duty he noticed that the splinters or loose fibers on the rough plank "caught pieces of waste." One day after he had finished his work, and had "washed up" in the hydrant room, and while walking over the platform

on his way to the building in which his street clothes were kept, his right foot came in contact with the sharp end of a splinter, five or six inches long and about a half inch wide, projecting from the surface of a plank in the platform, which penetrated through the sole of his shoe into the bottom of his foot, well forward, passing upward about two inches. The wound thus inflicted was very serious, requiring several months' medical and surgical attention. He was greatly disabled, and had not entirely recovered at the time of the trial. The shoe worn by him at the time of the injury was double-soled; the outer one having been worn through under the ball of the big toe, where the splinter penetrated. The foregoing is a statement of the salient facts of the case as disclosed by the evidence, to which the defendant interposed a demurrer.

The decisive question thus raised is whether or not the plaintiff made out a prima facie case entitling him to go to the jury. Undoubtedly the law enjoins upon the employer the duty to furnish the employe in his service a reasonably safe place in which to perform the work assigned to him, and in default of the performance of this duty he is guilty of negligence. As to what is a reasonably safe place to work, where the evidence relating thereto is conflicting, the case is one for the consideration of the jury; but where the evidence is undisputed, or all tends the same way, then it is a question solely for the court. Smith v. Coal Co., 75 Mo. App. 177, and cases cited in defendant's brief. What is meant by a safe place which the employer is required to furnish his employe to work in or about is not the obvious or patent safety or unsafety of such place, because, in the nature of things, many kinds of labor have to be performed under conditions relatively unsafe and often dangerous. Engler v. Bothe, 117 Mo., loc. cit. 500, 22 S. W. 1113. The employer is not an insurer to the employe of the safety of the appliance with, or the place in, which the latter is required to perform the work required of him. Nor is he responsible for not providing against all possible and unanticipated happenings. Marshall v. Hay Press Co., 69 Mo. App., loc. cit. 260; Glover v. Bolt & Nut Co., 153 Mo. 327, 55 S. W. 88. He is not required to provide a place that shall be safe under all possible circumstances. Turner v. Haar, 114 Mo. 335, 21 S. W. 737. It is a part of his duty to use ordinary care to furnish a place in which to work which is reasonably safe, so far as the nature of the employment permits, and not to expose the employe to any unknown risks not ordinarily incident to the employment. Dayharsh v. Ry. Co., 103 Mo. 570, 15 S. W. 554, 23 Am. St. Rep. 900. And the employe has a right to rely on the performance of this duty by his employer. Street's Car Line v. Bonander, 97 Ill. App. 601.

Now, looking at the facts of the case as we have stated them to be, in the light of the

principles to which we have just adverted, and what ought to be our conclusion? Has the defendant been guilty of any breach of duty which he owed the plaintiff, and, if so, in what? It may be conceded that the duty of the defendant to provide a reasonably safe place in which the plaintiff was to perform his work extended to the platform over which the latter was walking when injured. *Heldmaier v. Cobbs*, 96 Ill. App. 325. The defendant's duty to the plaintiff required, as we have seen, no more of him than that he furnish a reasonably safe place in which to do the work assigned to him; and as the platform may be regarded as one of the places in which the plaintiff was obliged to go in performing the duties of his employment, and for the reasonable safety of which the defendant was responsible, the question narrows itself down to whether or not it was reasonably safe, regard being had for the use to which it was put. It was of the usual and customary material and construction of platforms used for similar purposes. It was comparatively new. No defect or imperfection is shown to have existed in it, unless it be the splinters that had been developed on the surface of the plank therein by the action of the weather and the ordinary use to which it had been subjected. If the plank therein had been new, and laid down the day before the accident, it could not have been safer, except as to the splintery condition. The accident which happened to plaintiff could not have been reasonably foreseen or anticipated, and surely no duty of the defendant required him to provide against it, because that would be most unreasonable indeed. If the plaintiff had complained that the splintery condition of the platform rendered it unsafe, what could the defendant have done to obviate that condition? It is true that it could have taken up the old plank, and laid down new ones in their stead; but was it required to do that, since the platform was already reasonably safe for the use to which it was subjected? This would have imposed on it the duty to have made it safe under all circumstances—a duty which the law does not require. If the defendant was required to do this, then it became an insurer to the plaintiff of its absolute safety. It may have been that, had the plank been laid transversely rather than longitudinally the risk of the danger to be apprehended from splinters would have been less; but the fact that the platform could in that way have been made safer does not establish that it was not reasonably safe and fit for its designed use. *Berning v. Medart*, 56 Mo. App. 443; *Higgins v. Railway*, 43 Mo. App. 547; *Friel v. Railway*, 115 Mo. 503, 22 S. W. 498. To hold that it was a duty the defendant owed its employees to tear up this structure on account, alone, of the splinters that had been produced on its surface, and replace it with a new one, in order to avoid liability in a case of this kind, is, we think,

going too far. Before the plaintiff is entitled to recover, we must hold that it was a duty the defendant owed him to furnish him a platform which was not only reasonably safe, but absolutely so; and this we are not authorized to do.

It is well settled that negligence cannot be presumed, where nothing is done out of the usual course of business, unless the course is improper. There must be some special circumstance calling for more particular care. Nothing is shown indicating any act or omission not incident to the constant use of the platform, or indicating fault. When something unusual occurs which injures an employé, but such unusual occurrence is not even inferentially the result of an unusual act, and the employer has, so far as he is concerned, been pursuing his usual course, which had theretofore been done in safety, then the unusual occurrence is what is called an "accident." From the facts—the warp and woof of this case—it appears that the happening of the plaintiff's injury cannot be attributed to any fault or breach of duty of the defendant; and it was, therefore, but an accident, for which the defendant cannot be held liable. *Saxton v. Ry. Co.* (Mo. App.) 72 S. W. 717; *Whitaker's Smith on Negl.* (2d Am. Ed.) 524; *Shearman & Redf.* §§ 15-16; *Anderson's Law Dict.* 12; *Buswell on Per. Inj.* § 111. As has already been stated, the material facts of the case were uncontroverted, and it was, therefore, one for the court and not for a jury. As was said by the very able and learned judge, "the latchet of whose shoes I am not worthy to unloose," in the course of his dissenting opinion in *Fugler v. Bothe*, supra, which was approved by the Supreme Court and has become a leading negligence case in this state: "It is a matter of daily experience, of which many courts have even taken judicial notice, that the submission of a case of this class to the jury always leads to the same result. To relieve the distress of others is a commendable impulse, which juries are but apt to follow, although they must necessarily do it at the expense of others. They are apt to forget that judicial charity, under the guise of law and at the expense of others, is but an act of licensed oppression."

In our opinion, the trial court erred in denying the defendant's demurrer to the evidence, and accordingly the judgment must be reversed. All concur.

WABASH R. CO. v. FLANNIGAN et al.
(Court of Appeals at St. Louis, Mo. May 13, 1902.)

INTERPLEADER — PARTIES — ENTITLED TO —
JUDGMENT DEBTORS — CONSENT OF
DEFENDANT — EFFECT.

1. Judgment for money due as wages was recovered by a servant against his master, which judgment was affirmed on appeal. Subsequently the master was garnished for the same wages

by a creditor of the servant, and, failing to set up the defense of the servant's judgment or to establish the defense set up, judgment was rendered against it. *Held*, that the master could not compel the assignee of the servant's judgment to interplead with the creditor, and thus relitigate his claim.

2. The fact that the creditor consented, by answer, to the interpleader, could not confer jurisdiction on the court over the servant's assignee against his consent.

Appeal from St. Louis Circuit Court; William Zachritz, Judge.

Interpleader suit by the Wabash Railroad Company against Alexander Flannigan and Virgil Rule. From a judgment denying the relief prayed for, plaintiff appeals. Affirmed.

Geo. S. Grover, for appellant. Charles P. Johnson and John D. Johnson, for respondent Rule.

BLAND, P. J. Plaintiff, by its third amended petition, averred that plaintiff was first organized as a railroad corporation under the laws of the state of Ohio, and subsequently organized under the laws of the states of Illinois and Missouri; that on the 1st day of August, 1889, and ever since, it has been continuously and without change a consolidated corporation; that in the months of May and June, 1891, defendant Tourville earned, as an employé of plaintiff, \$81.98, more or less; that defendant Flannigan, in April, 1895, instituted an attachment proceeding against Tourville before James H. Wyatt, a justice of the peace for St. Clair county, Ill., who had jurisdiction both of the subject-matter and person of defendant Tourville, and garnished the plaintiff in the cause; and that on June 14, 1895, judgment was rendered by said justice in said cause against Tourville and the plaintiff, as garnishee, for \$81.98, and that the said judgment was not appealed from, and remains in full force and effect, no part of it having been paid by Tourville or the Wabash Railroad Company, and that an appeal by the Wabash Railroad Company, as garnishee, would have been wholly unavailing under the laws of Illinois as there in force; that on the 10th of June, 1891, Tourville instituted a suit before a justice of the peace in the city of St. Louis, state of Missouri, against the Wabash Railroad Company, claiming the sum of \$81.98 due him for wages earned in the service of said railway company, and that said suit was tried and passed through various courts of this state by appeal, resulting in a judgment of \$81.98, which was finally affirmed by the Supreme Court of the United States; that both judgments are for the same sum of money, and that plaintiff never owed Tourville but the one sum of \$81.98; that Tourville has assigned his judgment to defendant Virgil Rule, and that Flannigan and Rule were each undertaking to collect his several judgment, and that plaintiff is in danger of having to twice pay the said sum of \$81.98, and alleges that it is

ready and willing to pay the said sum, with interest, to the party to whom it is due, but that it is unable to determine or to know whether the said sum and interest should be paid to Flannigan, or to Tourville and Rule, and prays that they be directed to come into court and interplead for said moneys. A temporary restraining order was issued, to which defendant Rule made return, assigning 17 reasons why plaintiff should not maintain its bill, and asked that the restraining order be dissolved. On the 22d day of April, 1901, plaintiff filed its motion for the relief prayed for, notwithstanding the return of defendant Rule, as follows: "Now comes the plaintiff in the above-entitled cause, by its solicitor, and moves the court here to continue its restraining order now in force, and to proceed with all convenient speed at its convenience to hear and determine the plaintiff's bill of interpleader therein filed, notwithstanding the return of Virgil Rule, defendant, filed in this cause April 19, 1901, for the following reasons, to wit: First. Because this court has full and complete jurisdiction over this matter. Second. Because plaintiff is entitled to the relief here prayed for, notwithstanding said return. Third. Because said return states no facts which would deprive the plaintiff of the relief prayed for. Fourth. Because, unless the relief here prayed for is granted to plaintiff, said defendants, Virgil Rule and Alexander Flannigan, will immediately proceed to defeat said bill of interpleader by compelling the plaintiff, a mere stakeholder, to pay the sum twice out of the sum in plaintiff's hands. Fifth. Because the plaintiff is entitled to the relief here prayed for, both at law and in equity, upon the facts stated in its third amended petition, and admitted in the return of said Virgil Rule." On the same day, defendant Flannigan filed the following separate answer, to wit: "Now on this day comes the defendant, Alexander Flannigan, having entered his voluntary appearance in this cause, by his attorney, to plaintiff's third amended petition, and says: He admits each and every allegation set forth in the petition of the plaintiff. Defendant further says that by virtue of said judgment of Peter Tourville against the Wabash Railroad Company, to the use of Alexander Flannigan obtained in Illinois, as stated in plaintiff's third amended petition, this defendant thereby obtained a lien upon said sum of \$81.98, prior in right to all liens, if any, upon said sum or sums claimed by Peter Tourville or his assignee, Virgil Rule, from the Wabash Railroad Company, and is therefore, by virtue of said lien, entitled to the payment of said sum from the Wabash Railroad Company. Wherefore this defendant, under the facts stated in the plaintiff's third amended petition and this defendant's amended answer, says that he is entitled to said sum of \$81.98 mentioned, for which, with his costs, he prays judgment." On April 29, 1901,

the court dissolved the temporary injunction, and entered judgment against plaintiff, denying the relief prayed for. After an unsuccessful motion for new trial, plaintiff appealed. After the appeal was perfected, the plaintiff obtained, in vacation, an order from one of the judges of this court, restraining the collection of an execution which defendant Rule had sued out on the Tourville judgment. A motion to dissolve this restraining order has been filed in this court.

Counsel for appellant has incorporated in his statement and brief a history of its litigation with Tourville and Flannigan. This history, while interesting as history, has no place in the record beyond what is set forth in the bill for an interpleader, and what appears in the opinions of the appellate courts of this state, to which the Tourville case was taken by successive appeals. From the bill for an interpleader it appears that Tourville began a suit against the appellant on June 10, 1891, before a justice of the peace, and from the court reports it appears that on March 26, 1895, this judgment was made final by the decision and mandate of the St. Louis Court of Appeals. 61 Mo. App. 534; *Id.*, 148 Mo. loc. cit. 624, 50 S. W. 300, 71 Am. St. Rep. 650. The bill for an interpleader alleges that Flannigan begun his suit by attachment in the state of Illinois, and garnished the appellant on June 14, 1895, so that it affirmatively appears, when the Flannigan suit was commenced, Tourville had reduced his claim to a final judgment, and that his cause of action was merged or drowned in the judgment. *Cooksey v. Railroad*, 74 Mo. 477; *Freeman on Judgments* (4th Ed.) § 215. At the time Flannigan commenced his suit the old debt had ceased to exist, and was not thereafter the subject of garnishment under the laws of this state. *Drake on Attachments* (7th Ed.) 622; *Tourville v. Wabash R. R. Co.*, 148 Mo. 624, 50 S. W. 300, 71 Am. St. Rep. 650. But it appears that a different rule prevails in the state of Illinois, and that an indebtedness upon which a judgment has been rendered is the subject of garnishment (*Minnard v. Lawler*, 26 Ill. 301; *Luton v. Hoehn*, 72 Ill. 81; *Allen v. Watt*, 79 Ill. 284), and that this may be done even where the judgment was rendered by one court and the garnishment proceedings were in another and inferior court. *Luton v. Hoehn*, *supra*. In *Allen v. Watt*, *supra*, it was held that, where a debt has been recovered from a debtor by garnishee process under attachment proceedings in a court of competent jurisdiction in another state, the recovery is a protection in Illinois against his original creditor, and the fact that the debt may have been put into a judgment does not change the rule; and the court granted a perpetual injunction restraining the collection of the judgment recovered by the debtor in the Illinois court. In *Drake on Attachments* (7th Ed.) § 621, it is said that where the action is pending in one court and the garnishment in another, and the courts

are of different jurisdictions, that which was first instituted will be sustained; and that when the action is in such a situation that the garnishee, if charged, cannot avail himself of the judgment in attachment as a bar to recovery in the action, he cannot be held as a garnishee. To the same effect, see 14 Am. and Eng. Ency. of Law (2d Ed.) p. 775, and footnote 3. Tourville had recovered his judgment for the debt when the Flannigan suit by attachment was commenced, which judgment was never reversed, and, under the foregoing authorities, the appellant could have successfully interposed the judgment as a bar to a recovery against it as garnishee in the Flannigan suit. The bill of interpleader does not allege that this defense, or any other defense, was interposed by the appellant in the Flannigan suit. Appellant seems to have contented itself by trying to establish an offset of \$43.28 to the Tourville claim it had paid on a prior void judgment rendered against it as garnishee in an Illinois court in favor of Flannigan in his first attachment suit against Tourville. Having failed to establish the offset, it seems to us that it cannot now come into a court of equity and assume the innocent role of a stakeholder, and compel Tourville to relitigate his claim, which he has successfully reduced to a judgment at law. A stakeholder in equity is defined to be "one who has in his hands money or other property claimed by several others." *Bouvier's Law Dict.* A debtor may occupy the situation of a stakeholder in equity when he acknowledges that he owes the debt, that it is due to one or the other of several claimants, but that he is not advised to which of them, and when he deposits the money in court and asks that the contesting claimants may litigate their claims between themselves. The appellant is not in this situation. It does not occupy the equitable ground of a stakeholder. It has contested the Tourville claim through every court to which it could resort, and, having lost in that contest, it is in no position to ask that Tourville or his assignee be compelled to relitigate his claim with a stranger to the original suit. But it is contended by appellant that, as Flannigan voluntarily appeared in court and filed his answer claiming priority to the so-called fund, the court erred in dismissing the bill. The bill was to compel Flannigan and Rule, assignees of Tourville, to interplead. Flannigan's willingness to submit his person and judgment to an interpleader did not have the effect to give the court jurisdiction and power to compel Rule to submit his judgment also to an interpleader, nor deprive him of the right to demur to the appellant's bill on the ground that it stated no equity, nor deprive the court of the right to pass on his return in the nature of a demurrer. Flannigan alone cannot interplead, nor can he force Rule to join in an interpleader. Two things were necessary to authorize the court to order an interpleader: First, an appropriate

bill for that purpose; and, second, jurisdiction of the parties making adverse claims to the thing to be interpleaded for. The court had jurisdiction of the parties, but it ruled that the bill for the interpleader did not state facts sufficient to authorize it to order the parties to interplead. If this ruling of the court was correct, then it rightfully dismissed the bill.

The Tourville and Flannigan judgments are both judgments at law against the same judgment debtor, and for the same debt. Can the defendant in such circumstances compel its judgment creditors to come into a court of equity and interplead for the debt? is the question raised by the pleadings. A judgment is a finality. It ends the controversy as between the parties, and it would seem, on principle, the party in whose favor a judgment has been rendered should not be called upon by the judgment debtor a second time to make good his claim, unless the integrity of the judgment itself is directly attacked for fraud, or that other claimants of the debt or fund, in whose favor no judgment has been rendered, make claim to the fund. We have been cited to no case where it has been held that ordinary judgment creditors, having a common debtor, have ever been required to come into a court of equity and interplead for the purpose of determining which of the two judgments should be paid. Priorities may be adjudicated by an interpleader's bill where there are conflicting claims as to which of several claimants should be first paid out of a particular fund or from the sale of specific property, and on which the claimants claim to have legal or equitable liens; but ordinary judgment creditors are not in this class. That they cannot be compelled to interplead at the instance of a common debtor is, we think, supported both on authority and reason. *Cheever v. Hodgson*, 9 Mo. App. 585; *Dodds v. Gregory*, 51 Miss. 351; *Woodruff v. Taylor*, 20 Vt. 65; *Provident Savings Institution v. White*, 115 Mass. 112. The cases of *Hamilton v. Marks*, 5 De Gex & Smale, 638; *Johnson v. Macey*, 43 Ala. 521; *Mills v. Townsend*, 109 Mass. 115; *Newhall v. Kastens*, 70 Ill. 156; *Building Association v. Joy*, 56 Mo. App. 483—cited and relied on by appellant, do not meet the difficulty in the case at bar. In each of the above cases the debtor occupied the situation of a stakeholder, and as to some of the claimants there had been no judgment. The nonjudgment claimants had never had their day in court, and were therefore in a situation to come into a court of equity and set up their claims against a judgment claimant; but here both claimants have had their day in court, and appellant has had its day and opportunity in court to make its defenses to both of the claims. It defended the Tourville suit, but, from aught that appears in the bill of interpleader and in the pleadings, the defense it might have successfully made as garnishee in the Flannigan suit

it did not make, and it is now too late to require Rule, the assignee of Tourville, to come into a court of equity and interplead for a debt that has been reduced to a final judgment, and to show his superior claim by showing priority of suit and priority of judgment over the Flannigan judgment, which the appellant might have done as garnishee as a bar to that suit. It may be that under the ruling in *Allen v. Watt*, supra, the appellant, after paying the Tourville judgment, may successfully enjoin the collection of the Flannigan judgment in the court of Illinois, but we are clearly of opinion that it is not entitled to the relief prayed for.

On the showing it has made by its bill for an interpleader, the temporary restraining order is dissolved and the judgment is affirmed.

BABOLAY and GOODE, JJ., concur.

KREYLING et al. v. O'REILLY et al.
(Court of Appeals at St. Louis, Mo. July 7, 1902.)

APPEAL—BOND—APPROVAL—POWER OF APPELLATE COURT.

1. Under Rev. St. 1899, §§ 809, 810, providing that the court from which an appeal is taken may fix the amount of the appeal bond, and authorizing any judge of the Supreme Court or of either of the Courts of Appeals, on an inspection of the record, to grant an appeal and fix the amount of the appeal bond, the appellate court has no authority after an appeal has been granted by the circuit court, to fix the amount of an appeal bond, or to take and approve the same.

Appeal from St. Louis Circuit Court, Horatio D. Wood, Judge.

Action by August Kreyling and others against M. B. O'Reilly and others. From a judgment for defendants, plaintiffs appeal, and move the court to fix the amount of an appeal bond, and to approve the bond presented. Motion denied.

H. T. Farrish and T. D. Cannon, for appellants. James E. Withrow, for respondents.

BLAND, P. J. Plaintiffs have filed in this court a certified copy of the judgment rendered by the St. Louis circuit court on June 2, 1902, and a copy of an order granting the appeal therefrom to this court. Plaintiffs also present an appeal bond in the penal sum of \$250, and move this court to fix the amount of the appeal bond, to approve the one they have presented, and to order a stay of execution of the judgment of the circuit court.

The right of appeal did not exist in common law, and is purely statutory. In *re Bauer*, 112 Mo. 231, 20 S. W. 488; *State ex rel. v. Woodson*, 128 Mo. 497, 31 S. W. 105; *State v. Clipper*, 142 Mo. 474, 44 S. W. 264; *State v. Brown*, 153 Mo. 578, 55 S. W. 78. The right itself being purely statutory, such steps can only be taken on the appeal as are provided

for by statute. Under the provisions of section 809, Rev. St. 1899, the court from which an appeal is taken may fix the amount of the appeal bond at the time the appeal was taken. The next succeeding section (810) authorizes any judge of the Supreme Court, or any judge of either of the Courts of Appeals, on an inspection of the record, to grant an appeal, and to fix the amount of the appeal bond. If, after an appeal has been perfected, and a supersedeas bond has been given and approved, and while the case is pending in the appellate court, it is made to appear to the appellate court that the court or judge taking the bond committed error in approving it, as where the bond is defective in form and substance, or when the sureties are insufficient, the appellate court may require a new bond, as a condition to the continuation of the supersedeas. *American Brewing Co. v. Talbot*, 125 Mo. 383, 28 S. W. 555; *American Brewing Co. v. Talbot*, 135 Mo. 170, 36 S. W. 657. Beyond these powers, none are conferred on the appellate court to fix the amount of an appeal bond, or to take and approve the same. The appeal in this case having been allowed by the circuit court, that court alone is vested with the power to fix the amount of the appeal bond. The motion is therefore denied.

HESTER v. JACOB DOLD PACKING CO.
(Court of Appeals at Kansas City, Mo. March 8, 1902.)

MASTER—INJURIES TO SERVANT—SAFE PLACE TO WORK—KNOWLEDGE OF DEFECTS—ASSUMPTION OF RISK—NEGLIGENCE—DEGREE OF CARE—ADMISSION OF EVIDENCE—HARMLESS ERROR—INSTRUCTIONS.

1. Plaintiff, who was injured by the breaking of an old board in a scaffolding, testified that he was a carpenter of 30 years' experience; that he never went on a scaffolding without inspecting it; that he knew that some of the boards in the scaffolding in question were old and were not safe for scaffolding purposes, but did not know that the scaffolding was unsafe. *Held* that, even though defendant could not, by the exercise of ordinary care, have known more in regard to the dangerous condition of the scaffolding than plaintiff knew, it was for the jury to determine whether plaintiff was guilty of negligence in using the scaffolding.

2. Where, in an action by an employé for injuries received by the breaking of a board in a scaffolding, there was evidence tending to show that the attention of defendant's foreman had been called to the unsafe condition of the scaffolding, the trial court properly refused an instruction in the nature of a demurrer to plaintiff's case, though plaintiff's testimony showed that he knew of the unsafe condition of the scaffolding.

3. An employé at work as a carpenter on a scaffolding is not required to exercise the highest degree of care in the performance of his duties in order to avoid injuries.

4. In an action by an employé for injuries received by the breaking of a board in a scaffolding, a witness was asked to state whether the defect could have been easily discovered, to which he answered, "Yes, certainly, yes; the

place where Mr. H. [plaintiff] broke through was rotten." *Held* that, while the question was calculated to elicit a conclusion, the latter part of the answer rendered any error therein harmless.

On Rehearing.

5. Although an employé at work on a scaffolding may know of defects therein, which, however, do not render the scaffolding glaringly dangerous to work on, he may continue his work, and has a right to assume that the scaffolding may be used with safety.

Appeal from Circuit Court, Jackson County; E. P. Gates, Judge.

Action by Daniel Hester against the Jacob Dold Packing Company to recover for negligent injuries. Judgment for plaintiff, and defendant appeals. **Affirmed.**

Lathrop, Morrow, Fox & Moore, for appellant. Hollis & Fidler, for respondent.

BROADDUS, J. This case was in this court once before on appeal, and will be found reported in 84 Mo. App. 451. The plaintiff is a carpenter, and the defendant corporation is engaged in the business of killing and packing meats in Jackson county, this state. On about the 3d day of July, 1898, the defendant was engaged in erecting an ice plant on its premises, and while so engaged it became necessary to have scaffolding for the use of plaintiff and other workmen who were the employes of defendant in constructing said plant. This ice plant under construction consisted of two tanks, each about 35 feet wide, by 70 feet long and 4 feet deep. The framework (called "latticework" by witnesses) was being put on one of these tanks, and, not being strong enough to support the weight of a man, planks were laid across for the use of the workmen in getting about. The boards of the scaffolding were supported at about every 15 or 20 inches. Plaintiff was walking on one of these boards, in going after one of his tools, when it broke, letting his leg into the tank, injuring it. There was evidence tending to show that all the lumber furnished by the defendant was new, good, and sufficient for the purpose intended. There was also evidence to show that the plank which broke with plaintiff was painted, and had nail holes in it, indicating that it had been used before. Much of this statement is taken from the opinion of Judge ELLISON in the case as reported. The case was reversed for error of the trial court in giving a certain instruction for the plaintiff, and remanded for a new trial. The plaintiff's instructions herein, seem to have been framed so as to comply with the opinion of the court rendered as aforesaid. Therefore the plaintiff contends that the case is *res adjudicata*, and should be affirmed. On the contrary, the defendant contends that under the evidence the status of the case has materially changed, and that it should be reversed, because the instructions do not meet the issue under the changed conditions, and because.

¶ 2. See *Master and Servant*, vol. 34, Cent. Dig. § 674.

the court committed error in refusing to give to the jury certain instructions asked by the defendant.

The defendant's claim is that on the second trial the plaintiff's own testimony showed that he knew of the defects of the board that broke under him and caused his injury, as well as it was possible for the defendant's foreman in charge to know. As the first bill of exceptions containing his evidence is not before us, we do not know what his evidence in detail was. But judging from a statement in the opinion referred to, that the "plaintiff testified that he did not notice the defects," we will presume that such was the purport of his testimony. It is therefore to be ascertained from an examination of the record before us, whether at the time of the injury the plaintiff was aware of the defects of said board, or that he possessed as much knowledge in that respect as it was possible for defendant's foreman to have. We will give some of his testimony in answer to questions propounded to him: "Q. Now, you say you have been a carpenter for some thirty years? A. Yes, sir. Q. Have you ever helped to build houses? A. Yes, sir; lots of them. Q. In the course of building houses, Mr. Hester, did you ever see any scaffolding? A. Yes, sir; lots of them. Q. So, as a matter of fact, you have been working around and on scaffolding for some thirty years? A. Yes, sir. Q. You have put up scaffolding yourself, have you? A. Yes, sir. Q. Hundreds and perhaps thousands of times? A. I expect, a hundred times. I have built lots of scaffolding in my life. Q. So that you know as much about the strength of boards and scaffolding as any man could, of your thirty years' experience? A. Well, I think I know when a board will hold a man up. Q. And you see whether it is a new board or an old board? A. Yes, sir; I never use old boards in scaffolding. Q. Take a case of scaffolding built by somebody else, where you have to go; you always examine them? A. Most assuredly. Anybody would." After stating that his weight was about 230 pounds, the following questions were put to him: "Q. And so, before you trust your weight upon a scaffolding, it has been your practice, for years and years, to examine to see if it will hold you up? A. Yes; where a scaffold is built. Q. As a matter of fact, do you know of anybody that has more experience and more likely to know about the strength of boards than you have? A. No; I don't know that I do. Q. And that is the result of your thirty years' experience? A. Yes, sir. Q. And these boards, you say, that you had to walk on there, were not only old boards, but they were painted boards? A. Yes, sir. Q. And had nail holes in them? A. Yes, sir; had been nailed up on a building somewhere. I couldn't say where. Q. So, of course, you noticed that when you first went to work, did you not—when you first had gone to use them? A. Well, yes. Q.

Anybody who walked on them as you did couldn't help but notice that they were old boards, and that they were painted, and had these nail holes in them? A. Yes. Q. But if these board had been weakened, why, you knew from your thirty years' experience what the danger would be in walking over them, didn't you? A. Well, yes. Q. And from your experience, you knew that as well as any one else, didn't you? A. Well, yes; as I said before, I think I know when a scaffold is safe. Q. Now, when was it you made the first inspection—when you first went to work? A. Why, when the boards was put in. Q. And just from force of habit, as an old carpenter, when you were called on to work on this work, why, you would examine them and inspect them as you had occasion to use them? A. Why, most assuredly. Q. And based your judgment on that, as to whether they were sound and sufficient to hold your weight? A. Yes." This evidence, in short, is that he was a carpenter of 30 years' experience, and skilled in his craft; that his experience in building scaffolding was great, and his knowledge as to their stability and safety equal to that of any one; that he never went upon one without inspecting it in order to ascertain its safety; that he knew the material of which the one in question was constructed, inspected it before he got on it, and inspected the boards from time to time as he used them. With all this knowledge, he testified that he did not know that scaffolding was unsafe. It is shown by the evidence of J. W. Roberts that the plank that broke under the weight of plaintiff was unsound; that it was a rotten board, and painted on one side. He says that he noticed the character of the boards at the beginning, when the scaffold was started, and that he notified the foreman of its insufficiency. Notwithstanding the plaintiff may have been the most skillful of his craft, and had exercised all his skill and caution (which it seems he did) to ascertain whether there were defects in the scaffolding, and failed to detect any, yet, if the defendant's foreman had actual knowledge of its insecurity, would the defendant be liable? The witness Roberts says that he gave him notice of the insecurity of the scaffold, which, if true, imposed upon the defendant the duty to make it reasonably safe. The defendant insists that if the plaintiff's knowledge and skill were of the highest quality, which is not to be denied, and that he exercised the utmost caution, and failed to discover any defects in the scaffolding, then the defendant is not liable, because the defendant's foreman could have done no more. We have given much of the plaintiff's evidence in detail, to show the difference, if any, there is in the case as now before us, from what it was when it was here as reported.

The defendant, with the view of meeting the supposed change in the facts of the case, asked the court to instruct the jury as fol-

lows: "If the jury believe from the evidence that the plaintiff, Hester, was a carpenter of thirty years' experience, and thoroughly familiar with scaffolding, and boards used for scaffolding, including the one by which he claims he was injured, and that Hester knew as much about the strength of said boards, and the danger to be apprehended therefrom, as the defendant could or should have known by the exercise of ordinary care, then your verdict will be for the defendant, even though you should believe that Hester stepped upon a scaffolding plank, and the plank broke under him, causing the injury sued for." The defendant contends that said instruction is in harmony and supported by the rule of law announced by Judge Rombauer, and approved by the Supreme Court, in *Fugler v. Bothe*, 117 Mo. 475, 22 S. W. 1113. The rule of law thus stated was applied to a state of facts where the employé was injured, owing to the obvious danger of the employment itself. The general rule applicable to such cases is stated as follows: "If a workman is employed on a dangerous job, or to work in a service of peril, and if the danger belongs to the work itself, or the service in which he is engaged, he will be held to all the risks which belong to either." In *Price v. Railroad*, 77 Mo. 508, a case where a servant of the company accepted employment, knowing as well as his employer the perils attending such employment, it was held that he assumed the risk incident to the danger of the service. See, also, *Thomas v. Railroad*, 109 Mo. 187, 18 S. W. 980. In all this class of cases the facts show that the employés knew of the peril, the danger being obvious to a person of ordinary caution and prudence. But there is another general rule recognized by the courts of this state as applicable to another and different state of facts, viz.: Where there is no danger in the work or the service itself, and the peril grows out of extrinsic causes, which cannot be discovered by ordinary caution or prudence, the employer is liable, precisely as a third person, if the loss or injury is caused by his neglect or want of care." *Beard v. Am. Car Co.*, 63 Mo. App. 382; *Hamilton v. Mining Co.*, 108 Mo. 364, 18 S. W. 977; *Stephens v. Railroad*, 96 Mo. 207, 9 S. W. 589, 9 Am. St. Rep. 336. And it is also held that the "mere knowledge by the servant that an appliance is defective—that risk is incurred in its use—will not, as a matter of law, defeat the servant's action for an injury received in using it, when the danger is not such as to threaten immediate injury, or when it is reasonable to suppose that the appliance may be safely used by the exercise of care and caution. *Hamilton v. Mining Co.*, supra. And the following cases were cited in support of the opinion in that case: *Stoddard v. Railroad*, 65 Mo. 514; *Devlin v. Railroad*, 87 Mo. 545. And negligence on the part of the servant does not necessarily arise from a knowledge of the de-

fects of the appliances he may be using, "but it is a question of fact to be determined from such knowledge and other circumstances in evidence." *Huhn v. Railroad*, 92 Mo. 440, 4 S. W. 937; *Devlin v. Railroad*, supra; *Thorpe v. Railroad*, 89 Mo. 650, 2 S. W. 3, 58 Am. Rep. 120; *Dale v. Railroad*, 63 Mo. 455; *Soeder v. Railroad*, 100 Mo. 673, 13 S. W. 714, 18 Am. St. Rep. 724. Having the distinction thus made clear between cases where the peril to the employé is incident to the employment and obvious, and in cases where the dangers from defective appliances, however obvious, are yet of such a character that it may be reasonably supposed that they may be used in safety by the exercise of care and caution, we are prepared to pass upon the correctness of said instruction as applicable to the facts of this case. In the first place, the plaintiff testified that he knew that some of the boards in the scaffold were old boards, and had nail holes in them; that old boards, such as they were, were not safe for scaffolding boards; and that one of these boards broke under his weight, causing him to fall, whereby he was injured. Assuming, also, that this was all that the defendant knew, or could possibly know by the exercise of ordinary care, still we do not think the instruction should have been given, for the reason that the defects were not of such a character as would, as a matter of law, preclude the reasonable supposition that the scaffold might be used with safety by the exercise of ordinary care and caution. The jury were not to be told, upon these facts, as a matter of law, that the plaintiff could not recover. It was for the jury to determine, from the nature of the defects in the scaffolding, in connection with all the other circumstances, whether the plaintiff was guilty of negligence in using the defective appliance. There was evidence tending to show that the defendant's foreman's attention had been called to the insecurity of the scaffolding. If such was the case, it became defendant's duty to remedy the defects, so as to render it reasonably safe. It follows, therefore, that the defendant's instruction No. 1, in the nature of a demurrer to plaintiff's case, was properly refused. Instruction No. 4, being in conflict with the law, as held in this opinion, was also properly refused. Nos. 5, 6, and 7 required of the plaintiff, in the performance of his duties, in effect, the highest degree of care, and were consequently properly refused by the court.

The defendant assigns as error the action of the court in overruling its objection to the following answer to a question put to witness Roberts: "Q. Now, state, when you came to inspect it [referring to a board in the scaffold], whether, if it had been examined carefully, the danger could have been found easily? A. Why, certainly, yes; the place where Mr. Hester broke through was rotten." The question propounded was cal-

culated to elicit a conclusion, and did so in part; but the latter half of the answer, to the effect that the place where plaintiff broke through was rotten, was a statement of fact, and practically annulled the vice of that which preceded it. The jury could not, taking the answer as a whole, have been misled.

There is nothing in this opinion in conflict with the expression of Judge ELLISON in the former opinion of this court, but entirely in harmony with what was there said: We quote from that opinion, viz.: "The remarks of Judge Rombauer in *Fugler v. Bothe*, 117 Mo. 500, 22 S. W. 1113, are not applicable. There the nature of the work and the place were such that the servant knew the defect and danger much better than the master could possibly know it." The reference in this opinion to that class of cases and the one under consideration will fully explain the application intended by the special reference of Judge ELLISON to that case.

We find that the cause was tried without material errors. Affirmed. All concur.

On Rehearing.

The trial court, by instruction numbered 2, informed the jury that plaintiff had a right to assume that defendant had furnished lumber of a quality to make the use of it by plaintiff reasonably safe, unless it was so glaringly and obviously dangerous that a man of ordinary prudence would refuse to walk upon it. Defendant asks a rehearing on account of our not having considered that instruction. Defendant's position is based upon what it conceives to be the testimony of plaintiff himself; it being contended that he knew the lumber was unfit; and that presumptions or assumptions should be indulged only in cases where the complaining party was not shown to have been guilty of contributory negligence, or was not shown to have known of the defective place where he worked. It is quite true that one has no right to assume a thing to exist which he knows does not. As, for instance, he has no right to assume that a street railway company had bells on its mules which were drawing an approaching car, when he knew they had not. *Lynch v. St. Railway*, 112 Mo. 420, 20 S. W. 642. The objectionable instruction in that case put the injured party's right to assume there were bells on the mules, without regard to whether he, in exercise of ordinary care, might have known there were not. The instruction in that case, as written, left the injured party at reckless liberty to assume there were bells, when the least attention on his part would have disclosed there were not. In other words, the instruction was half complete. As said by the court in that case, it should have stated "that a person himself in the exercise of ordinary care or prudence

has the right to assume that others will obey the law and to act on that belief." Page 437, 112 Mo., page 646, 20 S. W. That is, the party, himself, in exercise of ordinary care, may assume that the other party will perform or has performed his duty. In this case the instruction objected to was complete in itself. It states the law, for it embraces the respective positions of the contending parties. It is the law that plaintiff had the right to assume that defendant had performed its duty in furnishing a reasonably safe scaffold for him to walk upon, unless its defect was so obviously dangerous as to deter an ordinarily prudent man from going upon it. If it was of the latter character, then plaintiff had no right to assume defendant had performed its duty, for he knew to the contrary. The testimony given by plaintiff was that he was a carpenter of long experience; that he was acquainted with lumber, its use, character, and relative strength, as well as suitability for different kinds of use; that he was not called upon to inspect the lumber in question, though he observed that some of the boards were old and were painted on one side, and that some of them had nail holes in them. But it is clear from his testimony—indeed, he stated in terms—that the boards being laid across the latticework or supports of from 14 to 20 inches apart were safe for him to walk upon. So, conceding that there was evidence tending to show the boards were so obviously dangerous that a prudent man would not have walked on them, yet it must also be conceded that the evidence also tended to show that the danger was not obvious. The instruction complained of submitted the comprehensive proposition that plaintiff had a right to assume that defendant had furnished him a safe place to walk upon, unless the danger was so obvious as to have prevented a prudent man, in which case no such assumption could be made. When a servant knows of a defect which is not glaringly dangerous, why may he yet continue to work? Plainly, for the reason that he has a right to assume that it may be used with safety, else the master would not have put it in place for his use. We regard the following cases as fully illustrating and supporting what we have said: *Duerst v. St. Louis Stamping Co.*, 163 Mo. 607, 63 S. W. 827; *Sullivan v. Railroad*, 107 Mo. 78, 17 S. W. 748, 28 Am. St. Rep. 389; *Doyle v. Trust Co.*, 140 Mo. 19, 41 N. W. 255; *Keegan v. Kavanaugh*, 62 Mo. 239. In each of these, the servant knew of the defect, yet his right to assume safety is stated in various ways—as that, he "had a right to believe," in the *Duerst Case*; that "he had a right to rely," in the *Sullivan Case*; that "he had a right to presume," in the *Doyle Case*.

The motion should be overruled. All concur.

MOORE v. ST. LOUIS TRANSIT CO.

(Court of Appeals at St. Louis, Mo. Aug. 4, 1902.)

STREET RAILWAYS — PERSONAL INJURIES — PERSON CROSSING TRACK — FAILURE TO LOOK AND LISTEN — CONTRIBUTORY NEGLIGENCE — DISCOVERED PERIL — EVIDENCE-SUFFICIENCY — DEMURRER TO EVIDENCE.

1. Where a demurrer is sustained to the plaintiff's evidence, every fact which the evidence tends in the slightest degree to prove must be taken as admitted.

2. In an action against a street railway company by a person injured while crossing the track, evidence *held* to require submission to the jury of the issue as to whether plaintiff was guilty of contributory negligence in failing to again look and listen when crossing the track immediately after a passing car.

3. In an action against a street railroad company for injuries caused by being struck by a car while attempting to cross the track, plaintiff's contributory negligence was not fatal to recovery where it appeared that defendant's servants could have stopped the car in time to have avoided injury to plaintiff had it not been running at a recklessly high rate of speed, in excess of that allowed by ordinance.

4. In an action by one injured while attempting to cross street car tracks, evidence *held* to require submission to the jury of the issue as to whether failure to stop the car in time to avoid injury to plaintiff was due to the operation of the car at a reckless rate of speed, in excess of that permitted by ordinance.

Goode, J., dissenting.

Appeal from St. Louis Circuit Court; Warwick Hough, Judge.

Action by Michael Moore against the St. Louis Transit Company. From a judgment for defendant, plaintiff appeals. Reversed.

J. O. Moore, T. J. Field, and Bert Fenn, for appellant. Boyle, Priest & Lehmann and Lon O. Hocker, for respondent.

BLAND, P. J. Was the plaintiff guilty of contributory negligence? and, if so, was such negligence the direct cause of the injury, or was there sufficient evidence to have warranted the court to have sent the case to the jury to determine whether the injury was due to the fault of the plaintiff or to the fault of the defendant? are the questions presented for decision by the record in the case. The trial court having granted a demurrer to the plaintiff's evidence, every fact which the evidence tends to prove, though but in the slightest degree, must be taken as admitted by the demurrer. *Bender v. St. L. & S. F. Ry. Co.*, 137 Mo. 240, 37 S. W. 132; *Franke v. The City of St. Louis*, 110 Mo. 516, 19 S. W. 938; *Noeninger v. Vogt*, 83 Mo. 589; *Herboth v. Gaal*, 47 Mo. App. 255; *Wilkerson v. Consolidated Street Ry. Co.*, 26 Mo. App. 144. And every inference which the evidence tends to show in plaintiff's favor should be drawn. *Patton v. Bragg*, 113 Mo. 595, 20 S. W. 1059, 35 Am. St. Rep. 730; *Franke v. The City of St. Louis*, supra; *Field v. The Mo. Pac. Ry. Co.*, 46 Mo. App. 449.

The evidence of plaintiff is that he did not look or listen for a car coming from the

north just before stepping on the crossing; that had he looked he could have seen the car at least 100 feet away; that he did not expect a car from that direction, one having just passed; and that he looked out for a car coming from the south on the east track, when he was struck by one coming from the north on the west track. There are some acts (such as the nonobservance of statutes and ordinances designed for the protection of the public, and such reckless conduct as manifests a wanton disregard for the safety and property of others), and some omissions of duty, that are so palpably negligent that the courts uniformly pronounce them to be negligence per se, and from these pronouncements rules of conduct have been formulated, one of which is that a pedestrian who is about to cross a street railway crossing where there are no gates, flags, guards, or signals of warning, is guilty of negligence if, according to his opportunity, he fails to look and listen both ways for a car before attempting to cross the track. *Cooksey v. The K. C., St. J. & C. B. R. R. Co.*, 74 Mo. 477; *Bindbeutel v. Street Ry. Co.*, 43 Mo. App. 463; *Hickman v. The Union Depot Ry. Co.*, 47 Mo. App. 65; *Smith v. The Citizens' Ry. Co.*, 52 Mo. App. 36; *Sonnenfeld Millinery Co. v. People's Ry. Co.*, 59 Mo. App. 668. This rule should be reasonably applied, and exceptions made to it when reason and common experience would make its application impracticable, or harsh and unjust to the pedestrians in the streets of a populous city. There are times in these cities when, on account of the crowded condition of the streets, to apply the rule in all of its strictness, would effectually block the street crossings or expose the pedestrians to unavoidable hazards. In applying the rule, it seems to us that some regard should also be had to the usual order, time, and manner of the passing of cars one after another on the same track, and to the situation and environment of the plaintiff; and, if injury is inflicted by a car to the plaintiff while in a position that a reasonably prudent man would have taken in like circumstances, he ought not to be denied a recovery on account of his mere failure to look in the direction from which the car came, when to have looked would have been to have exercised more than ordinary care by one in his situation. In such circumstances the question of his contributory negligence should be for the jury.

It seems to us that the evidence in the case at bar presents a situation where the rule should yield somewhat to the circumstances. The time between cars on the same track, while not always uniform, is well known to be from 3 to 20 minutes. The plaintiff was familiar with the streets and with the running of the cars. He stated he did not expect a car so soon from the north (neither would any other person in his situation and with his experience), and that he looked to the other side of the street, and

south down the east track for a car on that track. This was a reasonable expectation, and one that would have been realized had the cars on both tracks been running on schedule time. If this was such care as an ordinarily prudent man would have exercised in like circumstances, then the plaintiff was not guilty of contributory negligence. *Cincinnati Street Ry. Co. v. Snell*, 54 Ohio St. 197, 43 N. E. 207, 32 L. R. A. 276; *Consolidated Traction Co. v. Scott* (N. J. Err. & App.) 34 Atl. 1094, 33 L. R. A. 122, 55 Am. St. Rep. 620; *Evansville Street Ry. Co. v. Gentry, Adm'r* (Ind. Sup.) 44 N. E. 311, 37 L. R. A. 378, 62 Am. St. Rep. 421; *Johnson v. St. Paul Street Ry. Co.*, 67 Minn. 266, 69 N. W. 900, 36 L. R. A. 586. But conceding, as the decisions of our appellate courts seem to indicate, that the plaintiff was guilty of negligence per se in failing to look to the north for an approaching car, the fact remains that, if there was time and opportunity for the motorman to have stopped or so reduced the speed of his car as to have avoided the injury after the peril of the plaintiff was discovered, or could have been discovered by the motorman by the exercise of ordinary care, the law is that though the plaintiff was guilty of negligence his negligence was not the direct cause of the injury, but that the negligence of the motorman in failing to stop the car and prevent the injury was the sole proximate cause of the injury. *Shearman & Redfield on Negligence* (5th Ed.) § 99; *Chamberlain v. Pullman Palace Car Co.*, 55 Mo. App. 474; *Isabel v. Han. & St. J. R. R. Co.*, 60 Mo. 475; *Rine v. The Chicago & Alton R. R. Co.*, 88 Mo. 392; *Reardon v. The Mo. Pac. Ry. Co.*, 114 Mo. 384, 21 S. W. 731; *Baird v. Citizens' Ry. Co.*, 146 Mo. 265, 48 S. W. 78; *Cooney v. So. Electric Ry. Co.*, 80 Mo. App. 226; *Klockenbrink v. St. L. & M. Riv. Co.*, 81 Mo. App. 356, and cases cited; *McAndrew v. St. Louis & Sub. Ry. Co.*, 88 Mo. App. 97; *Roberts v. Spokane Street Ry. Co.* (Wash.) 63 Pac. 506, 54 L. R. A. 184. Judge Scott expressed the rule, in *Adams v. Wiggins Ferry Co.*, 27 Mo., loc. cit. 101, 72 Am. Dec. 247, as follows: "Where there is a mere passive fault or negligence on the part of the plaintiff, the defendant is bound to the observance of ordinary care and prudence in order to avoid doing him a wrong." And in *Tuff v. Borman*, 5 Com. B. N. S. 573, the rule is expressed as follows: "Mere negligence or want of ordinary care will not disentitle a plaintiff to recovery, unless it is such that but for it the misfortune could not have happened, nor if the defendant might, by the exercise of care on its part, have avoided the consequence of the negligence and carelessness of the plaintiff." To the same effect, in *Virginia, Midland Ry. Co. v. White*, 84 Va. 498, 5 S. E. 573, 10 Am. St. Rep. 874.

The evidence is that plaintiff was in the glare of the street lamp, and could have been seen by the motorman had he looked, and the

fair inference to be drawn from the evidence is that the car was at least 100 feet from the crossing when the plaintiff was about to step on the track, and that the car could have been stopped in 70 feet had it been running at a lawful speed. Without any warning by ringing the bell, without an effort to stop or check his car, while plaintiff's back was turned toward the north, the motorman ran his car onto him. This was evidence of culpable negligence that should have been submitted to the jury.

2. It is a reasonable inference also, that, had the car been running at a speed of eight miles per hour, the plaintiff would have had ample time to pass over the west track in safety. The ordinance regulating the speed of cars in the city is a police regulation for the protection of the public, and is as binding on the defendant as if the regulation had been made by a state enactment, and all persons traveling in the street had a right to expect that defendant would observe the ordinance, and to govern their situation accordingly. The ordinance had a direct bearing on the question of defendant's negligence, and should be taken into consideration in determining whether or not its negligence in running its cars at an unlawful rate of speed was the proximate cause of the injury. *Wright v. Malden & Melrose R. R. Co.*, 4 Allen, 283; *Correll v. The B. C. R. & M. R. R. Co.*, 38 Iowa, 120, 18 Am. Rep. 22. Plaintiff was lawfully in the street. The evidence is clear and uncontradicted that defendant was running its cars at not only an unlawful speed, but at a speed that was reckless, and extremely hazardous to persons traveling in the streets. *Evansville Street Ry. Co. v. Gentry, Adm'r* (Ind. Sup.) 44 N. E. 311, 37 L. R. A. 378, 62 Am. St. Rep. 421. If this breach of duty and reckless conduct can be reasonably connected with the accident, the case should have gone to the jury. *Williams v. The Great Western Ry. Co.*, L. R. 9 Exch. 157. In *Correll v. B. C. R. & M. R. R. Co.*, 38 Iowa, at page 123, it is said by Chief Justice Miller "that, if the injury would not have occurred except for a violation of the ordinance, the defendant is liable." See, also, 1 *Shearman & Redfield on Negligence*, § 27. In *Langhoff, Adm'r, v. Railway Co.*, 19 Wis., loc. cit. 497, the court, through Dixon, C. J., said: "Certainly some consideration is to be given to the circumstance that the defendant was prohibited by law from running its train at a rate of speed not exceeding six miles an hour, and that, if the trains had been running at that rate or less, the deceased would have had ample time to pass the track unharmed and without the risk of harm."

In *Hutchinson v. Mo. Pac. Ry. Co.*, 161 Mo. 246, 61 S. W. 635, 84 Am. St. Rep. 710, it is said: "But the city ordinance forbade the running of the train at a higher rate than 6 miles an hour, and this train was running at the rate of 35 miles an hour. That act

was negligent per se, and, if it was the cause of the accident, then defendant was liable, unless the deceased contributed to the result by her own negligence." And it was held that the fact that the deceased saw the train approaching, and undertook to cross the track in front of it (misjudging the speed at which it was running), was not conclusive that she was guilty of contributory negligence.

From the opinion in *Hilz v. Mo. Pac. Ry. Co.*, 101 Mo. 36, loc. cit. 53, 54, 13 S. W. 946, we take the following extract: "Parties operating such engines must do so, we apprehend, upon the theory that collisions and accidents are liable to happen at public crossings in general use in cities like St. Louis. And they ought to be vigilant and ready to avoid impending dangers, if they can reasonably do so. This increased care the law exacts out of tenderness for human life, which is more largely or frequently exposed at such places than at other localities. If, then, the law charges those in control of such dangerous agencies with the duty of active vigilance at such places, then the fact that they did not see the person injured will not in such cases necessarily exonerate the corporation from liability. If such failure to so discover him was the result of the omission of that measure of duty which the law requires, in view of the locality, circumstances, and dangers to be anticipated, and the due observance thereof would have enabled the persons in control of dangerous agencies of this sort to have avoided the injury by the use of reasonable care, then and in such case such omission and want of reasonable care is, under the law, held the proximate cause of the injury, and liability for the resulting damage may then exist, notwithstanding the negligence of the person injured."

In *Hanlon v. Mo. Pac. Ry. Co.*, 104 Mo. 381, 16 S. W. 233, it was held that the failure to ring a bell on a moving railroad engine, as required by a city ordinance, alone constituted such negligence as will warrant a recovery, where it appears that obedience to the requirement of the ordinance would have prevented the injury sued for.

In *Sullivan v. Mo. Pac. Ry. Co.*, 117 Mo. 214, 23 S. W. 149, the deceased, while attempting to pass over a public railroad crossing in Kansas City, was run over and killed by a train of cars running at a speed prohibited by ordinance. The trial court gave the following instruction: "(5) Although you may believe from the evidence that Ellen Sullivan was guilty of negligence in stepping upon the track, yet if you further find from the evidence that, after said Ellen Sullivan was guilty of negligence, the agents, servants, and employes of defendant in charge of the locomotive and cars discovered, or could have discovered by the use of ordinary care, her condition, and the danger of the same, if it was dangerous, and could have avoided in-

juring her by the use of ordinary care, and failed to do so, then such negligence of said Ellen Sullivan is no defense to this action [and in this regard the court further instructs you that although you believe from the evidence that Ellen Sullivan was guilty of negligence in stepping upon the track, and although you may believe from the evidence that the servants, agents, and employes of defendant in charge of said train, after seeing her on the track, and discovering the danger of her position, if it was dangerous, could not have avoided injuring her by the use of ordinary care, yet if you further find and believe from the evidence that their inability to avoid such injury after discovering her condition was caused by their running at an illegal rate of speed, and if they had then and there been running at a legal rate of speed they could have avoided injuring her by the use of ordinary care, then such negligence of said Ellen Sullivan is no defense to this action]." That part of the instruction embraced in brackets was condemned by *Brace, J.*, in the main opinion, which was concurred in by *Sherwood and Gantt, JJ.* Judge *Black*, in a separate opinion, held that inability to stop the train in time to avoid the injury was no excuse, if the inability was due to the prohibited rate of speed at which the train was running. Judge *Barclay*, in a separate opinion, spoke as follows: "This distinction between different sorts of negligent acts of the defendant seems to be entirely artificial, and untenable on principle. Worse than that, its application has the effect to excuse the defendant from performing one duty (said to rest upon it by reason of common-law principles) because of its failure to observe another duty enjoined on it by the ordinance. These ordinances contemplate that persons are likely to be upon the public streets where defendant has its tracks, and their design is to protect the lives, limbs, and property of citizens lawfully using the highway concurrently with the railway company. If a train is moving slowly, that care which its managers are bound to use to avoid running people down will be far more effective than if the train is going at a great speed. It appears in evidence that, if the train had been running at the ordinance rate, it could have been stopped within 10 feet; but, in point of fact, it was stopped 'about a block' after passing the place of accident. All the evidence establishes that it was running at a higher rate of speed than the ordinance permitted. To hold that defendant was bound only by the duty to use ordinary care to discover and avert injury to Mrs. Sullivan, however fast the speed of the train might be, is, in my opinion, to take the life out of the ordinance, and to put a premium on its violation. Such a ruling practically gives defendant a great advantage from its own wrong, and seems to me to be out of harmony with the reason and spirit of the law of neg-

negligence." Judge Macfarlane, in a separate opinion, said: "The running an engine within an incorporated town or city at a rate of speed prohibited by a valid ordinance is of itself negligence, and, if one is injured on a public crossing by an engine being run in violation of such ordinance, the corporation is prima facie liable for all damages resulting therefrom." Judge Burgess, in his separate opinion, said: "I concur in the opinion of the court, with the exception of what is said therein, in regard to instruction No. 5, given on the part of plaintiff, and the instructions given on behalf of defendant, to the effect that, although defendant was guilty of negligence per se in running its train which caused the accident at a rate of speed prohibited by city ordinance, yet if, after those in charge of the train exercised reasonable care and diligence to avoid the collision after they saw the perilous position of deceased, the defendant is not liable. But for the ordinance limiting the rate of speed in the city, the rule thus announced in the opinion would be the correct one, but that it is not with the ordinance in force is, I contend, well-settled law. The rule is well-established in this state that moving a train in a city in excess of the rate of speed fixed by ordinance is negligence per se. *Schlereth v. Railroad*, 96 Mo. 509, 10 S. W. 66; *Flynn v. Railroad*, 78 Mo. 201, 47 Am. Rep. 99; *Holmes v. Railroad*, 69 Mo. 586; *Elliot v. Railroad*, 67 Mo. 272; *Keim v. Railroad*, 90 Mo. 814, 2 S. W. 427; *Eswin v. Railroad*, 96 Mo. 290, 9 S. W. 577." From these four separate opinions it appears that four of the seven judges sitting in banc approved the instruction No. 5 as a whole, and held that running at a speed prohibited by a city ordinance was not a valid excuse for not stopping the train and avoiding the injury, if it could have been stopped in time had the train been running at a lawful speed.

In *L. S. & M. S. Ry. Co. v. Bodemer*, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 213, the court said: "The train which committed the injury was traveling at the unusual speed of thirty-five or forty miles an hour, in the crowded city of Chicago, over street crossings, upon unguarded tracks so connected with the public street, and so apparently the continuation of the public street, as to be regarded by ordinary citizens as located in the public street, along a part of such track where persons were known to be passing and crossing every day, in conceded violation of a city ordinance as to speed, and without warning of the approach of the train by the ringing of the bell. This conduct tended to show such a gross want of care and regard for the rights of others as to justify the presumption of willfulness. It also tended to show that, if there was a failure to discover the danger of the deceased, such failure was owing to the recklessness of the company's servants in the management of its trains."

The conceded facts in the case at bar justi-

fy the same inference, that, if there was a failure to discover plaintiff's danger and to stop the car in time to avert injury, such failure was owing to the recklessness of the defendant's servants in the management of the car. In *Guenther v. St. Louis, I. M. & S. Ry. Co.*, 95 Mo. 286, 8 S. W. 371; *Bowen v. The C., B. & K. C. Ry. Co.*, 95 Mo. 268, 8 S. W. 230; *Merz v. Missouri Pacific Ry. Co.*, 88 Mo. 672, 1 S. W. 382; *Frick v. The St. Louis, K. C. & N. Ry. Co.*, 75 Mo. 595; *Bluedorn v. The Mo. Pac. Ry. Co.*, 108 Mo. 439, 16 S. W. 1103, 32 Am. St. Rep. 615—the speed and operation of trains in cities were held to be appropriate evidence to establish negligence on the part of defendants.

From the evidence in the cause we conclude that it cannot be said, as a matter of law, that plaintiff's negligence (if any) was the direct cause of the injury, and that there is abundant evidence from which the inference may be logically drawn that the injury was due to the excessive speed of the car. If so, the plaintiff is entitled to recover. *Fath v. Railway Co.*, 105 Mo. 537, 16 S. W. 913, 13 L. B. A. 74.

The judgment is reversed, and the cause remanded.

BARCLAY, J., concurs.

GOODE, J., dissents, and thinks the opinion is in conflict with *Butts v. St. Louis, I. M. & S. Ry. Co.*, 98 Mo. 272, 11 S. W. 754; *Watson v. Mound City Ry. Co.*, 133 Mo. 246, 34 S. W. 573; *Kelsay v. Mo. Pac. Ry. Co.*, 129 Mo. 362, 30 S. W. 399; *Moberly v. K. C., St. J. & C. B. Ry. Co.*, 98 Mo. 183, 11 S. W. 569; *Jones v. Barnard*, 63 Mo. App. 501; *Drake v. C. & A. Ry. Co.*, 51 Mo. App. 562—and asks that the cause be certified to the Supreme Court for its decision, which is accordingly done.

GOODE, J. (dissenting). In this case the plaintiff had left his home on the north side of Thomas street, west of Jefferson avenue, one evening in September, 1900, to go to a grocery store on or near the southeast corner of said street and avenue. He walked along the north side of Thomas street until he came to the crossing on the west side of Jefferson avenue, then turned south over the crossing, on which he walked until a little north of the center of Thomas street, when he left it and walked diagonally southeastwardly to the crossing over Jefferson avenue on the south side of Thomas street. As he drew near the latter crossing he looked north, and saw a street car approaching from that direction. This car passed as he stood a short distance away on the crossing last mentioned. As soon as it had passed, he took a few steps, which carried him into the middle of the west railway track on Jefferson avenue, and heard some one shout "Get out of there!" which startled him so that he made a leap, and was immediately struck by a second car coming from

the north. Plaintiff admits that after the first car passed he at once walked onto the west track, without looking north again to see if a car was coming, although he was familiar with the locality, the mode in which the street cars were run, and knew that those on the west track came from the north. At no time did he stop walking, as the first car passed without it being necessary for him to stop, and he then continued across the street until he was struck by the second car.

Plaintiff told the story of the accident on his examination in chief as follows: "Well, I was after washing my feet, and I was in the house, and I goes to take hold of me pipe. I wanted to get a smoke, and I had no tobacco, and I run me shoes on without stockings, and I started to go and get me some tobacco, and I took hold of a little pitcher that was there to get me a little pitcher of beer, so at the same time I would have a cold drink. I started out, and when I got down to the corner I stepped out off of the sidewalk on the crossing. The car was coming down. I see the car coming down from the alley as I was passing along. I walked across the street, and that car passed me by, and he was ringing his bell and going as fast as he could go; there is no mistake in that. Well, I was within three, or maybe I had three steps to make before I got into the track, and as soon as I got into the track, the fellow hollered, 'Get out of there! Get out of there!' and I looked and I jumped, and that was the last of me; I couldn't tell no more. Q. When did you see the car? You said you saw a car. A. I see the car that passed me; I seed this car ahead of it just before it struck me that way [striking his hands together], and no more. Q. Did you see that car before it struck you? A. No, sir. Well, I seen it just as it was going to strike me, when the fellow was hollering at me, 'Get out of there! Get out of there!' And I gave a jump, and I jumped high enough to get out of his way, and that is all I know when this happened. Q. When you came to the corner, did you look one way or the other to see whether the car was coming down? A. When I come to the corner and I stepped out in the street, I looked up. Q. Which way did you look? A. I looked up north, and I was looking south; I was going south to get across the track, and I would see anything that would be coming to me there; but I looked to the north, that way, and the car was coming down from, well from the alley, from this side of the alley, and just as I went across, about four or five feet of the crossing, the car passed, and I was alongside of the car out in the street. There was room enough for me to keep out of the car's way as it was passing, and as soon as I turned to go across on the crossing the fellow hollered, 'Get out of there! Get out of there!' and with that I jumped off the track, and I know no more after that."

On cross-examination he testified: "Q. You kept walking down towards the south crosswalk of Jefferson avenue? A. Yes, sir. Q. And where were you when the car passed you by? A. I was about in here [indicating on a map]. Q. Walking south? A. Yes, sir. Q. To let the car pass you by? A. Yes, sir. Q. You did not have to stop in order to let the car pass you by? A. No, sir; I didn't have to stop. Q. When the car passed you and left the crossing clear, how far were you away from the near rail of the track? A. I had two or three steps to make until I got into the middle of that track there; just two or three steps. Q. About six or eight feet; something of that sort? A. No, sir; two steps from me would amount to five feet; that is what I calculate, a step is two feet and a half. Q. Two would be five feet, and three would be seven and one-half feet; so you were from five to seven and one-half feet away? A. Yes, sir. Q. When this car passed you by? A. Yes, sir. * * * Q. And as soon as this car passed you by, you started right on across the track? A. Yes, sir. Q. And you didn't look any more after you looked in here for a car? A. No. Q. And you didn't listen or pay any particular attention any more after this car had passed you by? A. No, of course not. * * * Q. And you could see up and down the street a good ways, couldn't you? A. If it wasn't dark you could see a good ways up there, but the trouble was you couldn't see where there was two cars, one behind another. You couldn't see if there be two, following one behind the other. You could see only the one car coming, and then I expected no other one behind it. Q. In other words, you did not expect two to be so close together, and therefore you didn't look? A. Exactly. Q. You could see a block away at that time of night on that day, couldn't you? A. I don't know as I could see a block away at that time of night; I am not sure. * * * Q. You could see a light a long ways? A. Yes. Q. And you could see an object that was not lighted over a hundred feet away, couldn't you, on that evening? A. Yes, sir. Q. Now, in order to look south to see whether the car comes, and to look north, you merely had to turn your head and your neck, just a glance? A. Yes. Q. You don't have to turn your whole body? A. Yes, sir. Q. And you can look in both directions, can't you, in the space of a second? A. Both north and south. I could look both north and south, and I looked north because my back was turned to the north, and as I was going across I looked north and I saw the car coming. Q. You looked north when the first passed, and before you reached the crosswalk? A. Yes, sir. Q. But after that car passed you, you did not look north any more; that is what you say? A. No, sir, I did not."

Mary Foster, one of plaintiff's witnesses, testified: "I saw the old man go across, and I happened to see the car coming very swift,

but I didn't know he was going to go right in front of it; but when he stepped in the track I hollered, but it didn't seem to do him any good. Q. The car was right on him at that time? A. Yes, sir." This witness also swore that in the interval between the passage of the two cars she walked from No. 2612 Thomas street, passed 2610, 2608, 2606, and was in front of 2604 at the time of the accident. The cars were running about 120 feet apart.

The foregoing evidence shows to my mind very conclusively, that the plaintiff was guilty of such contributory negligence as to justify the circuit court in giving the peremptory instruction to the jury to return a verdict for the defendant. Granting that the car which struck him was being run at too high a speed, his admission that he was seven or more feet from the west track when the first car passed, and that he continued to walk ahead on to said track without again looking north to see if a car was approaching, although he knew cars on that track approached from the north, makes such a case of carelessness on his part as to defeat his action. After deducing from all the evidence the inference most favorable for the plaintiff, we must still have a case where the negligence of the plaintiff concurred with that of the defendant as the proximate cause of the accident. No recovery can be had in such instances. *Craig v. Sedalia*, 63 Mo. 417; *Dougherty v. Railroad*, 97 Mo. 647, 8 S. W. 900, 11 S. W. 251.

This controversy is undistinguishable in principle, as far as I am able to see, from numerous others in which the plaintiff was nonsuited because his injury was sustained while he was attempting to cross a railway track without first looking or listening to ascertain if a train or a car was approaching. *Watson v. Mound City Street Ry. Co.*, 133 Mo. 246, 34 S. W. 573; *Boyd v. Wabash Ry. Co.*, 105 Mo. 371, 16 S. W. 909; *Butts v. St. Louis & Iron Mt. Ry. Co.*, 98 Mo. 272, 11 S. W. 754; *Maxey v. Railroad Co.*, 113 Mo. 1, 20 S. W. 654; *Davies v. Railroad Co.*, 159 Mo. 1, 59 S. W. 982; *Henze v. Railroad Co.*, 71 Mo. 636; *Vogg v. Railway Co.*, 138 Mo. 172, 36 S. W. 646; *Tanner v. Railroad Co.*, 161 Mo. 497, 61 S. W. 826; *Hook v. Mo. Pac. Ry. Co.* (Mo. Sup.) 63 S. W. 360; *Jones v. Barnard*, 63 Mo. App. 501. The fact that the defendant was guilty of negligence in running its car at an unlawful speed will not exonerate the plaintiff from the consequences of his own negligence in stepping on the track without taking the simple precaution of looking for danger where he knew it was apt to be. This has been often decided. *Drake v. Railroad Co.*, 51 Mo. App. 562; *Henze v. Railroad*, *supra*. Running cars more rapidly than an ordinance allows is surely no more flagrant a dereliction than the failure of a steam railway company to give the crossing signals; and it is unquestionable law that this omission on the part of

the servants of a railway company, who were running one of its trains, does not render it liable to a plaintiff who is hurt by going on the track without looking or listening for an approaching train which he could have seen or heard if he had looked or listened. The plaintiff's testimony in the present case discloses that at no time did he hesitate or pause in his course; that he was seven or eight feet from the west track when the first car passed him, and could easily have turned his head north to see if another car was approaching; that he could have seen the car which hit him if he had looked, whether it had on a headlight or not, 100 feet away; that he did not take this easy precaution, but went straight onto the track, and was immediately struck by the car. I fail to see why such negligence was not the proximate cause of plaintiff's injury—at least, as proximate as the lawless speed of the car. Plaintiff gives three reasons why he did not look to the north after the first car passed. He says he was looking to the south to see if a car was coming from there; that he looked ahead because that was the way he was going; and that he did not look north again because he was not expecting another car to follow so soon after the first one. But there was no necessity for him to be watching to the southward until after he had seen the other direction was safe, for he knew the cars on the west track would approach from the north. A glance each way would have been sufficient. It was his plain duty to look out for danger on the west track before he endeavored to cross it. Nor was it enough that he had looked one time and seen the first car. The duty of looking continued until the danger was over; that is, until he saw the way was clear for him to cross the nearest track. *Hayden v. Railroad*, 124 Mo. 566, 28 S. W. 74; *Kelsay v. Railroad Co.*, 129 Mo. 362, 30 S. W. 339; *Moberly v. Railroad Co.*, 98 Mo. 183, 11 S. W. 569; *Drake v. Railroad Co.*, 51 Mo. App. 562; *Jones v. Barnard*, 63 Mo. App. 501. Instead of doing so, he heedlessly walked right in front of the car which hurt him. In each of the cases last cited, the plaintiff had taken care to look and listen before going on the track, but had done so only one time, although he might easily have detected the danger thereafter, if he had looked or listened again, and for his omission to do so he was denied a recovery. In my judgment, the facts in this case make the rule announced in *Morgan v. Railroad Co.*, 159 Mo. 262, 60 S. W. 195, and *Hutchinson v. Railroad Co.*, 161 Mo. 246, 61 S. W. 635, 84 Am. St. Rep. 710, wholly inapplicable. That rule, commonly known as the "humane doctrine," is that when a plaintiff is injured by the negligence of both himself and the defendant, but the defendant, before the injury, discovered, or by the exercise of ordinary care might have discovered, plaintiff's peril, and afterwards neglected to use the means at hand to prevent injuring him, plaintiff's

contributory negligence will not under such circumstances defeat his case. This plaintiff was in no danger until he stepped on the track, when he was instantly run down by the car. The motoneer had no chance to save him after discovering his position of peril, which is of the essence of the humane, or "last chance" rule. Whatever negligence defendant's servants were guilty of in running the car too rapidly, was prior to and simultaneous with plaintiff's negligence in stepping on the track without looking for a car, thus presenting the common case of concurring negligence. But the theory of the rule in question is that a defendant's negligence in omitting proper measures to avoid injuring a party after he is discovered to be in danger to which he carelessly exposed himself, makes the defendant liable notwithstanding the plaintiff's negligence. Certainly a motoneer or engineer cannot be required to assume that an adult person approaching a railway track is going to walk in front of an engine or car, instead of pausing until it passes, or act on such an assumption. The humane rule is properly invoked in cases where the injured party was on the track and exposed to peril in view of the persons operating the car or train, if they were vigilant, for a period long enough for them to avoid striking him by proper efforts. Here the plaintiff, to the surprise of one witness who was watching him, stepped in front of the rapidly approaching car, which he could readily have seen by turning his head, and was immediately struck. It is plain, therefore, that his own reckless act was the cause of his injury. No reasonable inference can be drawn that he would have escaped but for a subsequent negligent act or omission of the defendant, or that the negligence of the latter was any more the proximate cause of the accident than was his own.

For the foregoing reasons I am constrained to dissent from the decision of my learned associates in this cause, and to favor an affirmance of the judgment of the circuit court. I deem the decision of the majority of this court in conflict with the following previous decisions of the Supreme Court, to wit: *Butts v. St. Louis & Iron Mt. Ry. Co.*, 98 Mo. 272, 11 S. W. 754; *Watson v. Mound City Street Ry. Co.*, 133 Mo. 246, 34 S. W. 573; *Kelsay v. Railroad Co.*, 129 Mo. 362, 30 S. W. 339; and with the following decisions of the Kansas City Court of Appeals: *Jones v. Barnard*, 63 Mo. App. 501; *Drake v. Railroad Co.*, 51 Mo. App. 562.

LAKER v. ROYAL FRATERNAL UNION.
(Court of Appeals at St. Louis, Mo. May 27, 1902.)

FRATERNAL BENEFIT INSURANCE—CERTIFICATE—CONSTRUCTION—EXTENT OF LIABILITY.

1. A fraternal benefit society issued a certificate to a member, which provided that, on re-

ceipt of satisfactory proofs of death, \$2,000 should be paid his wife; that the benefits accruing under the certificate should be payable on the annuity system—a specific sum quarterly until the full amount should be paid. In the application for insurance and in the certificate the member agreed that the constitution and by-laws should be a part of the certificate. By-law 108 provided for monthly assessments, and conferred authority to levy and collect such additional assessments as might be necessary to provide for the payment of accrued benefits and expenses. By-law 183 required the supreme executive committee to pass on and examine all claims for benefits, and to order their payment first from the benefit fund; then out of the reserve fund, if necessary; and then pro rata in case of the insufficiency of both funds. By-law 209 limited the liability of the society for a death benefit to "the amount of one assessment actually realized for the benefit fund from the membership in force * * * for the month in which the death occurs," and not exceeding the amount of the certificate. *Held*, that the beneficiary in the certificate was entitled to \$2,000 on the death of the member, and not merely to the amount realized from one assessment, as provided in by-law 209.

Appeal from Circuit Court, Greene County, James T. Neville, Judge.

Action by Medora E. C. Laker against the Royal Fraternal Union. From a judgment for plaintiff, defendant appeals. Affirmed.

Vaughan & Coltrane, for appellant. Mil-lard R. Powers and Carlos S. Hardy, for respondent.

BLAND, P. J. The suit is to recover the fourth installment of \$125, claimed to be due plaintiff as the beneficiary in the benefit certificate issued by the defendant to Frederick W. Laker. The contents of the certificate, material to this controversy, are as follows:

"Division Two.

"Read Your Certificate.

"Benefit Certificate.

"Royal Fraternal Union of St. Louis, Mo.

"No. 3,712.

"Assessment, \$4.30.

Age, 53 years.

"\$2,000.

"Date, April 1, 1898.

"Member, Frederick W. Laker.

"Address, Springfield.

"State, Mo.

"National Council No. One.

"When writing the home office with reference to this certificate, always give the number. In case of death or disability from accident or sickness, immediate notice must be given the home office.

"Division Two.

"Number 3,712.

Age, 53 years.

"The Royal Fraternal Union of St. Louis, Mo., hereby certifies that in reliance upon the representations, statements, and agreements contained in the application of Frederick W. Laker, of Springfield, Mo., a member of National Council No. one, of St. Louis, state of

¶ 1. See Insurance, vol. 28, Cent. Dig. § 1961.

Missouri, by occupation a locomotive engineer, passenger train, he is accepted as a beneficiary member of this order, in Class D, under the conditions hereinafter specified, and that he is entitled to the following benefits, to be paid from the benefit or benefit reserve fund, as provided in the by-laws, during the time this certificate is maintained in continuous force and effect, viz.: * * *

"Fifth. To be paid to Mrs. Medora E. C. Laker (his wife), if surviving, otherwise to the legal representatives of the member, at the home office of said order, in the city of St. Louis, Missouri, upon the receipt of satisfactory proof of the death of the member, together with the surrender of this certificate, two thousand (\$2,000.00) dollars.

"All benefits accruing under this certificate, except monthly, sick, and accident benefits, shall be payable on the annuity system, as follows: One hundred and twenty-five dollars shall be paid quarterly until the full amount of the benefit shall have been paid, provided that, should the death of the member occur after five years from the date hereof, then in such case the death benefit will be paid in one sum.

"Sixth. A written notice from the member or his representative, and a certificate from the attending physician, stating the time, place, and manner and nature of injury, sickness, or death, must be received at the home office of the order, in St. Louis, Missouri, within ten days of the date of injury, commencement of sickness, or within sixty days after the death of the member, as conditions precedent to recovery. No sick or accident benefits will be paid for any time prior to the date of mailing letter and said notice or attending physician's certificate. Monthly, sick, and accident benefits will not be paid in excess of twenty weeks during any membership year; neither will both sick and accident benefits be paid for the same period, or to the member on more than one certificate at the same time. All benefits for which the order is liable shall be payable only after satisfactory, direct, and affirmative proofs have been received by the order at its office in St. Louis, Missouri.

"Seventh. This certificate shall not take effect until after payment in cash of the certificate fee and one assessment, and delivery hereof to the member while he is alive and in good health, and shall continue in force only so long as all assessments are fully paid. It is issued in consideration of the payment of the certificate fee, and the further payment of one assessment of four and thirty-hundredths dollars, payable in advance, without notice, on or before the last week day of each month, at the home office of the order, in St. Louis, Missouri, or to the authorized local treasurer or collector—the first assessment to apply in payment for the month in which this certificate is issued—and is subject to the agreements and statements contained in the member's application, all of

which we agree to be warranties, and the conditions and statements on the back hereof, and the constitution and by-laws of the order, now in force or hereafter enacted, all of which are made a part of this certificate.

"In testimony whereof, the Royal Fraternal Union has caused this certificate to be signed by its supreme president, supreme secretary, and certificate writer, and has hereunto attached its seal, at the city of St. Louis, state of Missouri, this first day of April, at 12 o'clock noon, A. D. eighteen hundred and ninety-eight. A. Price, Certificate Writer. John N. Dalby, Supreme President. F. H. Pickrell, Supreme Secretary."

"(3) Privileges and Requirements. While it is the custom and privilege of the order to pay just claims immediately on presentation of acceptable and proper proofs of the disability or death of a member, yet the order reserves the right, if it so desires, to take such a reasonable time as is necessary to properly investigate the merits of a claim. It is agreed that no claim shall be valid against the order unless final proofs thereof are received at the home office of the order, in St. Louis, Missouri, within six months from the date of the death of said member, or within one month from the date the disability ceases for which indemnity is claimed, and that three months shall be allowed, after the receipt of said proofs, for the investigation of said claim by the order, if it so desires, during which period no proceedings shall be commenced thereon against said order; and it is agreed that all claims against the order upon this certificate shall be deemed to be waived, and shall be invalid for any purpose, unless the matter shall be submitted to arbitration in the manner prescribed in the by-laws of this order within six months after receipt of final proof of the claim. No suit at law on this certificate shall be begun or maintained unless instituted within sixty days next succeeding the adjournment of the supreme council next following the decision of the arbitration committee. All claims for benefits on this certificate shall require affidavits of the claimant, attending physician, undertaker, and such others as are clearly necessary to establish the claim, and such affidavits shall be on the forms of blanks furnished by the order, and all questions thereon are required to be fully answered."

Defendant pleaded two special defenses: First, that the plaintiff's claim had not been submitted to arbitrators as provided for by the certificate, constitution, and by-laws of the defendant order; second, by-law No. 209, which reads as follows, to wit: "Sec. 209. The liability of this order as to the amount of death benefit due in any division shall not exceed the amount of one assessment actually realized for the benefit fund on the membership in force in such division for the month in which the death occurs, and not to exceed the amount named in the benefit

certificate as being due, or proper claim thereunder; and is to be paid under the conditions specified in the benefit certificate"—which the answer alleges was in force when the benefit certificate was issued to F. W. Laker, and that it entered into and formed a part of the contract of insurance; that on March 23, 1898, said by-law was duly amended by the supreme trustees of the order, and, as amended, reads as follows: "Sec. 200 (amended). The liability of this order as realized for the benefit fund from the membership in such division for the month in which the death occurs, and not to exceed the amount named in the benefit certificate, and such sum shall be the full amount of the liability of this order, and it is to be paid under the conditions specified in the benefit certificate and these by-laws"—and "that said Frederick W. Laker, for himself and on behalf of his beneficiary, assented and agreed to its terms and conditions; that the amount of one assessment actually realized for the benefit fund from all the membership in force in division two for the month in which said Frederick W. Laker died, to wit, September 20, 1899, amounted to \$425.74; that defendant has paid to plaintiff \$375; and that plaintiff ought not to have or recover more than the difference between said \$425.74 and \$375, namely, \$50.74." There was a replication denying the new matter.

Plaintiff testified that she was the wife of Frederick W. Laker, and the beneficiary in the insurance certificate; that her husband died on September 20, 1899. It was admitted that the proofs of death required by the policy were made in due and proper form, and that Frederick W. Laker paid all dues and assessments up to the date of his death. It was shown by the testimony of plaintiff's attorney, and by the letters of defendant's secretary, addressed to plaintiff and to her attorney, that the defendant in October, 1899, acknowledged a liability on the certificate of insurance, but claimed that the extent of its liability was to pay \$425.74. This was the amount of the assessment for the death benefit fund for the month of September, 1899, and derived from the membership of division No. 2 of the order, of which division F. W. Laker was a member at the time of the issuance of this certificate and at the date of his death.

Defendant read in evidence the articles of incorporation of the order, which are as follows:

"Know all men by these presents: That we, whose names are hereunto subscribed, desiring to form a corporation under the laws of the state of Missouri, and more particularly under the provisions of the Revised Statutes of the State of Missouri, A. D. 1889, chapter forty-two, article ten, do hereby adopt the following articles of agreement as organic regulation for ourselves, our associates and successors: * * *

"Third. The purpose and scope of the society shall be as follows: The association together, in supreme and subordinate councils, of all suitable persons of good moral character with a view to mutual improvement in education, moral virtue and ethical development; to afford the members congenial society and social intercourse; to cultivate right living and good citizenship; to inculcate charity, benevolence and promote fraternity and mutual co-operation and assistance; to provide for the relief and aid of members and their families, widows, orphans or other kindred dependents of deceased members, and by assisting such as may be sick or disabled from the proceeds of assessment upon the members of the society, and to that end to issue to the members beneficial certificates payable at such times and in such manner as shall be provided in said beneficial certificates, and do such other things as shall be provided by the laws of this state.

"Fourth. The business of the society shall be managed and conducted by a board of three trustees, who shall be known as the supreme trustees, who shall enact and adopt a constitution and by-laws, and prescribe the time and manner of meeting and of electing officers. The supreme trustees shall also adopt a ritual of ceremonies, prescribing the form of the initiation of its members, the opening and closing meetings of the supreme and subordinate councils, the installation of officers, and the burial service of its deceased members.

"Fifth. The first board of supreme trustees shall consist of John H. Allen, J. F. D. Geiger, and W. B. Addington, who shall hold office for two years, and until their successors are duly elected and installed. * * *

"Seventh. The members of the society, at any regular meeting of the supreme council, may amend or repeal any by-law enacted by the board of supreme trustees, or may enact new by-laws"

—And proved by the secretary of the defendant the authenticity of certain by-laws (among them, No. 200, and No. 209 as amended), both of which are set out in the answer.

Plaintiff made various objections to the introduction of the constitution and by-laws as evidence, and they were excluded by the court for the following reasons announced by the court from the bench: "The Court: This minute book, I think, is perfectly competent, if the matters contained in it are a defense, or tend to make a defense. I hold that this is just a plain contract of insurance—so much money payable monthly, and so much to be paid upon death—and that these trustees have no power to make a by-law there of this kind [the one objected to], and that it does not affect this contract made with Frederick W. Laker. They do not say they will pay him an amount not exceeding \$2,000, but say they will pay his wife \$2,000 at his death; and, while a member of a corporation is in some sense a part and parcel of the

corporation, still, under this application and this certificate, I hold that he is dealing with them as a separate entity, within the plain wording of the application and certificate. The objections are sustained."

Defendant then read in evidence the following application by Laker for insurance, to wit:

"Application for Membership and Beneficiary Certificate in the Royal Fraternal Union of St. Louis, Mo. I, Frederick W. Laker, having carefully examined the principles, constitution, and by-laws and benefit certificate of the Royal Fraternal Union of St. Louis, Mo., and this application blank, hereby make application for membership in Council No. 1, located at St. Louis, Mo., and for a beneficiary certificate division No. 2, for \$2,000, and agree to pay the certificate fee and one advance assessment," etc. "I understand that the amount of each withdrawing member's share of the reserve fund is not fixed, but estimated. * * * (14) Beneficiary, Medora E. C. Laker; relationship, wife; residence, Springfield, Mo. * * * (18) Do you agree, where any doubt exists as to the validity of your claim, to the reference of the matter to a committee of three qualified physicians, to be composed of your attending physician, a second chosen by the order, and the third to be chosen by these two, and that the decision of this committee shall in all cases be final, and that you will not appeal from it, except as provided in the by-laws of the order? Yes. (19) It is hereby agreed that all the answers and statements in this application, whether written by the applicant or not, are warranted to be full, complete, and true, and this agreement, and the constitution and by-laws of the order, with all the amendments heretofore or hereafter made, together with all statements in this application, are hereby made part of any benefit certificate that may be issued hereon; that if any of the answers and statements made are not full, complete, and true, or if any condition or agreement shall not be fulfilled as required or agreed, then the certificate issued thereon shall be null and void, and all money paid thereon shall be forfeited to said order," etc. "This application forwarded by A. T. Sims, who acted as my agent. Frederick W. Laker."

Defendant offered the printed constitution and by-laws of the order as a whole, having first shown that they had been duly adopted. The court excluded them on the ground that they were irrelevant. The excluded evidence shows that defendant was incorporated by an order of the St. Louis circuit court on February 25, 1897. The articles of incorporation show that the order was organized for the purpose of the mutual improvement of its members, and mutual co-operation and assistance, with the authority to issue "benefit certificates payable at such times and in such manner as shall be provided in said beneficiary certificates." The business of the

order is managed by a board of trustees, to whom power is given to enact and adopt a constitution and by-laws, and to adopt a ritual of ceremonies for the initiation of members, etc.; to repeal by-laws and make new ones. Local councils corresponding to the lodge system are provided for, which are required to hold regular meetings on the day and hour fixed by the by-laws. None but members of the order can hold a beneficiary certificate. Social members are not required to contribute to the benefit fund of the order, and they have no voice in the management of the same. The supreme governing body of the order is the supreme council, which has power to approve, reject, or amend by-laws, and to make new ones. On November 23, 1897, the order adopted a new constitution and a complete set of by-laws, with the evident purpose of availing itself of the benefits of the act entitled "Fraternal Beneficiary Associations," approved March 16, 1897 (Acts 1897, p. 132). The beneficiary members of the order are divided into classes, presumably on account of the difference in age and in the degree of hazard incident to the different occupations of the members.

It is evident from the foregoing that the defendant is a fraternal benefit society, and the circuit court erred in holding the certificate of insurance to be an old-line insurance policy, and should have admitted the constitution and by-laws of the order in evidence. Defendant showed the September, 1899, dues from the members of division No. 2 (the class in which Laker was insured) to be \$425.74, and that of this total amount it had paid to plaintiff \$375. The court peremptorily instructed the jury to find for plaintiff, and to assess her damages at \$125. If the constitution and by-laws had been admitted in evidence, would it have been error for the court to have peremptorily instructed the jury to find for the plaintiff, is the principal question in the case. If defendant's liability is to be measured by by-law No. 209, the instruction was clearly erroneous. If, on the other hand, its liability is fixed by the terms of the certificate of insurance, independent of the by-law, the instruction was correct. If the certificate stood alone, there could be no question but that the defendant would be liable for the full amount of the insurance; but in the application for insurance, as well as in the certificate itself, Laker agreed that the constitution and by-laws of the order, with all amendments theretofore or thereafter made, should be made a part of the benefit certificate. The constitution and by-laws of the order, by this agreement, were made a part of the certificate, and must be read into it, to make up the complete contract of insurance. *Aloe v. Mutual Reserve Life Ass'n*, 147 Mo., loc. cit. 574, 49 S. W. 553; *Houck v. Frisbee*, 68 Mo. App., loc. cit. 19; *Njb-lack on Benefit Societies*, § 136. Ordinarily, when the terms of a benefit certificate and

the by-laws of the order conflict, the order will be deemed to have waived the by-law, and the certificate will control. *Niblack on Benefit Societies*, § 147; *Davidson v. Old People's Mutual Benefit Society* (Minn.) 39 N. W. 803, 1 L. R. A. 482; *Fairly v. Fee*, 83 Md. 83, 34 Atl. 839, 32 L. R. A. 311, 55 Am. St. Rep. 326; *Morrison v. Wisconsin O. F. Mut. L. Ins. Co.*, 59 Wis. 162, 18 N. W. 13; *McCoy v. Northwestern Mutual Relief Ass'n*, 92 Wis. 577, 66 N. W. 697, 47 L. R. A. 681. But when the laws of the order are referred to by apt words in the certificate, and made a part of the policy of insurance, the certificate and laws together make out the contract, and the whole are to be construed together, in an endeavor to ascertain the intention of the parties. *Bacon on Benefit Societies & Life Insurance*, § 184. The certificate contains an unconditional promise to pay the beneficiary the sum of \$2,000 on the death of the member, in installments of \$125 per quarter, provided the member should die within five years of the date of the certificate. The charter of the order (section 4) provides for the issuance of benefit certificates to its members, "payable at such time and in such manner as shall be provided in said benefit certificate." On November 13, 1897, by-law 108 was enacted. This provides for the payment of monthly assessments, and confers authority to levy and collect such additional assessments as may be necessary to provide for the payment of accrued benefits and expenses. At the same time, section 183 of the by-laws was enacted, which requires the supreme executive committee to pass on and examine all applications or claims for benefits, and to order their payment, first from the benefit fund, and, if that is not sufficient, then out of the benefit reserve fund, and provides that, if both funds are insufficient to pay all claims, they should then be paid pro rata. On March 15, 1898, section 209 of the by-laws was amended to read as follows: "The liability of this order as to the amount of death benefit due on any benefit certificate in any division shall not exceed the amount of one assessment actually realized for the benefit fund from the membership in force in such division for the month in which the death occurs, and not to exceed the amount named in the benefit certificate, and such sum shall be the full amount of the liability of this order, and is to be paid under the conditions specified in the benefit certificate and these by-laws." These by-laws were all in force at the date the policy was signed and issued (April 20, 1898), and must be read into the policy of insurance. Under the enumeration of benefits secured by the policy, the fifth clause provides, in substance, that on the death of Laker in good standing, and proofs of his death, there shall be paid to his wife, Medora, \$2,000. The provisions of the certificate, independent of the by-law, plainly and unequivocally provide for the payment of

\$2,000 to his wife on the death of Laker. By-law 108 confers the power of the governing body of the order to levy and collect additional assessments whenever it shall become necessary to provide for accrued benefits and expenses. If there were no other provisions found in the by-laws in respect to the payment of death benefits, we would not hesitate to say that defendant is liable for the full amount of the insurance (\$2,000). By-law 183 seems to have intended that additional assessments should not be resorted to for making up deficiencies to pay accrued benefits. Yet it does not take away the authority to levy and collect them, nor does it appear from the evidence that the benefit fund and the reserve fund were not sufficient to meet this loss in full. The defendant offered these by-laws in evidence, but did not offer to show that it had complied with either of them, nor that it did not have in these funds ample means to pay the policy in full; and it is fair to presume that it did have the money in one or both of these funds, and could have paid the benefit in full. By-law 209 is clearly in conflict with by-laws 108 and 183, and is in conflict with the terms of the policy itself. By-laws which qualify the terms of the certificate of insurance in an ambiguous manner are to be construed most favorably to the insured, under the general rule that, when the language of the promisor may be understood in more senses than one, it should be construed in the sense in which he had just reason to believe the promisee understood it. *Potter v. Ins. Co.*, 5 Hill, 149. By reading the certificate, Laker would naturally conclude that his life was insured in the sum of \$2,000 for the benefit of his wife, and we are to give it that construction, if, from the language of the certificate and by-laws, it is left in doubt whether or not such was the contract. *Yeaton v. Fry*, 5 Cranch, 341, 3 L. Ed. 117; *Metropolitan Life Ins. Co. v. Drach*, 101 Pa. 278; *Niagra Fire Ins. Co. v. Scammon*, 100 Ill. 644.

It is left in doubt whether the contract of insurance is for the payment of \$2,000, as a stipulated sum, to the beneficiary on the death of the insured, to be drawn from the benefit and benefit reserve funds, and, if these proved inadequate, then the balance to be raised by additional assessments, as authorized by section 108 of the by-laws, or whether a pro rata distribution of the benefits and benefit reserve fund, as provided by section 183 of the by-laws, furnishes the measure of the insurer's liability, or whether or not that liability can be discharged by the payment of the amount realized from one assessment, for the month in which the member died, on the members of the division to which he belonged, as provided by section 209 of the by-laws. In this uncertain and ambiguous condition of the contract as to the amount due on the certificate, we must give to it that construction which is most

favorable to the plaintiff, and hold that she is entitled to the full amount of the insurance. The trial court so adjudged, and we affirm the judgment.

BARCLAY and GOODE, JJ., concur.

STATE ex rel. BARFIELD v. MAIDEN,
Judge.

(Supreme Court of Tennessee. June 1, 1903.)

BILL OF EXCEPTIONS—CERTIFICATION—REFUSAL—MANDAMUS.

1. Mandamus will not be granted to compel a trial judge to certify and sign a bill of exceptions tendered in a case tried by him, where he states under oath in his answer that the bill of exceptions tendered is not a true record of the cause, and that he had already signed a bill of exceptions which he avers contains a full and correct report of all the proceedings incident to the trial.

Mandamus by the state, on relation of W. A. Barfield, against R. E. Maiden, circuit judge, to compel the latter to certify and sign a bill of exceptions. Writ denied, and petition dismissed.

Kirkpatrick & Tanner, T. J. Smith, and W. W. Craig, for relator. Charles T. Cates, Jr., Atty. Gen., for respondent.

BEARD, C. J. The relator in this case was tried at the October term, 1902, of the circuit court of Lauderdale county, and found guilty of murder, in the second degree, of one Hammond, and his punishment was fixed at 20 years' confinement in the state penitentiary. A motion for a new trial being overruled, an appeal was prayed and granted to this court.

The relator filed his present petition asking this court to grant him its writ of mandamus requiring the Honorable R. E. Maiden, the judge who presided at the trial of the cause, to authenticate a draft for a bill of exceptions which accompanies the petition as an exhibit, and which it is alleged is substantially correct, in the room and stead of a bill of exceptions already signed by him, and filed with the clerk as a part of the record in the cause, which latter bill, it is averred by relator, "does not correctly state the proceedings in the said cause, and is not the bill of exceptions upon which the relator should have to rely upon the trial of the case in the Supreme Court." Accompanying the petition are the affidavits of the relator and of his counsel, and also of bystanders, to the effect that this draft contains a true history of what occurred during and subsequent to this trial.

Judge Maiden has made an answer under oath to this petition, in which he denies distinctly and in detail every averment in the petition, to the effect that the bill of exceptions already signed and filed by him is in any respect incorrect or unauthentic. To the contrary, he asserts it contains a true and

complete history of the proceedings during the trial of the cause, as well as of those subsequently incident to it. He also avers that the paper or draft submitted by the relator, and which the latter now asks this court to require the respondent to sign, is full of inaccuracies, and is in many respects incorrect and seriously misleading.

The question is thus again presented whether this court will compel a circuit judge to certify a bill of exceptions which he, under his oath, states is not a true record of what transpired in the progress of the trial of the cause, after he has already signed a bill of exceptions which he avers does contain a full and correct report of such trial and all proceedings incident thereto. To this question we repeat, without hesitancy, the answer given in the case of State ex rel. v. Cooper, Judge, 107 Tenn. 202, 64 S. W. 50. It is unnecessary to restate the reasons for the ruling there made, or to refer to the cases which fortify it; it is sufficient to say that upon re-examination we regard these reasons as entirely sound, and the conclusion then reached as sustained by the highest authority and the soundest public policy. In addition, however, the delay in this cause would be of itself sufficient to repel the relator. The case was disposed of on the 1st of November, 1902, the bill of exceptions was noted by the clerk as filed on the 28th day of November of that year, and the present petition was not presented until the lapse of a little over four months from that date. This, under the facts disclosed, was an unreasonable delay. *Sprague v. Fawcett*, 53 Cal. 408; *People v. Judge*, 31 Mich. 72.

It follows that the writ of peremptory mandamus is refused, and the petition is dismissed.

ADOLFF v. IRBY & GILLELAND.

(Supreme Court of Tennessee. May 30, 1903.)

WITNESSES—EXCLUSION—PERSONS NOT PARTIES—INTEREST.

1. Shannon's Code, § 5599, declares that nothing in any section of the articles relating to witnesses shall be construed to require the parties, or either of them, to be put under the rule. *Held* that, where plaintiff sued a firm for injuries sustained from the explosion of a gasoline lamp sold to him by them, a witness who, though not a party to the suit, was interested in the controversy, as a partner with defendants, and who, in case of a recovery, would be liable to contribution, and whose presence in court during the trial was required, by reason of his intimate knowledge of the manufacture of the lamp, was properly permitted to testify, notwithstanding his failure to leave the courtroom when the witnesses were excluded under the rule.

Appeal from Circuit Court, Shelby County; L. H. Estes, Judge.

Action by Charles Adolff against Irby & Gilleland. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

T. D. Young, for appellant. Wright, Peters & Wright, for appellees.

BEARD, C. J. The plaintiff in this suit sought to recover damages against the defendants in error for personal injuries sustained by him from the explosion of a gas-line lamp sold by them to him. The case having resulted in a verdict and judgment against the plaintiff, he has brought it into this court, and assigned errors upon the action of the trial court. Among the errors so assigned is this: That, over the objection of the plaintiff, one Jameson was permitted to testify for the defendants, notwithstanding he had remained in the courtroom while the trial was in progress, and after the rule excluding witnesses had been invoked, and granted by the court. Waiving technical objections which might afford a sufficient answer to this assignment, we think there was no error in the action of the trial judge in this matter. The record shows that the lamps, of which this was one, were manufactured for the defendants, and that Jameson was interested with them, as partners, and, though not a party to the suit, was necessarily concerned in its result. For, if the theory of the declaration is correct—that the material used in the making of the lamp was inferior, and its mechanism was so faulty as to make it inherently dangerous—and it was purchased from the defendants with a warranty of soundness, then they would be liable for the injury sustained by the plaintiff from its explosion while being prudently used by him; and in such a case there can be no doubt of the right of Jameson's copartners to call upon him for contribution to the amount of the recovery made by the plaintiff. In view of this, it would seem a hardship if the necessary construction or application of this rule permitted his presence in court during the conduct of the trial alone under the penalty of the forfeiture of his right as a witness to give evidence of facts which might be essential to prevent a verdict or judgment operative as much against him as his partners, who happened to be parties to the record. However, in *Rainwater v. Elmore*, 48 Tenn. 363, the rule was announced that, upon an affidavit showing the necessity therefore, it was the duty of the trial court to place all the witnesses in a particular case under the rule. It was conceded that there was a conflict of authority as to the rule, many courts holding it to be within the discretion of the trial judge to exclude, or not, witnesses during the trial of the cause; but this court, in the case referred to, deemed it the part of wisdom to align itself with those tribunals which made the granting of the rule imperative whenever proper grounds were laid. In *Wisner, etc., v. Maupin*, 61 Tenn. 340 (decided in 1872), the rule was extended so as to embrace parties to the suit who desired to become witnesses, and this left as exempt from its operation only em-

ployed counsel. But prior to the delivery of the opinion of the court in the last-mentioned case, but, no doubt, after its trial in the lower court, the Legislature, at its session of 1871, passed an act in these words: "Nothing in any section of this article [as to witnesses] shall be so construed as to require the parties or either of them to be put under the rule, when witnesses in any case in which the rule has been applied for and granted." Shannon's Code, § 5599. In *Lenoir Car Company v. Smith*, 100 Tenn. 127, 42 S. W. 879, the proper application of this act came up for consideration by this court, upon the action of the trial judge, who declined to extend its benefits to an officer of a corporation, whose testimony was important, as bearing on the issues involved, and yet whose presence during the trial was essential to the proper presentation of the case; and we held that though the corporation was, and this officer was not, a party to the record, yet he was within the spirit of the act, and that his competency as a witness was not affected by the fact that, in violation of the rule, he remained in the court while the trial was in progress. This ruling was a radical, but a proper, departure from the doctrine of the earlier cases. Following this liberal construction of this statute, we think the witness Jameson was equally within its spirit. It happened that he, as a member of the firm, was most familiar with the construction and operation of this lamp. He it was who selected the firms in Connecticut to manufacture it, after superintending the making of the model and specifications therefor. He was present when tests were applied to ascertain the holding strength of the metals used in its construction, and afterwards he submitted the lamp to the National Board of Underwriters for their inspection and approval. His superior knowledge of the device, and of the safe as well as unsafe way of using it, is shown in the record; and it is equally shown that his presence was needed to counsel conducting a defense which inured to him as well as to his partners, who were the technical parties to the record. So it is this assignment of error is overruled.

The other assignments of error are not well taken, but, as they possess no general interest, they are disposed of in a memorandum opinion filed with the record.

It follows that the judgment of the trial court is affirmed.

CHICAGO, ST. L. & N. O. R. CO. v. SMITH.
(Supreme Court of Tennessee. June 23, 1903.)
RAILROADS—ACCIDENT TO TRESPASSERS—LIABILITY.

1. Evidence examined in an action by a trespasser injured while alighting from a train, and held to show no negligence on the part of defendant.

Appeal from Circuit Court, Tipton County; Thos. J. Filippin, Judge.

Action by Leona Smith, by her next friend, W. M. Smith, against the Chicago, St. Louis & New Orleans Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

R. W. Sanford, for appellant. Charles B. Simonton & Son and Fentress & Cooper, for appellee.

WILKES, J. This is an action for damages for personal injuries. It was tried before a jury in the court below, and there was a verdict and judgment for \$1,000. There was an error in the original judgment, for which it was reversed by this court, and on remand the judgment was corrected. The railroad company has appealed and assigned errors.

The facts, so far as necessary to be stated, are that plaintiff was a young lady 19 years of age, and resided with her father at Brighton, a station seven miles south of Covington on the Illinois Central Railroad. She went to Covington on the 29th of November, 1900 (Thanksgiving Day), with her brother, Elmer, a lad 12 years of age. In the evening she went with him to the station, expecting to send him home, and to remain all night in Covington herself. Her brother was not willing to return home without her, and, after much time spent in vain efforts to persuade him, they got upon the train together, not having bought any tickets, she giving as a reason that she was trying to persuade her brother to go alone until too late to get tickets, and, moreover, that she thought the money would be as good as a ticket. She and her brother entered the rear end of the ladies' coach with other passengers, and took seats; she says near the back end, he says about the middle of the coach. She was accustomed to riding on the train, and often went from her home to Covington and Memphis, and had gone upon the same evening train on previous occasions when she had tickets. She made no inquiry whether the train would stop at Brighton, her destination. She knew that that station was a flag station, and trains did not stop there unless there were passengers to get off of the train, or the train was flagged to let passengers on. The coach was full of passengers. They (the sister and the brother) state that they had their fares in their hands, but the conductor did not call upon them for tickets nor the passage money, nor did they offer it to him, nor tell him that they wanted to stop at Brighton. The conductor says he passed through the train between Covington and Brighton, and called for and took up tickets and fares. He was in uniform, and stated that as he approached the passengers' seats he would call for tickets, and take up all that were offered, or that he could discover. The porter was with him, and says that as the conductor would go through the cars he would call out "Tickets." No ticket for Brighton was pre-

sented, and no fare paid to that point by any one; and the conductor says he did not know that any one desired to get off at Brighton, and he would not have stopped there if it had not been that the train was flagged to stop and let on a United States mail inspector, who was there waiting for a train. At Covington the conductor, when the train stopped, had gone immediately to the ticket office for telegraph orders, and did not assist passengers to board the train, though quite a number got on. As the train approached Brighton, it was flagged and signaled to stop, and the conductor entered the front door of the ladies' coach, and called out "Brighton." No person arose or indicated a purpose to get off. The conductor stepped down on the platform at the front end of the car, the usual place for passengers to alight, and stood ready to help passengers on or off; and, after seeing the waiting mail agent get on the car, signaled the engineer to go ahead, and the train started. After the conductor passed out of the front door, plaintiff, with her brother, went out of the rear end of the coach, which was somewhat dark, and proceeded to alight. The train started as she was stepping from the bottom step, and she fell on the platform, a smooth crushed-stone surface, and broke her thigh bone, causing a serious injury. It appears that her brother stepped off the cars after she did, and reached the ground safely.

The trial judge charged the jury, in substance, that the company, under the circumstances of the case, owed the plaintiff ordinary care and prudence to see that she was not injured, and this was due her, though she had never paid her fare, or offered to do so, and though she attempted to leave the car without paying, and forfeited all rights as a passenger; that the duty of the company in such case was one of ordinary diligence, and not the highest kind of diligence required towards passengers who had paid fare; and, if the conductor did not stop a reasonable time for all passengers to alight, the company would be liable. We are of opinion that the court was in error in part of this instruction. If the relation of carrier and passenger had never been established, or if it had been forfeited by the passenger, the company owed her no duty, and would be liable to her only for willful, wanton, or intentional injury. We cannot see how the company was under any obligation to hold the train for the plaintiff to alight beyond the usual halt, which the conductor says was made, when the conductor did not know, and without his fault could not know, that she wanted to alight, or that she was a passenger, or that any passenger intended to alight; and this is all conceded by the plaintiff herself. He had adopted all the usual precautions to ascertain if there were any passengers for Brighton, and the usual, though apparently unnecessary, warnings for any to alight that might be aboard. The plaintiff left the car at an unusual place

—the rear of the coach—in the night, and was not, and could not be, seen by the conductor from his usual place of observation, and he was totally ignorant that she was on the train and wanted to get off. We are unable to see any negligence on the part of the conductor, or any duty the company was under to plaintiff. If he had seen her, and recognized that she was attempting to alight, he would have been under obligation to give her reasonable time to get off; but, not knowing anything whatever of her, there could be no obligation to wait for her—certainly not longer than the usual halt.

We are of the opinion that a conductor upon trains of a commercial road cannot be required absolutely to see and know at all hazards every person who may attempt to get on and off his train. He cannot be at each entrance to each coach, and see each person who may attempt to enter or leave. When he has called for tickets, and ascertained the destination of his passengers, he can only be required to see after those whom, by proper diligence, he has been able to discover, and not after those who have evaded or neglected to pay fare or to notify him of their destination; and especially is this true of persons who enter or leave the coach improperly, and at a point where they cannot be seen by the conductor. It is the duty of the passenger, when the conductor approaches him collecting fares and calling for them, to tender his ticket or money, and, in the latter event, to notify the conductor of his destination; and the conductor must take notice of the destination of each passenger known to him, or that, in the discharge of his duty, he may be able to discover, but cannot be held liable for those who do not come under his notice by evading payment of fare.

We are of opinion there is error in the judgment of the court below upon the features indicated, and it is reversed, and the cause remanded for a new trial. Appellee will pay costs of appeal.

MEMPHIS ST. RY. CO. v. SHAW.

(Supreme Court of Tennessee. June 9, 1903.)

STREET RAILWAYS—INJURIES TO PASSENGER
—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE
—DUTY TO AGED PASSENGERS—INSTRUCTIONS—WAIVER OF ERROR—PUNITIVE DAMAGES—SUFFICIENCY OF EVIDENCE.

1. Plaintiff's contention, in an action against a street railway for injuries, was that she was negligently carried beyond her destination on the trip out from the city to her home, and to the terminus of the road; that on the trip back she was wantonly carried beyond her stopping place again; that the conductor treated her rudely on the trip out and back; and that she was injured in attempting to get off at a place beyond her destination, where the car stopped on the return trip. *Held*, that evidence of what was said and done by the conductor and plaintiff was not only competent, but constituted the gist of the action.

2. Though the charge of the court, in an action against a street railway for injuries, to the

effect that defendant would not be liable if plaintiff's negligence was the sole cause of the injury, was erroneous, defendant is not in a position to complain, where it did not ask for any other or additional charge.

3. Where the record on appeal in an action against a street railway for injuries shows that defendant insisted that the facts adduced at the trial presented a case of sole negligence on the part of defendant, or sole negligence on the part of plaintiff, depending on whether plaintiff's or defendant's theory of the facts be adopted, and that no charge on contributory negligence was requested, defendant cannot complain of the court's failure to charge that it would not be liable, though negligent, if plaintiff's negligence contributed to her injury.

4. It is the duty of a conductor in charge of a street car to see that no one is in the act of alighting when he starts his car after having stopped to discharge or take on passengers at a regular stopping place.

5. It is the duty of those in charge of a street car to give greater care and consideration to aged and infirm passengers, whose age or infirmities are apparent, than to other passengers, and, if necessary, to assist such passengers to alight from the car when they arrive at their destination.

6. Defendant in a civil action cannot complain of the trial court's action in stating plaintiff's theory in the charge, when a correct statement of defendant's theory was also given.

7. In an action by a passenger against a street railway for injuries, evidence held to justify punitive damages.

Appeal from Circuit Court, Shelby County; J. P. Young, Judge.

Action by Mrs. Kate Shaw against the Memphis Street Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wright, Peters & Wright, for appellant. Carroll, McKeller & Bullington, for appellee.

WILKES, J. This is an action for damages for personal injuries. It was tried before a jury in the court below, and there was a verdict for \$5,000. On motion for a new trial, \$2,000 of this amount was remitted, and judgment was rendered for \$3,000 and costs, and the street car company has appealed and assigned errors.

The substance of the complaint is that plaintiff was negligently carried beyond her destination on her trip out from the city to her home, and was afterwards carried on to the terminus of the road, and brought back, and again wantonly carried beyond her destination on her return.

It is said the court erred in admitting, over the objection of the company, evidence of what was said and done by the conductor and plaintiff on the trip out and the return. Plaintiff's contention is that she was carried negligently beyond her destination in going out, and that the conductor would not return with her to her destination; that he treated her rudely on the trip out and back, and negligently and wantonly on the return trip carried her beyond her stopping place. The case in this court must be viewed from the plaintiff's standpoint, and on her theory,

¶ 4. See Carriers, vol. 9, Cent. Dig. § 1233.

and what was said and done on the trip out and back is not only competent, but constitutes the very gist of the action.

It is said the court erred in the following instruction to the jury: "The court further instructs you that a person who enters a street car to be transported to a certain place, and pays his fare, is a passenger, and that there is a corresponding obligation on the part of the passenger to act with prudence, and to use the means provided for his safe transportation with the same reasonable circumspection and care that is required on the part of the carrier, for the law does not prescribe a different rule or measure of care with respect of parties, and, if his negligent act solely contributes to bringing about the injury of which he complains, he cannot recover." The criticism is in the use of the word "solely," and the contention is that the court should have told the jury that, if both plaintiff and the company were negligent, the plaintiff could not recover. To give to the word "contribute" its legal significance would make the charge unintelligible, as one act cannot "contribute" solely to effect a given result, but only in connection with some other act; and there can be no sole contributory cause of an accident. We may assume, therefore, that the trial judge meant, if the negligent act of the plaintiff produced or was the sole cause of the injury, she could not recover. There are two or more answers to this assignment, assuming that it was meant to charge the doctrine of concurrent negligence. One is that there was no request for any other or additional charge. Another is that the company insisted throughout the trial that there was and could be no contributory negligence or concurrent negligence, under the proof, but that the facts presented a case of sole negligence on the part of plaintiff, or sole negligence on the part of defendant, according to whether the jury adopted plaintiff's or defendant's theory of the facts. Counsel for the road stated that, if plaintiff's theory was true, then the road was guilty of negligence, to which, in the language of counsel, "we don't claim her negligence contributed." The jury evidently adopted the theory of plaintiff. The case of *Nashville Street Railway Co. v. Norman*, 108 Tenn. 331, 67 S. W. 479, is cited by counsel for the road, and relied on by him; but in that case there was a theory of concurrent negligence presented by the record, and the court was asked to charge the doctrine of concurrent or contributory negligence. The court in the present case, in his charge, did present the feature of contributory negligence, saying to the jury: "But if the passenger is injured by his or her own negligence or want of care, and without any negligence or want of care on the part of the carrier, then the carrier is not liable, and there can be no recovery." This was meager, but there was no request for additional charge.

It is said the court erred in charging as follows: "You are also instructed that it is the duty of those in charge of the car, when signaled to stop at a regular stopping place to discharge passengers or to take on others, to await a sufficient length of time to allow the passengers—whether those giving the signal to stop, or those who are undertaking or attempting to alight—a sufficient length of time to alight in safety, by the exercise of reasonable diligence, and to see and know that no passenger is in the act of alighting when the car is again put in motion. And it is likewise their duty to give greater care and consideration to aged and infirm persons, whose age or infirmity are apparent from their appearance, than to other persons, and, if necessary, to assist them in getting off the car; and, if they fail to perform their duty in these respects, the employer is liable." One objection to this is that it requires the conductor absolutely to know and see that no passenger is in the act of alighting when the car is put in motion, and thus makes the company virtually an insurer that the conductor shall see the passenger if alighting. This doctrine is laid down in *Booth on Street Railroads*, § 349, in these words: "It is the duty of those in charge of the car, when signaled to stop for the purpose of discharging passengers, to ascertain who and how many of the passengers intend to alight at that place, to wait a sufficient length of time to allow them to alight in safety by the exercise of reasonable diligence, and, in any event, to see and know that no passenger is in the act of alighting, or otherwise in a position which would be rendered perilous by the motion of the car when it is again put in motion." *Booth on Street Railroads*, § 349. Again, in *Highland Co. v. Burt*, 92 Ala. 29, 9 South. 410, 13 L. R. A. 95, it is said: "It is the duty of the driver to wait a sufficient length of time to enable passengers to alight in safety by the exercise of reasonable diligence, and, in any event, to see and know that no passenger is in the act of alighting, or otherwise in a position which would be rendered perilous by a movement of the car." In *Railroad Co. v. Mitchell*, 98 Tenn. 31, 40 S. W. 72, no doubt citing from *Booth on Street Railroads*, it is said: "A common carrier is guilty of negligence if it fails to stop its trains at stations a sufficient length of time to enable passengers, including the aged and very young, by the exercise of due care and diligence, to leave the cars in safety and without hurry or confusion, or if, after having waited a reasonable time, it starts its train when it is known, or should by reasonable care have been known, that passengers were in the act of alighting from the cars. As applied to a woman aged 76 years, and weighing 200 pounds, the following instruction, taken as a whole, is not erroneous, to wit: 'It was the duty of the defendant company to use all reasonable care and diligence for her safety

while on and getting off of the train, and to give a reasonable time on arriving at the depot [her destination] to alight from the train in safety; and it was the duty of the company, or some agent or employé of defendant in charge of the train, to see that sufficient time was given for that purpose, and, if necessary, to assist in making her exit." In *Nellis on Street Surface R. R.'s*, p. 479, notes, it is said: "The conductor must be alert to see that no one is alighting or attempting to alight before he starts his car." Citing *Gilbert v. Street Railway*, 160 Mass. 403, 63 N. E. 60; *Loose v. Street Railway*, 63 Hun, 405, 18 N. Y. Supp. 297. While we think that the language of the trial judge, when taken in its connection, and in view of other portions of the charge, does not make the company an insurer, and was not so intended, we cannot, in case of street railways, when a conductor has only one car, or, at most, two or three cars, to watch, consider it too high a degree of care that he should be required to see and know that no one is in the act of alighting when he starts his car. The whole length of the car, and every passenger on it, can be brought under his notice at a glance, and they all alight on one side or at one end; and, by the exercise of any reasonable degree of care and caution, he may see and know. We do not mean to apply to commercial cars, where there are several coaches in a train, under one conductor. As to the duty of the conductor to look after the safety and care of aged and infirm persons, and, if necessary, assist them in alighting, the instruction given in this case does not go beyond the rule of duty laid down in *Railroad Co. v. Mitchell*, 98 Tenn. 31, 40 S. W. 72. This does not mean that it is the duty of the conductor to assist passengers generally to alight.

The sixth assignment complains of the fact that the trial judge gave plaintiff's theory of the case to the jury. We find that it was immediately followed by a statement of defendant's theory, and both are stated with substantially and virtually exact correctness. We do not find in the learned judge's statement any fact stated hypothetically which was not brought out by some of the witnesses, and plaintiff's theory is correctly set forth, as well as that of defendant.

It is said that the trial judge should have given no charge upon the subject of exemplary damages; that the case presented is not one for punitive damages, and hence the verdict and judgment are excessive, and so much so as to evince passion, prejudice, or caprice, caused by the charge upon the subject of exemplary damages. In considering this assignment, we must, of course, take plaintiff's version of the matter, as the jury evidently credited her, and gave the weight of their verdict in her favor, and there is no assignment that there is no evidence to support the verdict. If the case is one which

calls for exemplary damages, then the court should have charged the jury upon that feature. In *American Lead Penel Company v. Davis*, 108 Tenn. 254, 66 S. W. 1129, this court approves the language of *Sutherland on Damages*, when he says that punitive damages are allowed when a wrongful act is done with a bad motive, or so recklessly as to imply a disregard of social obligations, or when there is negligence so gross as to amount to misconduct and recklessness. Continuing, the court says: "The authorities affirm that what amounts to gross negligence under the facts of the case, or to a disregard of the safety of the person injured, is a discretionary ground for exemplary damages." This court has also said, in *The Traction Co. v. Lane*, 108 Tenn. 378, 53 S. W. 557, 46 L. R. A. 549: "A contract to carry passengers is not one of mere toleration and duty to transport the passengers on its cars, but it also includes the obligation on the part of the carrier to guaranty to its passengers respectful and courteous treatment, and to protect them not only from violence and insult from strangers, but also from violence and insult from the carriers' own servants." In *Telegraph Co. v. Shaw*, 102 Tenn. 318, 32 S. W. 163, it is said: "There need not be positive proof of malice or oppression, if the transactions, or facts shown in connection therewith, fairly imply its existence, and it is left to the jury to look at all the circumstances in order to see whether there was anything in the conduct of the defendant to aggravate the damages." Tested by these rules, we advert to the facts of the case as given by plaintiff and her witnesses: Plaintiff was a German lady, 73 years of age. She entered a car in the city to go to her home, in the suburbs. She desired to get off at Orleans street, and so told the conductor at the next crossing before reaching Orleans. It seems the conductor and another one, not on duty, and a young man friend, were on the rear of the car, talking. He, being engaged in conversation, did not give the signal to stop at Orleans, and plaintiff halloed at him, but he ran on to Richland avenue; and plaintiff declined to get off there, and demanded to be carried back, but the conductor refused, and notified her that he would take her to the end of the line, which he did. On the way back, the conductor demanded of her another fare, which she refused. She says he "fussed" at her, and she demanded to be put off at Orleans street, when the conductor threatened to carry her on to town again. Before reaching Orleans, the conductor and motor-man were in conversation, looking back at her and laughing, and, as a young lady passenger stated, evidently making fun of plaintiff. He did not stop at Orleans, but ran by that crossing very rapidly, and only stopped at the next, which was Lauderdale street, in order to take on three ladies. Plaintiff, when the three ladies got on, attempted to alight; and while on the step, and in the act

of putting her foot to the ground, the car was started suddenly, and threw her violently to the ground, bruising her, breaking one rib, and otherwise injuring her. There is a conflict as to whether the car had stopped when she tried to get off, but her evidence, and we think the decided weight of testimony, is to the effect that it had. The fact that three other ladies entered the car is strongly persuasive, if not conclusive, that the car did stop. That it started up before she alighted appears very clearly from the testimony of the policeman, who picked her up about six feet beyond the stopping point where the ladies entered the car, and beyond the regular crossing. This version, as well as the plaintiff's entire theory of the case, is fully sustained by Miss Taylor in its most important details.

A summary of the facts bearing upon this feature of punitive damages is that the conductor had only two passengers to look after. He was asked in ample time to stop the car at Orleans street. He neglected to do it, presumably because engrossed by the conversation of his companions. He carried her to the end of the line, and became angry and quarreled with her on the return, demanding additional fare. He threatened to take her back to town, and joined the motorman in laughing at her, or in such manner as to indicate it to her and to Miss Taylor, her fellow passenger. He carried her again by her stopping place on the return, at a high rate of speed, laughing with the motorman at her discomfiture. He stood and saw her attempt to get off, and started his car before she was safely on the ground, throwing her violently, and seriously injuring her. We think these facts are sufficient not only to call for a charge upon the feature of punitive damages, but also to justify the jury in giving them, and, in view of these facts and the injury sustained, there is no error in the amount; and the judgment is affirmed, with costs.

HALL v. STATE.

(Supreme Court of Tennessee. June 20, 1903.)

CRIMINAL LAW—TRIAL—MOTION IN ARREST—SUFFICIENCY—MOTION FOR NEW TRIAL—WAIVER—APPEAL—PRESUMPTIONS.

1. Where defendant made a motion in arrest of judgment after conviction, before the making of a motion for a new trial, he thereby waived the latter motion.

2. Where the recital in an appeal record relating to the making of a motion in arrest of judgment and for a new trial was, "Comes the defendant and moves the court in arrest of judgment and for a new trial, which motion being heard is overruled," it could not be presumed that the motion for a new trial was made and overruled before the motion in arrest was heard.

3. A general motion in arrest of judgment after conviction, failing to point out to the trial court the matters complained of, is properly overruled.

Appeal from Circuit Court, Obion County; R. E. Maiden, Judge.

Noel Hall was convicted of keeping a house of prostitution, and appeals. Affirmed.

Swiggart & Spradlin and Rice A. Pierce & Son, for plaintiff in error. Charles T. Cates, Jr., Atty. Gen., for the State.

BEARD, C. J. There was in this case an indictment and conviction for keeping a house of prostitution, to the common nuisance of the community. A motion for a new trial and in arrest of judgment was made. This having been overruled, the defendant appealed, and has assigned errors upon the action of the trial judge.

The practice in this state is well settled that a motion in arrest of judgment made before a motion for a new trial waives the latter motion. This is upon the ground that in regular order the latter motion precedes the former, and the making of the motion in arrest, being in the nature of an advanced step, waives that which, in pleading, should have gone before. *Snapp v. Moore*, 2 Tenn. 236; *Ins. Co. v. Crunk*, 91 Tenn. 376, 23 S. W. 140; *Freeman v. Railroad*, 107 Tenn. 340, 64 S. W. 1. Upon examination it will be found that this rule is recognized and enforced by many courts of high authority. *Cincinnati v. Case*, 122 Ind. 310, 23 N. E. 797; *Hall v. Nees*, 27 Ill. 411; *Craig v. Miss. Mills*, 12 Mo. App. 585; *Candler v. Hammond*, 23 Ga. 493; *Hipp v. Ingram*, 3 Tex. 17; *Respublica v. Lacaze*, 2 Dall. 118, 1 L. Ed. 313. In his work on General Practice, Judge Elliott (volume 2, § 895) says: "The right to move for a new trial may be waived by agreement in advance, or by inconsistent acts, or by neglecting to take the proper steps. Thus it has been held moving in arrest of judgment before moving for a new trial is a waiver of the latter motion." In support of this text, many cases are cited by the author. In this state, the rule goes back, at least, to 2 Overton's Reports. It is true opinions heretofore published have been delivered in civil cases, yet this has not indicated that the application of the rule was not equally proper in criminal cases. There is the same necessity for orderly procedure in the latter as in the former cases, and no reason can be assigned why the practice in this regard should be different in the two classes. In Texas, the rule was of legislative as well as judicial recognition, and was enforced in criminal as well as in civil cases (*State v. Mann*, 13 Tex. 62), and it existed until that state adopted its Code of Criminal Procedure, and changed it so far as the former class of these cases was concerned. *Mathews v. State*, 33 Tex. 102.

And it is an incorrect practice to enter and have acted upon these two motions at the same time. *Freeman v. Railroad*, supra. One or two courts have held that these two motions may be pending at the same time, and, if there is nothing to the contrary, it will be presumed that they were ruled upon

¶ 1. See Criminal Law, vol. 15, Cent. Dig. § 2353.

in their proper order. Volume 1, § 905, Elliott, Gen. Practice. But this presumption, even if tolerated in this state, could not be indulged in in this record. It cannot be presumed that these two motions were made and were pending together. The recital is: "Comes the defendant and moves the court in arrest of judgment and for a new trial, which motion being heard is overruled." Evidently there was a single motion embracing two distinct, if not incongruous, matters of procedure, and invoking the judgment of the trial judge upon it. In addition, even if this was construed as an equivalent of recital of the two motions, yet it could not be presumed that they were disposed of in proper order; for, from the statement of the record just given, we think the necessary inference is that the motion in arrest was first made, and, being so made, was disposed of first. The legal effect of the waiver of the motion for new trial is that the court is confined to error assigned upon the face of the record.

In addition, the motion in arrest should state concisely the defects complained of, or the ruling of the lower court upon such motion, it is held, cannot be reviewed on appeal. *Noyes v. Parker*, 64 Vt. 379, 24 Atl. 12; *People v. Dick*, 37 Cal. 277; *State v. Wing*, 32 Me. 581; *Vandever v. Garshwiler*, 63 Ind. 186; *State v. Bryan*, 89 N. C. 531. Nor will the motion be entertained for mere matters of form. *Greene v. State*, 59 Ga. 859; *State v. Raymond*, 20 Iowa, 586; *Billings v. State*, 107 Ind. 55; *Corn v. Brazleton*, 2 Swan, 272. This court has held that this was the better, "if not the only correct practice." *State v. Steele*, 50 Tenn. 134. A motion in arrest is much in the nature of a demurrer which goes to defects upon the face of the pleadings, and this common-law ruling requiring the motion in arrest to point out to the trial court the matters complained of is in accordance with the spirit of our legislation as to demurrers. The general demurrer prevailed for many years in this state, but it was finally condemned as a vicious practice, in that it laid a trap for trial courts and for adversary counsel. So the Code of 1858 abolished it, and provided that the demurrer must specify the defects relied on. We think a general motion in arrest is equally objectionable, and should be discountenanced.

It follows, from what has been said, that the judgment of the lower court is affirmed.

SHERROD & CO. v. HUGHES.

(Supreme Court of Tennessee. June 22, 1903.)
DEPOSITIONS—WITNESSES RESIDING IN COUNTY—PRESENCE OF WITNESS AT TRIAL—USE OF DEPOSITION.

1. Shannon's Code, § 5626, provides that the deposition of any person residing in the county where the suit is pending may be taken by any party, but the opposite party may summon the witness, in which case he shall be examined as

if summoned by the party taking his deposition. *Held*, that where the deposition of a witness residing in the county was taken by plaintiff, and the witness was present at the trial under subpoena issued by defendant, plaintiff was entitled to read the same, or examine the witness orally, or decline to do either, at his election, but in either event defendant was entitled to examine the witness as plaintiff's witness as to all matters, whether brought out in the deposition or not.

Appeal from Circuit Court, Crockett County; John R. Bond, Judge.

Action by Charley Hughes against Sherrod & Co. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Craig & Casey, for appellants. W. F. Poston, for respondent.

WILKES, J. This is an action of replevin for some lumber and shingles. The case was tried before a jury in the court below, and there was verdict and judgment for the plaintiff, Hughes, and the defendants have appealed.

It is said there is no evidence to support the verdict. This is based on the idea that Hughes became the owner of the lumber and shingles by a fraudulent arrangement with Shepard, from whom he claims to have bought them. This was a matter which addressed itself to the jury, and they have found for the plaintiff, and there is evidence to support their finding.

It is said that it was error to allow the deposition of the notary public, Neal, to be read. Neal lived in the county when the suit was tried, his deposition had been taken by the plaintiff, and he had then been summoned by the defendant as a witness, and was present at the trial and sworn, and placed under the rule by the defendant, and was so under the rule when plaintiff offered to, and did, read the deposition over defendant's objection. It is insisted that this was contrary to statute (Shannon's Code, § 5626), which is as follows: "The deposition of any person residing in the county where the suit is pending may also be taken by either party, but the opposite party may summon the witness, in which case he shall be examined as if summoned by the party taking his deposition." This statute has twice been passed upon by this court: First, in the case of *Turney v. Officer*, 3 Head, 576; and, second, in the case of *Puryear v. Reese*, 6 Cold. 21. In the two cases the court held directly opposite views, holding in the first that the deposition might be read, though the witness was summoned and in court under subpoena, and he might then be cross-examined by the opposite party. In that case the depositions appear to have been read without objection, and the witness was cross-examined by the opposing party. The court held that the section did not make it obligatory in such cases on the party taking the deposition to read it, but he might have examined the witness orally or read the deposition; and the oppo-

¶ 1. See Depositions, vol. 16, Cent. Dig. §§ 253, 259.

site party in either event would have been entitled to cross-examine him as the witness of the party who had taken his deposition. In the latter case (6 Cold, 27) the court held that in such case the party taking the deposition could not read it, but must orally examine the witness. While the case of *Turney v. Officer* is not referred to by name, the court evidently had it in mind when it said that it appeared to have been held otherwise, but the practice then laid down was the proper one. Judge Caruthers, in his *History of a Lawsuit* (page 192, § 314), concurs with the view of the court in the *Coldwell Case*, but without referring to the case of *Turney v. Officer*, 3 Head, 576, which was decided about the time the *History of a Lawsuit* was written. It is not improper to note that the *History of a Lawsuit* was written very soon after the Code of 1858 was enacted. Prior to the enactment of the Code of 1858, there does not appear to have been any provision of law authorizing the taking of depositions of persons living in the county of the pending suit. There was a statute providing for taking depositions of parties not living in the county, and in such cases depositions might be read, though witnesses were in court and under subpoena, and in such cases they were to be treated as witnesses of the party taking the depositions. *Ford v. Ford*, 11 Humph. 89; *Purveyor v. Reese*, 8 Cold. 27; *Car. Hist. Lawsuit*, § 314; *Sweat v. Rogers*, 6 Helsk. 122. It is not of so much importance that the rule be settled in accord with either view, as it is that it be settled in accord with one or the other definitely.

We are of the opinion that the practice laid down in *Turney v. Officer*, 3 Head, 576, should be established and followed. This makes the rule uniform as to witnesses in and out of the county whose depositions may be taken, and we see no valid reason for any difference in the two cases; and we therefore hold the rule to be, in both classes of cases, that when the deposition of a witness in or out of the county has been taken by either party, and the opposite party has brought the witness into court by subpoena, the party who has taken the deposition may read it, or may examine the witness orally, or may decline to do either, as he chooses; but, in either event, the opposite party may examine the witness, treating him as the witness of the party who has taken his deposition as to all matters, whether brought out in the deposition or not. It is true the statute uses the word "shall," but this word has been held to be a convertible term with "may." *Bank v. Johnson*, 3 Humph. 28; *Barnes v. Thompson*, 2 Swan, 313. The use of the term "shall" does not make an examination imperative, but is only intended to lay down the rule that he may be examined orally by either party; but if his deposition is read or not, or he is examined by either party, he shall be treated and considered as

the witness of the party who has taken the deposition.

It follows there was no error in the judgment of the court below, and it is affirmed, with costs.

JACKSON v. COFFMAN et al.

(Supreme Court of Tennessee. June 23, 1908.)
ATTACHMENT—PARTIES—TRUST DEED—FORECLOSURE—RIGHTS IN SURPLUS PROCEEDINGS.

1. Complainant filed a bill averring that the principal defendant was indebted to him in a stated sum; that he owned certain land, but was a nonresident; and that complainant was entitled to attach the land and hold it as security for the satisfaction of any decree recovered by him. He joined a second mortgagee as a party defendant, but failed to join the trustees under a prior deed of trust. *Held*, that he took nothing by his attachment.

2. On foreclosure of a prior deed of trust, and consequent extinguishment of a second mortgage on the land, the lien of the second mortgagee was transferred to the surplus proceeds arising from the sale.

3. Levy by garnishment on the surplus proceeds by an unsecured creditor could not defeat the second mortgagee's lien.

Appeal from Chancery Court, Shelby County; F. H. Helskelt, Chancellor.

Bill by J. M. Jackson against W. P. Coffman and others. Decree for complainant. Defendants appeal. Reversed.

Carroll, McKeller & Bullington and Watson & Fitzhugh, for appellants. W. B. Glisson and Malone & Malone, for appellee.

BEARD, C. J. This is a controversy between two adverse claimants over the surplus proceeds of a tract of land lying in Shelby county, realized by Eldridge and Richardson, trustees, who foreclosed a trust deed made by the defendant Coffman to them to secure a purchase-money note described therein. The complainant claims that, by proper process in this case, he impounded this fund, and is entitled to have it applied to the debt against Coffman, which he sets up in his bill; and the defendant the Chickasaw Coöperage Company rests its contention upon a mortgage second in point of time to this trust deed, made by Coffman to secure it in large advances made by this company to him. The bill was filed on the 15th of May, 1899, and in it complainant alleged that Coffman was indebted to him in an amount set out therein; that he was the owner of this tract of land, but a nonresident of the state; and that complainant was entitled to attach this property and hold it as security for the satisfaction of the decree which he asked the court to render in his favor as such creditor. As the holder of the mortgage above referred to, which bore date the 15th of February, 1899, the Chickasaw Coöperage Company was made a defendant, and it was called upon to disclose in its answer what ad-

¶ 2. See *Mortgages*, vol. 35, Cent. Dig. § 1636.

vances had been made on the faith of this security to Coffman; but complainant averred, on information, that there was little, if anything, left of this mortgage debt. In accordance with the prayer of the bill, an attachment was issued and levied on the land. At the time of filing the bill, there was outstanding the trust deed to Eldridge and Richardson, which antedated the mortgage made by Coffman to the cooperage company. The existence of this trust deed seems to have been overlooked by the draftsman of the bill. At any rate, the complainant proceeded against the land without any mention of this conveyance, and without making the trustees parties defendant. This being so, it is evident complainant took nothing by his attachment. *Lane v. Marshall*, 1 Heisk. 30; *Blackburn v. Clarke*, 85 Tenn. 508, 3 S. W. 505.

Subsequently, however, on the 31st of January, 1900, the complainant filed an amended and supplemental bill, in which, after repeating the allegations of his original bill, it was averred that on the 15th of December, 1898, Coffman had executed a mortgage to the Chickasaw Cooperage Company of all the white oak timber on certain lands in the state of Arkansas, and on the machinery to be erected on these tracts to manufacture this timber into staves, together with all the bolts or staves that might be sawed or cut from it, to secure a note of \$2,330 due the company, and "other advances to be made." It was also alleged that this indebtedness secured by the Arkansas mortgage had been greatly reduced by the 15th of February, 1899, the date of the Tennessee mortgage, and that since that date, as well as since the filing of the original bill and the levy of the attachment, the cooperage company had received many car loads of staves which were shipped by Coffman, the aggregate value of which was at least \$12,000, which sum, it was charged, was ample to discharge all liabilities secured by the land mortgage existing at the date of the levy of the attachment, and that by operation of law this mortgage was released as against complainant, and the property covered by it opened to the attachment of complainant. This pleading, as did the original bill, omitted all mention of the trust deed, and also failed to make the trustees parties defendant.

After the filing of this amended and supplemental bill, another attachment was issued. It seems that on April 10, 1900, the trustees, Eldridge and Richardson, foreclosed this trust deed, and from the proceeds of sale had remaining in their hands, after satisfying the trust deed and expenses, a considerable surplus. Upon this the last attachment was levied by proper garnishment process, and it is this surplus which complainant seeks to reach; and his contention is that either under the original attachment on the land, or else by virtue of the garnishment, he has the right to appropriate it to his debt.

As has been seen, this claim cannot be rested on the original. Can it be on the latter attachment? The record clearly shows that on the 12th day of May, 1899, Coffman's indebtedness to the Chickasaw Cooperage Company, secured by the Arkansas and Tennessee mortgages, amounted to the sum of \$9,673.09, and that from that date up to the time of the service of the garnishment, the 10th of April, 1900, it had additionally advanced to him, in various amounts and at various times, sums aggregating \$10,854.26, making a total debit on that day of \$21,028. It also shows that at this latter date the sum total of Coffman's credits with the company was, from all sources, \$10,424.31.

We think there is little difficulty, in view of these facts, in determining the respective rights of the parties. When the trust deed on this land was foreclosed, the effect of such foreclosure was to extinguish the second mortgage; but, as to the surplus left after the payment of the trust deed and the expenses of sale, there can be no doubt. It stood in the place of and represented the equity of redemption, upon which, by virtue of its mortgage, the cooperage company had a lien. 2 Jones on Mortgages, § 1687. This being so, the question is, under what sound rule can complainant deprive this company of its right to this surplus, and have it applied to this claim, when his lien is inferior in point of time? None has been, and we think none can be, found. Had complainant, after his levy by garnishment on this surplus fund, filed a supplemental bill, invoking the doctrine of marshaling securities, upon the ground that the cooperage company had two securities, and he a lien only on one of these, his claim would have been entitled to equitable consideration. But this was not done, and such is not the theory of his case. He comes as an attachment creditor, and asks the court to oust a mortgagee who is first in time and right from a security to which he is entitled, and apply it to his (the complainant's) claim. This cannot be done. *Nolen v. Crook*, 5 Humph. 312.

In conclusion, it is proper to say that the rule as to application of payments, invoked by complainant, does not arise on the facts presented in this record.

The decree of the chancellor, save as to the personal decree against Coffman, is reversed, and the bill is dismissed as to the Chickasaw Cooperage Company, at cost of complainant.

MEMPHIS ST. RY. CO. v. KARTRIGHT.
(Supreme Court of Tennessee. May 23, 1903.)
STREET RAILWAY COMPANY—FALL OF TROLLEY WIRE—RES IPSA LOQUITUR—NEGLIGENCE—SUFFICIENCY OF EVIDENCE—CONSTRUCTION AND MAINTENANCE—DEGREE OF CARE REQUIRED.

1. The doctrine of *res ipsa loquitur* applies to the fall of a street car company's trolley wire, caused by a stroke from a deranged trolley pole.

2. In an action against a street railway company for injuries from a fall of a trolley wire, occasioned, as plaintiff testified, by a blow from the trolley pole of an approaching car, the company's employes whose duty it was to make repairs testified in general terms, but quite emphatically, as to the quality of the wire, its condition, and frequent inspection. *Held* that, in view of the presumption of negligence arising from the manner of the injury, a finding of negligence was sustained by the evidence.

3. A street car company is under obligation to use the highest degree of care in constructing and maintaining its electric wires, so as to avoid injuring persons in the streets.

Error to Circuit Court, Shelby County; J. P. Young, Judge.

Action by William Kartright, by his next friend, against the Memphis Street Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Wright, Peters & Wright, for plaintiff in error. Jerre Horne and M. C. Ketchum, for defendant in error.

WILKES, J. This is an action for damages for personal injuries. It was tried in the court below by a jury, and there were a verdict and judgment for \$250, and the railway company has appealed and assigned errors.

The facts, so far as necessary to be stated, are that plaintiff, a young man, about 20 years of age, was standing on the pavement at the corner of Rayburn and Vance streets, in the city of Memphis. A car of the defendant company was approaching on the street, when the trolley wire, forming part of its overhead construction, with an insulator upon its end, fell, and the insulator struck the plaintiff upon the head, inflicting a wound over his right eye, which left a permanent scar or blemish on his face. He was confined to his bed for several days, and was not able to work for some 10 days, and incurred a medical bill of \$25. It is not definitely shown what caused the breakage and fall of the trolley wire, but the plaintiff states that the trolley pole knocked the wire down; that he saw it fly off and knock the wire down.

It is assigned as error that there is no evidence to sustain the verdict. This assignment is based upon the theory that there is no definite testimony as to why the wire broke, and no evidence of negligent construction, maintenance, and operation of the line, while there is testimony that the wire was in good condition, and had been inspected two days before; that at the time there was a break in the wire near the same place which was repaired, and the wire was then found to be in proper condition. The rule, as laid down in the case of *Chattanooga Ry. Co. v. Mingle*, 103 Tenn. 667, 56 S. W. 23, 76 Am. St. Rep. 703, is that "negligence on the part of the street car company in the selection, construction, or supervision of its guy wire is presumed, without further evidence, from the fact that such wire, dangerously charged with electricity, falls on or near a public street, even if its fall was caused by

a stroke from the deranged trolley of a passing car." This presumption of negligence must be overcome by the car company. The evidence introduced by the company consisted of the testimony of Bowen, the lineman; Erickson, the foreman of the repair apparatus, called the "Trouble Wagon"; and a negro, Branch, a member of his crew. The testimony of these witnesses is quite contradictory, though they speak, in general terms, quite emphatically as to the quality of the wire, its condition, and frequent inspection. They are more or less interested, as employes whose duties were to make repairs and keep the line in order. On the other hand, the testimony of the plaintiff furnishes some evidence that the breakage was caused by the slipping of the trolley pole, which is not explained; and the jury, from his statement, might have legitimately inferred that there was negligence in the slipping of the pole, or a defect in the condition of the wire, and, under the rule, this is sufficient testimony, coupled with the presumption, arising out of the breakage, that there was negligence.

The other assignments of error may be treated together, and relate to the degree of care required to be exercised by electric street railways in the construction, maintenance, and operation of its superstructure.

The court charged the jury that the street car company was obligated to use the best material, most approved methods of construction, and the highest degree of care and skill in maintaining and keeping same in repair, considering the dangerous nature of the appliances, and the peril to life and limb embodied in their use. And it is insisted that this was requiring too great a degree of care, and the court was requested to charge that the company was only required to exercise a high degree of care in these respects, and not the highest degree of care. Counsel cites in support of his contention the language of this court in *Chattanooga Street Railway v. Mingle*, 103 Tenn. 667, 56 S. W. 23, 76 Am. St. Rep. 703; *Street Railway v. Nugent* (Md.) 38 Atl. 779, 39 L. R. A. 161; *Nellis on Street Surface* R. R. 258. The trial judge, in portions of his charge, did state the rule to be a high degree of care, and defined the term, with accuracy, as requiring care commensurate with the perils to be apprehended, and such as would make the appliances safe in their use; but he also, in another part, charged that the highest degree was required. The charge is open to the objection that the rule is not stated in the same or equivalent terms in all portions of the charge, and was, to some extent, confusing to the jury; but we must assume that the jury applied the strict rule of the highest degree of care, in order to constitute error, even upon defendant's contention. It is true in the case of *Chattanooga R. Co. v. Mingle*, 103 Tenn. 670, 56 S. W. 24, 76 Am. St. Rep. 703, this court said, "In view of the extreme peril conse-

quent upon the displacement and fall of the wires, and in the operation of an electric railway system, it is essential that a high degree of care be exercised, not only in the construction, but in their continued maintenance in a good and safe condition." Citing *Denver Cons. Co. v. Simpson*, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566; *Giraud v. Electric Imp. Co.*, 107 Cal. 120, 40 Pac. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114. The real point at issue in the Mingle Case was whether the doctrine of *res ipsa loquitur* applies in case of breakage of the wires, so as to require the company to repel the presumption of negligence arising from the mere fact of breakage; but the court was not attempting to lay down with strict accuracy the full measure of care required of such companies in the construction, maintenance, and operation of their lines. So the question recurs, was it error to instruct the jury that the highest degree of care must be exercised? In the case of *Denver Cons. Co. v. Simpson*, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566, it was said by the trial judge: "The defendant was not an insurer of the safety of the plaintiff, but, in constructing its line and in maintaining the same in repair, it was held to the highest degree of care and diligence, and in this respect was bound to the highest degree of care, skill, and diligence in the construction and maintenance of its lines of wires and other appurtenances, and in carrying on its business so as to make the same safe against accidents, so far as such safety can, by the use of such care and diligence, be secured. If it observed such a degree of care, it was not liable. If it failed therein, it was liable for the injuries caused thereby." On appeal this charge was affirmed, the appellate court saying: "Where all minds concur, as they must in a case like the one we are considering, in regarding the carrying on of a business as fraught with peril to the public, inherent in the nature of the business itself, the court makes no mistake in defining the duty of those conducting it as the exercise of the utmost care. It was therefore not prejudicial error for the court to tell the jury in that case what the law requires of the defendant, viz., the highest degree of care in conducting its business. The late case of *Block v. Milwaukee Street Railway Company*, 89 Wis. 371, 61 N. W. 1101, 27 L. R. A. 365, 46 Am. St. Rep. 849, rightly interpreted, supports this doctrine; and the case of *Haynes v. Raleigh Gas Company*, 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786, expressly lays down the rule as observed by the trial court in the instructions given in this case." In *Giraud Case*, supra, the court say: "The public, aside from the consumers using the commodity, owe no duty to those introducing it. But on the other hand, it is the duty of those making a profit from the use of so dangerous an element as electricity to use the utmost care to prevent injury to any class of people composing the

public, which consists in considerable members. They must protect those having less than the ordinary knowledge of the character of the commodity." In *Haynes v. Raleigh Gas Company*, supra, the rule is stated thus: "It is due to the citizen that electric companies that are permitted to use for their own purposes the streets of a city or town shall be required to use the utmost degree of care in the construction, inspection, and repair of their wires and poles, to the end that travelers along the highway may not be injured by their appliances. The danger is great, and care and watchfulness must be commensurate with it. All the reasons that support the rigid enforcement of this rigid rule against the carrier of passengers by steam apply with double force to those who are allowed to place above the streets of a city wires charged with a deadly current of electricity, or liable to become so charged. The requirement does not carry with it too heavy a burden." In *City Electric Railway Company v. Conery*, 61 Ark. 381, 33 S. W. 426, 31 L. R. A. 570, 54 Am. St. Rep. 262, the court uses this language: "Electric companies are bound to use reasonable care in the construction and maintenance of their lines and apparatus—that is, such care as a reasonable man would use under the circumstances—and will be responsible for any conduct falling short of this standard. This care varies with the danger which will be incurred by negligence. In cases where the wires carry a strong and dangerous current of electricity, and the result of negligence might be exposure to death or most serious accidents, the highest degree of care is required. This is especially true of electric railway wires suspended over the streets of populous cities or towns. Here the danger is great, and the care exercised must be commensurate with it. But this duty does not make them insurers against accidents, for they are not responsible for accidents which a reasonable man, in the exercise of the greatest prudence, would not, under the circumstances, have guarded against." In the case of *Cook v. Wilmington City Electric Company*, 9 Houst. 306, 32 Atl. 643, the court say: "The law requires that they [electric light companies] should use every way to protect and save the public from loss or injury. They must use every means, regardless of expense, to protect and make safe the public, or citizens passing over the streets of the city, who are not aware of danger. They must use due care and ordinary diligence in such case, with the legal meaning in law following and attached to such words as I have stated." As to the meaning of these words, the court say: "The words 'usual and ordinary care' mean, in such cases, nothing more or less than, if there be a great danger and hazard in the business, there should be a corresponding degree of skill and attention required by the law." Mr. Keasbey, in his work on *Electric Wires*, says: "The use of

the electric current is authorized by law. It will do no harm if it is kept in its proper place, but it is very dangerous if it is allowed to escape. Those who use it are charged with a public duty to use the greatest care to keep it from doing harm, and, for failure to observe this care, they are responsible to persons using the public streets who may be injured without any fault of their own." *Keasbey on Electric Wires*, § 243. And Mr. Joyce, in his work on Electricity, holds the same view: "An electrical company is under the duty of so maintaining its wires as not to interfere with the free, unobstructed, and safe use of the highway. Although it is not an absolute insurer of its wires, yet it is bound to use the utmost care in maintaining them." *Joyce on Electricity*, § 450. See, also, *McAdam v. Central R. Co.*, 67 Conn. 445, 35 Atl. 341.

We are of the opinion that in view of the danger attendant upon the breaking and falling of overhead electric wires in the streets, and the results to be apprehended to persons in the streets, the company should be held to the highest or utmost degree of care in the construction, maintenance, and operation of its lines; and the court was not in error in so charging. We are of opinion, also, that, taking the whole of his charge together, the jury must have understood the trial judge to lay down the rule of the highest degree of care; and there is therefore no reversible error in the record, and the judgment is affirmed, with costs.

WOLF & BRO. v. ERWIN & WOOD CO. et al.

(Supreme Court of Arkansas. June 20, 1903.)

CORPORATION—DEED OF TRUST—AUTHORITY TO EXECUTE—INSOLVENCY—PREFERENCE OF CREDITOR—ATTACHMENT—FRAUDULENT MORTGAGE—VALID TRUST DEED—EFFECT.

1. The fact that a chattel mortgage permits the mortgagor to retain and dispose of the property, substituting other property of the same kind therefor, and is therefore void as to creditors as to that portion of the property actually disposed of, does not furnish a ground for attachment where the remaining property and that substituted for the portion disposed of are afterwards embraced in a deed of trust to the same mortgagee.

2. Where, on the call of a corporation's president, the directors meet, and agree that a loan is necessary, to be secured by mortgage on the corporation property, and a few days later, at another meeting at which all except the president are present, it is ordered that he execute notes and a deed of trust, as before agreed, the authorization of the deed of trust by the corporation sufficiently appears; all of the directors and the president having a practical notice of the meetings.

3. The right of a corporation to prefer one of its directors and officers as a creditor cannot be questioned where the corporation is not shown to be insolvent.

Appeal from Circuit Court, Union County, in Chancery; Charles W. Smith, Judge.

Bill by Wolf & Bro. against the Erwin & Wood Company and others. Decree for defendants, and plaintiff appeals. Affirmed.

W. D. Jamison, Jesse B. Moore, and Morris M. Cohn, for appellant. Smeade & Powell, for appellees.

BUNN, C. J. At the October term, 1896, the plaintiff Wolf & Bro., a mercantile firm doing business in the city of Little Rock, filed a creditors' bill in the Union circuit court in chancery against the Erwin & Wood Company, C. M. Cook, trustee, W. T. and J. M. Parnell, as garnishees. Subsequently E. W. Albie, intervener in certain prior attachment suits, was made defendant also. The defendants filed their answers, taking issue on all the controverted allegations of the bill. We gather from statement of counsel in the "case" that the only ground for the attachment upon which the bill is based was that the defendant company was a foreign corporation, and a nonresident of the state; and such, as we understand it, was the only ground for previous attachments, which had been dismissed on compromise some time before the later attachments were sued out, as will appear further on.

Having established a sawmill plant at Norphlet, in Union county of this state, the Erwin & Wood Company on the 18th June, 1894, borrowed of E. W. Albie the sum of \$5,000, for which it gave him its notes, due in 12 months thereafter, and secured the same by its mortgage of even date on all its property in that vicinity situated. The company was then, and still is, a corporation organized under the laws of the state of Iowa, with its principal office at the city of Dubuque, in that state, and doing business at the time at Norphlet, as aforesaid. Albie was then the vice president of the company, and afterwards became its treasurer, as he is still, so far as the record shows. The money thus borrowed was for the purpose of buying iron rails to be laid on the company's tramways from the mill at Norphlet, and was so used, according to the testimony of N. P. Wood, one of the plaintiffs, who had been secretary part of the time, and all the time an employé of the company from the beginning. Wood also testified that the company had borrowed other money in 1895 from Albie and from the First National Bank of Dubuque, giving a note therefor with Albie as surety. Witness does not state the amount of these loans, or whether Albie paid the surety debt. In other respects his testimony is in corroboration of Albie's and other witnesses connected with the business of the company. The mortgage is, in a general and indefinite way, alleged to have been a fraud upon the rights of the plaintiffs, whose claims, however, did not exist prior to September, 1895, about 15 months after its execution.

There can scarcely be any question as to

the bona fides of the debt secured by this mortgage; nor is there any contention that it was executed without authority. It is contended, however, that the property, or portions of it—part of the lumber—was disposed of by the mortgagor company, which was permitted to remain in possession and dispose of the lumber, but required to replace the same by lumber then to be manufactured, and that the proceeds of this lumber were not appropriated to the mortgage debt, due in June, 1895, as aforesaid. There is meager testimony as to the facts, but on the face of the mortgage the provision referred to above appeared, and this, under the rulings of this court in *Fink v. Ehrman*, 44 Ark. 310, and *Gauss & Sons v. Doyle et al.*, 46 Ark. 122, made the mortgage technically void, but only pro tanto; that is, as to the property permitted to be disposed of in this way by its terms. The mortgage is valid in other respects. As the same lumber and that substituted for it is embraced in the later deed of trust, attachment as to that is not available. The lumber included in the mortgage and that substituted for it was included in the deed of trust dated February 28, 1896. In the latter part of January, 1896, the plaintiffs, or most of them, sued the company on their several debts against it in justice of the peace courts in El Dorado township of Union county, and at the same time sued out the several writs of attachment on the ground that defendant company was a non-resident. In commencing its business at Norphlet the company had appointed, under the requirements of the statute of the state, one H. P. Graham; as its agent at Norphlet; upon whom service of legal process might be made. Early in the month of February, 1896, while these suits in attachment were pending at various stages, the company dispatched their attorney, one Dohs, to Norphlet, to undertake some kind of settlement of the matter. After much negotiation between Dohs and the attorneys for the plaintiffs, acting for their respective clients, an agreement was finally reached, by which the company agreed to pay one half of the several claims of plaintiffs and the costs of the attachments cash, and to give its promissory notes, due in 90 days, for the other half of the plaintiffs' several claims. This agreement was carried out, the half of the claims was paid in cash, the costs were paid, and the notes for the other half of the several debts were given, and the pending attachment suits were dismissed as agreed. About the time of the pendency of this settlement; or soon afterwards—the exact time does not appear—the company at Dubuque undertook to make provision for meeting the cash part of the settlement thus made, and for that purpose had to effect a loan of that much, and finally Aible was induced to make it an additional loan of \$2,000 for that purpose on condition that the company would secure him not only for that sum, but for all his

unsecured partially secured claim against the company, which at that time amounted to \$7,500, by a deed of trust on all its property at Norphlet. This was in addition to the sum secured by the first mortgage and named therein, and the deed of trust was not to affect that mortgage in any wise. The debt thus to be secured amounted in the aggregate to the sum of \$9,500, which was then embraced in two promissory notes, one for \$5,000 and the other for \$4,500, and the deed of trust of even date therewith was executed according to the agreement between them, and placed on record in the recorder's office of Union county, Ark., on March 10, 1896. Upon the nonpayment and protest of the notes given in the settlement as aforesaid when they fell due, the attachment suits upon which the bill in this case is based were instituted, and levies caused to be made upon all the personal property of the defendant company at Norphlet; consisting of a large quantity of manufactured lumber; the commissary, etc., and writs of garnishment were served upon Farnell and — Farnell, purchasers on a credit of about 20 head of cattle belonging to the mill of the company. Most of these suits were in justice of the peace court, and one of these was prosecuted to judgment (and by agreement of record all the others were to abide the determination of this one), an appeal was taken to the circuit court by the defendant company; the trustee in the deed of trust; C. M. Cook, who had been property substituted for Graham, who had declined to act; said Cook, as such trustee; having all the property in possession at the time of the service of the writs of attachment; and Aible, the intervener, who claimed the property embraced in the deed of trust. The other suits were instituted originally in said circuit court, and were then pending, and were embraced in the agreement aforesaid. All these suits were consolidated when the appeals were perfected, and in the meantime the creditors' bill, in which all the plaintiffs joined, was filed, and the cause transferred to the equity docket. The trustee, Cook, answered the bill, setting up his possession of the property at and before the attachments were levied, and from the time of the execution of the deed of trust through his predecessor, Graham, and that he had disposed of none of the property except to pay off laborers and other liens thereon, and claiming his right to possess and control the same as such trustee. Aible, the intervener, also answered, claiming the property under the deed of trust, and that his debt was just and unpaid, and also denying the fraud alleged in the bill. Upon the hearing the chancellor found that the mortgage and deed of trust were made matters of record soon after the respective dates of their execution; that the debts secured by both were bona fide and just; that the attachment and judgments were void for want of proper serv-

ice upon the defendant company; that the absence of pleadings, except in the case of Wolf & Bro., was occasioned by the agreement aforesaid that the others should abide this suit's determination, and should not, therefore, prejudice the parties; and generally he found all the essential facts for the defendant, the trustee, and intervener, and entered his decree for the plaintiffs as to their debts against the defendant company, and for the trustee for the possession of the property, and for the intervener according to the terms of the deed of trust, and ordered the garnishees to pay to the trustee the amounts they respectively owed and had admitted in the pleadings, and plaintiffs appealed.

It is contended by the plaintiffs the board of directors of the company did not authorize the execution of the deed of trust of the 28th February, 1896. It appears in testimony that some days before the execution of the deed of trust the directors, on the call of Bronson, the president, all met at his office in Dubuque, to consider the financial affairs of the company, and especially the condition of its affairs at Norphlet; and finally they unanimously agreed that, in order to meet its pressing obligations, as before stated, it was necessary to borrow the sum of \$2,000, and for that purpose should execute a mortgage on the property of the company. It was also ascertained that Albie would make the loan on the condition heretofore stated. No minute of the meeting was made. A few days elapsed, and another meeting was had, all being present except Bronson, the president, and at this meeting it was resolved and ordered that a deed of trust and notes be executed by the president to Albie, as before agreed upon, and the minutes of this meeting were properly made in the directors' books. Immediately afterwards the deed of trust was executed by Bronson, the president, as directed, and the same was put on record as stated.

It was held by this court, in effect, in *Simon v. Sevier Association*, 54 Ark. 58, 14 S. W. 1101, that the stockholders of a corporation, and others interested, are entitled to the advice and counsel of all the directors in all matters of business action by the board of directors, as well as to the benefit of all their votes; that, when the time of the meeting is fixed by law or the by-laws, no further notice is required; that, when proper notice of a special or call meeting has been given to all, a majority present constitutes a quorum, and may lawfully transact business, but that, when no notice is given to all, then the acts of those present are void, and not binding. All being present and participating, of course obviates the necessity of previous notice. The sole object of the notice to the directors is that each one should have an opportunity of being present and participating in the

meeting and its proceedings. In the present case the whole purpose of the law was as fully and fairly accomplished as if the notice had been regularly given, or all had been present at both the meetings, delaying after the first meeting for the purpose of ascertaining the exact amounts, etc., as we infer, the second meeting was had, and the deed of trust ordered to be executed according to their former agreement. This was done by the president, as before stated, and he was the only one absent at the last meeting. This, we think, was a substantial compliance with the requirements of the law under the particular circumstances of the case, and this was sufficient authority for the execution of the deed of trust.

There is no sufficient proof that the company, at the time of making the deed of trust, was insolvent. Attachment is a harsh remedy, and all the facts to sustain the affidavit for the issuance of the writ should be definitely shown in testimony, and not be left to mere suspicion or conjecture. The solvency or insolvency of a corporation or other business concern can ordinarily be shown with more or less definiteness or certainty by proof of its assets, and their value, and amount of its liabilities, and attendant circumstances. In this case it is contended by plaintiff that the company was at the time insolvent, and had shut down its mill, and ceased to do business. On the other hand, the defendants contend that the company had sufficient assets to pay all its debts, and that, while its mill was shut down for the time being, that was owing to an unusual stringency in the lumber market, which prevented it from disposing of the same except at a great sacrifice; and, as it had a large amount on hand, it thought best to suspend the further manufacture of lumber until the market should become satisfactory, and then it was its intention to resume. Such is the theory they claim to have been acting on, as we understand the testimony. Whether this was true or false, we, of course, cannot say. It might be that such was the intention when the deed of trust was executed, and the effort to revive was subsequently rendered ineffective by the harassment of this attachment litigation. As to this we cannot say. We do not think, at all events, that insolvency was sufficiently shown, and, that being true, the question as to the right of a corporation to prefer one of its directors and officers as a creditor, as was done in regard to Albie in the making of this deed of trust, does not arise, as the question could only arise when the debtor corporation is insolvent, and shown to be so.

The chancellor's opinion fully covers all the other questions raised, and we think his findings are sustained by the evidence, and cannot be disturbed. The decree is therefore in all things affirmed.

PLANTERS' MUT. INS. CO. v. LOYD.

(Supreme Court of Arkansas. June 20, 1903.)
INSURANCE—WIFE'S PROPERTY—HUSBAND'S INSURABLE INTEREST.

1. Under Const. art. 9, § 7, providing that the property of a married woman, so long as she may choose, shall be her separate property, and may be conveyed or devised by her as if she were single, and shall not be subject to her husband's debts, the husband has no insurable interest in his wife's property, and his policy taken out thereon is void.

Appeal from Circuit Court, Little River County; Will P. Feazel, Judge.

Action by F. M. Loyd against the Planters' Mutual Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed.

J. W. House, for appellant. L. A. Byrne, for appellee.

WOOD, J. This is the second appeal in this case. The opinion in the first appeal is found in 87 Ark. 584, 56 S. W. 44, 77 Am. St. Rep. 136. The suit is on a policy of fire insurance. We reversed the cause on the first appeal, because the assured represented that the property insured was his property, when in fact it was the property of his wife. The representation was a warranty, and part of the contract of insurance. This and other grounds of forfeiture were urged at the second trial, and are presented on this appeal; but it suffices to say of these that the proof is sufficient to show that the forfeiture on these grounds was waived by the conduct of the company's adjuster.

When the cause was here before we did not pass upon the question as to whether or not the husband had an insurable interest in his wife's property, for the reason that the cause had to be reversed on another ground, and we did not know what the proof might develop on another trial. The proof on the last trial shows that the property was insured as the property of appellee; but the fact is the title was in his wife, and the property belonged to her. The appellant, by request for instructions, raised the issue that the husband cannot insure in his own name the property of his wife. Article 9, § 7, of the Constitution provides: "The real and personal property of any feme covert in this state, acquired either before or after marriage, whether by gift, grant, inheritance, devise or otherwise, shall, so long as she may choose, be and remain her separate property and estate, and may be devised, bequeathed, or conveyed by her the same as if she were a feme sole and the same shall not be subject to the debts of her husband." Section 4940, Sand. & H. Dig. In *Agricultural Ins. Co. v. Montague*, 38 Mich. 548, 31 Am. Rep. 326, Judge Cooley, speaking for the court, said: "But such a doctrine [that the husband can insure his wife's property] is at war with the fundamental principles of insurance, which require that a person shall have an insurable

interest before he can insure. A policy issued where there is no such interest is void, and it is immaterial that it is taken in good faith and with full knowledge. The policy of the law does not admit of such insurance, however willing the parties may be to enter into it. The doctrine of waiver has obviously nothing to do with such a case."

Under statutes similar to ours the authorities generally hold that the husband has no insurable interest in his wife's property. *German American Ins. Co. v. Paul* (Ind. T.) 53 S. W. 442; *Traders' Ins. Co. v. Newman*, 120 Ind. 554, 22 N. E. 428; *Clark v. Dwelling House Ins. Co.* (Me.) 17 Atl. 304; *Trott v. Ins. Co.*, 83 Me. 362, 22 Atl. 245; *Insurance Co. v. Jesse*, 1 Metc. (Ky.) 523; *Ostrander on Fire Ins.* p. 212, § 61; 2 *Joyce, Ins.* § 1049. There are authorities which hold that the husband has an insurable interest in the property of his wife; but these are usually based upon statutes giving him some interest, or upon conditions in the relations of the parties to each other and the property which under the common law would give an interest in his wife's property. See authorities in appellant's brief. In this case there was no curtesy, in-litiate or consummate, shown. No recovery can be had for the personal property, for the reason that the contract of insurance was entire, under the decisions of this court in *McQueen v. Insurance Co.*, 52 Ark. 257, 12 S. W. 498, 5 L. R. A. 744, 20 Am. St. Rep. 179, and *Phoenix Ins. Co. v. Public Parks Co.*, 63 Ark. 202, 37 S. W. 959.

Judgment reversed, and judgment for appellant.

RUSSELL et al. v. ST. LOUIS SOUTHWESTERN RY. CO.

(Supreme Court of Arkansas. June 20, 1903.)

EMINENT DOMAIN—RAILROAD CORPORATION—DOMESTIC OR FOREIGN—RIGHT TO EXERCISE—PROCEEDINGS—INSTRUCTION ON DAMAGES—ERROR—CURE.

1. The Arkansas Constitution ordains that corporations may be formed under general laws, and prohibits the exercise of eminent domain except by domestic companies. Act March 13, 1889 (Acts 1889, p. 43, c. 34), provides that any railroad company existing under the laws of another state may build its line within the state, provided that before it shall be permitted "to avail itself of the benefits of this act, or any part thereof," it shall file with the Secretary of State a certified copy of its articles of incorporation, etc., whereupon it shall become to all intents and purposes a railroad corporation of the state, subject to all its laws, as if formally incorporated in the state. *Held*, that a railroad corporation organized in a sister state, on complying with the act, became a domestic corporation, with the right to exercise eminent domain, notwithstanding the act also provides, with reference to existing foreign corporations operating in the state, that they shall file copies of their charters, and shall thereupon become domestic corporations, and "process may be served upon the agents * * * of such corporation * * * in the same manner that process is authorized * * * to be served on the agents" of domestic railroad corporations.

¶ 1. See *Insurance*, vol. 23, Cent. Dig. § 153.

2. In proceedings by a railroad company for the condemnation of land at a bridge approach for the erection of works to protect the bridge, in the course of which a levee of the owner is destroyed, it is error to instruct that the jury must not award damages because they believe injury may thereafter be suffered by defendant, if they could be prevented by proper construction and maintenance of the work.

3. Such instruction was not cured by instructing that in determining the owner's damage the jury should consider, as tending to show decrease in market value, the reasonable cost of a new levee, the market value of a steamboat landing upon the land taken, and the increased danger of an overflow on the owner's plantation.

Hughes, J., dissenting.

Appeal from Circuit Court, Columbia County; Chas. W. Smith, Judge.

Proceedings by the St. Louis Southwestern Railway Company for the condemnation of real estate, contested by the owners, J. C. and W. H. Russell. From a judgment granting insufficient relief, the owners appeal. Reversed.

Jones & Neill and Oscar D. Scott, for appellants. Sam H. West and Gaughan & Lifford, for appellee.

BATTLE, J. The St. Louis Southwestern Railway Company instituted proceedings in the Lafayette circuit court for the purpose of condemning certain lands of J. C. Russell and W. H. Russell for its use and benefit. It represented in its complaint that it was a railway corporation duly organized under the laws of this state; that its road crosses Red river, over which it maintains a valuable bridge; that the bank of Red river where it crosses the same is caving and washing away in such manner as to endanger the safety of the bridge if it be not speedily arrested; that J. C. and W. H. Russell own a certain parcel of land on the bank of the river above the bridge and the railroad right of way, consisting of 8.97 acres, which it was necessary for it to acquire to enable it to do certain work to protect and save the bridge; and asked that such parcel be condemned for its use, and that damages on account thereof be assessed, and that in the meantime it be allowed to proceed with such work upon depositing with the clerk of the court a sum of money designated by the judge.

The plaintiff was permitted to begin and prosecute the work upon depositing \$1,000 with the clerk.

J. C. and W. H. Russell answered, and denied that plaintiff was a domestic corporation, but alleged that it was a foreign corporation organized and existing under and by virtue of the laws of the state of Missouri, and that it did not have the power, under the Constitution of Arkansas, to condemn or appropriate private property, and that in many ways they would be greatly damaged by such work.

At the time the jury was impaneled to assess the damages the work was completed.

In the trial the following agreement was read as evidence:

"It is agreed between the parties hereto that the following stipulation of facts may be considered as evidence on the hearing of the above-entitled cause pending in the circuit court of Columbia county, to wit:

"That the plaintiff corporation did, within the time required by law, file with the Secretary of State for the state of Arkansas a certified copy of its articles of incorporation (it having been incorporated under the general law of the state of Missouri), with a map and profile of the line, and did pay the fees prescribed by law for railroad charters, in obedience to section 6326, Sand. & H. Dig.; and since the date of said filing plaintiff has continuously and still does operate its railroad on the same line mentioned in the said charter profile," etc. "That within twelve months past said plaintiff has as often as two times removed causes pending between citizens of the state of Arkansas as plaintiffs and itself as defendant in the circuit courts of said state to the proper Circuit Courts of the United States on the ground of diverse citizenship of the parties under the judicial acts of Congress."

"Evidence was also adduced tending to prove that the defendants were the owners of a large farm, of which the 8.97 acres were a part; that in the construction of the work a part of a levee built by the defendants for the protection of their farm was taken by the plaintiff, and also a steamboat landing; that the work has caused much of the farm to cave into the river, and will probably continue to do so; and that by reason of the foregoing facts the present market value of the defendants' farm has been considerably reduced.

At the request of the defendants the court instructed the jury in part as follows:

"(3) In determining the defendants' damages you may take into consideration, as tending to show the decreased market value, the reasonable cost of any new levee that the proof shows by a preponderance may be required to supply the place of that taken by the plaintiff; the market value of any steamboat landing upon the land taken, if the proof shows that any such was taken; the increased danger of an overflow from Red river upon the defendants' plantation by reason of the construction of the so-called 'protection work,' if the preponderance of the testimony shows that there is such increased danger; and that the same has depreciated the market value."

And at the request of the plaintiff the court instructed the jury, in part, over the objections of the defendants, as follows:

"(5) If the jury believe from the evidence that no damage will accrue to the defendants hereafter by reason of the work done on Red river, if the same is properly maintained and extended, as necessity may require, to prevent further damage hereafter, then they will

not award defendants any damage because they may believe from the evidence such damage will hereafter accrue to the defendants from the work as it now exists, but which may be prevented by proper construction, extension, or maintenance of said work by the railroad."

The jury returned a verdict in favor of the defendants for \$500, and they appealed.

Appellants contend that the appellee has no right to condemn or appropriate property in this state, because it was originally formed under the laws of the state of Missouri. Are they correct?

Unless prohibited by its Constitution, one state may adopt a corporation of another state, and constitute it its own. *Railroad Co. v. Harris*, 12 Wall. 65, 20 L. Ed. 354; *Ohio, etc., R. Co. v. Wheeler*, 1 Black (U. S.) 286, 293, 297, 17 L. Ed. 130; *Railroad Co. v. Vance*, 96 U. S. 450, 457, 24 L. Ed. 752; *Memphis, etc., R. Co. v. Alabama*, 107 U. S. 581, 2 Sup. Ct. 432, 27 L. Ed. 518; *Clark v. Barnard*, 108 U. S. 436, 2 Sup. Ct. 878, 27 L. Ed. 780; *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83; *Graham v. Railroad Co.*, 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. Ed. 196; *Goodlett v. Louisville, etc., R. Co.*, 122 U. S. 391, 7 Sup. Ct. 1254, 30 L. Ed. 1230. In order to do so, "the language used must imply creation or adoption in such form as to confer the power usually exercised over corporations by the state or by the Legislature, and such allegiance as a state corporation owes to its creator. The mere grant of privileges or powers to it as an existing corporation, without more, does not do this." *Pennsylvania Railroad v. St. Louis, Alton & Terre Haute Railroad*, 118 U. S. 290, 296, 6 Sup. Ct. 1094, 30 L. Ed. 83; *Goodlett v. Louisville & Nashville Railroad*, 122 U. S. 301, 405, 408, 7 Sup. Ct. 1254, 30 L. Ed. 1230; *St. Louis & San Francisco Railway v. James*, 161 U. S. 545, 561, 16 Sup. Ct. 621, 40 L. Ed. 802.

The Constitution of this state ordains that corporations may be formed under general laws. And section 2 of an act approved March 13, 1889 (Acts 1889, p. 43, c. 34), which is entitled "An act relating to the consolidation of railroad companies, and the purchasing, leasing and operating railroads, and to repeal sections 1, 2, 3, 4, and 5 of an act entitled 'An act to prohibit foreign corporations from operating railroads in this state, approved March 22, 1887'" (Acts 1887, p. 110, c. 80), so far as is applicable to this case, is as follows: "Any railroad company existing under the laws of any other state or territory, may extend and construct its railroad into this state: * * * provided * * * that before any railroad corporation of any other state or territory shall be permitted to avail itself of the benefits of this act, or any part thereof, such corporation shall file with the Secretary of State of this state a certified copy of its articles of incorporation, if incorporated under a general law of such

state or territory, or a certified copy of the statute laws of such state or territory incorporating such company, where the charter of such railroad corporation was granted by special statute of such state, and upon the filing of such articles of incorporation or such charter, with a map and profile of the proposed line and paying the fees prescribed by law for railroad charters, such railroad company shall, to all intents and purposes, become a railroad corporation of this state, subject to all of the laws of the state now in force or hereafter enacted, the same as if formally incorporated in this state, anything in its articles of incorporation or charter to the contrary notwithstanding, and such acts on the part of such corporation shall be conclusive evidence of the intent of such corporation to create and become a domestic corporation."

Upon a compliance with the act of 1889 a railroad corporation of another state becomes a corporation of this state, with all its rights and powers, and subject to all its duties and obligations. But appellants say that the act further provides:

"That every railroad corporation of any other state which has heretofore leased or purchased any railroad in this state, shall, within sixty days from the passage of this act, file a duly certified copy of its articles of incorporation or charter with the Secretary of State of this state, and shall, thereupon, become a corporation of this state, anything in its articles of incorporation or charter to the contrary notwithstanding, and in all suits or proceedings instituted against any such corporation, process may be served upon the agent or agents of such corporation or corporations in this state, in the same manner that process is authorized by law to be served upon the agents of railroad corporations in this state, organized and existing under the laws of this state;" and suggest that the last clause, providing how process may be served, indicates that it was not the intention of the act to make foreign corporations that comply with it the same as those originally incorporated under the laws of this state. But this suggestion is not correct. The last proviso seems to apply only to railroad corporations which leased or purchased any railroad in this state before the passage of the act. The clause referred to is not in conflict with what precedes, but is a useless repetition of what is already said in other words; and is a further evidence of the fact that the intention of the act was to fully and completely make corporations complying with it domestic corporations. It cannot be a limitation of the effects of the act; for, if it be such, the only effect of the act would be to provide that the railroad corporations complying with it may be served with process in the same manner domestic corporations can be served—a most unreasonable construction of the act.

Appellants contend that the act does not empower a railroad corporation of another

state, which has complied with it, to condemn or appropriate private property, because the Constitution of this state declares that foreign corporations shall not have such power. But the act has not and does not undertake to do so, for it expressly provides that, before any railroad corporation of any other state or territory shall be permitted to avail itself of "its benefits, or any part thereof," it shall become a corporation of this state—a domestic corporation.

Appellants admit that appellee has complied with the act of 1889, but insist that it did not thereby become a corporation vested with all the rights and powers of a corporation of this state, and cite *St. Louis & San Francisco Railway Company v. James*, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802, to support their contention. In that case Etta James, a citizen of the state of Missouri, brought an action in the United States Circuit Court in this state against the *St. Louis & San Francisco Railway Company* for damages caused by the negligent killing of her husband at Monette, in Missouri. The defendant was originally created a corporation of Missouri, and afterwards became a corporation of this state by complying with the act of 1889. It contended that the court had no jurisdiction on the ground that the defendant corporation was not a citizen of Arkansas, but was a citizen of Missouri, of which state the plaintiff was a resident and citizen. The Supreme Court of the United States held that the defendant, as a Missouri corporation, by compliance with the act of 1889 did not become a corporation of this state in such a sense as to make it a citizen of this state, so as to subject it to a suit or action in the United States Circuit Court in Arkansas by a citizen of the state of its origin. This decision was based upon the theory that, where the jurisdiction of a federal court in an action in which a corporation is a party depends upon the citizenship of the parties, the citizenship of the corporation is determined by that of its members; and that "there is an indisputable legal presumption that a state corporation, when sued or suing in a Circuit Court of the United States, is composed of citizens of the state which created it"; and hence the corporation is a citizen of that state, and is "deemed to come within that provision of the Constitution of the United States which confers jurisdiction upon the federal court in controversies between citizens of different states." The court in that case did not hold that the defendant was not a corporation of this state; but, on the contrary, has often held "that a corporation of one state may be made a corporation of another state by the Legislature of that state in regard to the property and acts within its territorial jurisdiction." *Ohio & Mississippi Railroad Company v. Wheeler*, 1 Black, 286, 297, 17 L. Ed. 130; *Railroad Co. v. Harris*, 12 Wall. 65, 82, 20 L. Ed. 354; *Railway Co. v. Whitton*, 13 Wall. 270, 283, 20 L. Ed. 571;

Railroad Co. v. Vance, 96 U. S. 450, 457, 24 L. Ed. 752; *Memphis & Charleston Railroad v. Alabama*, 107 U. S. 581, 2 Sup. Ct. 432, 27 L. Ed. 518; *Clark v. Barnard*, 108 U. S. 436, 451, 452, 2 Sup. Ct. 878, 27 L. Ed. 780; *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 334, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636; *Graham v. Boston, Hartford & Erie Railroad*, 118 U. S. 161, 169, 6 Sup. Ct. 1009, 30 L. Ed. 196; *Martin v. Baltimore & Ohio Railroad*, 151 U. S. 673, 677, 14 Sup. Ct. 533, 38 L. Ed. 311; *Louisville, etc., Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552, 562, 19 Sup. Ct. 817, 43 L. Ed. 1081.

The decision in *St. Louis & San Francisco Railway Company v. James*, supra, did not affect the question in the case at bar. The Supreme Court of the United States virtually so held in *Louisville, New Albany & Chicago Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081, in which the question decided in *St. Louis & San Francisco Railway Company v. James* arose. In that case "a corporation created in Indiana brought an action in the federal court in Kentucky against several Kentucky corporations. There was a plea to the jurisdiction, asserting that the plaintiff was a corporation and a citizen of Kentucky, of which state the defendants were corporations. There was a contest as to whether the Indiana corporation had accepted the provisions of a Kentucky statute, which it was alleged constituted it a corporation of Kentucky." The Supreme Court, on the question of jurisdiction, said: "The acts done by the Louisville, New Albany & Chicago Railway Company under the statutes of Kentucky, while affording ample evidence that it had accepted the grants thereby made, can hardly affect the question whether the terms of those statutes were sufficient to make the company a corporation of Kentucky. But a decision of the question whether the plaintiff was or was not a corporation of Kentucky does not appear to this court to be required for the disposition of this case, either as to the jurisdiction or as to the merits. As to the jurisdiction, it being clear that the plaintiff was first created a corporation of the state of Indiana, even if it was afterwards created a corporation of the state of Kentucky also, it was and remained, for the purposes of the jurisdiction of the United States, a citizen of Indiana, the state by which it was originally created."

The instruction numbered 5 given to the jury by the court at the request of the appellee should not have been given. In that instruction the court told the jury not to award appellants any damage because they may believe from the evidence that damage will hereafter accrue to the appellants from the work done on Red river as it now exists, but which may be prevented by the proper construction, extension, or maintenance of said work. That instruction was misleading and prejudicial, because it was calculated to induce the jury to believe that they should

award no damage on account of the present market value of appellants' farm being impaired by reason of the injury that appellee's work will probably cause in the future. Why should they, if such injury was to be prevented by the proper construction, extension, or maintenance of said work? This defect was not cured by the instruction numbered 3 given at the request of appellants, as contended by appellee.

Reverse, and remand for a new trial.

HUGHES, J., dissents.

MEMPHIS ST. RY. CO. v. GRAVES.

(Supreme Court of Tennessee. May 23, 1903.)

CARRIERS OF PASSENGERS — STREET RAILWAYS — EJECTION OF PASSENGERS — REFUSAL OF TRANSFER TICKET.

1. Where the conductor on a street railway car gave plaintiff a transfer, which was refused by the conductor of the car to which plaintiff properly changed, on the ground that the transfer was defective, and plaintiff, being without money, was forcibly expelled from the car, he could recover therefor against the railway. Negligence in the issuing of the transfer was that of the company, and plaintiff was not bound to examine it.

Appeal from Circuit Court, Shelby County; J. S. Galloway, Judge.

Action by R. L. Graves against the Memphis Street Railway Company. From a judgment for plaintiff defendant appeals. Affirmed.

Wright, Peters & Wright, for appellant. J. W. Canda, for appellee.

WILKES, J. This is an action for the alleged unlawful ejection of the plaintiff from the car of the defendant company by one of its conductors. The action was commenced before a justice of the peace. On appeal it was tried before the court and a jury, and there was a verdict and judgment for \$50, and the street railway company has appealed and assigned errors.

The facts necessary to be stated are that the plaintiff boarded a car of the defendant company on its suburban line at the corner of Latham and McLemore streets. When he paid his fare, he asked for a transfer ticket to go east on Vance street. At the proper transfer point he boarded a Vance Street car, and, when the conductor of that car came for his fare, handed him the transfer ticket received from the conductor of the initial car. The conductor of the Vance Street car refused to recognize the transfer ticket, and after some parley the plaintiff was ejected from the car. He had no money with him, and was compelled to walk to his place of business, where he arrived late, causing him anxiety lest he lose his position. The plaintiff testifies that the conductor ejected him by force, over his protest and explanation, and treated him roughly. He testifies that,

when he presented his transfer ticket, the conductor insolently and insultingly handed it back to him, saying: "This ain't no good. You will have to pay your fare." He further states that he politely protested, and informed the conductor that the conductor on the suburban line had given it to him as a transfer east on Vance street. To which the conductor replied, "You will have to get off," and thereupon had the car stopped, and jerked him by the arm in the presence of the passengers, and rudely and roughly carried him out of the car, and put him on the ground, without any explanation why he would not honor the transfer; that there were many passengers on the car, some of whom were ladies, and he was greatly humiliated and embarrassed; and that it was a rainy, disagreeable morning.

It is said that the court erred in charging the jury that "it was the duty of the defendant company, upon being applied to for a transfer, to furnish the plaintiff a proper transfer, and, if the conductor furnished the plaintiff a different transfer from the one called for, that would be the negligence of the conductor, and not the negligence of the plaintiff; that the plaintiff had the right to presume that the street car conductor would do his duty in the premises, and had a right to rely for passage upon the transfer given him." It is said, also, that it was error to charge it to be negligence on the part of the company if the conductor gave him a wrong transfer, and also that it was error to hold that the plaintiff could accept the transfer without question, and that his acceptance of a wrong transfer would not constitute negligence on his part. We think there is no error in the charge, and that the question has already, in principle and effect, been settled in the case of *O'Rourke v. Street Railway Co.*, 103 Tenn. 126, 52 S. W. 872, 46 L. R. A. 614, 76 Am. St. Rep. 639. In that case the court said: "To require a passenger, who has made a valid contract for transportation and paid the requisite fare, to retire from the car and suspend his journey because of an original defect in the ticket furnished him by the company's agent, is to visit the wrong of the offender upon the offended. It is to make the rightful passenger suffer for the fault of the carrier, and that, too, in the latter's interest. This court will not yield its assent to a result so unjust and oppressive. The plaintiff had a right to believe the transfer ticket all that it should be. With it he diligently sought and promptly entered the first transfer car, and, upon being challenged by the conductor of that car as too late to use the ticket, he made a fair and reasonable statement, showing that he had just left the first car, and that the first conductor must have wrongfully indicated the hour of issuance on the face of the ticket. He owed the company no other duty, and his expulsion under such circumstances was a tortious breach of contract, for which he became entitled to re-

¶ 1. See *Carriers*, vol. 9, Cent. Dig. §§ 1423, 1427.

cover all approximately resulting damages, including those for humiliation and mortification, if such were in fact sustained." *O'Rourke v. Street Ry. Co.*, 103 Tenn. 135, 52 S. W. 874, 46 L. R. A. 614, 76 Am. St. Rep. 639. This court said again in the *O'Rourke* Case: "The passenger is not required in law, nor allowed in fact, to print or write or stamp the ticket. The carrier alone has that right, and the passenger is authorized to believe and presume it will be properly exercised, and that the ticket, when delivered, is a faithful expression of the contract as made." *O'Rourke v. Street Ry. Co.*, 103 Tenn. 133, 52 S. W. 874, 46 L. R. A. 614, 76 Am. St. Rep. 639. There was in the *O'Rourke* Case a printed statement on the back of the transfer ticket to the effect that the passenger would "examine date, time, and direction, and see that the same are correct." But the court held that it would not enforce such a condition, that it was unreasonable, and that it would not place upon the passenger the duty of verifying the act of the conductor in issuing a transfer ticket; and in that case the plaintiff made no examination at all of the transfer check, as in this case. *O'Rourke v. Street Ry. Co.*, 103 Tenn. 141, 52 S. W. 872, 46 L. R. A. 614, 76 Am. St. Rep. 639.

The argument of counsel for the street car company is that passengers should be required to examine transfer tickets when handed to them, and verify the action of the conductor, and, if there is any defect in the ticket or any deviation from the request, to have it at once corrected, and, if he does not do so, he is guilty of such negligence as must bar his recovery. We think this contention not sound. The ticket is a mere token, to be used for the convenience of the road. It is not the contract between the road and the passenger. It is a statement by the initial conductor to the subsequent conductor what the contract is, and what the passenger is entitled to, and, if it is not correct, the fault is that of the road. Nor can passengers be required to verify the acts of the conductor, but they may presume that he acts correctly. The tickets or tokens are prepared by the company. They contain more or less of printed and other directions. Some passengers cannot read. Others are children. None of them have the time or opportunity in the rush of travel to scrutinize the ticket, and in many instances, if they did, they could not understand the devices used by the company. The passenger has the right to presume the conductor has given him a proper ticket; and, if he make a mistake, it is the fault of the company, for which it is liable; and, if the passenger in good faith accept the ticket, he is not bound to stop and scrutinize it, to see that no mistake has been made.

We are of opinion that there is no error in the judgment of the court below, and it is affirmed with costs.

MEMPHIS ST. RY. CO. v. STATE

(Supreme Court of Tennessee. June 19, 1903.)

STATUTES—AMENDATORY ACTS—REFERENCE TO TITLE OR SUBSTANCE OF AMENDED LAW.

1. Acts 1903, c. 43, entitled "An act to amend chapter 52 of Acts of 1891, being sections 3074, 3075, and 3076, Shannon's Code of Tennessee, so as to include street railways and street railroads," and providing that such provisions are amended so as to include all street railroads and street railways in any county in Tennessee having a certain population, is violative of Const. art. 2, § 17, requiring that all acts amending former laws recite in their caption or otherwise the title or substance of the law amended, since the reference to the chapter and volume of the authorized publication of the act is not a recital of the title or substance of the act desired to be amended.

2. The constitutionality of the amending act is not aided by the reference in the title to the sections of Shannon's Code, as such Code has not been enacted into a Code, and has no general title recognized by law.

Appeal from Criminal Court, Shelby County; Jno. T. Moss, Judge.

The Memphis Street Railway Company was convicted of violating Acts 1903, c. 43, requiring separate accommodations for white and colored passengers, and it appeals. Reversed.

Wright, Peters & Wright, for appellant. The Attorney General, for the State.

WILKES, J. The street railway company is convicted of violating the provisions of chapter 43 of the Acts of 1903 of the state of Tennessee, and sentenced to pay a fine of \$200, and has appealed to this court and assigned errors.

In the court below a motion to quash the indictment was made upon several grounds. This motion to quash was overruled, and the cause was heard upon its merits before the trial judge; a jury being waived by consent of parties. It appears from the record that the defendant company was operating a street railway in the city of Memphis, county of Shelby, state of Tennessee, and was the only company operating a street railroad in that city; that the city had a population of more than 150,000; that it wholly failed and refused to provide separate accommodations for white and colored passengers, as required under chapter 52, p. 135, of the Acts of 1891, as amended by chapter 43 of the Acts of 1903. The questions raised by the motion to quash are the same as those presented on the trial of the case on the merits, and they need not be separately considered.

Several assignments of error are made, and they may be briefly stated as follows: (1) That the act of 1903 fails to comply with that part of section 17, art. 2, of the Constitution of the state of Tennessee, which provides that "no bill shall become a law which embraces more than one subject, that subject to be expressed in the title." (2) That it violates the remaining portion of the same section, which provides, that "all acts which

repeal, revive or amend former laws shall recite in their caption or otherwise the title or substance of the law repealed, revived or amended." (3) That the amendment made is not germane to the subject of the original act, nor is it embraced within its title. (4) That it is class legislation, making distinctions unnatural, unreasonable, and arbitrary, and it is not, therefore, the law of the land, but is partial, and applies only to Shelby county, and in its results only to the defendant road. (5) That it is repugnant to the fourteenth amendment of the Constitution of the United States, which guarantees the equal protection of the laws.

The act of 1903, now attacked, as well as the act of 1891, which it undertakes to amend, are as follows:

"Senate Bill No. 37. Chapter —, Acts of 1903.

"An act to be entitled 'An act to amend chapter 52 of Acts of 1891, being sections 3074, 3075, and 3076 Shannon's Code of Tennessee, so as to include street railways and street railroads.'

"Section 1. Be it enacted by the General Assembly of the State of Tennessee, that chapter 52 of the Acts of 1891, being sections 3074, 3075, and 3076 of Shannon's Code of Tennessee, be and the same is hereby amended so as to include all street railroads and street railways in any county in the state of Tennessee having one hundred and fifty thousand inhabitants, or over, as shown by the federal census of 1900, or any subsequent federal census.

"Sec. 2. Be it further enacted, that this act take effect from and after its passage, the public welfare requiring it."

The title of this act of 1891 is:

Chapter 52.

"An act to promote the comfort of passengers on railroad trains by requiring separate accommodations for the white and colored races.

"Section 1. Be it enacted by the General Assembly of the State of Tennessee, that all railroads carrying passengers in the state (other than street railroads) shall provide equal, but separate accommodations for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition so as to secure separate accommodations: Provided, that any person may be permitted to take a nurse in the car or compartment set aside for such persons: Provided, that this act shall not apply to mixed and freight trains which only carry one passenger or combination passenger and baggage car: Provided always, that in such cases the one passenger car so carried shall be partitioned into apartments, one apartment for the whites and one for the colored.

"Sec. 2. Be it further enacted, that the

conductors of such passenger trains shall have power and are hereby required to assign to the car or compartment of the car (when it is divided by a partition) used for the race to which such passengers belong, and should any passenger refuse to occupy the car to which he or she is assigned by such conductor, said conductor shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railroad company shall be liable for any damages in any court of this state.

"Sec. 3. Be it further enacted, that all railroad companies that shall fail, refuse or neglect to comply with the requirements of section 1 of this act shall be deemed guilty of a misdemeanor, and, upon conviction in a court of competent jurisdiction, be fined not less than one hundred nor more than five hundred dollars, and any conductor that shall fail, neglect, or refuse to carry out the provisions of this act shall, upon conviction, be fined not less than twenty-five nor more than fifty dollars for each offense.

"Sec. 4. Be it further enacted, that this act take effect ninety days from and after its passage, the public welfare requiring it.

"Passed March 11, 1891.

"Thomas R. Myers,

"Speaker of the House of Representatives.

"W. C. Dismukes,

"Speaker of the Senate.

"Approved March 27, 1891.

"John P. Buchanan, Governor."

It will be seen that the law sought to be amended by the act of 1903 is referred to in the caption or title of the latter act as "chapter 52 of the Acts of 1891, being sections 3074, 3075, 3076, Shannon's Code of Tennessee," and the purpose of the act is stated to be "to include street railways and street railroads"; that is to extend the provisions of chapter 52, p. 135, Acts 1891, "so as to include street railways and street railroads."

On behalf of the state it is argued that our statute (Code, § 3799; Shannon's Compilation, § 5584) provides that the acts of the Legislature may be proved by a copy purporting to have been printed by order of the Legislature. The act sought to be amended in this case purports to have been printed under the authority and by order of the Legislature as chapter 52, p. 135, of the Acts of 1891. It has been the uniform custom to refer to acts by the chapter and volume as they are published, except that the laws contained in the General Statutes of 1858 are referred to as the "Code of Tennessee," or the "Code," specifying the section. This is, it must be conceded, an easy, convenient, reliable, and definite mode of citation or reference, and it has been uniformly adopted by this and other courts, and affords a quick and ready reference to any act to which it is desired to call attention. But such a reference, without more, necessitates and requires an exam-

ination of the volume and chapter cited in order to see what the act contains, either in its caption or body.

For the state it is insisted that in an amendatory act it is sufficient to refer to the act to be amended by citing the volume and chapter of the authorized and published acts. Can this contention be maintained? The exact question here presented has not heretofore been directly passed upon by this court, though this provision of the Constitution has been frequently under consideration. It is the general rule to recite in the amendatory act the title or substance of the act to be amended. Evidently it is not necessary to recite both the title and substance of the original act, but a recital of either is sufficient. *Bank v. Haselton*, 15 Lea, 239; *Ransome v. State*, 91 Tenn. 717, 20 S. W. 310; *State v. Runnels*, 92 Tenn. 320, 21 S. W. 685. But the plain and unambiguous language of the Constitution is that either the title or substance must be recited; and this provision, as well as similar provisions in the Constitution, is mandatory, and any act not complying therewith is invalid and void. *Canuon v. Mathes*, 8 Heisk. 516; *Morrell v. Fickle*, 3 Lea, 82; *Truss v. State*, 13 Lea, 312; *Hyman v. State*, 87 Tenn. 111, 9 S. W. 372, 1 L. R. A. 497.

The question recurs: Is a reference to the act to be amended by chapter and volume sufficient compliance with the constitutional provision? There is a broad difference between a reference to an act and a recital of its title or substance. A reference to an act by volume and chapter carries with it no intimation whatever as to the title or substance of the act, or the character or subject-matter of the act referred to. To apply to the present case: The act of 1903 under consideration purports to extend the provisions of the act of 1891 to street railways and street railroads, but gives no intimation whatever, in its caption or body, what the act of 1891 contains. If we look alone to the title or the body of the act of 1903, and its references to chapter 52, p. 135, Acts 1891, we cannot tell whether the latter act refers to telephones, distilleries, or commercial roads, or any of the other numerous subjects of legislation. If we could infer that it related to commercial railroads, we could not tell whether it dealt with the condemnation of lands, the fixing of fares, the protection of passengers, carriage of freights, or any other features of railroad regulation and legislation.

The language of the Constitution is that the title or substance of the act to be amended must appear in the amending act, either in its caption or otherwise. The term "otherwise" can only mean the preamble or body of the act, as contradistinguished from the title or caption. *State v. Gaines*, 1 Lea, 736; *State v. Yardley*, 95 Tenn. 557, 32 S. W. 481, 34 L. R. A. 656; *Shelton v. State*, 96 Tenn. 521, 32 S. W. 967. And the constitutional

requirement is not met when existing laws are actually in terms referred to, unless the title or substance is recited. *Burnett v. Turner*, 87 Tenn. 129, 10 S. W. 194. The act to be amended need not be set out in extenso; and in *State v. Gaines*, 1 Lea, 736, it was held that the recital of the substance of that part of the act which was to be repealed or amended, so that the Legislature might see and understand the effect of its action, is sufficient. The controlling requirement is that the title or substance of the act to be amended must appear from an inspection of the amending act. As the matter under consideration is one of great importance, we deem it desirable to collate and to some extent comment upon the decisions of this court relating to and construing this constitutional provision, though none of them may be conclusive in the present case. In doing so we bear in mind and give full force to the rule so often announced that every intendment must be made in favor of the constitutionality of the law that can be legally indulged, and all doubts must be resolved in favor of it. *Morrell v. Fickle*, 3 Lea, 82; *Cole Manf. Co. v. Falls*, 90 Tenn. 466, 16 S. W. 1045; *State v. Yardley*, 95 Tenn. 546, 32 S. W. 481, 34 L. R. A. 656.

In *State v. Gaines*, 1 Lea, 736, the act in question was held constitutional because it recited the substance of that portion of the act which it was intended to amend; and it was held not necessary that the entire act, which was a general revenue act of many provisions, should be recited. In *McGhee v. State*, 2 Lea, 622, an act which had a sufficient title in itself was held unconstitutional, because it changed prior laws without reciting the title or substance of the prior laws thus changed. In *Morrell v. Fickle*, 3 Lea, 86, it was held that an act which did not recite the title or substance of a former act repealed was defective, but the defect was cured by the passage of another act at the same session of the Legislature, which was free from the objection; the two acts being considered together and as part of the same legislation. In *Home Insurance Company v. Taxing District*, 4 Lea, 644, it was held that the provision of the Constitution now under consideration does not apply to acts which by their written provisions operate a repeal of previous acts by necessary implication. See, also, *Ballentine v. Town of Pulaski*, 15 Lea, 633; *Railroad v. Sadler*, 91 Tenn. 508, 19 S. W. 618, 30 Am. St. Rep. 896.

In *Bank of Rome v. Haselton*, 15 Lea, 239, it is held that, if the title of the act repealed is recited in the body of the repealing act, that is a compliance with the constitutional provision. In *Hyman v. State*, 87 Tenn. 109, 9 S. W. 372, 1 L. R. A. 497, it was held that the amendatory act, whose caption merely recites the title of the original act, without enlarging its scope, is constitutional and valid, provided its purview is germane to the title of the original act; and, if the title of

the original act is sufficient, it is not necessary that the title of the amending act be likewise sufficient in and of itself. In *Burnett v. Turner*, 87 Tenn. 124, 10 S. W. 184, it was held that an amending act was unconstitutional which simply referred to section 2746 of the Revised Code as the act to be amended. The court said there was no Revised Code of Tennessee, because none has been adopted or enacted by the Legislature; and it was not the amendment of a recognized law to amend the Revised Code, nor to amend any section of such supposed Code by number. "It might be," said the court, "a correct reprint of an existing law; but it is not so by virtue of its existence in such compilation, or by reason of having a particular sectional number therein, as is the case in the enacted Code of 1858." It was further said by the court that as a matter of fact there were two compilations of statutes to which the term "Revised Code" could be applied with equal accuracy. So that not only is no law by title or substance recited in the repealing statute, but no law is referred to, and, worse still, no book is named or identified in the reference. It was further said that no inferential method could be resorted to, in opposition to the plain terms of the constitutional provision requiring that the amending act shall actually recite the title or substance of the act amended. Continuing, the court said: "The conceded purpose of the Constitution is to prevent the amendment or change of existing laws, even when they are actually in terms referred to, unless the title or substance is recited. A law, therefore, which proposed to repeal the original act from which No. 2746 in the late compilation originated, or one of its amendments, as the Acts of 1881 (Laws 1881, p. 79, c. 67), by reference merely to a certain section of a certain chapter of such act, without more, would be void. As, suppose the Legislature of 1887 had enacted that sections 1, 2, and 3, of the act of 1881 (which is the most material amendment to the mechanic's lien law embodied in section 2746 referred to), should read as follows, and then substitute for them the sections proposed in lieu of No. 2746 of the Revised Code. No one would controvert that the attempted amendment was invalid. Can it be possible, then, that, if a law enacted cannot be so amended by such reference to itself, it can be amended by a reference more vague to its mere copy or reprint, not enacted anywhere as law?" The holding of the court in this case decides, at least arguendo, the very question involved in the present controversy.

In *State v. Algood*, 87 Tenn. 166, 10 S. W. 310, it was said that the title of the amending act need not indicate the character of the proposed amendment, if the amendment is germane to the original act and is embraced in the title of the original or amended act, since, the title of the original act being made part of the amending act, the

particulars of the amending act need not be shown by its title. In *Ransome v. State*, 91 Tenn. 717, 20 S. W. 310, it is held, as in *Bank of Rome v. Haselton*, 15 Lea, 239, that it is sufficient if the amending act shall recite the subject of the statute amended in the body of the amendatory statute, without more. It is evident that the learned judge who delivered that opinion treated the word "reference" as synonymous with "recital," and the word "subject" as synonymous with "substance," in that case. He says: "If the 'substance'—that is, the 'subject'—of the act amended be recited, it will be sufficient. Such a reference to 'the subject or substance' will sufficiently identify the law intended to be amended." Accordingly in that case the court found the subject or substance of the act to be horse-racing, and that subject (or substance) was recited in the amending act, and this, continues the learned judge, "clearly recites the subject or substance of the act amended as one referring to running races." The act was decided, upon this ground and reasoning, to be valid and constitutional, though it would have been so on a different ground, set out in *State v. Runnels*, 92 Tenn. 341, 21 S. W. 665, which was treated as a question reserved at that time.

In *Ruohs v. Athens*, 91 Tenn. 20, 18 S. W. 400, 30 Am. St. Rep. 858, it was held that the constitutional requirement was complied with, because the repealing act recited in its caption the title of the act portions of which were repealed, and in express terms repealed certain sections of the act (by number) of which the title was set out; and it was held that it was immaterial that the title of the original act contained no reference to the part of the subject-matter to be affected by the repeal, nor did the repealing act give any intimation, either in its caption or body, of the nature of the legislation to be repealed. In *State v. Runnels*, 92 Tenn. 320, 21 S. W. 665, a statute amendatory of the Code was entitled "An act to amend section 4652, subsection 16, of the Code of Tennessee" (Laws 1889, p. 307, c. 161), and contained in its body substantially the same description of the law amended. It was held that the amended law was sufficiently recited in both the caption and body of the amendatory act. It was also held in that case that the word "caption" is synonymous with "title," and that the word "otherwise," used in the Constitution, means the body of the repealing, revising, or amending statute. It was also held that the compilation of laws in 1858 is entitled "An act to revise the statutes of Tennessee," and that it was provided in the compilation that it should be designated as the "Code of Tennessee," and that either of these expressions might be used as the title of any section of the Code in the recital of an act amending, revising, or repealing it. It was held that the substance of the act to be amended in that case was not recited in either the caption or title of the amending

act, and that no idea of the amended law, not even of the subject treated, could be gathered from any part of the whole of the amended act. The court held, however, that the words "Code of Tennessee" constitute the title of the compilation of 1858, and the amending act, referring to a section of the Code of Tennessee, does sufficiently recite, in its caption and otherwise, the legal title of the law amended.

The question as relating to other acts was stated to be expressly reserved in *Ransome v. State*, 91 Tenn. 718, 20 S. W. 310, and inferentially in *Burnett v. Turner*, 87 Tenn. 127, 10 S. W. 194. In *Shelton v. State*, 96 Tenn. 521, 32 S. W. 967, an act which had for its caption "An act to amend the criminal laws of the state" was held not to be a sufficient compliance with the constitutional requirement; that such a general designation was not a recital of the title or substance of any existing law or laws. It was said that, "if there was a single enactment or an authorized codification legally entitled the 'Criminal Laws of the State,' then the reference (or recital) might have been sufficient. But, in the absence of some former law or collection of laws so entitled, to which the reference can be appropriately applied as a recital of title or substance, the act cannot stand. By its own terms, as has been seen, the act is expressly amendatory, and yet it falls both in its caption and body to recite either the title or substance of any existing law or laws. It nowhere mentions the title, or attempts to give the substance, of the law or laws intended to be changed, and hence is obnoxious to the Constitution and necessarily null and void."

In *Henley v. State*, 98 Tenn. 665, 41 S. W. 352, 1104, 39 L. R. A. 126, the act in controversy was held not to be an amendatory act, but a new and original law; and, if it could be held to be a repealing law, it was so only by implication, and need not, therefore, recite the act repealed or modified—citing cases. In *Memphis v. Am. Ex. Co.*, 102 Tenn. 340, 52 S. W. 172, it was held that the case presented was one of implied repeal, and the presence of an express repealing clause had no force whatever, and hence the act did not come under the constitutional requirement and provision. In *State v. Brown*, 198 Tenn. 449, 53 S. W. 727, it is held in accord with *State v. Runnels*, 92 Tenn. 320, 21 S. W. 665, that the recital in the caption or body of a statute that it amends section 4614 of the Code satisfies the requirement of the Constitution, and that the chapter 56, p. 50, Acts 1871, also referred to in the caption and body of the amending act as having amended section 4614 of the Code, need not have been more specifically referred to, since it related alone to the punishment to be inflicted, and in no sense affected the scope or substance of the section, but left them the

same as before it was passed. It was further said that it was not necessary that the title should be an index or epitome of the provisions of the act, nor that it should set out the modes, means, or instrumentalities that shall be provided in the body of the act for the accomplishment of its general purpose as expressed in the title. In case of *State ex rel. Tyler v. King*, 104 Tenn. 163, 168, 57 S. W. 150, the case presented was one of implied repeal, and was held not to fall within the constitutional provision we are now considering. And so with the case of *Zickler v. Union Bank & Trust Co.*, 104 Tenn. 277, 57 S. W. 341, which was held to be a case of implied repeal.

We have thus examined and commented upon the several cases to be found in our books relating more nearly to the questions here involved; but none of them directly decide the case, as here presented, except the case of *Burnett v. Turner*, 87 Tenn. 124, 10 S. W. 194, and there it is treated and disposed of *arguendo*. So that at last we are driven to decide what is the proper meaning and construction of the constitutional provision as applied to a case like the present, when the chapter and volume of an authorized publication of acts is referred to in the caption of the amending act; and we are constrained to hold that such reference to chapter and volume is not a compliance with the constitutional requirement, in that there is no recital of the title or substance of the act desired to be amended. While we base our decision upon the words of our Constitution and the previous holdings of this court, so far as applicable, we are of opinion that it is in accord with the holdings in other states having similar constitutional provisions. The fact that Acts 1891, p. 135, c. 52, is referred to in the caption of the act of 1908 as being sections 3074, 3075, and 3076 of Shannon's Code of Tennessee, does not in any wise cure the defect. Shannon's Compilation or Code, though exceedingly valuable, and in constant use by the courts and people, is not a Code enacted into a law, as is the Code or General Statutes of 1858; and while a reference to it is sufficiently definite to indicate the volume meant, still it is not enacted into a Code or law, and has no general title recognized by law, and it falls within the reasonings of the court in *Burnett v. Turner*, 87 Tenn. 129, 10 S. W. 194, and its several provisions, while remarkably accurate, have not the verity of enacted law or acts within the meaning of the constitutional provision. For the reasons and upon the grounds stated, we are of opinion that the act in question is invalid and unconstitutional, and should have been so declared by the court below on the motion to quash.

The judgment of the court below is reversed, and the indictment is quashed, and the county will pay the costs.

RESSLER et al. v. FIDELITY MUT. LIFE INS. CO.

(Supreme Court of Tennessee. June 20, 1903.)

LIFE INSURANCE—FAILURE TO PAY PREMIUM NOTE—AVOIDANCE OF POLICY.

1. Where a note given in payment of a premium on a life insurance policy provided that, if not paid at maturity, the policy should be void, and a receipt given for the note stated that it was agreed that a past-due note was not payment, and any obligation given in exchange for the receipt, when not paid at maturity, should render the receipt and policy void, the policy was rendered void by failure to pay the note at maturity, though the policy contained no stipulation to that effect.

Appeal from Chancery Court, Shelby County; F. H. Helskell, Chancellor.

Action by Hannah Ressler and others against the Fidelity Mutual Life Insurance Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

Henry Craft and Wilkerson & McGehee, for appellants. R. L. Bartels, for appellee.

BEARD, C. J. On the 7th of December, 1891, the defendant issued its policy of insurance for the sum of \$1,000, and for the period of 20 years from its date, upon the life of Daniel N. Ressler. The premiums on the policy were payable on the 7th day of each December. The insured paid all the accruing premiums up to and inclusive of the one due on the 7th day of December, 1899, thus carrying his policy for the next ensuing year. For the premium due on the 7th of December, 1900, he gave his promissory note to the company, payable on the 7th of February, 1901. This note was not paid, nor was the premium that was due on the 7th of December, 1901. On the 28th day of December, 1901, the insured died. Soon after his death, a demand was made upon the insurer for blank proofs of loss, which was refused, upon the ground, as asserted by the defendant company, that the policy had lapsed and was no longer a valid or subsisting contract. The result was the institution of the present suit.

The ground upon which payment is resisted is that the note given for the premium due in December, 1900, contained a provision that, in the event it was not paid at maturity, the policy in question "should be ipso facto null and void, without notice to the maker and without any act on the part of the company," and should "remain so until reinstated as provided by its terms." Contemporaneous with the making and acceptance of this note, a receipt was given to the assured, upon the face of which was marginally printed the following words: "Notice to Policy Holders: * * * It is understood and agreed that a protested check, or past-due note or obligation of any kind, is not payment, and that any obligation given in exchange for this receipt, when dis-

honored or not paid at maturity, shall render the receipt and said policy absolutely void." It is conceded by the solicitors of the complainants that, had the policy contained a stipulation to the effect that the nonpayment at maturity of any note given by the assured and accepted by the company would forfeit the policy, then this defense would be maintainable. That this is true is well settled by the authorities. *Thompson v. Insurance Co.*, 104 U. S. 232, 26 L. Ed. 765; *Insurance Co. v. Pendleton*, 112 U. S. 696, 5 Sup. Ct. 314, 28 L. Ed. 806; *Pitt v. Insurance Co.*, 100 Mass. 500. But, as it contains no such stipulation, it is insisted that its absence or omission manifests the intention of the company to keep the policy alive, upon receiving payment of the premium by note, and that the courts will not permit this intention to be defeated by an inconsistent condition subsequent contained in the note, a mere collateral agreement.

As to this insistence it may be said, in a general way, that promptness in the payment of premiums is essential to the success of an insurance company. To the fund derived from premiums the company must look to meet expenses incurred in its operation, and to the creation of a reserve to be held for payment of losses when they occur. No company could remain long solvent, if the rights of the policy holder were preserved for him notwithstanding his delinquency, and the insurer be left to recover the premium due, through the tedious process of the courts, with the risk of encountering an insolvent debtor after judgment. To enforce promptness, clauses of forfeiture, under some form or other, are usually found in contracts of insurance; and these clauses are enforced by the courts, unless in some way waived by the insurer. As was said in *Klein v. New York Ins. Co.*, 104 U. S. 88, 26 L. Ed. 662, "If the assured can neglect payment at maturity, and yet suffer no loss or forfeiture, premiums will not be punctually paid. * * * The provision, therefore, for the release of the company from liability on a failure of the insured to pay the premiums when due, is of the very essence and substance of the contract of life insurance. To hold the company to its promise to pay the insurance, notwithstanding the default of the assured in making the payment of the premium, is to destroy the very substance of the contract." It is difficult, if not impossible, to see why this clause providing for forfeiture, when found in the policy, should be enforced, and not a similar provision in a note for the premium, which, waiving its strict right to demand payment in cash, for the accommodation of the policy holder, it receives and thus indulges him by an extension of time. For the extension of time, as well as the premium due, furnishes the consideration of the note. Such a transaction is as if the policy holder should say to

¶ 1. See *Insurance*, vol. 23, Cent. Dig. § 897.

the company that he was unable to pay promptly, but desired indulgence in order to save his insurance, and the company replied that indulgence would be given and his note would be accepted, upon the condition, however, that a forfeiture would be declared if the note was not paid at maturity. Upon an acceptance of this proposition, a note is executed containing the condition, and a receipt is given to the assured, calling his attention to the necessity of strict payment in order to avoid forfeiture of his policy. In such a case, it would seem that the policy, the note, and the receipt were all to be looked to, to ascertain the agreement of the parties, and that, questions of waiver out of the way, the courts would enforce a forfeiture for nonpayment as stringently as where the policy by itself, or together with the note, stipulated for such a result. It may be granted, however, that there are cases relied on by complainants which give some color, upon examination, but no substantial support, as we think, to their contention.

Among them is that of *Dwelling House Ins. Co. v. Hardie*, 37 Kan. 674, 16 Pac. 92. In the note accepted for the premium in that case, the condition was that upon a failure to pay when due the risk should cease and determine, as "provided in the policy." The company defended upon the ground that, as the note was not paid at maturity, the rights of the assured were forfeited. The facts were that after the loss occurred, as well as after its maturity, the assured paid the note to an agent of the insurance company authorized to receive payment. While there are some general expressions in the opinion which warrant the contention of the appellants, yet we think there was no purpose to announce any such general rule as is now insisted on; but its authority is to be confined to the facts of the case. The court makes the case turn upon the peculiarity of the phrase, contained in the note, that upon the failure to pay this obligation the risk should determine "as provided in the policy," coupled with the failure of the policy to provide for such determination. The court said: "The policy took effect upon the receipt and acceptance of the note. * * * It was competent for the parties to pay and accept payment of the premium in the form of a note, and this appears to have been done. This purpose was also evinced by the company in the collection of the note. The bank was its agent for collection, and the note had matured some time before the collection was made. Instead of * * * declaring the policy at an end when default was made, and collecting such portion of the premium as the company regarded to have been earned, it allowed the note to run, and then collected the entire amount of principal and interest."

We think the case of *McAllister v. New England Mut. Life Ins. Co.*, 101 Mass. 558, 3 Am. Rep. 404, when examined, gives even

less warrant to this contention. There the premium was paid, part in cash and the balance by the execution of two notes by the assured, one due in six months and the other in five years from date. Neither the policy nor the six-months note provided for a forfeiture upon the nonpayment of this note. The note at five years did. The first note was not paid, and the assured died before the next annual premium accrued. Unquestionably the court was right in holding that under this state of facts the rule of the forfeiture could not be invoked.

Trade Ins. Co. v. Barracloff, 45 N. J. Law, 543, 46 Am. Rep. 792, and *Fithian v. N. W. L. Ins. Co.*, 4 Mo. App. 386, were determined upon their peculiar facts, and therefore cannot be taken as authority by complainants.

The case of *Mut. Life Ins. Company v. French*, 30 Ohio St. 240, 27 Am. Rep. 443, adopting the view that a distinction was to be made between a policy which provided for a forfeiture upon nonpayment of a note given for a premium and one which did not, held in the latter case, where the stipulation was found alone in the note, that while the policy was not ipso facto void upon the failure to pay such note, yet the insurer could avoid it by giving distinct notice to the assured that he claimed such a forfeiture. This case, it will be seen, required an affirmative act to make the forfeiture complete. If this were held to be a sound law, the defendant company here could maintain its defense, for it gave notice to the assured of the lapse of his policy by reason of his neglect to pay his note, and urged him to undergo a medical examination and reinstate himself as a policy holder according to the condition of his policy. To the letter containing this notice he made no reply. But we do not think either view is sound. On reason and authority, we hold the policy in this case void, and the rights of the assured absolutely ended when his note matured and was unpaid.

Holly v. Mutual Life Ins. Co., 105 N. Y. 437, 11 N. E. 507, involved a policy which provided that after three annual premiums had been paid, should the assured fall in any payment thereafter, upon a surrender of the policy within 30 days after such unpaid premiums came due, the company would issue a paid-up policy for the premiums paid. In that case, the assured paid more than three annual premiums and then defaulted. The defendant company, however, accepted his note for the premium due, which contained this clause: "All claims to future insurance, and all benefits whatever which full payments in cash of said premium would have secured, shall become immediately void and be forfeited * * * if this note is not paid at maturity." The note, not being paid when due, was renewed. This second note, with a similar condition, matured and was not paid. Afterwards the assured offered to pay it, but the company declined to accept payment, claiming the policy was forfeited.

Action was then brought to compel the company to issue a paid-up policy; but the court held that, upon the failure to pay the note, the forfeiture of the policy at once attached, and the assured lost all right to any further insurance.

In *Iowa Life Ins. Co. v. Lewis*, 187 U. S. 335, 23 Sup. Ct. 126, 47 L. Ed. —, the Supreme Court of the United States has had occasion to examine this question and the cases theretofore decided by that court, including those of *Thompson v. Insurance Co.*, 104 U. S. 252, 26 L. Ed. 765, and *Insurance Co. v. Pendleton*, 112 U. S. 696, 5 Sup. Ct. 314, 28 L. Ed. 863, relied on by appellants in this case, and its conclusions are found in the syllabi, as follows: "(1) A notice, on the back of a premium receipt, that, if a note is given for payment of premium and is not paid at maturity, the policy shall determine, constitutes a part of the contract of insurance, where such receipt states on its face that it is subject to the terms of the contract and the conditions on the back, which the assured is directed to read. (2) A policy of life insurance is forfeited, without any affirmative action on the part of the insurance company, by the failure to pay at maturity a note given for the payment of the premium, which was accepted on condition that, if not paid at maturity, the policy shall cease and determine."

In line with these cases are those of *Kerns v. New Jersey Mut., etc., Company*, 86 Pa. 171, *Insurance Co. v. Myers*, 59 S. W. 30, *Insurance Co. v. Pentecost*, 49 S. W. 425 (those last two cases having been decided by the Supreme Court of Kentucky), and *Gorton v. Insurance Co.*, 39 Wis. 121.

There being no waiver in the case at bar, we are satisfied that all the rights of the assured ceased by and upon failure to pay his note. This renders it unnecessary for us to consider other questions discussed.

The result is that the decree of the chancellor, dismissing the bill, is affirmed, with costs.

STATE ex inf. CROW, Atty. Gen., v. CONTINENTAL TOBACCO CO. et al.*

(Supreme Court of Missouri. June 15, 1903.)

MONOPOLIES—PURCHASE OF COMPETING ESTABLISHMENT—LEGALITY—PROCEEDINGS BY ATTORNEY GENERAL—OBTAINING TESTIMONY OF NONRESIDENT OFFICERS AND EMPLOYEES.

1. Under *Sess. Acts 1897*, p. 208, § 1, providing that any corporation which shall create, enter into, or become a member of any pool, trust, combination, or understanding with any other corporation to fix the price of any manufactured article, merchandise, commodity, etc., shall be guilty of conspiracy, it is not illegal for a manufacturing corporation to purchase the plant and business of another manufacturing corporation engaged in the same business for a cash consideration and in good faith.

2. Under *Rev. St. 1899*, § 8983, providing that

whenever any proceedings shall be commenced by the Attorney General against a corporation under the law against trusts, and he desires to have the testimony of any officer, director, or employé of any corporation proceeded against, such persons being nonresidents of the state or without the jurisdiction, he shall file a statement setting forth the names of the persons whose testimony he desires to take, and thereupon the court shall issue notice to the attorney of the corporation, naming the persons whose testimony is desired, and requiring the attorney to have such persons at the place named in the application at the time fixed to testify, etc., and sections 8984 and 8985, providing that upon failure to appear and testify judgment by default shall be rendered, a mere statement in an application of the Attorney General that the testimony of the persons named therein is "valuable and material" is not sufficient to require the court to issue an order for the attendance of the witnesses.

In Banc. Quo warranto by the state, on information of Edward C. Crow, Attorney General, against the Continental Tobacco Company and others. Respondents discharged.

The Attorney General and Sam B. Jeffries, for informant. H. S. Priest, W. W. Fuller, Martin L. Clardy, and Boyle, Priest & Lehmann, for respondents.

FOX, J. On February 14, 1899, the following information was filed in this Court:

"Now at this day comes Edward C. Crow, Attorney General of the state of Missouri, and informs the court that the Continental Tobacco Company is a corporation organized under and by virtue of the laws of the state of New Jersey, and that said J. G. Butler Tobacco Company, Brown Tobacco Company, Drummond Tobacco Company, and Wright Bros. Tobacco Company are corporations organized under and by virtue of the laws of the state of Missouri. The plaintiff states that all of said named respondents were so severally organized as corporations for the purpose of buying, manufacturing, and selling tobacco, and were and are authorized to own, maintain, and operate such plants, machinery, warehouses, etc., as may be necessary to the proper conduct of their several businesses. The plaintiff states that the said Continental Tobacco Company is carrying on its said business of buying, manufacturing, and selling tobacco as a foreign corporation within the state of Missouri, and that said J. G. Butler Tobacco Company, Brown Tobacco Company, Drummond Tobacco Company, and Wright Bros. Tobacco Company were organized under the laws of the state of Missouri as aforesaid for the purpose of carrying on the business of buying, manufacturing, and selling tobacco in said state, and have since been carrying on said business in said state. Plaintiff, for cause of action herein, states that about the year 1890, and for many years prior thereto, there were certain five distinct and separate corporations or copartnership companies, to wit, Allen & Ginter, located at the city of Richmond, Virginia, W. Duke Sons & Co., located at the

*Rehearing denied July 2, 1903.

city of Durham, North Carolina, W. S. Kimball & Co., located at the city of Rochester, New York, and Goodwin & Co. and Kinney Bros., each located at the city of New York, New York, all severally engaged in the business of manufacturing cigarettes and smoking tobacco, and also severally engaged in selling the products of their respective factories throughout the United States. Plaintiff further states that on or about the year 1890 the said five last-named corporations or copartnership companies were merged and consolidated into one corporation, to wit, into the American Tobacco Company, which was then at that date organized as a corporation under the laws of the state of New Jersey. Plaintiff alleges the fact to be that said American Tobacco Company was organized as a corporation as aforesaid with the object and purpose on the part of the incorporators of absorbing, combining, and consolidating said five corporations or copartnership companies into one holding, and to place the same under the control and management of a single directory, and this with the further object and purpose thereby and by means of said combination to limit and control the production and price of cigarettes and smoking tobacco. Plaintiff states that after the organization of said American Tobacco Company, to wit, about the year 1890, the business and properties of said above-named five corporations or copartnership companies were transferred to the said American Tobacco Company, and thereafter were, and ever since have been, under the management, direction, and control of said American Tobacco Company. Plaintiff states that since the year 1890 numerous other corporations and copartnership companies, organized and existing in different states of the Union, for the purpose of manufacturing and selling cigarettes and smoking tobacco, and which were severally engaged in said business as separate and independent concerns, have also transferred their business and properties to said American Tobacco Company. Plaintiff states that said transfers of the business and properties of all of said corporations and copartnership companies to said American Tobacco Company were made with the object, purpose, and intention of effecting a combination or trust, so as to limit or destroy competition in the business of manufacturing and selling cigarettes and smoking tobaccos, and thereby to enable the said American Tobacco Company to acquire a monopoly of said business throughout the United States; and plaintiff alleges that by reason of the premises the said American Tobacco Company has in fact acquired, and now has, a virtual monopoly of said business of manufacturing and selling cigarettes and smoking tobaccos throughout the United States.

"Further complaining, the plaintiff says that the said American Tobacco Company, having thus acquired a virtual monopoly of said business of manufacturing and selling

cigarettes and smoking tobaccos as aforesaid, then and thereafter, to wit, between the years 1893 and 1898, organized and prosecuted a systematic plan or scheme, as hereinafter stated, to combine and bring under its control and direction the principal and leading corporations and copartnership companies existing in the different states of the United States, which were engaged in the business of manufacturing and selling plug chewing tobaccos. Plaintiff says that between the years 1893 and 1898, and prior thereto, there were a large number, to wit, about the number of ———, corporations and copartnership companies organized and existing in the different states of the United States, engaged as separate and independent concerns in the business of manufacturing and selling plug chewing tobaccos; that prior to about the year 1893 the business of manufacturing and selling smoking tobaccos, in the form of cigarettes, packages, and other forms, and the business of manufacturing and selling plug chewing tobaccos were carried on and conducted as different and distinct lines of manufacture, certain corporations and copartnership companies being engaged exclusively in the manufacture and sale of smoking tobaccos, and certain other corporations and copartnership companies being engaged exclusively in the manufacture and sale of plug chewing tobaccos; and that the two lines of manufactures were rarely, if ever, combined in the business of any one of such corporations or copartnership companies. Plaintiff states that in furtherance of its said plan or scheme to combine and bring under its control the principal and leading corporations or copartnership companies engaged throughout the United States in the business of manufacturing and selling plug chewing tobaccos, the said American Tobacco Company, about the year 1893, obtained control by purchase of the National Tobacco Works, theretofore under the management of Pfingst, Doerhofer & Co., a corporation organized under the laws of Kentucky, and engaged in the business of manufacturing and selling plug chewing tobacco. Plaintiff states that, after it had so obtained control of the said National Tobacco Works, the said American Tobacco Company, through its officers thereto duly authorized, proposed to all the leading and principal corporations and companies engaged in the several states of the Union in manufacturing and selling plug chewing tobacco to sell their business and properties to it, or to combine with it in organizing and effecting a combination or trust to control and monopolize under a single or common directory and management the said business of manufacturing and selling plug chewing tobacco throughout the United States; and plaintiff says that said American Tobacco Company, at the time of making its said proposal to said corporations and companies to buy their business and properties, or to combine with them as aforesaid,

threatened said corporations and companies, or many of them that if they refused to agree to said proposal that the said American Tobacco Company would sell on the markets of the country the plug chewing tobaccos manufactured by it at prices far below the cost of production, thereby entailing heavy losses on said other corporations and companies engaged in said business as its competitors, and that thereby and by means thereof it would compel and coerce said corporations and companies to sell their business and properties to it, or to combine with it as aforesaid for the purposes aforesaid. Plaintiff states that all of said corporations and companies to which said American Tobacco Company made said proposal as aforesaid at that time rejected the same, and refused either to sell their business and properties to, or to enter into any combination with, the said American Tobacco Company; and plaintiff states that thereafter, in furtherance of its threat to coerce and compel its said competitors to sell to or combine with it as above stated, the said American Tobacco Company did sell for general consumption the plug chewing tobaccos manufactured by it, through the said National Tobacco Works, in enormous quantities at prices greatly below the actual cost of producing the same. Plaintiff states that the trade war thus inaugurated by said American Tobacco Company in the manner and for the purposes aforesaid has been carried on and maintained by it for a long period of time, to wit, from since about the year 1898, at a large loss to the said American Tobacco Company; and plaintiff says that, in being compelled to meet the injurious competition thus forced upon them, the corporations and companies engaged as competitors of the said American Tobacco Company in the manufacture and sale of plug chewing tobaccos were forced to resort to new expedients, to incur extraordinary expenses, and suffer heavy losses, amounting to many thousands of dollars, in defending and protecting their trade, business, and properties against the attacks made thereon as aforesaid by the said American Tobacco Company. Plaintiff states that said American Tobacco Company was better prepared and more able to carry on said trade war than were its competitors engaged in manufacturing and selling plug chewing tobaccos, because, as plaintiff alleges, said American Tobacco Company, during all the period since 1898, has been receiving large profits, amounting to many millions of dollars, from its business of manufacturing and selling cigarettes and smoking tobaccos, of which business it has acquired a virtual monopoly as aforesaid.

"Plaintiff states that about the year 1898 the said J. G. Butler Tobacco Company, located at the city of St. Louis, state of Missouri, sold and transferred its business and property to the said American Tobacco Company, and has been ever since under the

control and operated by the said American Tobacco Company. Plaintiff states that during the year 1898 the said American Tobacco Company succeeded in purchasing the business and properties, or in purchasing a majority of the capital stocks, and thereby obtaining control of the business and properties of a large number of the principal and leading corporations and copartnership companies engaged in the several states of the United States in the business of manufacturing and selling plug chewing tobacco; that among the corporations and companies whose business and properties, or the majority of the capital stocks of which, the said American Tobacco Company purchased in the year 1898 as aforesaid, are the following, to wit: John Finzer & Bros., located at the city of Louisville, state of Kentucky; P. J. Sorg & Co., located at the city of Middletown, state of Ohio; P. H. Mayo & Bro., located at the city of Richmond, state of Virginia; Daniel Scotten & Co., located at the city of Detroit, state of Michigan; P. Lorillard Co., located at the city of Jersey City, state of New Jersey; Brown Tobacco Company, located at the city of St. Louis, state of Missouri; and Drummond Tobacco Company, also located at the city of St. Louis, state of Missouri. And plaintiff says that, in addition to the foregoing, the said American Tobacco Company purchased the business and properties, and purchased and acquired control of a majority of the capital stocks, of other corporations and copartnership companies engaged in manufacturing and selling plug chewing tobaccos in the states of Louisiana, Kentucky, Virginia, and in other states, to wit, during the year 1898; but plaintiff is unable to state definitely the names and exact locations of said corporations and companies. Plaintiff states that the business, capital stocks, and properties of the said corporations and companies, so purchased by said American Tobacco Company during the year 1898 as aforesaid, were, respectively, transferred and delivered to said American Tobacco Company by the several owners thereof, and the said American Tobacco Company entered into the possession, management, and control thereof. Plaintiff states that by reason of the premises the said American Tobacco Company came into the possession, management, and control during the year 1898 of manufacturing plants and properties which produced, and are capable of producing, about 66 per cent. of the total annual manufactured product of plug chewing tobaccos throughout the United States.

"Plaintiff states that at the time of the purchase by said American Tobacco Company of the business, capital stocks, and properties of said corporations and copartnership companies, during the year 1898 as aforesaid, it was understood and agreed between the said buyer and sellers thereof that the business and properties of all said corporations and companies so sold to said American Tobacco

Company, as well as all other manufacturing plants and properties owned or controlled by said American Tobacco Company and used by it in manufacturing plug chewing tobacco, should be merged, consolidated, and transferred to a new corporation to be organized for that purpose; and plaintiff states that the individuals who owned or were interested in said business, capital stocks, and properties of the corporations and companies which were sold and transferred to said American Tobacco Company as aforesaid contracted and agreed with said American Tobacco Company, as part consideration of said sales and transfers, that they would subscribe to and receive portions of the capital stock of said new corporation, so to be formed as aforesaid, in payment or in part payment of the business, stocks, and properties so sold by them to said American Tobacco Company, and that said individuals also at the same time, and as a part of said contracts of sale, contracted and agreed that they would not at any future time engage in the manufacture or sale of tobacco in competition with said American Tobacco Company, or with any corporation to which said American Tobacco Company might thereafter assign and transfer the business, capital stocks, and properties so purchased and acquired by it. Plaintiff states that after the sale and transfer by said named corporations and companies of their business and properties to the said American Tobacco Company as aforesaid, to wit, during the year 1898, the officers and others who were interested as stockholders or otherwise in the business and properties of said American Tobacco Company, and in the business and properties of the said corporations and companies which had been sold to said American Tobacco Company as aforesaid, did organize a new corporation in the state of New Jersey, under and by virtue of the laws thereof, to wit, the said Continental Tobacco Company, one of the respondents herein. And plaintiff states that thereafter, to wit, on the — day of December, 1898, the said American Tobacco Company assigned and transferred to said Continental Tobacco Company all business and properties theretofore acquired by it, through purchase or otherwise, which were held and used for the purpose of manufacturing plug chewing tobaccos; and plaintiff says that at the time of making said transfer the said American Tobacco Company received in payment of said business and properties so transferred a large amount, to wit, a majority, of the capital stock of said Continental Tobacco Company; and plaintiff also states that in accordance with the contracts and agreements made to that effect, as hereinbefore stated, large amounts of the capital stock of said Continental Tobacco Company were also delivered to officers and others who were interested in the stocks, business, and properties of the several corporations and companies whose capital stocks, business, and

properties were purchased by said American Tobacco Company, as aforesaid. Plaintiff states that since the organization of said Continental Tobacco Company the said American Tobacco Company has been, and now is, engaged exclusively in the business of manufacturing and selling cigarettes and smoking tobaccos; that the said Continental Tobacco Company is engaged exclusively in the business of manufacturing and selling plug chewing tobaccos; that the two lines of manufactures are thus separated, one being carried on by said American Tobacco Company, and the other being carried on by said Continental Tobacco Company. Plaintiff states that the business and properties now owned or controlled by said Continental Tobacco Company is composed in whole or in part of the capital stocks, business, manufacturing plants, and other properties formerly owned by said American Tobacco Company, and which it acquired by purchase from other corporations, companies, and individuals engaged in manufacturing and selling plug chewing tobaccos, as aforesaid. Plaintiff states that the board of directors of said Continental Tobacco Company is composed of the officers and stockholders of the said American Tobacco Company, and of the officers and directors of the said corporations and companies whose business and properties were purchased by said American Tobacco Company as aforesaid, and thereafter transferred by said American Tobacco Company to said Continental Tobacco Company as aforesaid; and plaintiff states that one J. B. Duke is the president and chief executive officer of both the said American Tobacco Company and the said Continental Tobacco Company.

"Plaintiff states that since the Continental Tobacco Company was organized, to wit, on the — day of January, 1899, it purchased the business and property of the said Wright Bros. Tobacco Company, and has entered into, and now has, the possession, use, and control thereof. And plaintiff states that during the year 1899 the said Continental Tobacco Company has also purchased and entered into, and now has, the possession, use, and control of the business and properties of other corporations and companies which existed and were engaged outside the state of Missouri in manufacturing and selling plug chewing tobacco. Plaintiff states that a majority of the several corporations whose business and properties were purchased by the said American Tobacco Company and the said Continental Tobacco Company between and including the years of 1895 and 1898, as aforesaid, still maintain their corporate existence, but that their several affairs are conducted and carried on under and subject to the control of the said Continental Tobacco Company. Plaintiff states that the said Continental Tobacco Company, since it purchased the business and properties of the said Wright Bros. Tobacco Company, on the — day of January, 1899, has closed the

factories of said Wright Bros. Tobacco Company and discontinued the manufacture of tobacco therein. Plaintiff states that the manufacturing plants and properties transferred to the said American Tobacco Company by the said J. G. Butler Tobacco Company, the said Brown Tobacco Company, and the said Drummond Tobacco Company, as aforesaid, and which were thereafter transferred by said American Tobacco Company to said Continental Tobacco Company as aforesaid, are now being, and for a long time past have been, used and operated under the direction and control of said Continental Tobacco Company in manufacturing plug chewing tobaccos, to wit, in the said city of St. Louis, state of Missouri, and that the said plug chewing tobaccos so manufactured are being sold throughout the state of Missouri under the direction and control and on account of the said Continental Tobacco Company. Plaintiff states that the said J. G. Butler Tobacco Company is now being run, managed, and operated by the said Continental Tobacco Company as the J. G. Butler Company branch of the Continental Tobacco Company, and that the said Brown Tobacco Company is now being run, managed, and operated by the said Continental Tobacco Company as the Brown branch of the Continental Tobacco Company, and that the said Drummond Tobacco Company is now being run, managed, and operated by said Continental Tobacco Company as the Drummond branch of the Continental Tobacco Company. Plaintiff further states that the said Continental Tobacco Company is now, and for a long time past has been, engaged in the business of selling plug chewing tobaccos within the state of Missouri, which are manufactured by said Continental Tobacco Company outside the state of Missouri; that is, tobaccos manufactured by it in and by use of the said several manufacturing plants located in the cities of Louisville, Kentucky, Middletown, Ohio, Richmond, Virginia, and Jersey City, New Jersey, which were assigned and transferred to it by the said American Tobacco Company as aforesaid.

"Plaintiff states that the said Continental Tobacco Company constitutes and is an unlawful trust or combination, formed and created by the said American Tobacco Company, the said John Finzer & Bros., the said P. J. Sorg Company, the said P. H. Mayo & Bro., the said Daniel Scotten & Co., the said P. Lorillard Company, the said J. G. Butler Tobacco Company, the said Brown Tobacco Company, the said Drummond Tobacco Company, and other corporations, companies, and persons to this plaintiff now unknown. Plaintiff states that said unlawful trust or combination so formed and created as aforesaid was created, and is now maintained, for the purpose of limiting the amount of plug chewing tobaccos which should be manufactured in the state of Missouri and through the United States, and for the purpose, also,

of regulating or fixing the price of raw tobacco and of manufactured plug chewing tobacco within the state of Missouri and throughout the United States; and plaintiff further states that said unlawful trust or combination was created as aforesaid, also, for the purpose and with a view to lessening full and free competition both in the manufacture and sales of plug chewing tobaccos within the state of Missouri and throughout the United States, and for the purpose and with a view of acquiring a monopoly of the business of manufacturing and selling plug chewing tobacco within the state of Missouri and throughout the United States; and plaintiff further states that said unlawful trust or combination does in fact lessen and tends to lessen full and free competition in the sale of raw tobacco to manufacturers, and also both in the manufacture and sale of plug chewing tobacco within the state of Missouri, and throughout the United States, and that by reason thereof the said unlawful trust or combination, created as aforesaid, creates and tends to create a monopoly in said trust or combination of the business of manufacturing and selling plug chewing tobacco. Plaintiff states that raw tobacco and plug chewing tobacco are articles of manufacture and merchandise. In consideration of the premises, the plaintiff states and charges the fact to be that the said trust or combination, to wit, the said Continental Tobacco Company, was created, and is now maintained as aforesaid, to the detriment of the public and against the public policy of the state of Missouri; and contrary to and in violation of the statute laws of the state of Missouri, and also contrary to and in violation of the general common law in force in the state of Missouri. Plaintiff further states that since the creation of said unlawful trust or combination the said Wright Bros. Tobacco Company has entered into and become a part thereof.

"Wherefore, in consideration of the whole premises, the plaintiff prays that the court will issue its writ to all said respondents, commanding each and all of them to show cause why the court should not render its judgment forfeiting their respective corporate rights, franchises, and privileges; and upon the hearing hereof the plaintiff prays the court to render its judgment forfeiting the corporate rights, franchises, and existence of the said J. G. Butler Tobacco Company, the said Brown Tobacco Company, the said Drummond Tobacco Company, and the said Wright Bros. Tobacco Company, and to oust the said named corporations of all and singular their corporate rights and franchises, so that the same shall thereafter become void and of non effect, cease, and determine, and that the court will also render its judgment forfeiting the right and privilege of the said Continental Tobacco Company to do business in the state of Missouri. And the plaintiff prays that the court will also render its judgment ousting the said Continental

Tobacco Company, the said J. G. Butler Tobacco Company, the said Brown Tobacco Company, the said Drummond Tobacco Company, and the said Wright Bros. Tobacco Company, and each of them, from the franchise and privilege of manufacturing plug chewing tobacco within the state of Missouri, and also ousting and depriving them, and each of them, from the franchise and privilege of selling within the state of Missouri any plug chewing tobacco manufactured by them, or either of them, within said state, and also ousting them, and each of them, from the franchise and privilege of selling any plug chewing tobacco whatever within the state of Missouri; and the court will make such other and further orders, judgments, and decrees as may be necessary and proper. Plaintiff also prays judgment against said respondents for the costs of this suit."

Respondents were duly served with process. After the disposition of numerous preliminary motions, respondents filed separate answers to the information. It is unnecessary to burden this opinion by quoting them herein. It will be sufficient to say that they directly put in issue the averments in the information which attributed to them the creation of any trust or combination, in respect to their business, in violation of any statute law of the state of Missouri, or in violation of the general common law in force in this state. After the issues were joined, as presented by the information and answers filed herein, this court appointed Hon. John P. Butler special commissioner to take the testimony in said proceeding and report his findings to this court. In pursuance of said appointment, the commissioner proceeded at various times and places to hear the testimony. After a patient and considerate hearing of the testimony, the commissioner, on the 18th day of April, 1902, filed his report, which is as follows:

"Now, to wit, on this 14th day of April, 1902, comes John P. Butler, heretofore appointed referee and special commissioner in the above-entitled cause, and reports to the honorable the Supreme Court of Missouri that soon after his appointment he duly qualified and entered upon the discharge of the duties enjoined upon him by the order of reference; that from time to time and at various places he has taken evidence on the part of the informant, and none on the part of the respondents, save and except, only, such as may have been gleaned from the examination of witnesses for the informant on cross-examination. Your referee and special commissioner is informed that, if the conclusions of law reached by him during the progress of this case, and made manifest by his rulings herein, are confirmed by the Supreme Court, no further attempt to produce evidence for the informant will be made; and as the respondents, nor either of them, have expressed any desire to submit any evidence

in rebuttal, the following finding of facts and conclusions of law arising upon the pleadings, admissions of record, and undisputed facts, are respectfully submitted for your confirmation, rejection or further direction:

"(1) The American Tobacco Company was and is a corporation organized and existing under the laws of New Jersey, with authority, among other things, to purchase and operate tobacco factories and warehouses, and to cure, manufacture, and sell all kinds of chewing and smoking tobacco. The exact date of its charter has not been proven, but it is shown by the evidence to have been engaged in business as far back as 1889. In 1895 the above-named American Tobacco Company purchased for cash the property, trade-marks, business, and good will of the respondent the J. G. Butler Tobacco Company, a corporation under the laws of Missouri and doing business in St. Louis, and since the said sale and purchase the said J. G. Butler Tobacco Company has ceased to exist as a corporate entity under its charter. In September, 1898, the American Tobacco Company made a like purchase for cash of the property, trade-marks, business, and good will of the respondent the Drummond Tobacco Company, a corporation under the laws of Missouri and doing business at the city of St. Louis, and the latter likewise ceased to do business as a separate entity under its charter. In October, 1898, the American Tobacco Company, by a purchase for cash, became the owner of the property, trade-marks, business, and good will of the respondent Brown Bros. Tobacco Company, a corporation under the laws of Missouri and doing business at St. Louis, and after that time the last-named company also ceased to do business as a separate concern under its charter, which by its own limitation expired in February, 1901. December 10, 1898, the respondent the Continental Tobacco Company was formed under the laws of New Jersey, with a capital of \$75,000,000, with power and authority to do a general tobacco business, and to own, hold, and purchase factories, warehouses, etc., without limitation as to situation of property. December 28, 1898, the Continental Tobacco Company purchased of and from the American Tobacco Company all of its property, trade-marks, business, and good will relating to the production and manufacture of plug chewing tobacco; the American Tobacco Company retaining that portion of its property and business relating to the production and manufacture of all kinds of smoking tobacco. January 6, 1899, the respondent the Continental Tobacco Company filed its articles of association with the Secretary of State for the state of Missouri, and was by the latter given a certificate authorizing it to do business in Missouri in accordance with its charter. In January, 1899, the exact date not shown, the Continental Company

purchased for cash the property, trade-marks, business, and good will of the respondent Wright Bros. Tobacco Company, a Missouri corporation doing business at St. Charles, Missouri, and after this sale and purchase the last-named likewise ceased to do business under its charter. The selling companies, the respondents other than the Continental, at the time of their sale and absorption by the purchasing companies, were doing a large and lucrative business in their respective lines of trade. February 14, 1899, this suit was filed, only 48 days after the purchase by the Continental from the American, and within 40 days of the time it was granted a certificate to do business in Missouri. From the short space of time intervening between the time of the acquisition by the Continental of the property of the other respondents until the bringing of this suit, your referee has been unable to reach a conclusion as to the ultimate results of these purchases by the Continental Tobacco Company. It is shown, however, that the price of plug chewing tobacco decreased within that time (taking into account the increase in internal revenue taxes). This was, of course, beneficial to the tobacco user, but whether a like benefit resulted to the tobacco grower is not demonstrated by the evidence. Your referee has excluded all evidence in relation of properties purchased since the filing of this suit, February 14, 1899, for the reason that, if this suit can be maintained at all, it must be founded upon a cause of action existing at the time it was instituted, and not upon after occurring facts. To these findings of fact and conclusions of law the Attorney General excepted and still excepts. The several purchases hereinbefore referred to, whereby the property of the other respondents became vested in the Continental Company, having been for cash, your referee is of the opinion, and so holds as a matter of law, that such sales and purchases were not unlawful, and that a person may freely do with his own whatsoever he will, provided he does not use it in derogation of common right and to the detriment of the general welfare. To which finding of facts and conclusions of law the Attorney General excepted and still excepts.

"(2) During the progress of this case before the referee, and on the 25th day of February, 1901, the Attorney General filed his petition asking an order to compel the attorneys of record for the Continental Tobacco Company to produce J. B. Duke, president, and W. H. McAlister, secretary, together with certain books, records, papers, and documents of said company, at the law office of Boyle, Priest & Lehmann, and to submit the said witnesses, and as well, also, the said books, papers, etc., for examination and inspection, further alleging in his petition that said witnesses were residents of the state of New York, and that the general offices where said books, etc., were kept were likewise in the

said state of New York. In compliance with the petition, and at the time of its presentation, your referee made the order requiring the attorneys of record, namely, Boyle, Priest & Lehmann, of St. Louis, Missouri, to produce the witnesses, books, papers, and records, etc., at the time specified in the order. Afterwards the respondent Continental Tobacco Company filed its motion to set aside and annul the said order. In support of this motion the respondent submitted a brief as to the law, and the Attorney General likewise submitted a brief in opposition thereto. The matter was continued from time to time for various reasons until March 6, 1902, when your referee, after mature consideration of the law of the case, sustained the motion, and set aside, canceled, and annulled the order of February 25, 1901, requiring the production of books, papers, witnesses, etc., on the ground that the statute authorizing such procedure, to wit, the act approved May 4, 1899 (Sess. Acts 1899, p. 318), and incorporated as new sections 8983-8985, in the Revised Statutes of 1899, was unreasonable, oppressive, unconstitutional, and void. Your referee's conclusions of law in this regard are grounded upon and supported by the following authorities: *Wilson v. Railroad Co.*, 108 Mo. 588, 18 S. W. 286, 32 Am. St. Rep. 624; *State v. Simmons Hardware Co.*, 109 Mo. 118, 18 S. W. 1125, 15 L. R. A. 676; *State v. Young*, 119 Mo. 520, 24 S. W. 1038; *Matthews v. Railroad*, 142 Mo. 660, 44 S. W. 802; *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110; *Gulf, Col. & S. F. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666; *Hovey v. Elliott*, 167 U. S. 408-419, 17 Sup. Ct. 841, 42 L. Ed. 215; *State ex rel. v. Union Trust Co.* (like motion denied, Sup. Ct. Mo., October term, 1897); *Ex parte Carnot Carter* (Mo. Sup., February 4, 1902) 66 S. W. 540. To the rulings of the referee and to his conclusions of law in this regard the Attorney General objected and excepted, and still excepts.

"(3) This information is based upon the act approved March 24, 1897 (Sess. Acts 1897, p. 208), whereunder it is sought to establish an illegal combination, pool, trust, or conspiracy on respondents under the provisions thereof. Section 1 of the act of 1897, after defining what shall constitute an illegal combination and what shall be a violation of law, contains the following exception: 'Provided, however, that the provisions of this section shall not apply to agreements of fire insurance companies, or their agents or boards of fire underwriters, to regulate the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm in cities in this state which now have or which may hereafter acquire a population of one hundred thousand inhabitants or more.' Whatever vice, if any, be attributed to section 1 of the act of 1897 by reason of the exception noted has been removed by the

enactment of a new section in 1899 in lieu thereof, which not only omits the proviso of 1897, but specifically declares its application without reservation of any kind whatever. This statute has been considered by the honorable Supreme Court of Missouri in the following cases: *State ex inf. v. Aetna Ins. Co.*, 150 Mo. 113, 51 S. W. 413; *State ex inf. v. Fireman's Fund Ins. Co. et al.*, 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 303; *State ex rel. v. Associated Press*, 159 Mo. 410, 60 S. W. 91, 51 L. R. A. 151, 81 Am. St. Rep. 368. In the first-mentioned case, the validity of the exception or proviso as to insurance companies was upheld. Since the determination of these cases by the Supreme Court of this state, the question arising here has been before the Supreme Court of the United States in a recent case arising under the anti-trust laws of Illinois, which contain exceptions similar to those contained in the Missouri statutes upon which this suit is bottomed, and that court held the Illinois statute void because of the exception. *Connolly v. Union Sewer Pipe Co. of Chicago* (not yet officially reported) 22 Sup. Ct. 430, 46 L. Ed. 679. Your referee is of the opinion, and so holds as a matter of law, that the grant of immunity to insurance companies in cities of one hundred thousand or more inhabitants, as contained in the proviso of section 1 of the act of 1897, renders the whole act nugatory and violative of the Constitution of this state and of the United States. In consequence whereof this suit, being founded upon a void statute, cannot be maintained. To this ruling and to those conclusions of law the Attorney General excepted and still excepts.

"Your referee and special commissioner herewith submits the evidence heretofore taken, and has caused the same to be marked 'Exhibit A' and 'Exhibit B,' together with the petition for the production of books, papers, witnesses, etc., the order made thereon, the motion to set the same aside, and the briefs and argument of counsel thereon, together with the original papers and exhibits in the case, and asks that this report be confirmed, and, if confirmed, that your referee and commissioner have leave to file a supplemental report, or record of his proceedings herein, together with a statement of time occupied, and a detailed statement of costs and expenses, for the purpose of taxing the same and of fixing a reasonable allowance for the services of your referee, etc. This report has been hurriedly made and hastily considered during the interval of other duties, and is respectfully submitted, with the request that, if it be not affirmed, you make such other orders and give such further direction in the premises as you may deem proper."

On the 19th of April, 1902, the informant filed his exceptions to the report of the commissioner, which are as follows:

"Now at this time comes Edward C. Crow,

Attorney General of the state of Missouri, who informs and prosecutes in this behalf on the part of said state of Missouri, and excepts to the action of the referee and special commissioner in his report to this honorable court for the following reasons, to wit:

"First. This informant objects and excepts to the action of said referee and special commissioner upon the findings of fact and conclusions of law arising upon the pleadings, admissions of record, undisputed facts, and evidence, because this informant has not yet completed the taking of testimony in said cause, and has not as yet announced to said referee and special commissioner that he had completed the taking of said testimony, and that there is yet much valuable testimony to be taken in relation thereto, and that due diligence has been exercised upon the part of this informant in the taking of testimony, as is shown from the report filed by the commissioner herein.

"Second. This informant excepts to the action of the referee and special commissioner in setting aside, canceling, and annulling the order of February 25, 1901, requiring the production of books, papers, witnesses, etc. Said act of May 4, 1899, upon authority of which said order was issued is constitutional and valid, is not unreasonable, oppressive, or void, and therefore said referee and special commissioner should have required said respondents to have produced the books, papers, and witnesses asked of it by this informant.

"Third. The informant further excepts to the special report made by said referee and special commissioner, wherein it is stated that the information in this cause is based upon the act approved March 24, 1897 (Sess. Laws 1897, p. 208), wherein it is sought to establish an illegal combination, pool, trust, or conspiracy on respondents, under the provisions thereof, and wherein said act of 1897 is declared by said referee and special commissioner unconstitutional and void; and as a further exception to the report aforesaid this informant says that this suit is not based upon a void statute, nor does its determination rest upon any statute law of the state of Missouri, but that it is alleged in informant's petition herein that the combination, monopoly, agreement, and conspiracy so formed as alleged therein is in violation of and contrary to the general common law in force in the state of Missouri, so that it is not essential, so far as the merits of the case are concerned, whether the act of March 24, 1897, be constitutional or unconstitutional.

"Fourth. This informant further excepts to the report of the referee and special commissioner herein, in that the act of the J. G. Butler Tobacco Company, Brown Bros. Tobacco Company, Drummond Tobacco Company, and Wright Bros. Tobacco Company, incorporations, in transferring the control of their property, franchises, and properties of every character and description to the Amer-

ican Tobacco Company, and by it to the Continental Tobacco Company, is sufficient in and of itself to cause a forfeiture of their respective corporate charters, and that the act of the said American Tobacco Company and the Continental Tobacco Company in assuming control over all the property and respective rights and privileges of the various correspondents of the Continental Tobacco Company, and its purchase of practically all of the plug tobacco factories of the state of Missouri and of the United States, as this informant believes he will be able to prove if further testimony is permitted, is in and of itself sufficient to find said Continental Tobacco Company, together with all its correspondents herein, engaged in an unlawful combination, conspiracy, pool, and monopoly to control the plug tobacco trade and traffic in the state of Missouri and elsewhere.

"Fifth. And that this informant will be able to show, as alleged in the petition, that it was a part of the plan of the officers, directors and shareholders of the various respondent corporations herein to acquire and amalgamate all the property used in the manufacture and sale of plug chewing tobacco within the state of Missouri, with the view of establishing a monopoly in this business in said state.

"Wherefore this informant moves to set aside the special finding of the referee and special commissioner on the questions of fact and conclusions of law contained in his report, and to set aside the ruling of said referee and special commissioner in refusing to require respondents to produce witnesses, books, and papers demanded by the informant, and to set aside and overrule his finding of law upon the constitutionality of said act of the General Assembly of 1897 and against this informant in general, and that he be ordered and required to proceed with all reasonable speed with the further taking of such testimony as may be required of him by this informant or the respondents herein."

Opinion.

It will be observed that this proceeding has been pending for more than four years, and the Attorney General, with commendable energy and ability, sought to secure all the testimony pertinent to the issues in this proceeding. A number of witnesses, who were supposed to know something of the methods of organization, as well as the manner of transacting business, by the respondents, were introduced as witnesses and testified in this cause. This testimony has been preserved and accompanies the report of the commissioner. We deem it unnecessary to recite in detail the evidence as taken before the commissioner. It will suffice to say that it fails to show a combination or trust, created by respondents, as is sought to be prohibited by the statute, unless the purchasing by the American Tobacco Company of all the property, franchises, etc., of the other corpora-

tions, and its transfer of all such property rights to the Continental Tobacco Company, in and of itself, constitutes sufficient proof of a combination and trust. With the report of the commissioner and the exceptions to such report before us, we deem it necessary only to dispose of two questions involved:

First. Were the findings and legal conclusions reached by the commissioner correct, as indicated in this part of the report where he says: "The several purchases hereinbefore referred to, whereby the property of the other respondents became vested in the Continental Company, having been for cash, your referee is of the opinion, and so holds as a matter of law, that such sales and purchases were not unlawful, and that a person may freely do with his own whatsoever he will, provided he does not use it in derogation of common right and to the detriment of the general welfare?"

Second. Was there a sufficient showing on the part of the state to require the commissioner, in the exercise of a proper discretion, to longer continue this proceeding; or does the record before us disclose such a state of facts, in view of the many years that this proceeding has been pending, to warrant this court in setting aside all the findings of the commissioner, and order and require him to further proceed with the taking of testimony?

In the discussion of these propositions, it is well to consult the statute in force at the time of the filing of this information, and ascertain the limitation upon the powers of corporations. Section 1 of the act of 1897, so far as applicable to this controversy, provides: "Any corporation organized under the laws of this or any other state or country for transacting or conducting any kind of business in this state, or which does transact or conduct any kind of business in this state, or any partnership or individual, or other association of persons whatsoever, who shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, or to maintain said price when so regulated or fixed, or shall enter into, become a member of or a party to any pool, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by

fire, lightning or storm, shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to penalties as provided in this act." Then follows the proviso, referred to by the commissioner, from which he deduces the legal conclusion that said act is unconstitutional. We will not discuss the constitutionality of this law. It is not necessarily involved in the determination of the questions presented by the record before us. We will say, however, that we do not concur with the legal conclusions of the commissioner in respect to this statute, and it will suffice to say that this court has held otherwise. *State ex inf. v. Firemen's Fund Ins. Co.*, 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363.

We quote this statute, simply that we may fully comprehend its import and appreciate the evils it is intended to suppress. It will be noted that the prohibitions of this statute are applicable to individuals and partnerships, as well as corporations. It prohibits any corporation from creating or entering into any pool, trust, agreement, combination, confederation, or understanding with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix prices, or to maintain such prices when so regulated and fixed, or to fix or limit the amount or quantity of any article of manufacture. This statute contemplates the existence of at least two or more corporations, individuals, or partnerships, so as to agree or combine with each other to do the prohibited acts mentioned in the statute. In other words, it is intended to operate upon two or more corporations or individuals, who, so far as the public are concerned, indicate that they are pursuing an independent business, legitimate competitors, when in fact there is a secret agreement by which the very things condemned by the statute are accomplished. The public has rights which the law contemplates shall be respected. Neither corporations, individuals, nor partnerships are permitted to deceive or mislead the public by an apparent competition, when in fact none exists. On the other hand, the terms of this statute are not broad enough to prohibit one corporation, in good faith, in the legitimate pursuit of its business, from purchasing the assets of another corporation in a similar business. Its terms are applicable to individuals and partnerships, as well as corporations. Its condemnation is as pronounced against the individual as it is against the corporation. Hence it follows, if this statute is to be construed as prohibiting corporations from purchasing in good faith the assets of another corporation, it must be applied with equal force to the rights and powers of individuals.

It is conceded in this proceeding that the Continental Tobacco Company was organized under the laws of New Jersey, and that in pursuance of the certificate of the Secretary of State it is authorized to do business in this state. The purposes of their organ-

ization are averred in the information. It is alleged: "That the Continental Tobacco Company is a corporation organized under and by virtue of the laws of the state of New Jersey, and that said J. G. Butler Tobacco Company, Brown Tobacco Company, Drummond Tobacco Company, and Wright Bros. Tobacco Company are corporations organized under and by virtue of the laws of the state of Missouri. The plaintiff states that all of said named respondents were so severally organized as corporations for the purpose of buying, manufacturing, and selling tobacco, and were and are authorized to own, maintain, and operate such plants, machinery, warehouses, etc., as may be necessary to the proper conduct of their several businesses." Thus we have clearly stated what the respondents were authorized to do under their respective charters. The Continental Tobacco Company having been organized under the laws of New Jersey, being authorized to do business in this state, it necessarily brought with it the powers of its charter, unless restricted by the laws of this state. In the case of *Helf v. Rundle*, 108 U. S. 222, 26 L. Ed. 837, Mr. Chief Justice Waite says: "No state need allow the corporations of other states to do business within its jurisdiction unless it chooses, with perhaps the exception of commercial corporations; but, if it does, without limitation, express or implied, the corporation comes in as it has been created. Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs, both in life and after dissolution." The authority to buy, manufacture, and sell tobacco, and the additional authority to own, maintain, and operate such plants, machinery, warehouses, etc., as may be necessary to the proper conduct of their business, clearly granted the power to purchase any property, plants, or machinery necessary to the proper conduct of their business. We are not aware of any law, general or special, which restricts or limits a corporation, individual, or partnership as to the contractual powers in respect to the subject involved in this proceeding.

It is true that the lawmaking power may restrict the freedom of contracts in some directions; but as to the power and authority exercised by the respondents in this cause, as reported by the commissioner, if done in good faith, it seems not to have been restricted. When the authority is clearly granted to the corporation or individual to contract, the principle denouncing the infringement of such rights is equally applicable to both. This court, in the case of *Ry. Co. v. Ry. Co.*, 135 Mo., loc. cit. 199, 36 S. W. 608, 33 L. R.

A. 607, in discussing the power of corporations to contract, speaking through Gantt, J., said: "What corporations may lawfully do is summed up in a few words by Judge Thompson in his recent Commentaries on the Law of Corporations (volume 4, § 5645), where he says: 'In respect of the power of corporations to make contracts, two propositions may be stated: (1) That they have, by mere implication of law and without any affirmative expression to that effect in their charters or governing statutes, and, of course, in the absence of express prohibitions, the same power to make and take contracts, within the scope of the purposes of their creation, which natural persons have. (2) That this power, on the other hand, is restricted to the purposes for which the corporation has been created, and cannot be lawfully exercised by it for other purposes.' This statement of the law accords with the general current of authority on this subject." Judge Black, in the case of *State v. Loomis*, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789, in the application of the principle of the right to contract, approvingly quotes from Mr. Story on the Constitution, where he very appropriately defines "liberty," as used in the Constitution and as applicable to freedom of contract. He says: "The word 'liberty,' as used in these constitutional declarations, means more than freedom of locomotion. It includes and comprehends, among other things, freedom of speech, the right to self-defense against unlawful violence, and the right to freely buy and sell as others may." 2 Story on the Constitution (5th Ed.) § 1950. Continuing the discussion of the application of this principle, the learned and esteemed judge, in *State v. Loomis*, supra, says: "Liberty, as we have seen, includes the right to contract as others may; and to take that right away from a class of persons following lawful pursuits is simply depriving such persons of a time-honored right which the Constitution undertakes to secure to every citizen." Judge Cooley, in treating of this subject, says: "To forbid to an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large would be to deprive them of liberty in particulars of primary importance to their 'pursuit of happiness'; and those who should claim a right to do so ought to be able to show a specific authority therefor, instead of calling upon others to show how and where the authority is negatived." Cooley's Const. Lim. (6th Ed.) 484.

Upon the power of corporations to transfer property, the rule is very clearly announced in *American & English Encyclopedia of Law*, Vol. 7, p. 734. In the text we find the rule thus stated: "And by the weight of authority, both in England and the United States, a strictly private commercial corporation, owing no peculiar duties to the public, may, with the consent of all the shareholders, and in the absence of express or implied restric-

tions in its charter or prejudice to the rights of creditors, transfer all of its property to another corporation or person, if the latter is capable of taking." The Supreme Court of Texas, in *Gates v. Hooper*, 39 S. W. 1079, very clearly interprets the meaning of the terms "trust and combination." It says: "In order to constitute a trust, within the meaning of the statute, there must be a 'combination of capital, skill, or acts by two or more.' 'Combination,' as here used, means union or association. If there be no union or association by two or more of their 'capital, skill, or acts,' there can be no 'combination,' and hence no 'trust.' When we consider the purposes for which the 'combination' must be formed, to come within the statute, the essential meaning of the word 'combination,' and the fact that a punishment is prescribed for each day that the trust continues in existence, we are led to the conclusion that the union or association of 'capital, skill, or acts' denounced is where the parties in the particular case designed the united co-operation of such agencies, which might have been otherwise independent and competing, for the accomplishment of one or more of such purposes. In the case stated in the petition there is no 'combination.' The plaintiff bought defendant's goods, together with the good will of his business, both of which were subjects of purchase and sale; and, in order to render the sale of the good will effectual, the seller agreed that he would not, for one year thereafter, do a like business in that town. This was but a kind of covenant or warranty that the purchaser should have the use and benefit of such good will during that year; for it is clear that, if the seller had immediately engaged in a like business at the same place, the purchaser would have had no benefit therefrom. By this transaction neither the capital, skill, nor acts of the parties were brought into any kind of union, association, or co-operative action."

The Continental Tobacco Company simply exercised a legal right to incorporate and conduct its business. If the purchase of the plants as owned by the American Tobacco Company was made in good faith, in the legitimate conduct and management of its business, then the conclusion reached by the commissioner in his report, that such transaction was not unlawful, was correct. That the respondent had the right to organize a corporation we think is clear. The laws of this state are broad enough to reach individuals who undertake to organize a corporation that would create a trust in itself; but, where the corporation is alleged to be duly organized, then the condemnation of the statute as applicable to it is not in the method of its organization, but by its express terms denounces and prohibits the unlawful acts as a legal, existing corporation. It was a legitimate inquiry by the commissioner as to the integrity and good faith of the transfer by the American Tobacco Company of all its assets to the

Continental Tobacco Company, and we have no hesitation in saying, considering the amount involved, the extent and far-reaching scope of the transaction, it was sufficient in itself to arouse in the mind of the Attorney General a strong suspicion—yes, even a strong probability—that a trust was being created, and warranted his prompt action, in the interest of the public, by filing the information herein. However, it must be remembered that this proceeding partakes of the nature of a criminal prosecution. Severe penalties are imposed, and hence it is not sufficient, to warrant a finding adverse to respondents, that we may entertain strong suspicions, or even strong probabilities, of their guilt. Such conclusions should only be reached upon a clear showing by the testimony, fully satisfying the minds of the court, that they were guilty of the violations of the law as charged in the information.

The case of *Distilling Co. v. People*, 156 Ill. 448, 41 N. E. 188, 47 Am. St. Rep. 200, is distinguished from this case by reason of the facts. In that case there was a trust formed by a number of unincorporated associations, and, as was shown by the testimony, to evade the condemnation of the statute. This same trust of unincorporated associations incorporated and conducted the business along the same lines and with a similar purpose. The court said: "That corporation thus succeeds to the trust, and its operations are to be carried on in the same way, for the same purposes, and by the same agencies as before." The commissioner, in the case before us, finds the facts just the reverse to the *Illinois Distilling Case*. The commissioner, who is one of the circuit judges of this state, has heard the testimony, had the witnesses before him, and reports that from the evidence adduced there was nothing unlawful in the sale and purchase of the assets of the corporations, as detailed in the report. We will not disturb the finding of the commissioner in that respect.

This brings us to the question as to the further continuance of this cause, for the reasons disclosed by the record. Pending the hearing of testimony before the commissioner, the state presented the following application for the production of certain witnesses, books, and papers:

"Now comes Edward C. Crow, Attorney General of the state of Missouri, who prosecutes for the state of Missouri in this behalf, and states and informs: That J. B. Duke, of 111 5th St., New York City, is the president of the Continental Tobacco Company, one of the defendants herein, and that W. H. McAllister, of 111 5th St., New York City, in the state of New York, is secretary of the said defendant, the Continental Tobacco Company. That the said J. B. Duke and W. H. McAllister are nonresidents of the state of Missouri and are without the jurisdiction of the court in which said cause is pending, and that they are valuable and

material witnesses for plaintiff in said cause, and have in their possession certain books and documents which are material and necessary evidence on the part of this plaintiff. That among the books, papers, and documents in the care, custody, and possession of the said W. H. McAllister, secretary of the aforesaid Continental Tobacco Company, one of the defendants herein, is the stock book of said company containing a list of the stockholders and the number of shares held by each prior to and on the 1st day of February, 1899; the secretary's minute book, containing an account of the actions and transactions of the board of directors and the stockholders of said company prior to and on the 1st day of February, 1899, together with the book, books, paper, papers, document, and documents showing a list of the assets and holdings of the said Continental Tobacco Company, and the value thereof, prior to and on the 1st day of February, 1899, and the date of acquiring the same. That said books, papers, and documents are necessary and material evidence to the issues in said cause. That said Edward C. Crow, Attorney General aforesaid, further states that he desires to take the evidence of said J. B. Duke and W. H. McAllister, and to introduce in evidence the books, papers, and documents aforesaid, at the court room of Division No. 2 of the Supreme Court of Missouri, in the Supreme Court building at the city of Jefferson, county of Cole, and state of Missouri, on the 27th day of March, 1901, between the hours of 9 o'clock in the forenoon and 5 o'clock in the afternoon of said day, and, if not completed thereon, to be continued from day to day until the same is for the time concluded. And for the purpose of taking said testimony and the introduction of said evidence the said Edward C. Crow desires the appearance and attendance of the said J. B. Duke and W. H. McAllister at the place and time aforesaid. Wherefore the said Edward C. Crow, Attorney General aforesaid, requests and prays the Honorable J. P. Butler, commissioner as aforesaid, to immediately issue a notice in writing, directed to Messrs. Boyle, Priest & Lehmann, a law firm composed of Henry S. Priest, W. F. Boyle, and F. W. Lehmann, whose office is located in the Laclede Building, at St. Louis, Mo., and that a like notice immediately issue in writing directed to Hon. Martin L. Olardy, an attorney at law of St. Louis, Mo., who, together with Messrs. Boyle, Priest & Lehmann, are the attorneys of record for the said defendant Continental Tobacco Company, a corporation organized and existing under the laws of the state of New Jersey, and a like notice directed to Fauntleroy & Howe, attorneys of record for the remaining respondents, notifying the said attorneys of record for said Continental Tobacco Company and the remaining respondents herein that the testimony of the said J. B. Duke and W. H. McAllister is

desired in said cause, and require the said attorneys of record in said cause to have said J. B. Duke and W. H. McAlister, president and secretary, respectively, of the aforesaid defendant Continental Tobacco Company, at the place and on the day, date, and time above set out, then and there to testify in said cause, and to require the said W. H. McAlister and J. B. Duke to produce in evidence the books, papers, and documents above mentioned and described."

This application is predicated upon section 8983, Rev. St. 1899, which is as follows: "Whenever any proceeding shall be commenced in any court of competent jurisdiction in this state by the attorney general against any corporation or corporations, individual or individuals or association of individuals, or joint-stock associations or copartnership, under the law against the formation and maintenance of pools, trusts of any kind, monopolies in commodities, combinations or organizations in restraint of trade to dissolve the same or to restrain their formation or maintenance in this state, then in such case, if the attorney general desires to take the testimony of any officer, director, agent or employé of any corporation or joint-stock association proceeded against, or in care of a copartnership, any member of said partnership or any employé thereof, in any court in which said action may be pending or before any person duly authorized by any court to take testimony in any such action; and the individual or individuals, whose testimony is desired, are without the jurisdiction of the courts of this state, or reside without the state of Missouri, then, in such case, the attorney general shall file in said court in term time, or in vacation, or with any person duly authorized to take the testimony in such case, a statement, in writing, setting forth the name or names of the persons or individuals whose testimony he desires to take and the time when, and the place in the state where he desires the said persons to appear; and, thereupon, the court in which, or one of the judges thereof, or the person before whom testimony is being taken, shall issue immediately a notice, in writing, directed to the attorney or attorneys of record in said cause, or any agent, officer or employé of any corporation, joint-stock association or copartnership which are parties to said action, notifying said attorneys of record, or officer, agent or employé that the testimony of the person or persons named in the application of the attorney general is desired, and requiring said attorney or attorneys of record or said officer, agent or employé, to whom said notice is delivered or upon whom the same is served, to have said officer, agent, employé or representative of said copartnership or agent there whose evidence it is desired to take at the place named in the application of the attorney general and at the time fixed in said application, then and there to testify: provided,

however, that the said application shall always allow, in fixing said time, the same number of days for travel to reach the designated point in Missouri that would be now allowed by law in case of taking depositions: provided, also, in addition to the above named time, six days shall be allowed for the attorney or attorneys of record, or the agent, officer or employé on whom notice is served, to notify the person or persons whose testimony is to be taken. Service of said notice and the return thereon, in writing, may be made by any one authorized by law to serve a subpoena." There follows sections 8984 and 8985, which provide substantially that, upon failure to appear and testify as ordered, all defenses to such proceeding will be stricken out, and judgment by default rendered upon the charges in the information.

The commissioner made the order as prayed for in the petition filed, but subsequently set it aside. The report of the commissioner assigns as his reason for setting aside the order that the statute authorizing it is unreasonably oppressive, void, and unconstitutional. We will not undertake to pass upon the constitutionality of this statute. It is not necessarily involved in this record. The witnesses were not compelled to appear, nor were any questions propounded to them which tended to incriminate them. The statute is a very strong one and far-reaching in its results. When witnesses are compelled to obey it, then will be the appropriate time to determine its validity. Conceding, for the purposes of this case, that this statute is constitutional, and that it may not be subject to the criticism in the report of the commissioner, in which he says it "is unreasonable and oppressive," the courts that are called upon to enforce it must give it a reasonable interpretation. Under the statute, the application for the production of witnesses may be made to the court, or to the commissioner taking the testimony. We take it that the court, before issuing its process, under the provisions of this strong and far-reaching statute, where it requires witnesses, without compensation, to come from the remotest parts of the government, would at least require a clear showing in the application, not only of the materiality of the testimony, but, as well, the competency of the witnesses. The statement that the president and secretary of this corporation can furnish valuable and material testimony is not such a showing as would authorize either the commissioner or the court to put in motion the provisions of this statute. If, by merely giving the names of the parties and the statement that their testimony is valuable and material, the court must issue the process, then the terms, as applied to this statute, that it is "unreasonable and oppressive," are quite appropriate.

As to the application for the production of certain books and papers, we will say that the commissioner followed the precedent in

the case of *State ex rel. Attorney General v. Union Trust Co. and Mississippi Valley Trust Co.*, at the October term, 1897, of this court. While there was no opinion written denying the motion, yet a similar motion (except it was much more specific as to the materiality of the books and papers) was filed by the Attorney General, praying the court to compel the trust companies to produce certain books as evidence in the causes then pending against them. This court, by the following order, overruled this motion: "Now, at this day, the court having fully considered and understood the motion heretofore filed for an order for the production and inspection of certain books and papers, doth order that said motion be, and the same is hereby, denied." It may be said that the motion filed in these cases was before the enactment of this statute, and not based upon it; but it must be remembered that the Union and Mississippi Valley Trust Companies were residents of this state, and, if it had been deemed proper and appropriate to exercise the power, no statute was required. The only purpose of this statute was to provide a means of securing the witnesses contemplated by it, who were nonresidents of the state.

With the record before us, the exception to the report of the commissioner in setting aside the order, issuing the process to the attorneys of respondents, and a refusal to issue, stands in the nature of an application for a continuance of this proceeding that other testimony may be taken. Measured by the well-settled rules as to the essential requirements of applications of this character, it fails to make the clear showing indicating in what respects the testimony is material and relevant to the inquiry before the commissioner. The Attorney General has brought before the commissioner a number of witnesses, presumably supposed to know the entire nature of this transaction, and their testimony was taken and failed to disclose a violation of the provisions of the statute or of the common law in force in this state in relation to combinations and trusts. We therefore see no reason why this proceeding should be further prolonged.

The report of the commissioner in respect to the finding of the facts, and his legal conclusions upon that particular finding, will be confirmed, and the respondents discharged. All concur.

MEYER v. CHRISTOPHER et al.

CHRISTOPHER et al. v. MEYER et al.*

(Supreme Court of Missouri, Division No. 1.
May 27, 1903.)

VENDOR AND PURCHASER—TRUST DEED—SATISFACTION—LIMITATIONS—EVIDENCE—HEARSAY—FAILURE TO OBJECT.

1. Plaintiff sold defendant realty, which had been pledged by plaintiff's predecessor by deed

of trust to secure certain notes, which deed did not appear satisfied of record. A contract was made, providing that one of the notes given by defendant for the price should be held by a third person until the notes secured by the deed of trust were produced, and such third person satisfied that they had been paid and the deed of trust released. Plaintiff's predecessor in title was unable to find the notes, but said he had paid them, and the heirs of the deceased beneficiary in the trust deed quitclaimed the premises. Held, that the purpose of the contract was only to protect defendant against the possible defect in his title, and hence, though she was unable to produce the notes, plaintiff was entitled to receive the purchase-money note, on a decree declaring the trust deed satisfied.

2. After limitation has begun to run against a note, it continues to run, though the note is transferred to one under disability.

3. Hearsay testimony, admitted without objection, must be considered.

Appeals from Circuit Court, Jackson County; Jas. H. Slover, Judge.

Suit by F. C. Meyer against Lilla L. Christopher and others. Separate action by the above-named defendants against said Meyer and others. From judgments for Lilla L. Christopher, said F. C. Meyer appeals. Modified.

M. A. Fyke and John Georgen, for appellant. Karnes, New & Krauthoff, for respondent.

MARSHALL, J. These two cases are separate cross-actions in equity, but they grow out of the same transaction. The case made is this: On January 30, 1883, Elizabeth G. Williams was the owner of the lots in controversy here, being lots 8 and 9, in block 12, of Dundee Place, an addition to Kansas City; and on that date she executed a deed of trust upon said lots to secure two notes for \$1,500 each, with interest coupons attached, payable, respectively, January 1, 1886, and 1888, and payable to the Dundee Mortgage, Trust & Investment Company, Limited, of Dundee, Scotland. Edward E. Holmes was the attorney in fact, at Kansas City, of the Dundee Mortgage, Trust & Investment Company (referred to hereinafter, for the sake of brevity, as "the trust company"), and he testified that in May and June, 1886, he had possession of said notes for the trust company, and that "Mr. Pratt, of some place in New York. I don't remember the place, wrote and asked how much it would take to procure an assignment of these notes, or whether we would assign them or not; and this is my recollection, although it is 14 years ago. It is as clear as anything can be during that length of time. Subsequently Mr. Grove remitted from the same place, or near the same place—I think from the same town—the amount required by me to pay it off, and he didn't mention in his letter that he wanted an assignment, and it had slipped my memory, and I stamped the notes 'Paid,' and went up and released them." The release was en-

*Rehearing denied July 2, 1903.

¶ 2. See Limitation of Actions, vol. 22, Cent. Dig. § 417.

tered on the margin of the record as follows: "This deed of trust is satisfied in full, both principal and interest. Witness my hand and seal this 18th day of May, 1888. The Dundee Mortgage, Trust & Investment Company, Limited [Seal], by Edward E. Holmes, Attorney in Fact. Countersigned by A. M. Gossett, Attorney. Witnessed by C. D. Lucas, Recorder, by Fred Matting, Deputy Recorder."

Mr. Holmes further testified that after he had marked the notes "Paid," and had released the deed of trust, "I sent the notes to Mr. Grove, and he immediately wrote that he did not want them marked 'Paid,' that he had distinctly asked me for an assignment, and that I had given him the figures at which I would assign them. I looked up the correspondence, and found that that was the fact, and that I had made a mistake. Then I wrote to him that the only thing I could do to rectify my error was to mark on the notes that they were stamped by mistake and file the statement which is copied in that abstract, which I did do." He further testified that he marked on the notes that they were paid by mistake, and made a formal assignment of the notes, and sent them to Grove, and had never seen them since, and that on June 11, 1888, he filed for record in the office of the recorder of deeds of Jackson county the following notice: "To Whom It may Concern: Notice is hereby given that Charles C. Grove, of Erie county, in the state of New York, claims that the release made by the Dundee Mortgage, Trust & Investment Company, by E. E. Holmes, attorney in fact, and Alfred N. Gossett, attorney, on the margin of a deed of trust in favor of the Dundee Mortgage, Trust & Investment Company, recorded in Jackson county, Missouri, in Book B No. 81, at page 325, made by E. G. Williams and husband to the Dundee Mortgage, Trust & Investment Company, Limited, was entered by mistake, and that said deed of trust was to have been assigned to him by said company without recourse, and all persons are cautioned against buying said premises without release from him until said claim is adjusted. In witness, the said company has hereto set its hand by Edward E. Holmes, attorney in fact, this 10th day of June, 1888. [Signed] The Dundee Mortgage, Trust & Investment Co., Ltd., A. N. Gossett, Attorney, by Edward E. Holmes, Attorney in Fact."

In the interim between the 18th of May, 1888, when the deed of trust was released, and the 11th of June, 1888, when the notice above set out was filed, to wit, on May 21, 1888, Elizabeth G. Williams and husband conveyed the lots to Charles H. Pratt, subject to the said deed of trust, and Pratt assumed and agreed to pay the said notes secured by said deed of trust. Some time thereafter, and before April 1, 1893 (the date is not shown, nor is the deed in evidence), Pratt conveyed the property to Lilla L. Bliss; and

on April 1, 1893, Mrs. Bliss entered into a written contract with Mr. Meyer to sell him the lots for \$10,000, to be paid for in the following manner: \$250 when the contract was signed, \$500 when the deed was delivered, \$400 in 30 days, \$400 in 60 days, \$450 in 90 days, \$1,000 in 2 years, \$1,000 in 3 years, \$1,000 in 4 years, and \$5,000 in 5 years—and to furnish an abstract of title, and to give him a warranty deed, and, if the title was found defective, to rectify the defects within a reasonable time, not to exceed 30 days, "but in case such defects in the title cannot be cured or remedied within that period, and no extension is had between the parties, this contract is to be null and void." On April 5, 1893, Mrs. Bliss conveyed the lots by a warranty deed to Mr. Meyer, and he paid her \$750 in cash, and gave her notes, as agreed, for the balance, except the note for \$5,000, which was placed in the hands of Mr. Leon Block, as hereinafter explained.

An examination of the records disclosed the state of affairs hereinbefore set out as to the release of the deed of trust and the notice, and thereupon the parties entered into the following written agreement:

"This agreement, made this 6th day of April, 1893, between Lilla L. Bliss and F. C. Meyer, both of Kansas City, Jackson county, Missouri, witnesseth: That, whereas, said Lilla L. Bliss did on the 5th day of April, 1893, sell and convey to said Meyer lots eight (8) and nine (9), in block twelve (12), in Dundee Place, an addition to the city of Kansas, Jackson county, Missouri, and as part of the same transaction said Meyer and wife did execute to said Lilla L. Bliss, on April 6, 1893, various notes for a portion of the purchase money for said property, secured by a deed of trust thereon, among which notes is a note for five thousand dollars (\$5,000.00), payable five years after date, with interest from date at the rate of 6 per cent. per annum; and, whereas, there appears upon the records in the recorder's office at Kansas City, Jackson county, Missouri, in Book B 81, at page 325, a deed of trust dated January 30, 1883, from Elizabeth G. Williams and Charles F. Williams, her husband, to Edwin E. Wilson, trustee for Dundee Mortgage, Trust & Investment Company, Limited, of Dundee, Scotland, which deed of trust conveys the property above described in trust to secure two notes, dated January 30, 1883, for the sum of fifteen hundred dollars, (\$1,500.00) each; and, whereas, said Lilla L. Bliss is unable at this time to produce satisfactory evidence that said notes and deed of trust of 30th of January, 1883, have been paid and canceled: Now, therefore, it is hereby agreed that said note of five thousand dollars (\$5,000.00) above described shall be placed in the hands of Leon Block, and is not to be delivered to said Lilla L. Bliss by him until said two notes of fifteen hundred dollars each are produced, and the said Block is satisfied that said two

notes have been paid, and said deed of trust securing said two notes properly released or canceled of record. Witness the hands and seals of the parties the day and year first above written. As said Meyer has the privilege of paying \$1,000.00 or any multiple thereof upon said \$5,000.00 note at any semiannual interest payment, now, if said Meyer should be ready to make any such payment, and said Lilla L. Bliss should not then have obtained possession of said \$5,000.00 note, then said Meyer may deposit any such sum with the New England Safe Deposit Co., of Kansas City, Mo., and said Meyer shall not be required to pay interest upon any sum so deposited; the sums so deposited to be paid over to said Lilla L. Bliss by said Safe Deposit & Trust Co., upon the order of said Leon Block. Lilla L. Bliss. [Seal.] F. O. Meyer. [Seal.]

"I have received the five thousand dollar note above mentioned, and agree to hold the same in accordance with above conditions. Leon Block."

Mr. Meyer took possession of the property on April 6, 1893. In the transaction Mr. R. L. Yeager acted as attorney for Mrs. Bliss, and Mr. Leon Block as attorney for Mr. Meyer. It was then supposed that there would be no trouble about obtaining the notes secured by the deed of trust from Mr. Pratt. Accordingly, and for this purpose, Mr. Yeager went to see Mr. Pratt, who at that time was living on Wyandotte street, between Twelfth and Thirteenth, in Kansas City, and was engaged in the banking business at Springfield, Kan. Mr. Yeager's testimony of what was said and done was admitted without objection from any one, and is as follows: "I was informed that Mr. Pratt was not at home, but would be at home on Saturday night. So I went to his house on Sunday, and he said he thought he had the notes. He knew he had paid them. It went over for a week, perhaps, until the next Sunday, when I saw him again; but he said he could not find the notes anywhere. I then reported that fact to Mr. Block—that it would be impossible to get the notes, as Mr. Pratt said they were lost. Then we spoke of getting a release or a quitclaim from the Grove heirs, and I sent on and got a deed of release. Q. They were the parties who held the notes originally? A. Yes, sir. Mr. Pratt had paid them, so I sent to the Groves and got the release. Q. You found out that you could not get the notes, and so reported to Mr. Block, and then he wanted you to get a release? A. Yes, sir. We talked about either that or bringing a suit to cancel. I think Mr. Block will remember that. We talked of that as the shortest way. Q. Now, he thinks that quite a number of times afterward he asked you with regard to these notes. What is the fact about that? A. Mr. Block and I do not agree on that; for I told him the notes were lost, and I could not get them. It was impossible to produce the

notes. Q. Then you talked about bringing a suit or getting a release? A. Yes, sir; and this would be of less expense and trouble, as I got the names of all the heirs from Mr. Pratt. I knew from him that Grove was dead. Q. Now, has that release been with Mr. Block until this suit was brought? A. Yes, sir; I then went and got it from him."

The release here spoken of was a quitclaim deed from all the Grove heirs to the lots. Mr. Yeager delivered it to Mr. Block, who testifies that it was defective, in that three of the parties acknowledged it before unauthorized officers, and that Mr. Meyer would not be satisfied with it anyway, and insisted that his contract called for the production of the notes and the release of the deed of trust, and that he would not accept anything else as a compliance with the contract, and that if the notes were lost or destroyed, and could not be produced, Mr. Meyer was entitled to rescind the sale. Nevertheless, Mr. Meyer continued to pay the notes for the deferred payments as they fell due, until 1895, when he failed to pay the \$1,000 that fell due in April, 1895. Mrs. Bliss (who, in the meantime, had married Mr. J. H. Christopher) brought suit therefor, and Mr. Meyer immediately paid it. On October 28, 1896, Mr. Meyer paid Mrs. Christopher the sum of \$3,387.50, on account of the said notes. This covered all the notes, except the \$5,000 note, which was held by Mr. Block, and included the note for \$1,000 payable at four years, and which was not then due, and by its terms would not be payable until April 5, 1897. Thus the matter stood until 1899, and in that year the property had become depreciated 40 per cent., so that, instead of being worth \$10,000, it was only worth \$6,000. Mr. Meyer testified that in 1893 he proposed to Mrs. Bliss to give her back the property, and that she should give him back the notes. Mrs. Bliss denies this. Mr. Meyer testified that in 1894 he spoke to Mr. Christopher to the same effect. Mr. Christopher denies this, and says that at that time he did not even know there were any such notes or deed of trust in existence. However, on March 7, 1895, Mr. Block wrote Mrs. Christopher that, from what Mr. Yeager told him, he judged it would be impossible to produce the notes, and that Mr. Meyer wanted to treat her fairly, and he therefore proposed to treat the case as though he had gone into possession as her tenant; she to refund him the money he had paid her, with interest, and also such sums as he had paid out for taxes, insurance, repairs, and improvements, and to surrender the notes for the deferred payments, and he to execute to her a quitclaim deed to the property, and that he would be willing to pay \$600 rent for the first year he had occupied the house, and \$40 a month thereafter, and, if she did not care to repay him the said amounts in cash, he would take a paid-up lease on the house for a time sufficient to cover those amounts. It does not appear

that Mrs. Christopher received the letter, and at any rate she never answered it.

Nothing further appears to have been said or done looking towards an annulment of the sale until June 12, 1899, when Messrs. Ess & Georgen, attorneys for Mr. Meyer, wrote to Mr. Christopher, proposing to cancel the trade and reconvey the property, if Mrs. Christopher would pay Mr. Meyer \$1,200, and surrender his note for \$5,000 that was held by Mr. Block. Under date of June 23, 1899, Mrs. Christopher declined this proposition. Thereafter, on July 25, 1899, Mr. Meyer wrote to his attorneys, Messrs. Ess & Georgen, and they forwarded the letter to Mrs. Christopher, in which he said: "At the time when I bought the house, Mrs. Christopher deposited with Mr. Block the note of \$5,000.00 to protect me against damages which might occur to me by failure of her giving a clear title to the property, and a special contract was entered into between her and myself regarding the disposition of the matter." And after stating that he had performed the contract, but that she had failed to make the title good, he stated that he had expended on the property already the following amounts:

Repairs	\$1,200 00
Taxes paid, 6 years, at \$70.00.....	420 00
Street paving	209 00
Insurance, more or less.....	50 00
Interest of 6 per cent. for 6 years on \$5,000.00	1,800 00
Would be total coming to me..	\$3,679 00
Value of rent received.....	3,600 00
Balance in my favor.....	\$ 79 00
And amount paid on property.....	5,000 00
	\$5,079 00

And then he added: "That is the amount which I am entitled to, if Mrs. Christopher wants the property back." It does not appear whether or not Mrs. Christopher answered said letter. From the time Mr. Holmes sent the two notes and deed of trust to Mr. Grove in June, 1886, until the trial of this case on June 20, 1900, nothing was ever heard of said notes or deed of trust. They were never presented for payment to either Mrs. Christopher or Mr. Meyer, and the only trace of them that the diligence of the parties has been able to discover is that Mr. Pratt said he thought he had them, he knew he had paid them, and that he searched for them and could not find them.

This was the status of the matter on November 23, 1899, and on that day Mr. Meyer instituted a suit in equity against Mrs. Christopher and her husband, asking to have the sale of the property rescinded, the deed from Mrs. Christopher to him and his deed of trust to secure the purchase notes set aside, for an accounting for rents, issues, and profits, and as to amount paid to Mrs. Christopher, and as to amounts paid by him for repairs, taxes, water, notes, and that the balance due him, with interest, be declared a

lien on the land, and that the \$5,000 note held by Mr. Block and the deed of trust securing the same be canceled. On the 21st of February, 1900, Mrs. Christopher and her husband instituted a suit in equity against Mr. Meyer and his wife, Mr. Block, Mr. Yeager (trustee under the Meyer deed of trust in favor of Mrs. Christopher), Harriett N. Grove, individually and as sole executrix of the will of Charles C. Grove, deceased, William N. Grove, Clara Grove, Edward B. Grove, Lafayette L. Grove, and Hattie A. Grove (who are admitted and proved to be the only heirs of Charles C. Grove, deceased), Edwin E. Wilson, and the Dundee Mortgage, Trust & Investment Company, asking to have the deed of trust and two notes aforesaid made by Elizabeth G. Williams on January 30, 1883, to the Dundee Mortgage, Trust & Investment Company declared paid and satisfied, and land declared to be free of the lien thereof; that Mr. Block be ordered to turn over to Mrs. Christopher the note for \$5,000, held by him as aforesaid, and that the deed of trust securing the same be declared to be a valid lien on the lots; and that it be foreclosed, and the land sold to satisfy said note for \$5,000. Mrs. Christopher filed an answer to Mr. Meyer's suit, which was virtually the same as her petition in her suit against him, and Mr. Meyer filed an answer to Mrs. Christopher's suit, which was virtually the same as his petition in his suit against her. Mrs. Grove and the Grove heirs entered their appearance in Mrs. Christopher's suit, and filed an answer, and consented that a decree might be entered as prayed, upon condition that no costs should be taxed against them. The other defendants in Mrs. Christopher's suit made default. The circuit court dismissed Mr. Meyer's suit against Mrs. Christopher, and held that he was not entitled to recover. In Mrs. Christopher's suit against Meyer et al., the court found the facts to be substantially as herein stated, and entered a decree in her favor as prayed in her petition. From these decrees, Mr. Meyer appealed.

The determination of this controversy depends upon the proper construction to be placed upon the contract of April 6, 1893, with regard to the two notes, for \$1,500 each, made by Mrs. Williams on January 30, 1883, and secured by deed of trust, and with regard to the \$5,000 note, dated April 5, 1893, made by Mr. Meyer to the order of Mrs. Christopher (née Bliss), and placed in the hands of Mr. Block by the contract of April 6, 1893. The language of the contract of April 6, 1893, upon which Mr. Meyer predicates his claim is: "It is hereby agreed that said note of five thousand dollars (\$5,000.00) above described, shall be placed in the hands of Leon Block, and is not to be delivered to said Lilla L. Bliss by him until said two notes of fifteen hundred dollars each are produced, and the said Block is satisfied that said two notes have been paid, and said deed of trust securing said two notes properly released or

canceled of record." And the contention of Mr. Meyer is that this contract must be literally and strictly construed, and that, as no time is mentioned in the contract for its performance, it was Mrs. Christopher's duty, within a reasonable time, to produce the two \$1,500 notes and to satisfy Mr. Block that they had been paid and that the deed of trust securing them was properly released or canceled of record; that, failing so to do, it was the privilege of Mr. Meyer to have the sale rescinded, and to recover all he had paid Mrs. Christopher, together with interest and all expenses for repairs, taxes, insurance, etc.; that this is true, even if the notes were destroyed, and therefore they could not be produced, for so the contract reads, and, if Mrs. Christopher had wished to be excused from producing the notes in case they were lost or destroyed, she should have so stipulated in the contract, and, having failed so to do, the court cannot make a contract for her by supplying such an excusatory clause; that he is not obliged, and cannot be compelled, to take a cancellation of the notes and deed of trust by a decree of court, because the contract says the notes must be produced, and did not provide for any alternative or equivalent means of securing a release of the deed of trust. Mr. Meyer further claims that under the contract the two \$1,500 notes had to be delivered into his possession and become his property after they were paid; but the contract does not so provide, and, on the contrary, gives no color to this contention. Mr. Meyer further contends that a decree canceling the notes and deed of trust would not be as good or safe as the production of the notes and the release of the deed of trust, for the reason that, although the notes were more than 12 years past due when this case was tried, and no demand had been made upon them for over 7 years, still they might have passed into the hands of a person under disability, against whom the statute of limitations would not run, and therefore they might still be collected, and that the fact that they were not found among the papers belonging to Mr. Grove shows that he had transferred them.

The law is plain that courts cannot make contracts for litigants, and that a party must show performance on his part of a contract before he can recover upon it or compel the other party to perform it. This rule is axiomatic. But the law is equally as well settled that courts construe contracts and ascertain their meaning from all of the provisions of the contract, and not from single words or phrases or sentences, and, when the intention of the contracting parties is thus ascertained, that intention effectuated, unless it violates some inexorable rule of law, which is not the case here. It is true the contract requires the notes to be "produced," and it is true that it requires that Mr. Block shall be "satisfied" that they have been paid; but it is too apparent for dispute that these steps

were intended only as means to an end, and that end was that the deed of trust should be released and the title cleared up. Neither the production of the notes, with the most indisputable evidence that they had been paid, nor the fact that Mr. Block was satisfied that they had been paid, would have had the effect of releasing the deed of trust on the record. It would have been evidence sufficient to procure the cancellation of the deed of trust by a court of equity, but of itself it would not accomplish that end. The contract did not even require that this evidence should be turned over to Mr. Meyer, as he erroneously states. The purpose of the contract was to protect Mr. Meyer from loss if Mrs. Christopher did not clear up the title by having the deed of trust released, and the means employed by the contract to afford that protection were to have the note for \$5,000 placed in Mr. Block's hands, to be held by him until the title was cleared up. This is the interpretation placed upon the contract by the parties for over six years, and this is the interpretation placed upon the contract by Mr. Meyer in his letter to his attorneys, and by them forwarded to Mrs. Christopher, on July 25, 1899, about four months before his suit was begun; for he said: "At the time when I bought the house, Mrs. Christopher deposited with Mr. Block the note of \$5,000.00 to protect me against damages which might occur to me by failure of her giving a clear title to the property, and a special contract was entered into between her and myself regarding the disposition of the matter."

If there was any room for doubt as to the true meaning and purpose of the contract, this would remove it. *Patterson v. Camden*, 25 Mo. 13; *Brewing Co. v. Water Works Co.*, 34 Mo. App. 49; *Carter v. Arnold*, 134 Mo. 195, 35 S. W. 584; *Depot Co. v. Railroad*, 131 Mo. 291, 31 S. W. 908. But there is no room for doubt as to the meaning and purpose of the contract. It was to make Meyer whole against loss until the title was cleared up. Meyer wanted a clear title. It is idle to say he wanted the title made clear by only one process of doing so. It was the end, and not the means, that was necessary or important. That end is as effectually—aye, even more effectually—attained by a decree of a court of equity canceling the deed of trust, as it is by having the notes produced and the deed of trust released by the act of the parties. The latter is liable to be set aside for mistake or fraud. The decree of court is final. The purpose of the contract is therefore effectuated, and Mr. Meyer has no ground of complaint. *Mullally v. Greenwood*, 127 Mo. 138, 29 S. W. 1001, 48 Am. St. Rep. 613; *Hanna v. Land Co.*, 126 Mo. 1, 28 S. W. 652.

The fear expressed by Mr. Meyer that the notes may have been negotiated by Grove, and may have fallen into the hands of some person who is under a legal disability, and

who is not a party to this case, and hence they may yet be collected or enforced, is groundless. The notes were dated January 30, 1883, and were payable on January 1, 1886, and 1888, respectively. They were held by the original payee, the trust company, until May or June, 1886, and were then transferred to Grove. At that time the first note was past due, and the statute of limitations had begun to run; and, as it began to run against the trust company, it would continue to run against all persons acquiring it thereafter, whether they were under disability or not. *Pim v. St. Louis*, 122 Mo., loc. cit. 666, 27 S. W. 525. As to the other note the evidence is uncontradicted that it, as well as the first note, was paid. Counsel for Mr. Meyer say, however, that there is no evidence of that fact. They overlook the testimony of Mr. Yeager that Mr. Pratt told him he knew he had paid the notes, and at first thought he had them, but was unable to find them. It is said, however, that this is only hearsay. The answer is that Mr. Yeager was permitted to so testify without any objection or exception. It is therefore in the case, and is uncontradicted. It appears that Mr. Pratt lived in Kansas City, yet neither party saw fit to call him as a witness. The parties made their own case in their own way, and the court must deal with it as it is made up in the record.

It is a significant fact that Mr. Pratt wrote to Mr. Holmes to ascertain how much an assignment of notes could be had for, and that, when Mr. Holmes answered Mr. Pratt's inquiry, Mr. Grove, who, Mr. Holmes says, lived in the same or in a neighboring place in New York, sent the exact amount of money that Mr. Holmes had written Mr. Pratt that the assignment could be had for. This fact, taken in connection with the fact that the money was received by Mr. Holmes on May 18, 1886, and that on May 21, 1886, Mr. Pratt purchased the property from Mrs. Williams and assumed the payment of the notes aforesaid, and the fact that from that day to this no one has ever asserted any right under the deed of trust or sought to collect the notes, gives substantial support for an inference of fact that it was Mr. Pratt who really acquired the notes from the trust company, and that Mr. Grove only acted for him.

But, whatever may be the reason, it is now certain that the notes and deed of trust are barred by limitation, and that there was substantial evidence to support the finding of the trial court that the notes are paid; and therefore the judgment of the circuit court in dismissing Mr. Meyer's suit, and in decreeing in Mrs. Christopher's suit that the deed of trust be canceled, and in ordering Mr. Block to turn over to her the \$5,000 note, and ordering the deed of trust to be foreclosed, was correct. There was no evidence that Mrs. Christopher had paid any taxes, and therefore so much of the decree as required Mr. Meyer to pay her any such taxes

is eliminated from the decree. In all other respects the judgments of the circuit court in both cases are affirmed, at the cost of the appellant. All concur, except ROBINSON, J., absent.

ECKRICH v. ST. LOUIS TRANSIT CO.*
(Supreme Court of Missouri, Division No. 1.
May 27, 1908.)

**JURY—PROVISIONS FOR SPECIAL JURY—
CONSTITUTIONALITY.**

1. Rev. St. 1899, p. 1553, c. 91, art. 23, § 6566, authorizes courts of record in cities having over 100,000 inhabitants to order a special jury for the trial of any cause, on the application of either party; the jury commissioner to select and furnish to the proper officer of the courts the names of the persons to be summoned for such jury, and the costs of such jury to be paid by the party applying for it, irrespective of the result, unless at the close of the trial the presiding judge certify that the same be taxed as costs against the losing party, etc. Const. Mo. 1875, art. 2, § 28, provides: "The right of trial by jury, as heretofore enjoyed, shall remain inviolate." Const. Mo. 1865, art. 1, § 1, par. 17, and Const. Mo. 1820, art. 13, § 8, provide that "the right of trial by jury shall remain inviolate." Act March 17, 1835 (Rev. St. 1835, p. 342) § 14, provided: "The court shall have power to order a special jury for the trial of any civil cause," etc. The territorial act of 1816 provided that "the common law of England * * * and all statutes made prior to the fourth year of James I., * * * not contrary to the laws of this territory and not repugnant to * * * the Constitution and laws of the United States," should be deemed a part of the law in Missouri. *Held*, that the right of trial by jury referred to in such constitutional provisions was that existing at common law, under which special juries obtained, and hence said section 6566 was not unconstitutional.

2. The fact that a party applying for a special jury is required to deposit the cost thereof, and that it puts it out of the reach of a poor man to have a special jury, does not make the law obnoxious to the federal Constitution, as denying him the equal protection of the law.

3. Rev. St. 1899, p. 1553, c. 91, art. 23, § 6566, does not violate Const. Mo. art. 2, § 10, providing that "the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice should be administered without sale, denial or delay," in that a price beyond the reach of the poor man has been placed on the enjoyment of the right to have a special jury, and therefore justice is sold.

4. The fact that the sheriff in the county or the jury commissioners in the large cities have the power to select the special jury, and that they are not drawn by lot, as the regular panel is, does not make the law unconstitutional.

5. Rev. St. 1899, p. 1553, c. 91, art. 23, § 6566, does not violate the Constitution of the United States and of Missouri, nor is it repugnant to the principles of justice, in that it allows one man—the jury commissioner—to select the jury, and thereby opens the door for a dishonest commissioner to "fix" any jury.

Appeal from St. Louis Circuit Court; D. D. Fisher, Judge.

Action by Peter Eckrich against the St. Louis Transit Company. Judgment for defendant, and plaintiff appeals. Affirmed.

*Rehearing denied July 2, 1908.

¶ 4. See Jury, vol. 31, Cent. Dig. § 230.

Alfred Gfeller and Geo. D. Reynolds, for appellant. Boyle, Priest & Lehmann and Geo. W. Easley, for respondent.

MARSHALL, J. This is an action for personal injuries. When the case was set for trial in the circuit court, the defendant obtained an order of court for a special jury, and under the order deposited in court the sum of \$75 to cover the cost thereof. When the case was called for trial, and the special jury was called, the plaintiff challenged the array, and filed the following motions, in respect to which the following proceedings were had:

"Now comes Peter Eckrich, by vocation a common laborer, a citizen of the United States, and residing within the jurisdiction of the state of Missouri, the plaintiff in the above-entitled cause, and moves the court to quash the venire for a special jury ordered issued in said cause by this court upon motion of the defendant, and made returnable on the day set for trial of this cause, for the following reasons, to wit:

"(1) The law and the established practice of this court, and the officers under which said venire for a special jury has been issued and executed, is unconstitutional and repugnant to the letter and spirit of the Constitution of the United States of America, and especially of section one (1) of the fourteenth amendment thereof, because said law, and the practice of said court and its officers thereunder, abridges the privileges and immunities of the plaintiff as a citizen of the United States, and deprives plaintiff of his property without due process of law, and denies to plaintiff, a citizen and inhabitant of the state of Missouri, and within its jurisdiction, the equal protection of the laws, in this:

"(a) Said law, and the practice of the court and its officers thereunder, commits to the unrestrained will of a single public officer, who holds an office not provided for by the Constitution of the state of Missouri, the power of selecting a jury in a manner contrary to the common law, and against the common right, as well as contrary to the general statutes of the state of Missouri.

"(b) It compels the plaintiff, and other persons similarly situated, to submit their causes to the exclusive determination of a jury not chosen indiscriminately from qualified jurors of the city of St. Louis, as all other jurors by law are required to be selected, but selected from a class of men reputed to be owners or controllers of great industries, and bankers, merchants, and employers of labor generally, whose interests and bias are antagonistic to plaintiff and other persons similarly situated, and it excludes from the panel laborers, mechanics, and artisans, and employes who have equal practical knowledge, and have equal intelligence, with the class above referred to, producing an unjust

and illegal discrimination between citizens of the United States, and making an unequal and unfair class discrimination in the composition of the jury.

"(2) Because the law and practice of this court, under which said venire for the special jury has been issued, is unconstitutional and repugnant to the letter and spirit of the Constitution of the United States of America, and especially to the seventh amendment thereof, and that the jury summoned to try this cause is not a common-law jury, as guaranteed to him by said amendment.

"(3) Because the law and rules of practice of the court, under which said venire of a special jury has been issued and executed, is unconstitutional and repugnant to the letter and spirit of the Constitution of the state of Missouri, and especially article 2, § 10, thereof.

"(4) Because the law and rules of practice of the court, under which said venire for a special jury was issued and executed, is unconstitutional and repugnant to the letter and spirit of the Constitution of the state of Missouri, and especially article 2, § 28, and that the jury summoned to try this cause is not a common-law jury guaranteed to him by the Constitution of the state of Missouri.

"(5) Because said law, and the rules and practice of the court under which said venire for a special jury has been issued and executed, is unconstitutional and repugnant in letter and spirit to section 30, art. 2, of the Constitution of the state of Missouri, and that the jury summoned in this cause is so biased and prejudiced against plaintiff as to deprive him of due process of law.

"(6) Because the statute under which the venire for a special jury issued in this cause is so indefinite and uncertain, and conflicting with other statutes of the state of Missouri, as to render it null and void.

"(7) Because the jury summoned to try this cause has not been summoned in accordance with the general laws of the state of Missouri governing rules in civil causes."

After counsel had read the above motion to the court, the following took place in open court:

"Mr. Gfeller: If it may please the court, I desire to introduce evidence in support of my motion to show the manner in which this jury has been selected and summoned.

"The Court: In reference to the question of law, I don't see any necessity of taking any testimony. I will pass on that motion and overrule it.

"Mr. Gfeller: Permit me to have the testimony of the jury commissioner introduced in support of the motion.

"The Court: I don't see the necessity for that. The law defines his duties. You don't charge corruption on his part, so I don't see any occasion for taking his testimony."

To which ruling of the court in refusing to hear evidence in support of, and the over-

ruling of, said motion to quash said special venire, plaintiff's counsel then and there duly excepted.

"Mr. Gfeller: I desire to apply for a writ of prohibition in the Supreme Court of the state of Missouri, and, if necessary, carry the case to the United States Supreme Court. For this reason I desire to introduce this testimony in order to show how special juries are selected and summoned.

"The Court: I am giving you the benefit of the allegations stated in the motion as being true. Are you ready for trial in the case?

"Mr. Gfeller: I am ready for trial.

"The Court: Let the jury come forward.

"Mr. Lon O. Hocker, attorney for defendant: An amended petition was filed on Saturday, and I have not filed any pleading to it.

"Mr. Gfeller: I am willing that the cause may be continued to a certain day, and not be tried on its merits until this question has been passed on by the higher courts.

"The Court: The jury will be discharged until February 11th, to appear here at that time without further notice.

"Mr. Gfeller: I desire to have your honor's decision embodied in the record. I understand, if what is contained in this motion were true, you would overrule the motion anyway.

"The Court: Yes.

"Mr. Gfeller: I desire to have that embodied in the record."

Plaintiff properly saved exception to the ruling of the court.

Afterwards, at the February term, 1901, of the court, on February 11th, the cause was again called for trial, and the special jury selected by the jury commissioner under order of court of January 7th, made on motion of defendant, a list of which was theretofore returned into court, was called, the same having been duly summoned by the sheriff, and the following proceedings took place:

"Mr. Gfeller: If the court please, I have presented an application for a writ of prohibition to the Supreme Court, and that court refused to grant it, on the ground that plaintiff must come there either by appeal or writ of error. I again ask your honor to quash the venire for the special jury ordered selected and summoned in this cause, for the reasons already urged and for additional reasons stated in an additional motion to quash, which I ask leave to file and read.

"The Court: You may file and read the motion."

Plaintiff's counsel filed and read his second motion to quash the special venire of jurors called in this cause, which motion is in words and figures as follows (omitting caption):

"Now comes Peter Eckrich, a common laborer and without means, the plaintiff in the above-entitled cause, and again moves the court to quash the special jury venire ordered by this court, selected by the jury commissioner and summoned by the sheriff of the

city of St. Louis, and from which a jury is to be selected to try this cause, for the following additional reasons, to wit:

"(1) Because the order of this court directing the jury commissioner to select said special venire does not state by what authority and under what statutes said order was made, nor how said venire is to be drawn and selected.

"(2) Because the order granting the defendant's application for a special jury has been made in pursuance of an established practice of the circuit court of the city of St. Louis, according to which applications for special juries are granted only upon condition that the applicant for such a jury deposit forthwith with the clerk of said court the sum of seventy-five dollars (\$75), and from time to time such further sums as may be required to meet all expenses under such order, thus producing, in force and effect, an unjust and unlawful discrimination against plaintiff and those who lack the means and are unable to deposit such sum of money for a special jury, and granting undue, unjust, and unlawful advantages and privileges to defendant in this cause to those who are possessed of the means to enable them to comply with the rule and practice of the court, thereby obtaining for a money consideration a venire from which to select a jury to try their causes, entirely different and distinct from the venires provided for by the general statutes and laws of the state of Missouri governing jury trials, contrary to the letter and spirit of article 2, § 10, of the Constitution of the state of Missouri, which provides that the courts of justice shall be open to every person, and certain remedy offered for every injury to the person, property, or character, and that right and justice should be administered without sale, denial, or delay.

"(3) Because the order of this court granting defendant's application for a special jury, upon condition that it deposit with the clerk of this court the sum of seventy-five dollars (\$75) and such further sums as may be required, is unconstitutional, and repugnant to the letter and spirit of section 1 of the fourteenth amendment to the Constitution of the United States, in this: It abridges the privileges and immunities of plaintiff as a citizen of the United States, and deprives plaintiff of his property without due process of law, and denies to plaintiff, a citizen and inhabitant of the state of Missouri and residing within its jurisdiction, the equal protection of the law, in this: That defendant, itself a powerful corporation, employing a great force of laborers, by reason of its ability to deposit with the clerk the sum of seventy-five dollars (\$75.00) has obtained a venire for a special jury from which to select twelve (12) men to try this cause, who were not drawn indiscriminately from the names of the qualified jurors of the city of St. Louis, deposited in the jury wheel, as all other jurors by law are required to be drawn, but,

to the contrary, a venire selected from a class of men reputed to be owners or controllers of great industries, and bankers, merchants, and employers of labor generally, and solely and exclusively from a class of men whose interests and bias are antagonistic to plaintiff, and that in selecting said venire the jury commissioner purposely and intentionally excluded from the panel laborers, mechanics, and artisans and employes, although they have equal intelligence with the class of men first above referred to, thus producing an unjust and illegal discrimination and class distinction between plaintiff and defendant as citizens of the United States, and making an unequal and unfair class discrimination in the composition of this jury.

"(4) Because the facts involved in this cause do not require trial by a special jury."

"The Court: I overrule your motion."

To which ruling of the court, in overruling said second motion to quash said special jury venire, plaintiff's counsel then and there duly excepted.

"Mr. Gfeller: Plaintiff declines to proceed further in this cause.

"The Court: If so, I dismiss this cause for failure to prosecute, at plaintiff's cost. It is so ordered. Mr. Sheriff, discharge the special jury in the cause of Eckrich against St. Louis Transit Company from further service."

To which order and ruling of the court in dismissing plaintiff's cause, plaintiff by his counsel then and there duly excepted. Judgment of dismissal and for costs entered. After proper steps taken, the plaintiff appealed.

1. The decisive question in this case is the constitutionality of the law allowing a special jury in civil cases, in cities having over 100,000 inhabitants, being section 6506, art. 23, c. 91, p. 1553, Rev. St. 1890. That section is as follows: "In every city in the state of Missouri, having over one hundred thousand inhabitants, all courts of record in which juries are required shall have power, upon the application of either party, to order a special jury for the trial of any cause, if the application be made at least three days before the trial, and when ordered, the jury commissioner, as he may be directed by the court, shall select and furnish to the proper officer of said courts the names of the persons to be summoned for such special jury, and the said officer shall summon them according to the order of the court, and make out and deliver to each party or his attorney, a panel of the jury so summoned; but the costs of such special jury shall be paid by the party so applying, irrespective of the result, unless the judge presiding at the trial shall at the close thereof, or within two days thereafter, certify that the costs of the special jury shall be taxed as other costs against the losing party," etc. The plaintiff's contention is that this law violates the seventh and fourteenth amendments to the Constitution of the United States, and also sections 10, 28, and 30 of article 2, of the

Constitution of Missouri, and the two motions to quash the venire filed by the plaintiff, and set out in full herein, specify the grounds and reasons upon which the contention is bottomed.

Counsel for plaintiff, in very comprehensive, strenuous, and able briefs, have amplified their contention, so that their position may be summarized to be as follows:

First. The provision of section 28 of article 2 of the Constitution of 1875, that "the right of trial by jury, as heretofore enjoyed, shall remain inviolate," and the provision of paragraph 17 of section 1 of article 1 of the Constitution of 1895, "that the right of trial by jury shall remain inviolate," are mere continuations of, and must be construed in the light of, the provision of section 8 of article 13 of the Constitution of 1820, "that the right of trial by jury shall remain inviolate," and therefore a party litigant is entitled to a trial before such a jury as was authorized by the laws of Missouri at the date of the adoption of the Constitution of 1820, and any law passed since that date, authorizing a jury such as was not known to the law in 1820, is unconstitutional.

Second. That the jury guaranteed by the Constitution of 1820 was not such a jury as was known to the common law, but was such a jury as was known in Missouri under the territorial laws before the admission of Missouri into the Union as a state, and before the adoption of the Constitution of 1820, and that was such a jury as was authorized by the act of Congress, known as the "Organic Law," approved June 4, 1812, prescribing the law for the government of the Missouri Territory, section 11 whereof was as follows: "That all free male white persons of the age of 21 years, who shall have resided one year in the said territory and are not disqualified by any legal proceeding, shall be qualified to serve as grand or petit jurors in the courts of said territory; and they shall, until the General Assembly thereof otherwise direct, be selected in such manner as the said courts shall respectively prescribe so as to be most conducive to an impartial trial and least burdensome to the inhabitants of the said territory." Geyer's Dig. p. 34. It is further contended by the plaintiff that by the territorial act of 1816 it was provided that "the common law of England, which is of a general nature, and all statutes * * * made prior to the fourth year of James 1, * * * which common law and statutes are not contrary to the laws of this territory and not repugnant to or inconsistent with the Constitution and laws of the United States," should be deemed a part of the law in Missouri; but, as the common law in reference to juries is inconsistent with the law in Missouri prior to 1820, this feature of the common law never became a part of the law in Missouri. It is further contended that prior to 1820 the only special jury that was known to the law in Mis-

Missouri was that provided for by section 18 of Act Aug. 20, 1813 (1 Terr. Laws, p. 276, c. 93) which prescribed that, if a party to any pending suit made oath that he could not have a fair and impartial trial by a jury selected from the county wherein the court was sitting, the court should order a special jury to be summoned from an adjoining county. Upon these predicates the contention is based that it was a Missouri jury, and not a common-law jury, that was guaranteed by the Constitution of 1820, and that the subsequent Constitutions were only intended as continuations of the provision of the Constitution of 1820, and therefore it is still only such a jury as was authorized by the laws of Missouri prior to 1820 that is guaranteed or allowed by the Constitution of 1875; and, as such a special jury as is provided for by the section in question here (section 6566, Rev. St. 1899) was unauthorized by the Constitution of 1820, it is therefore unauthorized by the Constitution of 1875.

Third. That section 6566 aforesaid violates the Constitution of the United States, in that it is such a jury as only a rich man can pay for, and therefore a poor man is denied the equal protection of the law.

Fourth. That section 6566 violates section 10 of article 2 of the Constitution of Missouri, which provides that "the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice should be administered without sale, denial or delay," in this: that a price beyond the reach of the poor man has been placed upon the enjoyment of the right to have a special jury, and therefore justice is sold.

Fifth. That section 6566 violates the Constitution of the United States and of Missouri, and is repugnant to the principles of justice, in this: that it allows one man—the jury commissioner—to select the jury, and thereby opens the door for a dishonest commissioner to "fix" any jury.

Sixth. These postulates necessarily lead counsel to the necessity of challenging the correctness of what they term the dicta in the case of *State ex rel. v. Withrow*, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43, and to ask that what was there said by the majority of this court shall be overruled. Counsel are also forced to contend that the decisions of this court in *Vaughn v. Scade*, 30 Mo. 600, and *State ex rel. v. Slover*, 134 Mo. 607, 36 S. W. 50, and of both the majority and minority in *State v. Hamey*, 168 Mo. 167, 67 S. W. 620, 57 L. R. A. 846, are wrong, and that the only correct rule that has ever been announced in this state is that laid down in *Bank v. Anderson*, 1 Mo. 244, and in the minority opinion in *State ex rel. v. Withrow*, 133 Mo., loc. cit. 523, 34 S. W. 245, 36 S. W. 43.

It will be observed that the position taken

by counsel for plaintiff is extreme and far-reaching, and, if it is correct, the result would be that every verdict that has been rendered by a special jury in this state since 1835 has been an unconstitutional verdict. The adoption of such a view would be most revolutionary, and would be a sad reflection upon the intelligence and legal learning of the legislators who have enacted the laws that have been on our statute books since 1835, and of the bar and bench that invoked and enforced such laws. Such a view ought not to be lightly considered or adopted. A retrospect, as brief as the subject permits, of the origin, growth, and present condition of the law in Missouri in regard to the right of trial by jury, is both necessary and pertinent.

At common law the sheriff selected and summoned the jury pursuant to a writ of *venire facias* issued out of King's Bench, and, if the sheriff was disqualified to act, the coroner acted, and, if he was disqualified, the court appointed two *elisors* to act. 12 Enc. Pl. & Prac. p. 278. Originally the sheriff used his own discretion as to the number to be summoned, and it was not until St. Wm. II, c. 38, that the number was limited to 24. *Thompson & Merriam on Juries*, §§ 67, 79; 12 Enc. Pl. & Pr. p. 334, and cases in notes; *Id.* p. 273. The essentials at common law were that the jury should be composed of 12 men, that they should be impartial, and that their verdict should be unanimous. *State ex rel. v. Slover*, 134 Mo., loc. cit. 612, 36 S. W. 50; *Thompson & Merriam on Juries*, § 4. There were two kinds of trial juries known to the common law—the regular panel for the sitting or term of court, and the special jury. Speaking of the latter kind, *Thompson & Merriam on Juries*, §§ 12, 13, says: "Special juries appear to have been first introduced in the King's Bench upon trials at bar in causes of great consequence, or, as stated by Blackstone, 'when the causes were of too great nicety for the discussion of ordinary freeholders, or where the sheriff was suspected of partiality, though not upon such apparent cause as to warrant an exception to him.' Later the practice seems to have become quite general in all the courts of allowing them, upon simple application in any civil case, as a matter of course, or, at least, they seem to have been easily procured when the granting was within the discretion of the court. * * * In making up the list from which a special jury is to be struck, the officer charged with this duty is not obliged to take the names in any order in which they stand upon the register of jurors. He may make a selection of names of persons who, from their position in the community, are more likely to be possessed of that intelligence which is sought in a jury of this kind." "By the English jury act [6 Geo. IV, c. 50, § 34] the party applying for a special jury is fixed with the costs of the same, 'unless the judge before whom the cause is tried shall, immedi-

ately after the verdict, certify under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury." Thompson & Merriam on Juries, p. 15, § 13, par. 4. So a special or struck jury is allowed in nearly all of the states of the Union, "in order to obtain persons acquainted with the particular class of matters involved in the case," or when "it appeared necessary in order to obtain a fair trial, or when it appeared to be required by the 'importance or intricacy' of the case." 17 Am. & Eng. Enc. Law (2d Ed.) pp. 1196, 1197; Thompson & Merriam on Juries, § 14, and statutes cited in notes.

The first law in Missouri relating to juries was Act Oct. 1, 1804 (1 Ter. Laws, p. 61, c. 13, § 13), by which it was provided that in all criminal prosecutions "the trial shall be by a jury of twelve good and lawful men of the vicinage, and in civil cases the trial shall be by a jury, if either of the parties require it, and in all cases where neither of the parties shall require a jury, the law and the fact shall be determined and damages assessed by the court, and execution awarded as in other cases," etc. Section 15 of the act provided penalties for failure to attend when summoned as a juror, but there was no provision made as to how or by whom the jury should be selected or summoned, presumably leaving those matters as they had previously been regulated, however that was.

The next law in Missouri on this subject was Act Oct. 28, 1808 (1 Terr. Laws, p. 198, c. 60), under which the judges of the courts of common pleas were required to select, from a list, to be furnished by the collector of taxes, of all free white male persons, over 21 years old, whose taxable estate in real or personal property amounted to \$100, "sixty honest and intelligent householders, farmers, merchants and traders, inhabitants of this territory, not being clergymen, practitioners of physic, or attorneys of any court, sheriffs or their deputies, ferry-keepers, or constables, or such as be, or be reputed, persons of ill fame, but altogether such as be of the best fame, reputation and understanding and credit in there [their] district." The names so selected were required to be written on separate pieces of paper of the same size, and the clerk was required, in the presence of the judges, the suitors, and others attending the court, to draw by lot the names of the jurors to serve at the next term of the courts of common pleas in St. Louis, St. Genevieve, St. Charles, Cape Girardeau, and New Madrid. The clerk was required to keep the pieces of paper on which such names were written in a box, and for the trial of all criminal cases, and of all civil suits in the general court, he was required to draw out 12 names as the jury to serve therein. *Id.* p. 200, § 5.

The next law in Missouri relating to juries was Act Oct. 25, 1810 (1 Ter. Laws, p. 238, c. 74; Geyer's Dig. p. 272). Section 1 of the

act provided: "The several courts within this territory before whom juries are required, are hereby authorized to direct the respective sheriffs to summon a sufficient number of persons to perform the duties of jurors." Section 2 made every male resident of lawful age, except clergymen, physicians, attorneys, sheriffs, clerks of courts, ferry keepers, constables, and judges of courts of record, subject to jury duty, but required the courts to divide the task of sitting on juries as near as may be equally among all citizens, and, in order to "obtain the impartial administration of justice," gave the court power to direct the sheriff "to avoid persons of ill fame or those who labor under the influence of either party." Act Oct. 24, 1808, was expressly repealed. Thus the sheriff was vested with the power of selecting and summoning the jury, with the qualification stated.

Then came Act Cong. June 4, 1812, c. 95, 2 Stat. 746 (1 Ter. Laws, p. 12, c. 4; Geyer's Dig. p. 34), by section 11 whereof, which is fully set out *supra*, it was provided that all free male white persons of the age of 21 years, who have resided in the territory one year and are not disqualified by any legal proceeding, shall be qualified to serve as jurors, "and they shall, until the General Assembly thereof shall otherwise direct, be selected in such manner as the said courts shall, respectively, prescribe, so as to be most conducive to an impartial trial and least burdensome to the inhabitants of the said territory."

Circuit courts were first established in Missouri by Act Jan. 4, 1815 (1 Ter. Laws, p. 345, c. 125), but nothing was said in that act about selecting jurors. Act Jan. 21, 1816 (1 Ter. Laws, p. 444, c. 159) created the superior court of the territory. Section 6 of the act made it the duty of the judges of the court, or any two of them, to issue their precept, directed to the sheriff or coroner, commanding him to summon 60 good and lawful men of his county, qualified by law, to serve as grand and traverse jurors at the next term of the superior court. By Act Cong. March 6, 1820, c. 22, 5 Stat. 545, Missouri was admitted into the Union, and the consent of the people of Missouri, in convention assembled, was given thereto on July 6, 1820. 1 Ter. Laws, p. 632, c. 252.

Thereafter the practice act of Jan. 11, 1822 (1 Ter. Laws, p. 841, c. 363) was adopted, by the forty-second section whereof it was provided that any party to a suit might "require a trial by jury," but, if neither party required a jury, the court should determine the law and the facts, or might refer the cause "to three or more indifferent and competent persons, whose report, if approved by the court, shall have the same effect as a verdict by a jury." Nothing was said about how the jury should be selected or summoned, nor whether it should be a common or special jury that a party might "require."

The next act was approved December 28,

1826 (2 Ter. Laws, p. 95, c. 52), and was entitled "Jurors," the third section whereof required the party demanding a jury to deposit, at the time of the demand, the sum of 25 cents for each juror, which should be paid to the jurors as soon as the verdict was rendered, and which was taxed as costs against the losing party; but, if the party made affidavit that he was unable to make such deposit, he should nevertheless be entitled to demand a jury, and the jury fee should be taxed as costs. Nothing was said in this act about who should select the jury, nor of the character of the jury.

Next came Act March 17, 1835 (Rev. St. 1835, p. 342), which was entitled "Jurors." The first section of the act provided: "All courts before whom juries are required may order the sheriff or other officer to summon a sufficient number of jurors." The fourteenth section provided: "The court shall have power to order a special jury for the trial of any civil cause; in such case the sheriff shall summon eighteen jurors, according to the order of the court, and make out and deliver to each party or his attorney, a list of the jury so summoned, and each party shall have the right to strike off three of the names on such list." The fifteenth section provided that, if a party should make affidavit that he could not have a fair and impartial jury to try the case on account of the unfriendliness or prejudice of the sheriff and coroner to him or his attorney, the court should appoint some disinterested and impartial person, "who shall act as ellisor, and proceed to summon a fair and impartial jury." It will be noted how like to the common law this act was, and also that the first section is very similar to the act of 1810, *supra*, without the qualification as to the power of the sheriff in selecting the jury.

Sections 1 and 14 of the act of 1835 were carried almost literally into the revision of 1845. Rev. St. 1845, pp. 627, 628, c. 91. Section 1 of the act of 1835 was carried literally, also, into the revision of 1855, and became section 2, c. 88, p. 910, Rev. St. 1855. Section 14 of the act of 1835, relating to special juries, was also carried into the revision of 1855, the only change being that the sheriff was required to summon 24 persons for such special jury. Rev. St. 1855, p. 912, § 24. Sections 1 and 14 of the act of 1835 were also carried into the revision of 1865, and became sections 19, 23, of c. 146, p. 599, Gen. St. 1865, with the change from 18 to 24, above noted, that was made by the revision of 1855.

The act of March 15, 1873 (Acts 1873, pp. 46, 47), entitled "An act to provide for the manner of selecting and summoning grand and petit juries for courts of record," provided, by section 2, that "the county court of each county, at a term thereof, not less than thirty days before the commencement of the circuit court, or other court having civil and criminal jurisdiction, shall select the names of not less than one hundred and

seventy-five persons having all the requisite qualifications of jurors; and the names of such persons shall be written on separate slips of paper, placed in a box to be provided for that purpose, and thoroughly intermixed; and the court in selecting such names, shall select, as near as practicable, the same number from each township in the county, according to population." Section 3 provided: "The clerk of the county court, so situated as to be unable to see the names on said slips, shall then, in the presence of said court, draw, by lot, from said box, the names of eighteen persons, who shall serve as a grand jury of the county, at the next term of the court for which said jury is drawn; and the said clerk shall then, in like manner, draw, by lot from said box the names of twenty-four persons, who shall serve as a petit jury at the next term of said court for which said petit jury is drawn." Section 6 provided that, if the regular panel be exhausted, the court should order the sheriff, or other proper officer, to summon a sufficient number of other competent and qualified persons to complete the panel, and in executing the order it required the sheriff to summon "sober, intelligent and industrious persons to complete such panel; and he shall not summon any vagrant, common idler or person having no visible means of support." This act changed the method of selecting the regular panel of petit jurors, and took away from the sheriff the power of selection that had been conferred upon him ever since the act of 1808, and vested that power in the county court, to be exercised by lot as described, and left the sheriff the power of selection only as to such jurors as became necessary after the regular panel was exhausted. This act had no application, however, to special juries, and left their selection to the sheriff, as it was provided for by section 23, c. 146, p. 599, Rev. St. 1865.

The aforesaid provisions of the act of 1873 as to the regular panel were re-enacted by the act of March 23, 1874 (Acts 1874, pp. 97, 99, §§ 2, 3, 7). This act also left the provisions of the Revised Statutes of 1865 as to special juries unaffected.

The act of March 15, 1875 (Acts 1875, p. 80), providing for the selection of the regular panel of petit jurors, repealed the provisions of the acts of 1873 and 1874, vesting the power of selection in the county court, with the power in the sheriff only to select further jurors after the regular panel was exhausted, and re-enacted, almost literally the provisions of sections 1 and 14 of the act of 1835, and again vested the power of selection of both the regular panel and the special juries in the sheriff. Acts 1875, pp. 80, 81, §§ 19, 20, 23.

In the revision of 1879 the act of 1875 seems to have been entirely overlooked, and the provisions of the act of 1874 were carried into the revision of 1879, with certain amendments thereto which are not important

to this inquiry, and sections 2, 3, and 7 of the act of 1874 aforesaid became sections 2784, 2785, and 2788 of chapter 43, Rev. St. 1879. Thus the county courts were again given the power of selecting the regular panel, and the sheriff was given only the right to select those necessary to fill up after the regular panel was exhausted. But a new section was added to the law, and was numbered section 2802 to that chapter, which provided: "Either party to a cause pending in the circuit court, or court of common pleas or criminal court of any county, and triable by a jury, shall be entitled, as of course, to an order for a special venire on motion made therefor, three days before that on which the case is set for trial; but the cost of such special jury shall be paid by the party so applying, irrespective of the result, unless the judge presiding at the trial shall, at the close thereof, or within two days thereafter, certify that the case was one for the trial of which a special jury should have been ordered, in which case the costs of the special jury shall be taxed, as other costs against the losing party. This section shall apply to cities having over one hundred thousand inhabitants, as fully as to all other parts of the state."

Nothing is said in this section as to who shall select the special jury, nor is there any provision requiring a special jury to be drawn from the list of jurors made up by the county court. Therefore section 23 of the act of 1875 (Acts 1875, p. 81) remained in force, and the sheriff had to select them. The last sentence of section 2802, Rev. St. 1879, making the new section apply to all cities of over 100,000 inhabitants, as well as to the whole state, was evidently added because of Act April 11, 1879 (Acts 1879, p. 28), which provided that in all cities of this state having over 100,000 inhabitants the judges of the circuit and criminal courts should appoint a jury commissioner, who was required to make up a jury list, and put the names of the qualified jurors, on separate slips of paper, in a wheel, and should draw a jury from the wheel, by lot, whenever the court ordered a jury. Acts 1879, p. 33, § 16. This act said nothing about special juries. Hence the significance of the last sentence of section 2802, Rev. St. 1879.

The provisions of sections 2784, 2785, 2788, and 2802, Rev. St. 1879, were carried into the Revised Statutes of 1889, and became sections 6067, 6068, 6073, and 6089, respectively, of the Revised Statutes of 1889; and those sections were in turn carried into the revision of 1899, and became sections 3769, 3770, and 3791, Rev. St. 1899.

The act of April 11, 1879, regulating juries in cities of over 100,000 inhabitants, was amended by the act of March 17, 1885 (Acts 1885, p. 74), which provided for special juries in such cities. This act is like section 2802, Rev. St. 1879, and, in addition, made sections 17 to 25 of the act of April 11, 1879,

in relation to the summoning and service of common jurors, applicable also to special juries. This act passed into the Revised Statutes of 1889, and became section 29 of article 21 of the appendix to volume 2, at page 2169, Rev. St. 1889; the balance of that article being the act of April 11, 1879, aforesaid. This act passed also into the revision of 1899, and became article 23 of chapter 91, Rev. St. 1899; the act of 1885 aforesaid, relating to special juries in cities of over 100,000, becoming section 6566, Rev. St. 1899, which is the section whose constitutionality is challenged in this case, and being section 29 of article 21 of the appendix to Rev. St. 1889, which is set out in full in *State ex rel. v. Withrow*, 135 Mo., at page 511, 34 S. W. 245, 36 S. W. 43, and which underwent adjudication in that case.

Thus it appears that from 1808 to 1873 the sheriff was vested with the power of selecting all juries, regular as well as special; that by the acts of 1873 and 1874 the power to select regular jurors was transferred from the sheriff to the county courts, but the provisions of the Revised Statutes of 1865 (section 23 of chapter 146), which vested in the sheriff the power to select special jurors, remained in full force; that the act of 1875 again placed the power of selection of both regular and special juries in the sheriff; that the revision of 1879 gave the power to select the regular panel to the county court, and added a new section (2802) providing for special juries, but did not specify who should select them; that the same is true of the revisions of 1889 and 1899; that the act of 1879 provided for the appointment of a jury commissioner in all cities having over 100,000 inhabitants, and prescribed for his making up a jury list and drawing the regular panel from a wheel, nothing being said about special juries; that the act of 1885, which became section 29 of article 21 of the appendix to the Revised Statutes of 1889, and afterwards became section 6566, Rev. St. 1899, relating to special juries in cities of over 100,000 inhabitants, required the jury commissioner in such cities to select the special jurors; and that under the decision of this court in *State ex rel. v. Withrow*, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43, the jury commissioner was not required to draw the special jury from the wheel, by lot, but had a right to select them from the list of qualified jurors that he was required by law to keep. So that the power to select special juries is, and has always been, vested in the sheriff in all parts of the state outside of cities of over 100,000 inhabitants, and inside of such cities it is, and ever since 1885 has been, vested in the jury commissioner. It thus appears that at common law, and in Missouri from 1835 to this date, special juries have been provided for by law, and that the sheriff always has selected them, except since 1885 in cities of over 100,000 inhabitants, where the jury commissioner selects them. There is no substantial

difference between the character of special juries at common law and in Missouri.

This court has uniformly held that the provisions of the Constitution of 1820 and 1865, that the right of trial by jury shall remain inviolate, and the provision of the Constitution of 1875, that the right of trial by jury as heretofore enjoyed shall remain inviolate, means the right of trial by jury as it existed at common law. In *Vaughn v. Scade*, 30 Mo. 600, Scott, J., said: "The term 'trial by jury' was well known and understood at the common law, and in that sense it was adopted into our Bill of Rights. Of course, the nonessentials of that institution, such as concern the qualifications of jurors, the mode of summoning them, and many other such matters, were left to the regulation of law. The Constitution is preserved in retaining the substance of that form of trial as it was known and practiced among those from whom we have derived it." The same rule was laid down by Sherwood, J., speaking for the majority of the court in *State ex rel. v. Withrow*, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43, and by Gantt, J., in *State ex rel. v. Slover*, 134 Mo. 607, 36 S. W. 50, and by Gantt, J., speaking for the majority of the court, in *State v. Hamey*, 168 Mo. 167, 67 S. W. 620, 57 L. R. A. 846. The only utterances from this court, or any of its members, to the contrary, are what was said by McGirk, C. J., in *Bank v. Anderson*, 1 Mo. 244, by Barclay, J., in his dissenting opinion in *State ex rel. v. Withrow*, 133 Mo., loc. cit. 523, 34 S. W. 245, 36 S. W. 43, and by Sherwood, J. (in which the writer hereof concurred), in the dissenting opinion in *State v. Hamey*, 168 Mo., loc. cit. 204, 67 S. W. 620, 57 L. R. A. 846.

Judges McGirk and Barclay agree with the contention of the plaintiff herein that the Constitution of 1820 does not guaranty a common-law jury, but only such a jury as was prescribed by the territorial laws of Missouri prior to the adoption of the Constitution of 1820, and that the only special jury that was spoken of in those laws was a special jury called from an adjoining county, when a party litigant disqualified by affidavit the people of the county in which the court was sitting. The dissenting opinion in *State v. Hamey*, 168 Mo. 204, 67 S. W. 620, 57 L. R. A. 846, held that the Constitution of 1875 was an original organic instrument and not a mere continuation of the Constitution of 1820, and that the provision that the right of trial by jury as heretofore enjoyed should remain inviolate meant as that right was enjoyed according to the laws of the state of Missouri, which included the common law and the English statutes enacted prior to the fourth year of James I, except as modified by our statute, and was not limited to the right of trial by jury as it was known to the common law. *Ice Co. v. Tamm*, 138 Mo., loc. cit. 388, 39 S. W. 791. See, also, to the same effect, *Perry v. State*, 9 Wis. 19. But so far as the case at bar is concerned there is

no difference of opinion under either the majority or the minority opinion in the *Hamey* Case. For special juries were known to the common law, and were selected by the sheriff or the coroner or two others, and special juries have been provided for by the laws of Missouri, in express terms, ever since the act of 1835, and in the country they are selected by the sheriff, and in cities of over 100,000 inhabitants they are selected by the jury commissioner.

In England under St. 6 George IV, c. 50, § 34, the cost of the special jury is taxed against the party applying for it, unless the trial judge after the trial certifies that it was a proper case for a special jury; and the same has been substantially the law in Missouri since 1835. Under section 2802, Rev. St. 1879, the party applying for the special jury was required to pay the costs thereof, irrespective of the result. Similar provisions, requiring the applying party to pay for the special jury, are also contained in the laws of Delaware (Rev. Code Del. 1874, p. 661, c. 100, § 18), Indiana (2 Rev. St. Ind. 1876, p. 150, § 1, note), Ohio (Rev. St. Ohio 1880, § 5189), New York (Code Rem. Jus. N. Y. § 1069), Michigan (Comp. Laws Mich. 1871, § 6005), and New Jersey (Revision N. J. 1877, p. 528, § 18). "The power of the Legislature to require payment of a reasonable jury fee as a condition to entitle a party to a jury trial, and to provide that the failure to do so shall constitute a waiver of the jury, is undoubted." 12 Enc. Pl. & Pr. 249.

The plaintiff, however, attempts to break the connection between the common-law right of trial by jury and the right of trial by jury in Missouri since 1835, by invoking Act Cong. June 4, 1812, c. 95, 2 Stat. 743, and by saying that there have been no lawful special juries in Missouri since 1835, because all of the laws authorizing them were violative of the Constitution of 1820. Act Cong. June 4, 1812, c. 95, 2 Stat. 743, simply prescribed the qualifications for jurors (which was evidently intended to nullify the territorial act of Missouri of 1808 prescribing a property qualification for jurors, but which act, as already herein pointed out, was repealed by the territorial act of 1810), and then provided that, until the General Assembly of the territory of Missouri should otherwise direct, the jurors should be selected in such manner as the courts might prescribe. It will be easily and readily seen that this act was not intended to have the effect of establishing a new jury system, nor of abolishing the special juries known to the common law, any more than of abolishing any other kind of a jury that was known to the common law. The territorial laws enacted prior to 1820 are in the same condition. They simply provided that a party should be entitled to a trial by jury, and, when a jury was demanded, the court should order the sheriff to summon one. No particular kind

of a jury was specified, and no intimation can be gleaned from the act of Congress or from these territorial laws that any other kind of a jury than such a jury as was known at common law was intended. That was the only kind of a jury the fathers of our country knew or had any respect for. Therefore, when the act of 1816 was passed, adopting the common law of England and the statutes of England passed prior to the fourth year of James I as a part of the law of Missouri, the common-law juries, regular and special, were adopted, and became a part of the system of our laws and of the machinery of our courts. This being true, they were the kinds of juries that the Constitution of 1820 guaranteed. There were no Missouri juries, as distinguished from common-law juries, prior to the adoption of the Constitution of 1820, and therefore the foundation of the plaintiff's whole contention is untenable.

The fact that a party applying for a special jury is required to deposit the cost thereof, and that it puts it out of the reach of a poor man to have a special jury, does not make the law obnoxious to the federal Constitution. "The preservation of the common-law right to trial by jury in both civil and criminal cases is guaranteed by the federal Constitution, as well as by the fundamental law of the several states. It is well settled that the federal provision is a restriction only on the general government and its officers, and the states may constitutionally abolish, alter, or amend the existing right of trial by jury." 6 Am. & Eng. Enc. Law (2d Ed.) p. 974, and cases cited in notes. The requirement of such a deposit no more violates the equality clause of the federal Constitution than the fact that a rich man can employ the highest-priced lawyers, while the poor man can only afford to employ the lower-priced lawyers, violates the constitutional guaranty that a man shall be entitled to defend by himself or by counsel. The law furnishes the jury to every man on the same terms. The inequality consists in the unequal financial ability of the parties to avail themselves of the benefits of the law.

Neither does the fact that the sheriff in the country, or the jury commissioners in the large cities, have the power to select the special jury, and that they are not drawn by lot, as the regular panel is, make the law unconstitutional. Such matters depend wholly upon the legislative will. The power of selection must be lodged somewhere, in one or more persons, and it is for the legislative wisdom to provide whether the power shall be vested in the sheriff, as it was at common law and is in Missouri outside of the large cities, or in a jury commissioner in the large cities, or in a body composed of more than one. Experience does not justify the fear expressed by the plaintiff of having juries "fixed," because the power is vested in a single officer; nor does the selection by the

officer, and not by chance or lot, make the law unconstitutional. *Perry v. State*, 9 Wis. 19.

Special juries are allowed by the laws of the United States in the federal courts. Section 805, U. S. Comp. St. 1901, vol. 1, p. 626 (Act April 29, 1802, c. 31, § 30, 2 Stat. 167), provides: "When special juries are ordered in any circuit court, they shall be returned by the marshal in the same manner and form as is required in such cases by the laws of the several states."

These considerations show that the judgment of the circuit court is right, and it is therefore affirmed. All concur, except Robinson, J., absent.

CORDER v. O'NEILL.*

(Supreme Court of Missouri, Division No. 2
June 9, 1903.)

REAL ESTATE BROKER—COMMISSION—FRAUD
OF PRINCIPAL—DAMAGES—INTEREST—SUFFICIENCY OF PETITION—NATURE OF ACTION—
EVIDENCE—COMPETENCY—SUFFICIENCY—
INSTRUCTIONS.

1. A petition by a real estate broker alleged that he had entered into a contract with defendant whereby he was to have a certain commission for the sale of a mining lease to a named party, or his assigns, if the agreed price was paid by a certain date; that a contract of sale was duly made by defendant with an assignor of the prospective purchaser, and part of the purchase price paid down, the balance to be paid on the date named in plaintiff's contract; that, a few days before this final payment became due, defendant verbally agreed with the purchaser to extend the time for such final payment, if a small payment would be made; that the purchaser was at that time willing and able to pay the balance due on the original contract, and would have done so, had he not relied on the verbal agreement for an extension; that on the day the original contract would expire the purchaser was ready and offered to make the agreed partial payment; that, for the purpose of defrauding plaintiff out of his commission, defendant refused to accept the money and make a contract extending the final time of payment, but agreed to do so after the expiration of that day; that on the following day the partial payment was made, and a contract similar to the original was entered into, except that the consideration was larger and the time of final consummation different; that the lease was duly transferred to the purchaser; that, by reason of the fraud thereby practiced by defendant, plaintiff was damaged in a named sum (the same as the agreed commission). The contracts were all set out. *Held* to state a good cause of action for fraud.

2. It was necessary for plaintiff to allege his contract with defendant and performance thereof in order that he might complain of defendant's fraud.

3. While an averment in the petition that plaintiff was damaged by reason of the fraud practiced on him by defendant through his breach of the verbal contract as to an extension was misleading, indicating that the action was based on contract, it did not affect the substantial averments of the petition, so as to prevent a recovery for fraud.

*Rehearing denied July 3, 1903.

4. It was not only competent, but material, to allege and prove the breach of the verbal contract to show how defendant was operating to prevent the consummation of the original contract according to its terms.

5. It was immaterial whether the verbal agreement was within the statute of frauds.

6. It was shown that plaintiff's first negotiations in regard to the property were had with a son-in-law of defendant, that the one in whose name the original contract was made negotiated with this son-in-law, that the negotiations as to the extension of time were carried on with him, and that defendant had told another witness that any act of his son-in-law in regard to this sale was his act. *Held* to warrant submission to the jury of the question whether defendant's son-in-law had authority to act.

7. It was error to instruct the jury that, if they found for plaintiff, they should assess his damages in the amount of the commission agreed on, as it was for the jury to determine the amount plaintiff was entitled to recover.

8. It was error to instruct the jury to award plaintiff interest from the time he had made demand for his commission, as the action was for unliquidated damages, and plaintiff claimed no interest in his petition.

9. While the verbal contract was material to show the manner in which defendant attempted to defraud plaintiff, it was error for the court to single it out, and make it the sole basis for plaintiff's recovery.

Appeal from Circuit Court, Jasper County; Jos. D. Perkins, Judge.

Action by Hal Corder against James O'Neill. Judgment for plaintiff, and defendant appeals. Reversed.

Edw. Cunningham, Jr., and Galen & A. E. Spencer, for appellant. B. O. Brown, Thos. Dolan, and C. V. Buckley, for respondent.

Statement.

FOX, J. This action was commenced in the Jasper county circuit court November 7, 1899. Upon the trial of the cause there was a judgment for plaintiff in the sum of \$5,306.65. From this judgment, in due time and form, defendant prosecuted this appeal. The record is now before us for review. The plaintiff's petition contained four separate counts, but before the case was submitted to the jury the plaintiff abandoned and dismissed the first, second, and fourth counts, so that all that is left of the petition is the third count, which is in the words and figures following:

"Third. The plaintiff further states: That he is now, and was at all times hereinafter mentioned, engaged in the business of selling real estate, mines, mining property, and leases on mining property in Jasper county, Missouri, as agent for such persons or concerns as might employ him therefor, and on March 22, 1899, the defendant, James O'Neill, was the owner of a certain lease, known and described as the 'Get There Lease,' in or near the city of Carterville, in said county and state, and on said day he was desirous of selling the same. That at the same time plaintiff had as customer for a piece of mining property one C. C. Playter, who desired, for himself and others,

and especially for one R. Tibbets, of Boston, Massachusetts, to purchase a mining lease in Jasper county, Missouri, and on said date the defendant entered into a contract with the plaintiff, whereby he agreed that if the said Playter, or his assigns, should take the lease of the defendant, known as the 'Get There Lease,' and should comply with the conditions of a contract made with said Playter, or his assigns, for said lease, and should pay to the defendant the sum of ninety thousand dollars in cash for said lease on or before the 1st day of May, 1899, then the defendant will pay the plaintiff the sum of \$5,000, in full for all commissions and compensation for services rendered by the plaintiff in and about the sale of said 'Get There Lease.' That the defendant and said Tibbets, acting through the said Playter (the defendant at all times knowing that said Playter was the agent of said Tibbets in the purchase of said lease), entered into a contract, whereby said O'Neill sold to the said Tibbets, or agreed to sell to said Tibbets, for the sum of \$90,000, the said 'Get There Lease'; \$5,000 to be paid in cash, and the balance of said purchase money on or before the 1st day of May, 1899. That said Tibbets was fully able to pay said balance of \$85,000 when due. That said Tibbets at the time of said contract paid to defendant, or into the bank for his use, the sum of \$5,000. That during the existence of such contract the said Tibbets, through his said agent, requested of the defendant that he would extend the time for the payment of the balance of the purchase money for said lease until the 1st day of June, 1899. Said contracts are herewith filed, marked Exhibits 'A' and 'B.' Plaintiff further states: that at the time of procuring said property for sale defendant only asked the sum of \$85,000 therefor, and by agreement with defendant offered and contracted said property for the sum of \$90,000; it being agreed that the excess over \$85,000, to wit, \$5,000, should be paid by defendant to plaintiff for making said sale. That within the time limited plaintiff sold said property for \$90,000 to one Frederick R. Tibbets, on March 22, 1899, and \$5,000 of the purchase price was thereupon paid by said Tibbets to defendant, and the balance was to be paid by said Tibbets on or before May 1, 1899. That about the 25th day of April, 1899, and on the 30th day of April, 1899, said Tibbets had an oral agreement with defendant, wherein defendant promised that if, upon the 1st day of May, 1899, said Tibbets would pay \$10,000, he would extend said contract for thirty days, giving said Tibbets that much more time to purchase said property. That said Tibbets and the plaintiff relied upon said promise and agreement, and at the time said agreement was made said Tibbets was able and willing to put up and pay to defendant the balance due on said first-mentioned contract,

and on or before May 1, 1899, comply with all its terms, and would have made said payment and complied with all its terms by the 1st of May had it not been for said verbal agreement, and was prevented from so doing and lulled into security in the premises by reason of said verbal agreement. That on said 1st day of May, said Tibbets offered and tendered to defendant said \$10,000; but the defendant, for the purpose of cheating and defrauding plaintiff out of his said commissions, refused and deferred any action thereon, or making any contract on that day, but promised and agreed that after the expiration of that day he would make a contract with said Tibbets giving him until June 1, 1899, to consummate said deal for said lease. That thereafter, to wit, on the 2d day of May, 1899, in pursuance of his said scheme to cheat and defraud plaintiff out of his said commissions, defendant had drawn up new papers to carry out his sale to said Tibbets, which said papers were of like import with said original contract, except time for consummation of said sale was extended to June 1, 1899, and Tibbets required to pay \$10,000 in addition to amount specified in original contract. That in pursuance thereto said Tibbets paid \$10,000 on May 10th and the balance on June 1, 1899, at which time said lease was duly transferred by defendant to Tibbets. That by reason of breach of said verbal agreement and promise to extend said original contract by defendant, and by reason of the fraud thereby practiced on plaintiff by defendant, plaintiff is damaged in the sum of \$5,000, for which sum, together with costs, plaintiff prays judgment."

The answer of the defendant denied each and every allegation contained in the plaintiff's petition.

The contract mentioned in the petition, entered into by the defendant with the plaintiff, was introduced in evidence, and is as follows:

"March 22, 1899.

"If, on or before May 1, 1899, C. C. Playter, or assigns, pays to me the full sum of ninety thousand dollars (\$90,000) cash, in performance of the contract I have made with Playter for the sale of my lease, known as the 'Get There Lease,' and fully complies with all the conditions of said contract, I agree to pay to Hal Corder, of Joplin, Missouri, the sum of five thousand dollars (\$5,000.00) in full for all commissions and compensation for services in and about said sale. No money whatever to be due and payable except on full performance of all the above-named conditions.

"James O'Neill."

The plaintiff next offered in evidence the contract referred to in the preceding instrument, by which the sale of the "Get There Lease," signed by James O'Neill on the one part and C. O. Playter on the other, was made. Said contract is as follows:

"This agreement, made this 22d day of March, A. D. 1899, by and between James O'Neill, as first party, and C. C. Playter, as second party, witnesseth, that whereas first party has this day sold to second party his lease on the northeast quarter of the southeast quarter of section twenty-one, township twenty-eight (28), range thirty-two (32), in Jasper county, Missouri, together with certain machinery thereon, for ninety thousand dollars (\$90,000.00) cash, to be paid on or before May 1, 1899, and has this day executed proper conveyance thereof, which conveyance is hereby referred to for a more specific description of the property conveyed: Now it is agreed that, if second party shall on this date pay first party five thousand dollars (\$5,000.00) cash, first party will in consideration thereof deposit such conveyance, with a duly executed copy hereof, with the First National Bank of Carterville, Missouri, and if second party, or his assigns, shall, on or before May 1, 1899, pay into said bank, to the credit of first party, the further sum of eighty-five thousand dollars (\$85,000.00) cash, and comply with all the conditions hereof, said conveyance shall then be delivered to second party or his assigns. If second party, or assigns, fails to make such payment of \$85,000 within the time above limited, then such conveyance shall be returned to first party, and said bank is hereby authorized and directed to deliver same to him, and he shall hold and retain said five thousand dollars (\$5,000.00) as compensation for the making of this contract and the depositing of said conveyance (said payment being made as a consideration therefor, and only to be credited on price in the event the further sum of \$85,000.00 is paid within the time limited), and all rights of second party, or assigns, concerning said property, or the purchase thereof, shall end. It is agreed that time is the essence of this contract, and all agreements of said party must be strictly complied with on or before May 1, 1899, and all rights hereby granted him shall end on said date. Said conveyance shall be taken subject to all subleases, mining rights, contracts, or licenses in force on said premises on the date of the delivery of said conveyance. Second party shall by written agreement assume the payment of all orders made on and accepted by first party in the operation of said land. Second party shall also by a written agreement bind himself and assigns to pay or allow to Thomas J. Steers his rebate on royalty on all ores mined from the Laura S. mine, on mining lots fourteen (14) and fifteen (15) of said land, said rebate being two and one-half (2½) per cent. gross on zinc and five (5) per cent. gross on lead; also to pay or allow to Lively & Co. their rebate on royalty on all ores cleaned on their tailing mill on said land, said ores being produced by cleaning tailings in said mill. Until the payment of said sum of \$85,000.00 first party shall continue to operate and mine said land, and collect and hold for his own use and benefit

all rents, revenues, and royalties therefrom, as if this agreement had not been made. Witness our hands the day and year first above written. Executed in triplicate.

"[Signed] James O'Neill.

"[Signed] C. C. Playter."

There was some conflict in the testimony. We will say, however, that the testimony tended to prove the allegations in the petition, and the testimony of the defendant tended to prove his theory of the defense to this action. The testimony bearing most strongly upon plaintiff's theory of his cause of action is that relative to the extension of the time of payment from the 1st day of May to the 1st of June. This testimony being so vital, we here quote the testimony of C. C. Playter and his brother, Geo. Playter:

C. C. Playter, sworn as a witness on behalf of the plaintiff, testified as follows:

Direct examination: "Q. Where do you reside now? A. Aurora, Mo. I resided here in Joplin in March, 1890. Q. Prior to that? A. Well, I was at Pittsburg, Kansas, about six months previous to that time. Q. Never mind. I thought you were from Boston. A. No, sir. Q. Acquainted with Col. O'Neill? A. Yes, sir. Q. State if you are the C. C. Playter who negotiated the sale, or the purchase, rather, of the 'Get There Lease'? A. I am. Q. For whom were you acting at that time? A. Frederick R. Tibbets, of Boston. Q. Did you have any conversations, or were your dealings direct with Col. O'Neill or Bruen? A. My dealings up to the date of the contract was made with Bruen. Q. That was before March 22d? A. Yes, sir. Q. You are the C. C. Playter that made the contract of March 22d? A. Yes, sir. Q. On behalf of Frederick R. Tibbets, of Boston? A. Yes, sir. Q. Did you have anything to do with the transaction after making that contract? A. Why, I signed the second contract that was made. Q. That was the contract of March 22d? Did you sign the first one? A. Yes; that is the first. Q. Did you have any dealings with Col. O'Neill, or his son-in-law, Mr. Bruen, subsequent to that time? A. I saw Mr. Bruen on the 1st day of May in regard to the payment on the property that we were to make. Q. Did you have an agreement— Was it you or your brother that had the agreement regarding the payment of that \$10,000? A. My brother. I went with my brother to make the payment. Q. State what took place at that time on the 1st of May. A. My brother and I went over some time before noon. Went into the office, and Mr. Bruen was there. We told him we had come over to make a contract according to the agreement between Bruen and my brother. That was to pay \$10,000 and get an extension. Q. What took place between you and your brother and Mr. Bruen? A. We went in, and I told Mr. Bruen that we were ready to make the payment, and he said that Mr. O'Neill had refused to make any agreement until the other agreement had lapsed the next day. Q. What was his reason

for that? A. He said he didn't want to have two contracts out at the same time on the same property. Q. Was there any other contract out regarding that property, except this agreement of Col. Corder's? A. Not that I know of. Q. What else took place? A. I told Bruen we had come over on the strength of the understanding between he and my brother, and I didn't see that it made any difference; that we were there to make a new contract to take up the old contract, and the making of the new contract would not in any way make two contracts on the property, because they would take up the old one when the new one was made. He wouldn't listen to my plea, and we couldn't do anything else. That was the only dealings had that day. Q. What arrangement as to subsequent meeting? A. My brother went to O'Neill, and I left— Q. You don't know yourself about that? A. No, sir. Q. Were you present on the 2d of May? A. Yes. Q. Where? A. At Spencer's office in Joplin. Q. What time on the 2d of May? A. I didn't get there until about 10:00 o'clock, after my brother and Mr. O'Neill had been there. They had been there before I got there, and had talked over the matter. Q. What took place there? A. When I came up my brother called me aside — Q. Just what took place between you and your brother in the presence of O'Neill or Bruen, or both of them? A. Well, I made complaint against the contract as I understood it with O'Neill—from the agreement understood—it was different from the agreement they wanted then. Q. In what respect? A. That the \$10,000 to be paid was additional to the purchase price. Q. Who was insisting on that? A. Col. O'Neill. Q. What was that contention? A. My understanding— Q. State what was said there. A. I said that Mr. O'Neill— I considered he was going back on the contract he made with my brother. I didn't think he had any right to do it. That was all I said to him. Q. Was the deal finally closed there? A. A contract was made that day, yes, sir, in regard to the property. Q. What was the purchase price? A. \$100,000. Q. State to the jury what, at that time and previous thereto, was the financial condition of Frederick R. Tibbets. A. So far as that is concerned, I cannot say. I don't know. Q. What I want to get at, Mr. Playter, is whether, if it hadn't been for the agreement to extend the time, he was able to complete the contract by May 1st, as originally agreed upon? A. The payment was to have been made by the 1st of May. Q. What payment? A. \$85,000.00 on the first contract, in case we had received no extension. Q. Now, Mr. Playter, what money was paid on or after the 2d day of May for the purchase of this 'Get There Lease'? A. \$10,000 was paid about the 9th or 10th of May, I believe. The balance on or before the 1st of June. Q. What do you mean by balance? A. \$85,000. Q. Did that make \$100,000? A. All told; yes, sir. Q. Now state, Mr. Playter, if this

is the contract you referred to as having been made on May 2d? A. Yes, sir; that is the contract [marked "C"]. Q. Now, I will ask you if this is the assignment made to Frederick R. Tibbets, of Boston, Mass., of this 'Get There Lease' by Col. O'Neill? A. To the best of my knowledge it is. Q. The description there is of what is known as the 'Get There Lease,' isn't it? A. Yes, sir. Q. Calling your attention to the matter of your conversation further with Mr. Bruen on the 1st of May, state if at that time you had a draft for \$10,000. A. I did. Q. State if you offered that to Mr. Bruen. A. Yes, sir. Q. State the exact language of Mr. Bruen, so far as you can remember, that was used by him at that time regarding the expiration of this contract. A. Bruen said O'Neill refused to make a new contract until after midnight that night; that it would be out that night. Q. That was on the 1st of May? A. Yes, sir."

Cross-examination: "Q. You didn't see Col. O'Neill on the 1st of May at all, did you? A. No, sir. Q. What conversations you had on the 1st of May were with Bruen? A. Yes, sir. Q. You say Mr. Bruen told you that, when you wanted to pay \$10,000 to get the contract for an extension, Col. O'Neill wouldn't enter into any new contract during the life of the outstanding one? A. Yes, sir. Q. You have also said that you told him at that time that you didn't know of any contract that was out except the one with you? A. Yes, sir. Q. Did you at that time know of this contract between O'Neill and Corder to pay Corder \$5,000? A. No, sir; I did not. Q. You didn't know anything about that? A. No, sir. Q. As a matter of fact you didn't know Corder was getting any commission from O'Neill? A. No, sir. Q. Your understanding was he was getting his commission from the other side, if any at all? A. No, sir. Q. At the time you said to Col. O'Neill that you didn't know of any other contract, you didn't know at that time of his contract to pay \$5,000 that night if the property was taken that day? A. No, sir. Q. You didn't go to see O'Neill yourself after having this conversation with Bruen? A. No, sir. Q. What time of day was that? A. In the forenoon. I don't remember exactly. Somewhere about 10:00 o'clock. Q. On the 1st day, the last day of the life of this contract between O'Neill and Corder, how much money did you have here of Tibbets? A. \$10,000. Q. You didn't have, and never did have during the life of that contract, the money here to take it up? A. No, sir. Q. You were representing Tibbets? A. Yes, sir. Q. There was no other reason for that extension excepting lack of money? A. He wasn't ready to pay the money at that time. Q. According to that contract? A. Not if he could get an extension. Q. And you went over to see about getting the extension? A. Yes, sir. Q. Bruen told you O'Neill wouldn't give an extension? A. No, sir; didn't tell me that.

Q. He told you he wouldn't enter into any other contract? A. Yes, sir. Q. And after the contracts expired he would be at liberty to deal with you? A. Yes, sir. Q. And perhaps trade you the property? A. Yes, sir. Q. And after these contracts expired, a new contract was entered into, that you have testified to, for that purpose? A. Yes, sir. Q. Have you with you any of the letters or telegrams you received from your client, Mr. Tibbets, just prior to the time you went over there on the 1st of May? A. No, sir. Q. What did you do with them? A. I think I have them on file. Q. Have you ever shown them to Mr. Buckley or Mr. Corder? A. No, sir."

Redirect examination: "Q. The agreement about the extension of time to complete this contract was made before you went over there on the 1st of May? A. Yes, sir. Q. That wasn't made with you? A. No, sir; with my brother."

George H. Playter, sworn as a witness on behalf of the plaintiff, testified as follows:

Direct examination: "Q. What relation are you to C. C. Playter? A. Brother. Q. Were you here on the 22d of March, 1899? A. Yes, sir. Q. Did you have anything personally to do with the transaction of that date between yourself or your brother and Col. O'Neill? A. I was here at the time, and in the office at the time, the contract was made. That was in Spencer's office. Q. That contract was made between Col. O'Neill and your brother? A. Yes, sir. Q. Who were you and your brother representing in that contract for the purchase of this 'Get There Lease'? A. Frederick R. Tibbets, of Boston, Mass. Q. Is that the same F. R. Tibbets to whom the assignment of the 'Get There Lease' was finally made by Col. O'Neill? A. Yes, sir. Q. Now, after the execution of that contract of March 22, 1899, did you have any conversation or agreement with Col. O'Neill or Mr. Bruen? And, if so, state what it was. A. I met Mr. Bruen, and told him Mr. Tibbets was desirous of procuring an extension of time of 30 days for carrying out that contract. He told me he would see Col. O'Neill and let me know whether they would do so, or whether Col. O'Neill would do so, and a couple of days later I went to his office in Webb City, and he said that he had had a talk with the colonel and on payment of \$10,000 more they would extend the time to June 1st. Q. When was that payment to be made? A. On or before the expiration of the contract. On or before May 1st. I asked him whether \$10,000 was to be considered as a bonus, or to be applied on the purchase price, and he said it would be simply a payment of that much addition on the purchase price, and the remainder of \$75,000 to be paid on or before June 1st. That was the substance of my arrangement and talk with Mr. Bruen. This was several days previous, five or six days previous to the time the contract would expire. I was satisfied with that, and tele-

graphed Mr. Tibbets, and he forwarded the money to be paid over. Q. The \$10,000? A. Yes, sir. That was in a draft, Boston exchange. Either the day previous to the 1st of May, or on the 1st of May, I don't recall which it was, now, I went with my brother to Webb City with the money, and called on Mr. Bruen, and went into the office expecting to find Col. O'Neill, and the colonel wasn't in. I told him we had the money, and my brother showed him the draft, and said that he was ready to sign it over to him on the fulfillment of the making of the extension of the contract. Then he told me that Col. O'Neill objected to closing up the matter that day; that he wanted to wait until the present contract had expired entirely, and I told him that that put us in a very awkward position in regard to our principal, Mr. Tibbets, and he said that that was all he could do. The colonel had just left, going out to the mines, and perhaps I could catch him at the livery stable. I walked down and met the colonel, and talked to him, and told him I would like to fix the matter up to-day and explained fully to him. That was the first time I had been able to see him. He had been sick, or where I couldn't get to him, and I considered— Q. State what you said. A. I told the colonel I had had such an arrangement with Mr. Bruen as above stated, and that I would like to close the thing up and pay the money over that day. He murmured, and said that it would be against his judgment to make a contract that day, and gave me no final answer either one way or the other whether he would or wouldn't fix the matter up at all, except saying he would be over to Joplin the next day, as soon as he got the other contract, and would meet me at Judge Spencer's office for the further consideration of the matter. Q. Next day was May 2d? A. I judge so; yes, sir. It was the 2d of May at any rate. On May 2d, I met him at Judge Spencer's office, and he said that he hadn't understood the contract as I had agreed with Bruen. Q. About what? A. In regard to an extension and the payment of the \$10,000. He said that that would have to be an entirely new contract, and the \$10,000 would be bonus, instead of being applied on the purchase price. I asked Mr. Bruen if our understanding wasn't exactly to the reverse of that—that it was to be applied on the purchase price, simply carrying out the old contract; and he stated that that was his understanding. Q. You and Mr. Bruen understood it the same? A. Yes, sir; but that, if he had so stated the proposition, to Col. O'Neill, Col. O'Neill had misunderstood him about it on that basis; that the colonel hadn't understood his position in the matter. Q. What you just stated—was that in the presence of Col. O'Neill? A. Yes, sir. Q. Go ahead. A. That changed the matter so completely, so far as I was concerned and my relations with Mr. Tibbets—my statement to him as to my ability to carry out the con-

tract by the payment of the additional \$10,000—that I told him I didn't feel like giving him the money under those circumstances. It resulted into our going over the matter pro and con, and that he gave me time to take the matter up with Tibbets to see whether he would agree to make that sort of an arrangement, and the contract was drawn up wherein we were given until the 10th. Q. You were given until the 10th? A. About 10 days; the balance on or before June 10th. Q. That is the contract of May 2d, and the only contract that was entered into—written contract—between Tibbets and O'Neill, or you and O'Neill, excepting the final transfer and the contract of March 22d? A. The only written contracts. Q. Did you pay that \$10,000? A. Yes, sir. Q. Did you pay the rest of it within the life of the second contract? A. It was paid within the life of the second contract. Q. How much was paid on that lease all together by Mr. Tibbets? A. \$100,000. Q. Would you have carried out that contract and paid the money on or before the 1st of May, provided there hadn't been an agreement to extend it? A. Personally, of course not, if I am allowed to state what instructions I had from Mr. Tibbets, and what he wrote me. Q. Where are those letters? A. I suppose in my office. I never have been asked to look them up. Q. State whether or not, if you know, Mr. Tibbets was ready and willing and able to carry out that contract if the extension hadn't been agreed upon? A. Yes, sir; to the best of my knowledge and belief. I want to add that to it, of course. Q. Was anything said by Col. O'Neill, or by him through Mr. Bruen, about getting rid of any contract before making this second one? A. Mr. O'Neill told me he didn't want to make one contract until he was through with another one. Didn't want to get mixed up in it. Q. Was there any other contract, except the Corder contract, regarding this, excepting the one you had? A. I knew nothing of any contract excepting the one I had."

Cross-examination: "Q. You didn't know at that time there was any other contract out between O'Neill and Corder, which expired on the 1st of May? A. No, sir. Q. The colonel said, when you went to see him on the 1st day of May, that he didn't want to get mixed up with different contracts on that property? A. Yes, sir; didn't want to make one until he was through with another. Q. And wouldn't do anything towards granting an extension or anything else until the present contract expired? A. Told me he would make no arrangements whatever until the present contract expired. Q. You have said here, in answer to a question of Mr. Buckley, that the arrangement would have been carried out if you hadn't had this talk about the extension. You get that from the correspondence which is here in Joplin? A. Yes, sir. Q. It is all based upon that correspondence? A. Certainly. Q. And the statements

In that correspondence consists of knowledge of letters and statements you sent to Tibbets—telegrams—and the replies you have on hands? A. No, I can hardly say that. The letters I had from him stating that he would do such and such things. Q. I don't care what the letters said, but it is from those letters? A. All my information is from correspondence I had from Mr. Tibbets. Q. You don't know Mr. Tibbets personally? A. Yes, sir. Q. How long have you known him? A. For 6 or 7 years. Q. Now, in relation to Mr. Tibbets being able to take this property, you know, as a matter of fact, at no time was he able to take it, and couldn't take it, and finally turned it over to Colley & Co. He couldn't take it himself? A. I couldn't state that. If you want me to answer the question in full, he had arrangements made, so he told me, to take up this property on the 1st of May, if there wasn't an extension. Q. That was in a letter? A. Yes, sir. Q. If he had \$30,000 at the time you have just spoken about, about the 1st of May, do you know what he had or what he did with that between that and the 1st of June? A. Tibbets is a broker back there, acting for other parties. Q. This extension of time was asked simply and solely to enable him to get the money? A. No, sir. Q. What was it for? A. With the idea of holding the property to go into our own company, termed the 'United Zinc Company.' Q. A corporation he was organizing? A. It was organized at that time. Q. When was it organized? A. In April, last year. Q. Then he had the corporation already organized before this time? A. Yes, sir. Q. And had its money? A. Some money; yes, sir. I don't know how much at that time. Q. He could have taken up the property and put it in the corporation? A. Not at that time. Q. He had the corporation, but didn't have the money? A. The United Zinc Company didn't have the money at that time to put into it. Q. That is what I say. The money was afterwards raised by selling stock? A. No, sir; Mr. Tibbets was at the same time selling properties to others. He had arrangements made, so he stated to me in his letters. All I know is through correspondence. He gave me the names of the parties who were willing to take up the property at the original purchase price, but in so doing he would simply have gotten his money, but he wanted to keep it so as to get the United Zinc Company to take it. Q. Did you tell O'Neill that? A. No, sir. Q. Bruen? A. Yes, sir. Q. When? A. On the 1st of May. Q. The money was raised for this company by the sale of stock? A. Yes, sir. Q. You told Bruen all about that, did you? A. Yes, sir. Q. You say the first time you saw Bruen that he told you he would have to see O'Neill? A. He said that he wanted to see O'Neill about it. Q. Told you he would see O'Neill? A. Yes, sir. Q. Didn't tell you then and there he would make any contract with you as O'Neill's agent? A.

No, sir. Q. But would carry your message to O'Neill? A. Yes, sir. Q. You weren't making any contract with him as the agent of O'Neill, but he said he would see O'Neill and let you know? A. Yes, sir. Q. How long afterwards until you saw him? A. Two or three days. Q. How long would that be before the 1st of May? A. Six or seven days. Q. You told us a while ago that the first conversation was five or six days before the 1st of May? A. Along the latter part of April. Q. Wasn't it on Saturday, the 29th of April? A. No, sir; because I had time, I know, to write to Tibbets, and get the money. Q. That was when you first saw him? A. No, sir; after I got his answer at the time I wrote to Tibbets to get the money out here. Q. Where did you see Bruen the second time? A. At his office in Webb City. Q. When did you fix that time? A. From the fact that I had to write to Boston and get an answer back it must have been— Q. Didn't you testify at Carthage that you told O'Neill when you went out there about the agreement you had with Bruen on Saturday before? A. That was on the 1st of May. Let's see. The time I saw Mr. O'Neill. I saw Bruen three times, in Joplin, then over there when I went to see whether I could get an extension, and then when I went to take the money. The last time was the 1st of May. Q. Didn't you tell Mr. O'Neill on Monday there about the agreement you had with Bruen for an extension on Saturday before? A. I told O'Neill what the agreement was with Bruen. I don't know what day. Q. What you do say about your former testimony that it was Saturday? A. May have been. Q. There wasn't time then, if it was Saturday, to write to Boston? A. The first time I saw him, and the second time was the time I wrote to Boston. Q. It was on Saturday, then? A. It couldn't have been. Q. It was five or six days before you say here you saw him in Joplin, and you would not have time then to get the money? A. I don't know. The draft was sent through the mail. I know. Q. That was for \$10,000? A. Yes, sir. Q. You telegraphed for that, didn't you? A. It might have been by telegraph, I don't know. Those things get old. I haven't thought of it since. Q. You testified to it a year ago? A. Yes, sir."

After the refusal of defendant, O'Neill, to extend the first contract with C. C. Playter from May 1st to June 1st, on the next day, the 2d of May, the following agreement was entered into with Tibbets, the party whom Playter was representing:

"This agreement, made this 2d day of May, A. D. 1890, by and between James O'Neill, of Webb City, Missouri, as first party, and Frederick R. Tibbets, of Boston, Massachusetts, as second party, witnesseth, that whereas first party has this day sold to second party his lease on the northeast quarter (N. E. $\frac{1}{4}$) of the southeast quarter (S. E. $\frac{1}{4}$) of section twenty-one (21), in town-

ship twenty-eight (28), of range thirty-two (32), in Jasper county, Missouri, together with certain machinery thereon, for the sum of ninety-five thousand dollars (\$95,000) cash, all to be paid on or before June 1, 1899, and has this day executed proper conveyance thereof, which conveyance is hereby referred to for a more specific description of the property conveyed: Now, in consideration of the premises, and the sum of one dollar to him paid by the second party, the receipt of which is hereby acknowledged, the said James O'Neill agrees that he will at once deposit a proper conveyance of all said leasehold property and effects, with a duly executed copy of this agreement, with the First National Bank of Cartersville, Missouri, and if said party shall, on or before May 10th, instant, pay into said bank for said first party the sum of ten thousand dollars (\$10,000), the said bank shall continue to hold said conveyance and transfer until the 1st day of June, 1899, and if on or before said last-mentioned date said second party, or any one for him, shall pay into said named bank for said first party the further sum of eighty-five thousand dollars (\$85,000.00) cash, then said conveyance and transfer shall be delivered to said second party or assigns. If said second party, or his assigns, fails to make said payments, to wit, ten thousand dollars (\$10,000.00) on or before May 10th, instant, and the further sum of eighty-five thousand dollars (\$85,000.00) on or before June 1, 1899, as above stated, then such conveyance shall be returned to first party, and said bank is hereby authorized and directed to deliver the same to him, and if the sum of ten thousand dollars (\$10,000.00) payable on or before May 10, 1899, shall have been paid into said bank, as herein provided, but thereafter default has been made by second party in the payment of the further sum of eighty-five thousand dollars (\$85,000.00), to be paid on or before June 1, 1899, then the said ten thousand dollars (\$10,000.00) is to be retained by first party as compensation for the making of this contract and the deposit of said conveyance; said payment being made in consideration thereof, and only to be credited on purchase price in the event the further sum of eighty-five thousand dollars (\$85,000.00) is paid within the time limited, and all rights of second party, or his assigns, concerning said property or the purchase thereof, shall end. It is agreed that time is the essence of this contract, and all agreements of second party must be strictly complied with within the times herein stated. Said conveyance shall be taken subject to all subleases, mining rights, contracts, or licenses in force on said premises on the date of the delivery of said conveyances. Second party shall, by written agreement, assume the payment of all orders made on and accepted by first party in the operation of said land. Second party shall also by written agreement bind himself and his assigns to pay or

allow to Thomas J. Steers his rebate on royalty on all ores mined from the Laura S. mine, on mining lots fourteen (14) and fifteen (15) on said land, said rebate being two and one-half per cent. (2½ per cent.) gross on zinc, and five per cent. (5 per cent.) gross on lead, and also to pay or allow to Lively & Co. their rebate of five per cent. (5 per cent.) on all zinc ores cleaned on their tailing mill on said land, said ores being produced by cleaning tailings on their mill. Until the payment of the said final sum of eighty-five thousand (\$85,000.00), first party shall continue to operate and mine said land, and collect and hold, for his own use and benefit, all the rents, revenues, and royalties therefrom, as if this agreement had not been made. Witness our hands the day and year first above written. Executed in triplicate.

"James O'Neill.

"F. R. Tibbets,

"By C. C. Playter, Agt."

There was also a final agreement entered into on the 2d of May, but not delivered until the 1st day of June, transferring the lease to Tibbets, in pursuance of the last contract. Plaintiff testified as a witness. His testimony tends to prove the formal allegations in the petition, his business, his negotiations with respect to the sale, and the consummation of the original contract with C. C. Playter. It will be observed that his negotiations, so far as it was necessary to confer about the deal, were with Bruen. There was also other testimony tending to show Bruen's authority to represent O'Neill. Counsel for defendant objected to all conversations or agreements with Bruen, on the ground, they urge, that the evidence was insufficient to show that Bruen was authorized to represent O'Neill. The only testimony introduced by the defendant was the introduction of the defendant himself. That we may fully appreciate the theory of the defense, we here quote the testimony of the defendant:

James O'Neill, sworn as a witness on behalf of the defendant, testified as follows:

Direct examination: "Q. You are the defendant? A. Yes, sir. Q. Reside at Webb City. How long have you resided there? A. About 11 years. Q. Know Mr. Corder? A. Yes, sir. Q. When did you first meet him? A. I think after the 1st of June, on the street car, when I was going to Galena. Q. That was what year, 1899? A. Yes. Q. Do you know this man, Geddes? A. Know of him. Q. He testified here? A. Yes. Q. Do you remember seeing him at your house on or about the 3d of June, 1899? A. Between the 2d and 5th, in the evening. Q. Tell the jury whether or not, at the time he was there at your house, he said to you that if swearing would get this commission they would have it, or words to that effect? A. Words to that effect. He said they would prosecute, and I told them they didn't have any case, and he said, if swearing would

get it, they would get it. That was Mr. Geddes that testified here this forenoon. Q. Did you see any of these parties after this contract was entered into the 1st of March? A. After the 22d of March? Q. Yes? A. I think one of the Playter boys, along pretty near the last of April. He asked me something about paying some money and giving them more time. I told him I wouldn't complicate any papers. There was one set of papers out, and I would give no others until that time run out. Q. What papers did you refer to then? A. The contract I gave them to buy on or before the 1st of May. Q. The contract introduced in evidence? A. Yes, sir; with C. C. Playter, or his assigns. That was the first, and the next was made to Frederick R. Tibbets. Q. Tell the jury whether or not, at any time after this contract was made in March, you had any writing with them in regard to extending the time until after the 1st of May? A. No, sir; I didn't. Q. Did you ever agree to extend the time? A. No, sir. Anybody that asked me, if they did ask me, I told them I wouldn't complicate the matter. Would have nothing to do with extending the time until I got the other papers taken up. If they didn't pay that day, I would do something else. Q. When did you get the papers back? A. The 2d of May. They were left in the First National Bank of Carterville, and were delivered to me. If they paid this \$85,000 on or before the 1st of May, they were to be delivered to the other parties; if they didn't, they was to be delivered to me. I went over on the 2d of May and demanded the papers. Mr. Kane wrote on the back of the envelope, and handed it to me, that it was 9:00 a. m., the 2d of May. Q. Did you ever afterwards promise to pay Corder any commission? A. Never had any conversation with him at all until after June, to my recollection. Q. You hadn't met him personally at that time? A. Never met him until after the 1st of June. Geddes and I had a very little conversation. Q. Tell the jury whether at any time you delayed carrying out the original contract for the purpose of defrauding or beating Corder out of his commission, or anybody else. A. I did not. I could get more money for the property if they didn't take it. Q. You may tell the jury why it was you refused to make any change in the contracts or negotiations during the life of the first contract? A. I didn't want to get mixed up in any lawsuits, because I had had contracts out before and wouldn't do anything until they were out with any other party. When I agreed to anything, I held up until that time was out. When these people didn't pay their money in, I supposed it was out. The papers were put in the First National Bank at Carterville, and if they paid the money on or before that date they was to take the papers, and if not, I was to take them. If they had paid it that day, I give Corder a contract I should pay

him \$5,000, and would have done it if they had complied with their contract the way the paper read; but they didn't do it, and I didn't pay it. I thought, if there was anything in papers, why they were to do as the papers said. That is what Mr. Spencer told me. That is what Mr. Spencer told me—that one day was as good as a year, and one year was as good as a hundred, when it comes to papers."

Cross-examination: "Q. Did Spencer tell you that? A. Yes, sir. Q. Which one? A. Arthur. Q. Arthur, or the old man? A. Arthur, on the 2d of the month. Q. Were you there at the time he and the old man and yourself had a conversation about this thing? A. Corder? Q. Yes? A. Yes. Q. Didn't you all have a conversation about it one time, about the effect of your making a contract on the 2d instead of on the 1st? A. Corder? Q. Yes? A. In Spencer's office? Q. Yes? A. No, sir. Q. There wasn't but one contract out, was there, on this land? A. There was two. One contract to Corder, \$5,000. Q. That contract and the contract you had to Playter were both dated March 22, 1899? A. That was all that was out at that time. Q. Now, when George Playter saw you on the 1st of May, and wanted to arrange with you, or told you about the arrangements he had with Bruen, to extend that time, he was the same man and represented the same party that appeared with you on the 2d at Spencer's office, wasn't he? A. He spoke to me. Do you want I should tell the conversation? There is too many questions there. Q. George H. Playter is the same George H. Playter that saw you on the 2d of May. Is he the same George H. Playter that saw you on the 1st of May? A. Yes. Q. These Playters were the parties you had been dealing with all the time? A. One Playter was the party. Q. One or the other? A. One. I was dealing with one. Q. You dealt with C. C. Playter first? A. Did all the time. Q. The last time you dealt with George H. Playter? A. He came in there and signed papers, I think. Q. George H. Playter signed papers, didn't he? A. I thought it was the same man, C. C. Playter. Q. This property you were selling, the 'Get There Lease,' provided for in the second contract, was the same property provided for in the first contract? A. With them; yes, sir. Only it was different parties. Q. Only it was different parties. You were dealing with the same parties? A. No, sir; I was not. Q. With the same property? A. Yes. Q. And with the Playters? A. Yes, sir; but not—Q. Tell me how it is you wanted to get shut first, you say, of the contract you had with the Playters regarding this property, and then you went ahead and made the contract with them for the same property? A. To get shut of just such people as you are. Q. Of the lawyers? A. Yes, sir; exactly. Q. There wasn't any show on earth for a lawsuit if you extended the contract? A. I

didn't intend to give any show. I don't think there is any now. Q. There wasn't any chance on earth to get into a lawsuit with the Playters? A. Not if I went according to the papers, as Spencer told me. Q. Don't lay this on Spencer. He has enough to bear himself. I want you to explain to the jury how it is you could get into a lawsuit, except with Corder, in this transaction, if you had extended the original paper of March 22d—the contract between Playters and yourself? A. How could I? Q. Yes. A. I didn't intend to get into any. Q. How could you get into one, I want to know? A. I don't know. May be you could study out some way. I couldn't. Q. I can't, colonel. As a matter of fact you put this off until after midnight of May 1st, in order to defeat Corder from collecting his commission? A. That is what you say. Q. Isn't that what you say? A. No, sir. Q. You say you never had any other arrangement regarding this contract before May 2d? A. With whom? Q. Regarding any other contract? A. No, sir; or wouldn't have. Q. Playter saw you over there on May 1st, didn't he? George H.? A. I couldn't tell you what date. A few days before the time run out. Q. Did you agree to meet him at Spencer's office the next morning to make the contract? A. No, sir. Q. Have any conversation with him about meeting him? A. I told him I was ready to deal with any one after that contract run out. Q. Did you have any arrangement with him to meet him at Spencer's office next morning? A. No, sir. Q. How did you happen to go there? A. To see Spencer, my attorneys; to see whether I was doing right, or not, in taking up the papers. Q. How did it happen the Playters met you there, and you entered into these negotiations? A. You will have to ask the Playters. Q. You don't know how they came to meet you there? You had no arrangement on the 1st by which you were to meet them on the 2d? A. If you ask Spencer, he can tell you. He is attorney for them. Q. You didn't have any arrangement to meet them on the 2d, and you don't know why they met you there? A. I didn't go there to see them. Q. Did you go there to have this second contract drawn up? A. Yes, sir. Q. What for? A. Because they were people I thought I could trust on drawing up papers. Q. Why did you go there to draw it up, if you had no arrangement to draw it up? A. I went there to see if I did right in taking down the first papers. I was there, and the other was drawn up. I told them the first was out. Q. Did you have any intention of drawing up another contract? A. No, sir; not with them. Q. Spencer's office is in Joplin? A. Yes, sir. Q. You live at Webb City? A. Yes, sir. Q. Were at Webb City on the 1st? A. Yes, sir. Q. Was Playter there in Webb City on the 1st? A. I saw him there. Q. How long was that before the 2d? A. It wasn't more

than a few days before the 2d. Q. You say now you made no arrangement with him to meet him after the expiration of that contract? A. I made no arrangement to meet him any place. Q. You don't know why you did meet him? A. Only what I told you. I suppose he was in there doing business with them, the same as I was. Q. Was any other business transacted there between them and the Spencers? A. That I couldn't tell you, because I have generally all I can attend to to attend to my own business. Q. Did you have any other business there? A. I had my business there with them to ask if I was perfectly right in taking up them papers. Q. You had no other business in Spencer's office that day, except something connected with the 'Get There Lease'? A. Perhaps you know. Q. You told me that. Probably I don't know as much as you do? A. You appear to. Ask me the question, and I will answer. Q. I understood you to say you had no other business there excepting something connected with the sale of the 'Get There Lease'? A. That is all I went for on the 2d, to see whether I done right in taking up the papers. I am not an attorney. Q. How much did you get as the purchase price out of the sale of the 'Get There Lease'? A. You mean all the while? Q. Yes; that is, from Tibbets and the Playters? What was the purchase price? What was received by you from Tibbets or the Playters, or anybody else interested with you? A. In the first place, I received \$5,000. Q. How much afterwards? A. \$95,000. Q. All together made \$100,000? A. Yes. Q. Now, you thought, by getting down there on the 2d, and drawing up this new contract, you would relieve yourself of the obligation to Corder? A. Why, no; I didn't think a breath about Corder. I thought the property was worth more, and I would get it, which it was. Q. Did you have Mr. Corder in mind? A. I didn't think anything about him. I supposed Mr. Corder was out of it after that date. Q. I believe you said nobody else had any claims on you regarding this property, excepting the contracts you speak of of March 22d? A. Not at any time. Q. You don't know of any lawsuits that were threatening against you about this matter, do you, at that time? A. No, sir; I wanted to steer clear of them. Q. Nobody had threatened you? A. No. Q. Playter didn't threaten you? A. They couldn't. They didn't have no show to do it. Q. I am asking if they did? A. No, sir; my relations with them was always friendly, and with everybody else. I thought like this, if they lived up to the contract, they got the money, according to the papers; if they didn't, they wasn't entitled to it. That is the same as to any other papers."

Redirect examination: "Q. Did you authorize Bruen, or anybody else, to extend the time or agree to any extension of time on those first papers? A. I do my own business, regardless of Bruen or anybody else, when

I am able to walk. Q. Did you? A. No, sir; if I did, I gave him a paper. Q. Something was said here about Bruen attending to this matter prior to the 22d of March. Where were you then? A. Was at Hot Springs, for 25 or 30 days. Geddes was mistaken when he said he saw me a few days before that, because I went there the last of February, and stayed there until Sunday, the 19th of March, and came to St. Louis, and had some business there the next day. That was the 20th, and I got home the 22d, in the morning. Q. After you got home on the 22d of March, this contract was entered into. Who represented you? A. Didn't anybody represent us."

Opinion.

This is a sufficient recitation of the testimony to enable us to determine the controverted questions involved in this cause. We have carefully analyzed the petition in this case, and have reached the conclusion that it states a good cause of action. While the contract entered into by defendant with plaintiff is the origin of the cause of action, it is not in fact a suit upon the contract, but is simply a concise statement of a cause of action for fraud, alleging the damages sustained by reason of the fraudulent conduct of the defendant. The contract was an essential ingredient to the cause of action, and is embodied in the statement of it. The allegations in the third count of the petition, as to the contract by defendant with plaintiff for the sale of this mining lease, and the performance of it by plaintiff, were necessary in order to place plaintiff in a position to complain of the fraudulent acts of defendant, which, it is averred, deprived him of the fruits of his labor in the performance of the contract. The cause of action as alleged in the third count of the petition is not based upon the breach of the verbal agreement by defendant, prior to the expiration of the original contract, to extend the time of payment of the balance of the purchase money to the 1st of June. In this respect the prayer of the petition, "That by reason of breach of said verbal agreement and promise to extend said original contract by defendant, and by reason of the fraud thereby practiced on plaintiff by defendant, plaintiff is damaged in the sum of five thousand dollars, for which sum, together with costs, plaintiff prays judgment," is misleading. This does not, however, affect the substantial averments of the petition, and would not prevent a recovery upon the true cause of action stated in the petition. The erroneous conception of this verbal agreement consists in treating it as a part of the cause of action, when its only purpose is that of being a part of the evidence which tends to establish the facts constituting the cause of action.

The substantial allegations of fraud, as charged in the petition, are in respect to the efforts of the defendant to have the time ex-

pire in which the original contract was to be consummated in order to deprive plaintiff of his commission. While the failure to carry out the verbal agreement that on the 1st day of May he (the defendant) would extend the time for the completion of the trade would not furnish the basis for a cause of action, yet it was competent and very material testimony, as tending to show how defendant was operating to prevent the consummation of the original contract according to its terms. This is not an action to enforce the verbal contract referred to in the petition, nor is it an action for the breach of it. We may concede, for the purposes of this case, that the verbal agreement, in respect to this mining lease, was not of such a character as could have been enforced, or for which an action would lie for the breach of it. Yet we take it that in this action, where all the facts are alleged, and it is charged in effect that the defendant fraudulently prevented the consummation of the original contract, in order to deprive plaintiff of his commission, it was clearly competent to show his entire conduct, his or his agent's verbal agreement, which were calculated to deceive or mislead the contracting parties, and prevent them from complying with the first contract. The statute of frauds has no application to the cause of action stated in the third count of the petition.

If the facts are true as averred in the count in the petition upon which this case was tried, it is clear that they constitute a fraud upon the rights of the plaintiff, for which he is entitled to recover damages. Contracts of the character involved in this litigation are presumptively entered into in good faith, and it is the province of the courts, in administering the law as to such contracts, to carefully protect the interests of the parties according to the true spirit and meaning of the contract. Litigation is not uncommon upon this subject; in fact, it has had the attention of the courts of all the states more frequently than almost any other. An examination of the cases will demonstrate most clearly the tendency of all the courts to zealously guard against the efforts of principals to avoid the payment of the legitimate commissions to the broker. It is unnecessary to burden this opinion with the citation of cases. It is sufficient to call attention to the very careful and correct annotation of all the cases on this subject, in *Brackenridge v. Claridge*, 49 L. R. A. 598. There you will find but one unbroken line of expression, "That, where the broker is the instrument through which the sale has been effected, no sort of artifice, deceit, or fraud will deprive him of his commission."

Appellant very earnestly insists that the testimony as to the conversations and agreement with Bruen was incompetent, on the ground that no sufficient evidence was introduced showing his authority to represent the defendant. Counsel for appellant very ably

and logically present that question. We will say, however, we have carefully examined all the evidence disclosed by the record on that subject. It must be noted that the first negotiation in respect to this property was had by the plaintiff with Bruen. C. C. Playter, in whose name the original contract was made, negotiated and talked with Bruen. George Playter, who testified as to the verbal agreement, negotiated with Bruen. This, in connection with the testimony of James I. Geddes, certainly was sufficient to at least submit that question to the jury. Witness Geddes testified upon that particular subject as follows: "Q. Are you acquainted with Mr. Bruen? A. Yes. Q. What relation is he to Col. O'Neill? A. Son-in-law. Q. Now, what conversation, if any, did you have with Col. O'Neill regarding Mr. Bruen's authority to act for him? State what it was in this matter. A. He said anything I had to communicate or any act of Bruen was his act. Mr. Bruen done his business. Q. Was that with reference to this transaction? A. Yes, sir." There was a sufficient showing to submit the questions to the jury, and they were the triors of the facts, and had the right to weigh the testimony and determine the fact as to the authority of Bruen to represent the defendant.

This brings us to the complaint of the appellant in respect to the instructions of the court, upon submitting this case to the jury. The instructions for the plaintiff were as follows: "(1) The court instructs the jury that under the contract read in evidence, dated March 22, 1899, the defendant agreed to pay plaintiff the sum of five thousand dollars if the terms and conditions therein expressed were complied with by C. C. Playter or his assigns. You are further instructed that if you find, from the evidence, that during the life of this contract, that is to say, on or before May 1, 1899, it was agreed between C. O. or George H. Playter, acting in that behalf for Frederick R. Tibbets, of Boston, Mass., if you find they were so acting, and the defendant, James O'Neill, by himself, or through his agent, George H. Bruen, if you find said Bruen was defendant's agent, and authorized to act for him in reference to the matter, that the time for the completion of the purchase of the 'Get There Lease' from the defendant by said Tibbets would be extended, provided the sum of ten thousand dollars was paid defendant on or before May 1, 1899, and that said Tibbets was able and willing to comply with the contract read in evidence, dated March 22, 1899, and would have done so, had it not been for such agreed extension, if you find such extension was agreed upon, and the defendant refused to grant such extension on the 1st day of May, 1899, but agreed to make a contract with them on the next day, and thereupon did make the contract read in evidence, dated May 2, 1899, and if you fur-

ther find, from the evidence, that defendant's delay in making the last-named contract until after the 1st day of May was for the purpose or with the intention or design of relieving himself from his obligation to pay plaintiff his commission as agreed upon, or was done with the design or intention on his part of depriving plaintiff of his commission for the sale of said lease, then you will find the issues for the plaintiff, and assess his damages at the sum of five thousand dollars, together with interest thereon at the rate of 6 per cent. per annum from the time demand was made by plaintiff upon defendant for such commission; if you believe, from the evidence, such demand was made. (2) The court instructs the jury that if you find, from the evidence, that the defendant, James O'Neill, authorized one George H. Bruen to act for him, and to agree with Playter for an extension of the time in which to comply with the contract of March 22, 1899, read in evidence, then and in that event an agreement to that effect made by said Bruen would be binding on defendant to the same extent as if made by himself personally."

Instruction No. 1 is erroneous. This, as before stated, is an action for damages induced by the fraudulent acts and conduct of defendant. While the contract fixing the amount of commission was competent evidence for the jury to consider in measuring the damages to be awarded, yet the jury had the right to estimate the damages, and so state in their verdict. The error of this instruction in that respect is in the fact that the court tells the jury that, if they find a certain state of facts, they will assess the damages at \$5,000. This count is not an action on the contract, and the contract, under the law of this case, cannot definitely fix the amount of damages. This instruction should have told the jury, if they find for the plaintiff, they should assess his damages at such amount as they may believe, from the evidence, he is entitled to, not exceeding the sum of \$5,000. It was also error to have the jury assess as damages any interest. The damages in this case is unliquidated. No interest is claimed in the petition. This instruction should have also omitted special reference to the verbal agreement as between Playter and Bruen. While this was material and most important evidence as to the perpetration of the fraud complained of in the petition, yet it ought not to be singled out and made the entire basis for the recovery. The issues, by an appropriate instruction, should be clearly defined. Their attention should be called to the contract of plaintiff with defendant for the sale of the mining lease, as it is in the first part of the instruction. This should be followed by directing their attention to the contract entered into by C. C. Playter, for Tibbets, with defendant, purchasing the mining lease, and requiring them to find that plaintiff, under

his contract with defendant, brought about this sale; then followed with the requirement to find, by reason of the fraudulent acts and conduct of defendant, the action of consummating the first contract was deferred and prevented by defendant until the 2d day of May, with the fraudulent intent and design of depriving plaintiff of his commission. The foregoing is not to be construed as a form for an instruction, but simply as a suggestion as to the features that should be embodied in one, so as to render it unobjectionable.

Instruction No. 2 is erroneous, because it is calculated to mislead the jury as to the true purpose of the testimony as to the verbal agreement by Bruen to extend the time in which to comply with the contract. That testimony, as before stated, is admissible only for the purpose of establishing the charge of fraud alleged in the petition. It is for the purpose of showing the efforts of defendant to mislead the contracting parties, and then, when the time comes to act, refuse to act, and by that method prevent the consummation of the first contract. The cause of action on trial does not require the jury to find that the agreement with Bruen, as the agent of defendant, was a binding contract, and one that could be enforced. The concluding part of that instruction, which tells the jury, "then and in that event, an agreement to that effect made by said Bruen would be binding on defendant to the same extent as if made by himself personally," should be left out, and in lieu thereof might be added, "then and in that event the acts and conduct of Bruen in respect to such agreement will be construed to be the acts of the defendant, and the jury may take into consideration such facts in determining the issues in this cause." With this modification, the first instruction clearly defining the issues, the jury would be advised as to the application of the testimony as to the issues, and not misled into the belief that the court was directing them to find the agreement a binding contract upon the defendant.

We have examined the record, and have reached the conclusion that if the plaintiff, in pursuance of his contract with defendant, brought about the sale of the mining lease, as indicated by the first contract, with C. O. Playter, and that defendant, by misleading the contracting party, and by his fraudulent acts and conduct, prevented such sale being consummated on the 1st of May, and designedly deferred the final completion of the sale until the 2d of May, in order to deprive plaintiff of his commission, he is liable in this action. This is substantially the cause of action set forth in the third count of the petition. The discussion of the errors in the instructions given at the instance of plaintiff indicate clearly the views of this court as to the issues which should be submitted in the declarations of law upon a retrial of this case. Hence it is unnecessary to review the

contentions as to the instructions for the defendant, and modification of them, by the court.

For the errors as indicated by the views herein expressed, the judgment will be reversed, and the cause remanded. All concur.

STATE ex inf. CROW, Atty. Gen., v. ATOHISON, T. & S. F. RY. CO.*

(Supreme Court of Missouri. June 15, 1903.)

RAILROADS — TERMINALS — RECONSIGNMENT CHARGES — QUO WARRANTO — INTERSTATE COMMERCE — POWERS OF COMMISSION — EXCLUSIVENESS.

1. The imposition of a reconsignment charge by railroad companies having switch tracks within a city, whereby a certain charge is made for the delivery of each car of grain from the track upon which it is originally placed to that designated by the consignee, is a matter of private concern between the railroad companies and the consignees, and not one of public interest, and quo warranto will not lie to prevent the companies from making such charge.

2. Rev. St. 1899, §§ 1112-1115, requiring delivery by the initial carrier of freight upon any track it owns, leases, or uses, or can use, does not prevent such initial carrier from assessing a reconsignment charge for delivering a shipment upon another track than that upon which it was originally placed.

3. Quo warranto will not lie to prevent the violation of a custom of railroads having switch tracks in a city to deliver consignments of goods from one track to another without making extra charge therefor.

4. Interstate Commerce Law, §§ 1-9, Act Feb. 4, 1887, c. 104, 24 Stat. 379, 382 [U. S. Comp. St. 1901, pp. 3154-3159], provides that all charges for service rendered in transportation of property, or for receiving, delivering, storage, or handling of such property, shall be reasonable and just, and prohibits unjust discrimination, and prohibits the making or giving of any undue or unreasonable preference. It is further provided that for any violation of the act the carrier shall be liable to the person injured thereby, and that any person claiming to be damaged may either make complaint to the interstate commerce commission or sue in his own behalf, etc. Other sections of the act furnish remedy by way of injunction in the Circuit Court of the United States. Held, that the remedies afforded by the act extend to the regulation of charges imposed by railroad companies for the transportation of consignments from the part of a city to which they were originally delivered to some other part at the consignee's order, and exclude the review of such questions by quo warranto in the state courts.

5. Under Rev. St. 1899, c. 12, arts. 2, 4, establishing a state railroad commission, prescribing their powers and duties, and declaring that, if any private individual sustain damages by reason of any fault of a railroad, he shall be afforded redress by resort to a state court, or by complaint to the railroad commission, quo warranto will not lie to prevent railroad companies from making reconsignment charges for delivering cars from the track in a city upon which they are first placed to another track designated by the consignee; the remedy provided by statute being exclusive.

In Banc. Quo warranto by the state, on the information of Edward O. Crow, Attorney General, against the Atchison, Topeka & Santa Fé Railway Company. Writ quashed.

*Rehearing denied July 2, 1903.

Edward C. Crow, Atty. Gen., Frank Hagerman, and Adiel Sherwood, for relator. Edward D. Kenna, Robert Dunlap, Gardiner Lathrop, and Samuel W. Moore, for respondent.

BURGESS, J. This is a proceeding by quo warranto, ex informatione the Attorney General, against the respondent, the Atchison, Topeka & Santa Fé Railway Company, a railroad corporation doing business in this state, to oust it from the exercise of certain rights, privileges, and franchises alleged to be illegally exercised by it. The information alleges that the respondent is a corporation of the state of Kansas, operating lines of railway extending through the territory of Oklahoma and the states of Colorado, Kansas, Nebraska, and Missouri, to Chicago, Ill., and extending west and south from Kansas City to San Francisco, Los Angeles, and San Diego, Cal., and the Rio Grande river; that it has no authority to do any business in Missouri, except as a foreign railroad corporation, having complied with its laws and obtained a certificate to do business in the state; that Kansas City is a market city for grain and grain products, with large mills and elevator facilities, and, being located on the lines of many railroads, it reaches the Eastern, Western, Northern, and Southern markets; that it is important to the people of this state that Kansas City be maintained as a grain market; that there is in Kansas City a large number of firms or companies, employing a large number of men and having a large investment of capital in the business of dealing in, buying, selling, storing, and handling of grain, many of them doing business as commission merchants, and all of whom have made their investments upon the faith of the course of business hereinafter stated; that Chicago and the cities and towns upon the Mississippi river are strong competitors of Kansas City for grain; that it has been customary to ship grain to Kansas City in car and train load lots, and place the same on what are called "hold tracks," for inspection, barter, and sale, and subsequent directions for delivery in the city of its destination; that on the faith of such universal custom and usage large numbers of the citizens of this state, and especially said persons at Kansas City, have engaged in the grain, elevator, milling, feed, and stock business, and invested large sums of money therein; that the course of business has been, in shipping grain to Kansas City, for the shippers to draw drafts against the shipments with bills of lading attached, with the right to the consignee to inspect the shipments on the "hold tracks" before making payment of such drafts; that about 57,000 cars of grain are brought into the Kansas City market and placed upon the "hold tracks" in the course of a year, of which about 67 per cent. is brought in by the Santa Fé, Missouri Pacific, Rock Island, and Burlington Railway Com-

panies; that up to July 28, 1902, the universal custom at Kansas City and all cities west of the Mississippi river had not only been to place the cars upon the "hold tracks," but to take them from thence to the point of delivery in said city designated by the consignee, without additional charge for so much of the carriage as passed over the tracks of the initial carrier or the tracks used by it; that switching charges over the tracks of connecting lines were made, averaging \$3 per car; that 48 hours' free time for inspection, sale, and delivery of cars, after arrival on "hold tracks," is allowed, a charge of \$1 per day per car being thereafter charged for demurrage; that the grain coming to Kansas City is largely sent to elevators for cleaning and grading and subsequent shipment out; that there are a number of lines of railway, of which Kansas City is the western terminus, which are the competitors of respondent and the other through lines above mentioned for traffic destined from or through Kansas City to Eastern and Southern points, and such companies seek to carry a part of the grain brought into Kansas City by respondent to points east, south, and north of Kansas City; that respondent and other through lines use every effort and endeavor to carry all the grain brought through or to Kansas City by them from points on their lines to points east, north, and south of Kansas City; that, if they succeed, competition between the various railroads for the haul east, north, and south of Kansas City will be destroyed, which competition is beneficial to the public; that the Burlington, Missouri Pacific, Santa Fé, and Rock Island Railway Companies are the only companies having lines extending from the west through Kansas City, extending east thereof, and reaching the Gulf ports and the ports upon the Great Lakes; that said four companies have adopted the practice of having large elevators constructed on their lines in the heart of the grain producing country, for the storage of grain, for the purpose of having such grain carried over their lines for the longest possible distance, and to said Gulf and Lake ports, and they seek to impose a reconsignment charge at Kansas City of a sufficient amount to deter producers of grain from shipping the same to the Kansas City market; that to protect themselves against those producers and dealers who will not ship over the lines of said four companies to markets east and south of Kansas City, said companies conspired and confederated to adopt some device or scheme in the way of an unlawful delivery charge for delivery at said Kansas City from the "hold tracks" to the point in Kansas City, Mo., designated by the consignee, which would enable them to haul out of Kansas City practically all the grain destined east, north, and south thereof; that such scheme is oppressive to the public, a burden to the Kansas City market, interferes with shipments thereto, and places the

consumers, merchants, and people of that city, and those there dealing in grain, at a disadvantage in attempting to compete with the Eastern, Northern, and Southern markets; that the result of the combination and conspiracy is to divert grain from the Kansas City market, which legitimately would flow to the said market, or pass through the same for sale and ultimate disposition; that said grain is concentrated at Western points and shipped over said lines to points south, east, and north of Kansas City; that the device and scheme so adopted was this: that said four through lines would make an extra charge, called a "reconsignment charge," of \$2 per car for delivering any car of grain in Kansas City, Mo., at any connection with any other railroad, or at any warehouse or mill or elevator or private industry therein, in addition to the switching and demurrage charges hereinbefore mentioned, and in addition to the freight charge made for carrying such grain to the consignee at Kansas City; that notice thereof was given, making said charge effective on the 28th day of July, 1902; that said charge is ultimately paid by the producer, places the Kansas City market at a disadvantage as compared with other concentrating points west of the Mississippi river, and is wholly unwarranted by law; that said reconsignment charge is absorbed or refunded if grain coming into Kansas City over one of said four lines is taken out of said city east, north, or south upon any of the other of said four lines, but not if it goes out over any other line; that the effect of said absorption or refunding of said charge is to create a monopoly in the buying, selling, and dealing in grain in favor of those who can and will ship out of Kansas City over one of said four lines; that the scheme and plan aforesaid is a discrimination in Kansas City, Mo., in charges and facilities between transportation companies and individuals, contrary to the laws of the state of Missouri; that an exclusive right and privilege is thereby given to shippers out of Kansas City over said four lines, contrary to the Constitution and laws of Missouri; that said shippers have an unlawful advantage over those persons, firms, and corporations who do not so ship, and who are engaged in similar business under similar circumstances and conditions at the same place; that the competition of other railroads for the transportation out of Kansas City of the 67 per cent. of the grain or grain products received thereat over said four lines is thereby prevented; that said reconsignment charge constitutes a discrimination against the locality of Kansas City, because no such charge is made upon grain or grain products transported to any other city in the state and afterwards transported therefrom; that under the laws of the state it is the duty of every railroad company to deliver grain at every point designated by the consignee on the line of such road, including crossings with other lines,

without discrimination; that the result is that the respondent is illegally charging \$2 on each car of grain shipped to Kansas City, Mo., for delivering the same in said city to the point on its lines designated by the consignee, under the false and fictitious pretense that it has the right to place the car upon the "hold tracks," notify the consignee of its arrival at such point, and then, when he designates the place of delivery, to make such charge for such delivery by calling it a "reconsignment charge," and then refund same only to the shipper or consignee who will ship from Kansas City, Mo., over their lines, or any one of the said four through lines, a like amount of grain or grain products. The defendant filed answer and return to the information in which is raised both issues of law and of fact.

The issues of law, upon which the cause is now submitted, are as follows: (1) That plaintiff ought not to have or maintain its aforesaid action, because it appears upon the face of said information that the object sought thereunder is the vindication of purely private rights and the redress of private grievances, in which the public has no interest, and for which there is full and adequate remedy both at law and in equity, available to each and all of the parties interested therein; and an original proceeding by information in the nature of quo warranto is not a proper remedy therefor, and this court has no jurisdiction over said matters in this proceeding. (2) That there is no usurpation or unlawful exercise of any franchise, right, or privilege set out in said information, and no sufficient facts stated therein to constitute a cause of action, or to entitle informant to the judgment prayed, or any relief whatever, in this proceeding. (3) That there is no unlawful exercise of any rights, privileges, or franchises shown in and by said information, when this court has authority or jurisdiction to inquire into or adjudicate concerning in this proceeding.

It is insisted by defendant that the information shows upon its face that it is prosecuted solely for the vindication of private rights and the redress of private grievances, in which the public has no interest, and therefore this proceeding cannot be maintained. Upon the other hand, it is asserted that there is nothing in the information to justify such claim, but, even if there was, this court has no power to interfere with the determination of the Attorney General, upon an information of this character, that public, as distinguished from the private, interests are involved. We concede that the Attorney General ex officio exercises his own discretion, and without leave of court has the right at any time to file in the Supreme Court an information in quo warranto wherein matters of public interest are involved; but that he cannot maintain such a proceeding solely for the vindication of private rights or the redress of private grievances, in which the public has no

interest, we think clear, and, if these facts appear from the information, they may be taken advantage of by return, or special plea to the order to show cause. The chief grounds of complaint are those affecting the rights of certain grain dealers in Kansas City, and certain railroad companies whose terminus is at that city, who deny the right of defendant to make a particular charge, called a "reconsignment charge," on grain and grain products made by four through lines of railroad, for a service actually rendered, after delivering the grain upon certain of their tracks known as "hold tracks," which said service had been performed gratuitously prior to July 28, 1902, and which said charge absorbed or was refunded in the event of reshipment out of said city over any of said four lines of road. We are unable to see wherein the public has any interest in the "reconsignment charge," which is paid solely by certain grain dealers and railroads whose western terminus is at Kansas City for an additional service not covered by the freight into that city, and which they have the right to charge, provided it be nothing more than what is reasonable for the services rendered.

In *Spelling on Injunctions and Other Extraordinary Remedies* (2d Ed.) vol. 2, § 1773, it is said: "It has been stated that quo warranto originated as a prerogative remedy, and has always retained the character as a judicial means for the assertion of sovereign rights. It is, and always was, a mandate issuing from or at the instance of the sovereign against an individual or corporation, requiring him or it to show quo warranto—by what warrant or authority—an office or franchise is claimed or exercised. That feature adheres to it in all cases, even where the interest of the relator seems to outweigh any public interest in the question at issue, as where it is resorted to to test the title to an office between two claimants; for, while the public may not have any interest in the question whether A. or B. shall perform the duties and enjoy the emoluments of a public office, still it has an interest that neither A. nor B. shall usurp a public office. And the same reasoning applies where title to an office in a private corporation is in dispute, since such controversy usually involves the further question of whether a corporate franchise has or has not been usurped. Hence quo warranto will not issue merely for the determination of a private right, where the whole community are not interested. Parties must be their own judges as to suits they will institute to have their private rights determined, and these must be tried and adjudicated upon their merits, where no general public interests are affected." Later on in section 1830, of the same volume, it is said: "The people of the state have no power to invoke the action of the courts of justice in this form for the redress of civil wrongs sustained by some citizens at the hands of others. When

the people come into court in the name and right of a sovereignty, as plaintiffs in a civil action, they must come upon their own right for relief to which they are themselves entitled. It is not sufficient for them to show that wrong has been done to some one. The wrong must appear to be done to the public, in order to support an action by the people for redress. This principle has been applied and illustrated in numerous cases, both in England and the United States. Thus, where a turnpike company, in making the road through private lands, had failed to compensate the owners according to the direction of the act, it was held that the company was merely a trespasser, and that the fact that the public was in no way interested in such controversy was a sufficient reason for not granting an information in the nature of quo warranto. In such cases, it is plain that entering and injuring lands of private parties is neither an abuse nor an assumption of corporate power, but simply a violation of private right. A provision of the company's charter, requiring it to do certain things before entering on lands, is inserted, not for public, but for private, security. By entering without complying, the company was simply guilty of a tort, as its trespassing agents would have been if no charter had been granted."

In *Beach on Private Corporations*, vol. 1, § 58, it is said: "Something more than a non-user, accidental negligence, excess of corporate power, is requisite to constitute a cause of forfeiture. There must be some willful or improper act or neglect, such as to work or threaten a substantial injury to the public, or actual inability to perform some corporate obligation, or an entire nonuser of its powers and privileges for such a time as to create a presumption of surrender. The transgression must not be merely formal or incidental, but material and serious, and such as to harm or menace the public welfare; for the state does not concern itself with the quarrels of private litigants. It furnishes for them sufficient courts and remedies, but intervenes as a party only where some public interest requires its action. Corporations may, and often do, exceed their authority where only private rights are affected. When these are adjusted, all mischief ends, and all harm is averted."

In *State ex rel. v. Meek*, 129 Mo. 436, 31 S. W. 915, the court says: "The primary and fundamental question in a proceeding by quo warranto is whether the defendant is legally entitled to the office, and not as to the rights of any person who may claim it."

In *Ramsey v. Carhart*, 27 Ark. 12, the syllabus is as follows: "The writ of quo warranto will only issue in the name of the state in cases where the whole community are interested, and will not be granted at the instance of an individual for the determination of a private right." The court says: "The only question is whether a quo warranto will

issue on the relation of a private person. It was held, in *State v. Ashley*, 1 Ark. 279, *Caldwell's Adm'r v. Bell and Graham*, 6 Ark. 227, and *State v. Williams*, that the writ of quo warranto would only issue on the relation of the Attorney General, in the name of the state, in cases where the whole community are interested, and would not be granted at the instance of an individual for the determination of a private right. * * * Quo warranto was invented originally, not to determine which of two persons were entitled to an office, but to require the incumbent to show by what authority he was exercising or attempting to exercise the duties of an office created by sovereign authority. The issue was between the state and the person in office, and not between two persons who claimed the right to exercise its duties. In short, quo warranto is the right of the state, and only issues at the instance of the state. It was not, nor is it now, designed or used as a remedy at law by which individuals may contest the right to an office. The Legislature has provided a separate remedy for the determination of such a question, and the parties must seek the remedies provided for them, instead of one provided for the state."

In *Cupit v. Bank*, 20 Utah, 293, 58 Pac. 842, the court says: "It is well settled by abundant authority that the writ will not issue and cannot be invoked for the purpose of determining merely a private right in which the public is not interested." To the same effect are *People v. Cooper*, 139 Ill. 461, 29 N. E. 872; *People ex rel. v. Bridge Co.*, 13 Colo. 11, 21 Pac. 898, 16 Am. St. Rep. 182; *State v. Railroad Co.*, 50 Ohio St. 239, 33 N. E. 1051; *Territory v. Virginia Road Co.*, 2 Mont. 104; *People v. Railway Co.*, 8 Colo. App. 301, 46 Pac. 219; *Attorney General v. Railway Co.*, 96 Mich. 65, 55 N. W. 562; *Attorney General v. Salem*, 103 Mass. 138; *People v. Drainage Commissioners*, 31 Ill. App. 219; *Reagan v. Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014.

Quo warranto is not a remedy to determine disputes between private persons and a corporation, but is to determine by what right a corporation exercises wrongfully or illegally a certain franchise, or to oust it from the right to be a corporation, for an abuse or nonuser of franchises granted. In a word, it will only lie against a corporation for some violation of its charter. But it is claimed by the Attorney General that sections 1113-1115, Rev. St. 1899, require delivery by the initial carrier of freight upon any track it owns, leases or uses, or can use, and that the enforcement of that statute necessarily deprives the railroad companies of this right to assess and collect the reconsignment charges described in the information. We are unable to concur in the view that, because the statute imposes additional duties upon initial carriers to those incurred by

contract, express or implied, that therefore it in any way deprived the railroad companies of the right to assess and collect a reasonable compensation for such extra work. There is nothing in the express terms of the statute requiring a free delivery to elevators or elsewhere after being placed on the "hold tracks," nor can such duty be implied from the language used. Nor do we believe the Legislature so intended; otherwise, it would have so indicated. Our conclusion is that mere private rights are invoked in this proceeding, and that quo warranto will not lie.

Nor will quo warranto lie for the violation of an alleged custom of gratuitously performing the services for which the reconsignment charge is now made. No legal right can be predicated upon such a custom. Usages and customs may be useful in the interpretation of a contract which was made with respect thereto, but cannot be held to create them. 27 Am. & Eng. Ency. of Law, 712; *Ulmer v. Farnsworth*, 80 Me. 500, 15 Atl. 65. "Usage cannot make a contract where there is none." *National Bank v. Burkhardt*, 100 U. S. 692, 25 L. Ed. 766; *Tilley v. County of Cook*, 103 U. S. 155, 26 L. Ed. 374.

It must be obvious to any one that the charges in question are made with reference to interstate commerce; for, as long as the loaded car remains in the custody of the initial carrier, and until it is finally delivered to the consignee or forwarded to its final destination upon his order, after being placed upon the "hold tracks," any further movement of the car would be a part of the interstate transportation, charges for which service are fully covered by the interstate commerce law. Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]. Section 1 of that law provides that the provisions thereof shall apply to any common carrier engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment from one state or territory of the United States to any other state or territory. It also contains the following provision: "All charges made for any service rendered or to be rendered in the transportation of passengers or property, as aforesaid, or in connection therewith, or for the receiving, delivering, storage or handling of such property, shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful." Section 2 prohibits unjust discrimination as between shippers in the making of charges for any service rendered in the transportation of a like kind of traffic under substantially similar circumstances and conditions. Section 3 prohibits the making or giving of any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or

any particular description of traffic. Section 6 provides for the establishment, printing, and posting of schedules of rates in force at the time upon its route, which schedules shall plainly state the places upon its railroad between which property and passengers will be carried, and "also state separately the terminal charges and any rulings or regulations which in any wise change, affect or determine any part of the aggregate of such aforesaid rates, fares and charges."

It will thus be seen that any and all services incidental or necessary to the transportation and final delivery of the shipment is a part of the interstate transportation, and that charges therefor are regulated by the interstate commerce act. Section 8 provides that for any violation of the act the common carrier "shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court." Section 9 provides "that any person or persons claiming to be damaged by any common carrier, subject to the provisions of this act, may either make complaint to the commission, as hereinafter provided, or bring suit in his or their own behalf, for the recovery of the damages for which such common carrier may be liable, under the provisions of this act, in any District Court or Circuit Court of the United States of competent jurisdiction, but such person or persons shall not have the right to pursue both of said remedies, and must, in each case, elect which one of the two methods of procedure herein provided for he or they will adopt." Other sections of the act furnish remedy, by way of injunction in the Circuit Court of the United States, to the commission or any company or person interested in its order or requirement, against the continuance of violations of the act by common carrier. Further relief by way of injunction in the Circuit Court of the United States against violations of the act is afforded by virtue of section 3 of a recent act of Congress, approved February 19, 1903, entitled "An act to further regulate commerce with foreign nations and among the states." 32 Stat. 848, c. 708.

That the validity of all charges for services rendered in connection with interstate transportation is vested exclusively in the interstate commerce commission and the courts of the United States is well settled. In the case of *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962, the state of Kentucky passed an act providing that it should be unlawful for the bridge company to charge, collect, demand, or receive for passage over the bridge spanning the Ohio river any toll, fare, or compensation greater or in excess of certain rates prescribed by the act, which were much less than the directors had fixed. The court held that the traffic across the river

was interstate commerce; that the bridge was an instrument of such commerce; that the statute was an attempted regulation of such commerce, which the state had no constitutional power to make, and that Congress alone possessed the requisite power to enact a uniform scale of charges in such a case; the authority of the state being limited to fixing tolls on such channels of commerce as were exclusively within its territory. So in *Interstate Commerce Commission v. Railway Co.*, 167 U. S. 633, 17 Sup. Ct. 986, 42 L. Ed. 306, it was said: "It must be conceded that a state railroad corporation, when it engages, as a common carrier, in interstate commerce, by making an arrangement for a continuous carriage or shipment of goods and merchandise, is subjected, so far as such traffic is concerned, to the regulations and provisions of the act of Congress. * * * So, likewise, it is settled that, when a state statute and a federal statute operate upon the same subject-matter and prescribe different rules concerning it, and the federal statute is one within the competence of Congress to enact, the state statute must give away. *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088; *Gatton v. Railway Co.*, 95 Iowa, 112, 63 N. W. 589, 29 L. R. A. 556; *Fletcher v. Railway Co.* (Tex. Civ. App.) 42 S. W. 362; affirmed, 92 Tex. 176, 46 S. W. 633; *Copp v. Railroad Co.*, 43 La. Ann. 511, 9 South. 441, 12 L. R. A. 725, 26 Am. St. Rep. 198."

It follows, from what has been said, that no common carrier doing an interstate business derives its right to charge tolls or fares for interstate transportation, or for services therefor or in connection therewith from the state, but from the federal government; hence the state has no power or authority to forfeit such right or franchise, or to oust any such common carrier from the exercise of any such right. But, even if the matter under consideration is not interstate (which we do not concede), and the state alone possesses the requisite power to regulate the charge in question, will quo warranto lie to control the defendant company in making, charging, and collecting rates for transportation and for charges for services rendered in connection therewith? The Legislature has made ample provisions for the regulation of transportation charges by railroads and prohibiting discriminations. Articles 2 and 4, c. 12, Rev. St. 1899. Unjust and unreasonable rates and charges, discrimination, undue advantages and preferences, and, in fact, the entire subject-matter of transportation wholly within this state, are fully covered, remedies provided, and penalties imposed; by the article last named a state railroad commission, some of the powers and duties of which are provided for by said article 2. The commission is also given the right to appeal to the courts of this state for assistance in the enforcement of its orders. By these statutes, if any private individual sustains damages by reason of any fault of a railroad common car-

rier, he is afforded ample redress by resort to the state courts or by complaint to the railroad commission. These statutes having been enacted in pursuance of the Constitution, the remedies therein pointed out for redress for damages sustained are exclusive, and it is therefore not within the jurisdiction of this court to entertain quo warranto against defendant on account of any such matter.

In *State ex rel. v. Francis*, 88 Mo. 557, it is said: "When the General Assembly, in obedience to the constitutional mandate, designates by general law the court or courts, or judge, by whom election contests shall be tried, and regulates the manner of trial, and all incidents thereto, from that moment the jurisdiction of courts or judges not thus designated ceases, if they possessed it before, and the courts to which the jurisdiction is confided must exercise it as prescribed by law. *State ex rel. Attorney General v. Mason*, 77 Mo. 189; *State ex rel. v. Vail*, 53 Mo. 97; *Commonwealth v. Garrigues*, 28 Pa. 9, 70 Am. Dec. 108; *Commonwealth v. Henszey*, *81 Pa. 101; *Baker v. Railroad Co.*, 86 Mo. 544; *Souland v. City*, 38 Mo. 546; *People's Railroad Co. v. Grand Ave. Railway Co.*, 140 Mo. 245, 50 S. W. 829; *Young v. Railway Co.*, 83 Mo. App. 509; *State ex rel. v. Marlow*, 15 Ohio St. 114. In *Winsor Coal Co. v. Railroad Co. (C. C.)* 52 Fed. 716, it was said: 'The right of action existing at common law in favor of the shipper for extortionate charges was superseded by the remedies provided by the statute.' Throughout the entire act it is clear that it was the legislative mind to impose upon the chosen agents of the state, the railroad commissioners, the duty of supervising and regulating the rates charged by such carrier, and to ascertain and declare, from time to time, as the changing conditions of trade and commerce might suggest, what, as between shipper and carrier, is a reasonable and just rate of compensation. In the absence of any affirmative action by the commissioners, the Legislature declares a maximum rate, and the carrier is to make and keep public a schedule within this maximum. The railroad commissioners may revise it, if deemed right and just to do so, and rates thus fixed are to be observed by the carrier until changed conformably to the statute. The statute expressly declares it to be unlawful for the carrier to exact a greater or less rate than that so scheduled. In the absence of any affirmative action by the commissioners, the intendment of law, arising from the legal presumption that public officers perform their duties, should be that no complaint had arisen of unjust charges, or that the commissioners, who are presumed to be in possession of the schedule adopted by the carrier, deemed the maximum fixed by the carrier and Legislature to be reasonable and just. * * * A right of action in favor of the shipper, it may be conceded, existed at common law for extortion-

ate charges; but the statute has superseded the common-law remedy."

Our conclusion is that, even if the reassignment charge be not interstate, but within the control and under the jurisdiction of this state, quo warranto will not lie to control the defendant in making, charging, and collecting rates for transportation and charges for services rendered in connection therewith. Nor do we think the information shows such a state of facts as would from any standpoint of view authorize the issuance of the writ of *oust*.

The plea to the information will be sustained, and writ quashed. It is so ordered. All concur.

101 LIVE STOCK CO. v. KANSAS CITY, M. & B. R. CO.*

(Court of Appeals at Kansas City, Mo. June 8, 1903.)

CARRIERS—LIVE STOCK—DELAY IN TRANSIT—LIABILITY OF INITIAL CARRIER—CONNECTING CARRIERS—REFUSAL TO ACCEPT STOCK—GROUNDS OF REFUSAL—CONTRACT OF SHIPMENT—STIPULATIONS—NOTICE OF INJURY—MEASURE OF DAMAGES—INSTRUCTIONS—PREJUDICIAL ERROR.

1. In an action against an initial carrier for injury to cattle in transit, the evidence examined, and held to sufficiently disclose negligence.

2. Where the agents of a connecting carrier refuse to accept cattle tendered by the initial carrier, because unaccompanied by a regular waybill, as required by a rule of their company, responsibility for their refusal is on the initial carrier, even though it furnished information sufficient to have enabled the connecting carrier to receive and properly bill the cattle.

3. In an action against an initial carrier for damages to cattle in transit, a charge that plaintiff was not compelled to consent to a delivery of the cattle to any other connecting carrier than that designated by it was improper, where there was no evidence that defendant required plaintiff to so consent.

4. In an action against a railroad for injury to cattle in transit, a charge that the measure of damages was the difference between the condition of the cattle as they should have arrived at a certain point and their condition as they did arrive was not prejudicial to defendant in misstating their destination as billed, where the place named in the charge and that designated by the bill were but a few miles apart.

5. A stipulation, in a contract of shipment of cattle, that in case of loss the value should be fixed as at the time and place of shipment, is valid, though there is nothing to show that the transportation was at a reduced rate.

6. Notice of injury to stock, required by a contract of shipment to be given by the shipper as a condition precedent to his right to damages for such injury, was waived by the carrier, where it, on receiving a partial and incomplete notice, refused to investigate the shipper's claim and denied liability.

7. Though a contract of shipment of cattle provided that the shipper should at his own risk feed and water its stock while en route, where the carrier undertook to perform that duty against the protest of plaintiff, it was liable for damages resulting from a negligent performance thereof.

Appeal from Circuit Court, Jackson County; Wm. B. Teasdale, Judge.

*Rehearing denied June 22, 1903.

¶ 5. See *Carriers*, vol. 9, Cent. Dig. § 904.

Action by the 101 Live Stock Company against the Kansas City, Memphis & Birmingham Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

L. F. Parker and Pratt, Dana & Black, for appellant. J. C. Rosenberger and Haff & Michaels, for respondent.

Statement.

BROADBUSH, J. This is a suit by the 101 Live Stock Company against the Kansas City, Memphis & Birmingham Railroad Company for delay of a shipment of stock at Memphis, Tenn., and for a failure to properly feed, water, and take care of said stock on the part of the Union Stockyards Company at Memphis, Tenn., into whose hands they were placed by the railroad company while waiting further orders, and to comply with the federal statutes in regard to watering and feeding stock in transit. There were three counts in plaintiff's second amended petition. At the trial plaintiff dismissed as to the first and third counts of the petition, and stood upon the second count, which alleged: That defendant was a railroad corporation and a common carrier between Birmingham and Memphis; that on the 5th day of June, 1898, at 7 o'clock a. m., at Birmingham, defendant received 361 head of cattle to transport to Memphis, Tenn., and there deliver to a connecting line, the St. Louis, Iron Mountain & Southern Railway Company, for further transportation to White Eagle, Okl.; that at said time, and for a long time prior thereto, there was and had been a custom on the part of said last-named railway not to receive any cattle unless the same was accompanied by regular waybills or expense vouchers, showing weight of shipment and freight charges thereon, and advanced and back charges and expenses of such shipment up to Memphis; that this was well known to defendant; that, at the time defendant received its cattle at Birmingham, defendant failed and neglected to procure, provide, or make out said regular billing, failed to inform plaintiff of the rule exacted by the St. Louis, Iron Mountain & Southern Railway Company aforesaid as to such waybills or expense vouchers, and failed to notify plaintiff that it would be unable to deliver said cattle in a reasonable time; that by reason of said negligence or carelessness defendant did not and could not deliver said cattle to the said St. Louis, Iron Mountain & Southern Railway Company in a reasonable time, and not until 24 hours had elapsed; that during said delay defendant, against the protest of plaintiff, caused said cattle to be unloaded in stock pens or yards wholly unfit for the proper care of said cattle, where said cattle were not properly watered or fed or cared for; that by reason thereof plaintiff was compelled to pay \$60 for feed and stockyard charges, \$16 for switching charges, and was compelled to make two stops en route, instead of one;

that 41 head of cattle sickened and died, and the remaining 320 head became sick and shrunk in weight—all to plaintiff's damage in the sum of \$1,500.

The evidence was somewhat conflicting. However, on the part of plaintiff, it tended to show the following facts, viz.: That plaintiff was engaged in the cattle business in Oklahoma Territory; that in the spring of 1898, through its agent, one Z. T. Miller, it bought and shipped from Selma, Ala., 361 head of cattle to White Eagle, in said territory; that they were billed from Selma over the Western Railroad to Montgomery, from Montgomery to Birmingham over the Louisville & Nashville Railroad, from Birmingham to Memphis over the defendant railroad, from Memphis over the Iron Mountain Railroad to Coffeyville, and from Coffeyville to their destination over the Santa Fé Railroad; that they were loaded at Selma in eight cars at 9 o'clock p. m. Saturday, June 4; that Miller, plaintiff's agent, accompanied the cattle, and that they arrived at Montgomery at about midnight the same day; that the Louisville & Nashville Railroad then took charge of them and delivered them at Birmingham at about 5 o'clock a. m. Sunday, June 5th; and that at Montgomery nine other car loads of cattle belonging to parties by the name of Rogers were attached to the train, so that when it arrived at Birmingham the train consisted of 17 car loads of cattle. Plaintiff's evidence tended to show that Miller had nothing to do with the Rogers cattle, while that of defendant tended to show that he did. At Birmingham the Louisville & Nashville Railroad turned the cattle over to the defendant, and new contracts were entered into between Miller, plaintiff's agent, and the defendant, by which the latter agreed to carry and deliver them to the Iron Mountain Railroad at Memphis. The train, composed of the 17 car loads of cattle, left Birmingham at about 6 o'clock a. m. June 5th, and arrived over defendant's road at Memphis at about 5 o'clock p. m. of the same day. Plaintiff's cattle had been billed in the care of the Iron Mountain Railroad at Memphis, the connecting line which was to carry them from that point to Coffeyville, Kan., under an arrangement with the Iron Mountain agent made by Miller before leaving Selma.

The evidence further tended to show that it was Miller's intention to stop at Little Rock, Ark., a station on the Iron Mountain Railroad, to rest, water, and feed the cattle, in compliance with the act of Congress prohibiting shippers and railroads from confining cattle in cars longer than 28 hours without unloading them for feed, water, and rest; that the distance from Memphis to Little Rock was 150 miles, and that the cattle could have arrived at said last-named place within 28 hours, if defendant had promptly delivered them to the connecting line. Miller gave as his reason for wanting to unload and feed

at Little Rock, instead of at Memphis, that the run from that place to White Eagle could have been accomplished in 24 hours, so that only one stop for feed, water, and rest would have been necessary for the entire journey, which would save the expense of two stops on the road for said purpose, whereas it would have required more than 28 hours to have made the distance from Memphis to White Eagle, requiring two stops, and with added expense. Miller had telegraphed ahead to the Iron Mountain agent at Memphis that the cattle were on the way, and when they arrived at Memphis said road was ready with an engine and train crew to start on the journey at once with them. There was evidence tending to show that when the cattle got to Memphis the cars containing them were set upon what was known as the "transfer track," and the defendant's agent went to the office of the Iron Mountain Railroad, informed its agent that he had no billings covering plaintiff's cattle, and that all he did have was a memorandum called a "slip billing" or a "billing with weight and charges to follow." The Iron Mountain road refused to accept the cattle, unless accompanied with a regular shipping bill, containing weights, charges, destination, and other necessary information for forwarding freight of the kind. Whereupon the defendant's agent sent the cattle to the stockyards for the purpose of unloading them. To this Miller objected, at which time, according to his testimony, defendant's agent said to him that they would do as they pleased with them. Miller stated that he insisted on having the cattle proceed to Little Rock, where he intended to feed, and offered to pay the freight, and, in addition, \$5 more per car than the regular tariff rate, but the agent, not having the billing, could not furnish the amount of charges, and refused his offer; that he then asked the agent to ascertain by telegram the amount of the charges, but the agent refused to do so; that he himself sent a telegram to defendant's general freight agent at Kansas City, Mo., asking him to guaranty to the Iron Mountain road that the freight charges would not exceed the amount he had paid on a prior shipment, to which he received no answer. The defendant unloaded the cattle in the stockyards. There was evidence that these yards were in bad condition and unfit for the proper care of cattle, and that they were not properly fed and watered; that the cattle were fresh from grass, and would not eat the cotton seed hulls given them until they were starved into doing so; that Miller demanded hay, but there was none; that he made an effort to get water for the cattle, and asked for the key to the water box, and was told that it was lost; that as a result of the condition of the stockyards and treatment of the cattle while there the plaintiff lost six of them; and that the remainder became weak and feverish and sick, and began to get down in the cars.

The delayed waybills arrived at Memphis at 6 o'clock p. m., when the cattle were reloaded. They reached Coffeyville at about 9 o'clock p. m. June 7th, where a stop was made, the 28-hour limit having expired, when they were rested and fed. At Coffeyville the billing was changed from White Eagle to Bliss, a place claimed to be more convenient for unloading. They arrived at Bliss at about 9 o'clock p. m., where, when they were unloaded from the cars, it is claimed that they stampeded, and got beyond the control of those in charge of them, and rushed to a pond, where many of them drank too much water and were foundered. There was evidence going to show that within 36 hours after they were unloaded 16 of them had died, and that within 10 days 41 had died, and that the others did not recover their health before the expiration of two months. There was evidence tending to show the amount of damages sustained. A letter from Miller to Mr. Riddle, defendant's general freight agent at Kansas City, was in evidence, in which he stated plaintiff's damage in the total was \$479.50; but this statement only referred to five dead cattle. His explanation was that his only purpose in writing said letter was to give defendant's agent an opportunity to visit the cattle ranch to see the cattle and investigate his claim. Said Riddle acknowledged receipt of Miller's letter notifying him of the loss of and damages to the plaintiff's cattle, but he declined to investigate the matter and denied all liability therefor. There was evidence showing that the waybills in question were in the office of the Louisville & Nashville Railroad at Birmingham at the time plaintiff's cattle were shipped over defendant's railroad, but that defendant's agent negligently failed to obtain them and forward them with the cattle. The agents of the defendant railroad were forbidden the use of memorandum waybills, such as defendant had when plaintiff's cattle reached Memphis; and it was a rule of the Santa Fé Railroad not to receive shipments on memoranda of the kind, of all which defendant had notice.

The contract of shipment in part reads as follows:

"Live Stock Contract. Executed at Bgham., Ala., station, June 6, 1898.

"This agreement, made between the Kansas City, Memphis & Birmingham Railroad Company, of the first part, and Zack Miller, of the second part, witnesseth: That whereas, the Kansas City, Memphis & Birmingham Railroad Company is a common carrier only at tariff rates and subject to the above rules and regulations, all of which are hereby made a part of this contract, by mutual agreement between the parties hereto, now, therefore, for the consideration and mutual covenants and conditions herein contained, the said first party will transport for the said second party the live stock described below, which it has received for shipment,

and parties in charge thereof as hereinafter provided, viz.:

"This company, in behalf of and as agent for connecting line or lines, but not as principal, guarantees through rates as herein set forth. — cars, said to contain — head of cattle, consigned, as stated in margin, from Birmingham, Ala., station to Memphis, Tenn., station, and at that place delivered to —, or connecting line, at rate named in margin, the same being a special live stock rate made in consideration of the provisions contained in this contract, for and in consideration of which special rate the said second party hereby covenants and agrees as follows:

"* * * And if any said stock shall sustain injury or damage while in transit, the presumption shall be that the same resulted from overloading, or from the neglect or inattention of the party of the second part, or his or their employes accompanying said stock, for which the party of the first part shall in no respect be liable.

"Third. That at his own risk and expense he is to take care of, feed, water, and attend to said stock, while the same may be in the stockyards of the said first party, or elsewhere, awaiting shipment, and while the same is being loaded, transported, unloaded, and reloaded, and to load and unload and reload the same at feeding and transfer points, and wherever the same may be unloaded and reloaded for any purpose whatever, and hereby covenants and agrees to hold said first party harmless on account of any or all losses of or damage to his said stock while being so in his charge, and so cared for and attended to by him or his agent or employes as aforesaid. And in case the first party should for any reason undertake to water and feed said stock, it shall not be liable for insufficient supplies or imperfect discharge of such undertaking.

"Sixth. That for the consideration aforesaid said second party further agrees that, as a condition precedent to his right to any damages or any loss or injury to his said stock during the transportation thereof or previous to loading thereof for shipment, he will give notice in writing of his claim therefor, stating the grounds thereof to some general officer of said first party, or to its nearest station agent, or to the agent at the delivering station on the railroad which carries the said stock to destination, or to the nearest station agent or general officer of such delivering road, before said stock is removed from the point of shipment, or from the place of destination, and before such stock is mingled with other stock, and within five days after the delivery of such stock at its point of destination, to the end that such claims may be fully and fairly investigated, and will afford a full and fair opportunity for the investigation thereof; and a

failure to comply in every respect with the terms thereof shall be held to be a waiver by said second party of any such claim, and shall be a complete bar to any recovery therefor. No one, except a general officer of said first party, has authority to waive such notice, and he only in writing.

"Eighth. The said second party further agrees, for the consideration aforesaid, that, in case of total loss of his said stock from any cause for which the said first party shall be liable to pay for the same, the actual cash value at the time and place of shipment shall be taken as full compensation therefor."

Defendant offered evidence to the effect that the Louisville & Nashville Railroad set the cars containing the cattle on its track at Birmingham, but that its agent did not deliver any billing, expense accounts, or anything else to defendant at the time; that Miller was anxious for the cattle to go forward as soon as possible, and that in order to accommodate him defendant made up a special or extra freight train for the purpose; and that if it had not made up a special train, as stated, the cattle would not have left Birmingham until 11:45 o'clock p. m., and would not have reached Memphis until 2:30 p. m. the next day, which was only a few hours before the time they afterwards in fact did leave Memphis. Defendant claims that on account of the failure of the Louisville & Nashville Railroad to deliver expense bills to defendant at Birmingham, and on account of the hurry to have the stock reach their destination as soon as possible, it forwarded the cattle to Memphis without the information in the possession of the said Louisville & Nashville Railroad Company. It was shown that the latter company sent to defendant's agent at Birmingham the regular waybills for plaintiff's cattle at about 10 o'clock Sunday, June 5th, about three hours after they had started for Memphis, and at the same time notified defendant that the bills for the Rogers cattle had not been received, which were not delivered until the next day. Upon receipt of the waybills for plaintiff's cattle, defendant's agent at Birmingham telegraphed to its agent at Memphis of such receipt, and also other information, which the defendant claims was sufficient to have authorized the agent of the Iron Mountain Railroad at Memphis to have received plaintiff's cattle and to have forwarded them at once. There was evidence going to show that the Iron Mountain Railroad's agent at Memphis would have received plaintiff's cattle when they arrived, and forwarded them upon the information in the slip waybills mentioned, had defendant's agent tendered them separately from the cars containing the Rogers cattle; but it seems he did not do this, as he wanted to get rid of them all at the same time. And it is claimed that it was through Miller's influ-

ence that plaintiff's cattle were not so received and forwarded at once, because he wanted both shipments kept together, for the purpose of getting the Rogers cattle upon his ranch, so that he would have the opportunity of grazing them; but there is no evidence that he influenced the Iron Mountain agent in the matter to any extent. There was evidence to the effect that the water that the cattle drank when unloaded at Bliss was so impure as to cause their death. There was also evidence that the cattle were worth more in Oklahoma than at Selma, the point of shipment.

The finding and judgment were for the plaintiff in the sum of \$856, from all which defendant appealed.

Opinion.

The contention of the defendant is that under the evidence the court committed error in not instructing the jury to return a verdict for the defendant, and that the court committed error in the giving and refusing of certain instructions named. We believe that the court committed no error in refusing to instruct for the defendant on the evidence, as there was ample proof to show that it was through the neglect of defendant's agents that the plaintiff's cattle were not promptly received and shipped by the Iron Mountain road on their arrival at Memphis, which act of negligence resulted in some damage to plaintiff's cattle. And it is not a matter of dispute that it was negligence on defendant's part not to have had a proper billing accompanying the shipment of the cattle from Birmingham. *Reynolds v. Ry. Co.*, 121 Mass. 291; *Mt. Vernon Co. v. Ry. Co.*, 92 Ala. 296, 8 South. 687; *Ins. Co. v. Ry. Co.*, 8 Baxt. 268. Besides, the jury might have found, upon the evidence, that the Iron Mountain road would have received and promptly shipped plaintiff's cattle on their arrival at Birmingham, on the information contained in the "slip waybills," had they been tendered as a separate shipment from that of the Rogers cattle.

Instructions Nos. 1 and 2 are not subject to the objection made by defendant that the jury were authorized to find against defendant on a general custom between the connecting carrier and railroads generally, whether defendant had notice of such custom or not. On the contrary, such instructions require that such notice to defendant should have been shown.

Said instructions are also attacked on the ground that it makes the case depend upon the theory that defendant did not obtain the regular billing of the cattle from the Louisville & Nashville Railroad, as the information obtained was all that was necessary. It may be true that the information could have enabled the Iron Mountain Railroad to have received the cattle and billed them properly to the next connecting carrier; but, if its agents refused to receive and ship them be-

cause the regular waybill was not tendered, which they were authorized to do under the rule, the fault was with the defendant, and there was no delivery to the connecting carrier. *Ins. Co. v. Ry. Co.*, 8 Baxt. (Tenn.) 268; *Reynolds v. Ry. Co.*, 121 Mass. 291; *Mt. Vernon Co. v. Ry. Co.*, supra.

Instruction No. 5 should not have been given, because it was not authorized by the evidence. It was not shown that the plaintiff was required to consent to a delivery of his cattle by defendant to its own road or that of any other connecting carrier. This instruction in effect tells the jury that, as the plaintiff had the right to designate the railroad at Memphis to which it wished delivery to be made, he was not compelled to consent to a delivery of said cattle by defendant to its own or any other connecting carrier.

Instruction No. 4 is criticised because it fixes the measure of the damages to the cattle as the difference between their condition as they should have arrived at Bliss and their condition as they did in fact so arrive. This objection is based upon the fact that the cattle were destined for White Eagle, and not Bliss; but, as it was shown that the two points were only a few miles apart, the condition of the cattle would not have been materially different, had they been unloaded at the former, instead of at the latter, point. The defendant could not have been prejudiced by the giving of said instruction.

But the further objection is made to said instruction that it fixes the value of the cattle at their destination, whereas the contract fixes their value at the place of shipment. It is contended by plaintiff that this provision of the contract is invalid, because there was no consideration for it, as the rate charged was not a reduced rate. There is nothing in this case to show that the rate for transportation was a reduced rate. In *Kellerman v. Ry. Co.*, 136 Mo. 178, 34 S. W. 41, 37 S. W. 828, it was held that "a stipulation in a written contract of shipment, placing a limited valuation on the property shipped in case of its loss by the default of the carrier, when not made in consideration of special or reduced rates of shipment, is not binding on the shipper." See, also, *Bowring v. Ry. Co.*, 77 Mo. App. 250. "In the absence of any agreement, the place for fixing the value would be at the place of delivery." *Sturgeon v. Ry. Co.*, 65 Mo. 569; *Glascok v. Ry. Co.*, 69 Mo. 589; *Ry. Co. v. Traube*, 59 Mo. 355. But the contract here is not one fixing the value of the cattle, but merely a stipulation providing at what point this value shall be fixed. In *D. Klass Commission Co. v. Wabash R. Co.*, 80 Mo. App. 164, it was held that "a stipulation in a bill of lading that the amount of loss or damage shall be computed at the time and place of shipment does not apply to loss occurring for failure to deliver the goods in a reasonable time, but rather to injury during shipment." The validity of the contract it-

self was not questioned, but the controversy arose over its construction. In this case the evidence showed that the cattle were worth more in Oklahoma than at Selma, the place where they were shipped. But such might not be the case in every instance, for we know that at times property is worth more at the time and place of shipment than it is at its destination at the time of its arrival. However, the validity of the contract is upheld in *Rogan v. Ry. Co.*, 51 Mo. App. 665. It was therefore error for the court to instruct the jury to compute plaintiff's damages for cattle lost as of their value at their destination and the time of their arrival.

The court refused to instruct the jury that there could be no recovery for more than 21 cattle. This is assigned as error. The contract of shipment, as seen in the statement, provides, as a condition precedent to plaintiff's right to damages for any loss or injury to his stock during transportation, that it should give notice in writing to defendant, before the stock was removed from the point of shipment, of its damages, to the end that its claim might be fully and fairly investigated, and that a failure to comply in every respect with the terms thereof should be held a waiver of such claim. The evidence disclosed that the plaintiff gave to the defendant notice of the loss of only a part of its cattle; but it was also shown that defendant refused to investigate, and denied all liability. Such being the case, there existed no necessity whatever for any notice, and because plaintiff's notice was incomplete and did not refer to his entire loss can make no difference, as the defendant, by its refusal to investigate his claim for damages, waived all right to the notice provided by the contract. This is a familiar rule of law as applied to insurance contracts, and we think is especially applicable to the facts of this case.

It is also contended by defendant that, as it was the duty of plaintiff under the contract of shipment to feed and water its own stock, the defendant is not liable because said cattle were not properly fed and watered. The plaintiff concedes that such is the law, but that it is also the law that it is the duty of the carrier to furnish a proper place and facilities, and a reasonable opportunity for so doing, which is true. *Lowenstein v. Ry. Co.*, 63 Mo. App. 68; *Duvenick v. Ry. Co.*, 57 Mo. App. 550. And, as the evidence in this case was that the defendant undertook to perform the duty of watering and feeding the stock at Memphis without the consent of plaintiff, it must be held to account for such damages as resulted from a negligent performance of such duty.

As the defendant asked 33 instructions in all, many of which were refused, we will not undertake to review them in detail, as we think what has been said will indicate those which should, as well as those which should not, have been given.

The plaintiff insists that defendant's appeal should be dismissed for want of a sufficient abstract, as required by the rules, and cites in support of its insistence *Beno v. Fitz Jarrell*, 163 Mo. 411, 63 S. W. 808, and other cases of like character; but that and the other cases named no longer govern. See *State ex rel. v. Jackson L. Smith et al.* (Mo. Sup.; not yet officially reported) 73 S. W. 134. Under the latter the abstract is sufficient.

For the reasons given, the cause is reversed and remanded. All concur.

HANKINS v. STATE.

(Court of Criminal Appeals of Texas. June 24, 1903.)

CRIMINAL LAW—EVIDENCE—ADMISSIBILITY—ATTEMPT TO BRIBE ACCOMPLICE—INSTRUCTIONS.

1. In a prosecution for theft it was error to permit defendant's accomplice to testify that while he and defendant were confined in jail defendant offered to pay one-half of his fine if he would testify that defendant had no connection with the crime.

2. In a misdemeanor case, if defendant deems the court's charge to be incomplete, he should make a request in writing for a charge on the issues not covered.

Appeal from Travis County Court; James R. Hamilton, Judge.

George Hankins was convicted of theft, and appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of theft, and his punishment assessed at confinement in the county jail for 10 months.

Among other matters complained of, is the action of the court permitting accomplice Meredith to testify that while he and appellant were confined in jail appellant sought to bribe him to testify in such manner that he (appellant) might be relieved from conviction. In other words, he offered to pay one-half of Meredith's fine if Meredith would testify that he (appellant) had no connection with the theft of the pants. Among other objections urged were that appellant was under arrest, and confined in the county jail, as shown by the testimony of the witness Meredith, at the time these statements were made. These objections should have been sustained. *Morales v. State*, 36 Tex. Cr. R. 234, 36 S. W. 435, 846; *Wright v. State*, 36 Tex. Cr. R. 427, 37 S. W. 732. For this error the judgment must be reversed.

There is another question suggested, though not placed in such manner as to require a reversal of the judgment, but on another trial it should be avoided. The court failed to charge the jury with reference to the testimony of the accomplice, Meredith.

¶ 2. See Criminal Law, vol. 14, Cent. Dig. § 2005.

Exception is reserved to this omission in the charge, but, being a misdemeanor, it was necessary for appellant to make a request in writing for such a charge, and, in case the court failed to give his requested instruction, then reserve proper exception presenting the matter. As this question may arise upon another trial, attention is called to it.

For the error indicated, the judgment is reversed, and the cause remanded.

LEWIS v. STATE.

(Court of Criminal Appeals of Texas. June 17, 1903.)

HOMICIDE — INSTRUCTIONS — SELF-DEFENSE — SEPARATION OF JURY — BILL OF EXCEPTIONS — NECESSITY.

1. In a prosecution for murder, defendant testified he went to decedent's room with a gun, found him in bed, and told him he had come to settle with him about the talk he had been making about his (defendant's) wife; that "at this time he attempted to go under his pillow I shot him. * * * I killed him because of the crack-shot talks he had been making about me in connection with my wife, and because he was attempting, as I thought, to kill me after I went into the room," etc. "He raised up and reached as if for something under the pillow, and I shot him. He was sitting on the side of the bed when I shot him." *Held* not to require a charge on self-defense.

2. Objection that the jury, after being sworn, were permitted to separate cannot be considered, where there is no bill of exceptions presenting the matter, but it was merely urged in the motion for new trial.

Appeal from District Court, Bexar County; John H. Clark, Judge.

Preston Lewis was convicted of murder, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the first degree, and his punishment assessed at confinement in the penitentiary for life. The evidence for the state shows that appellant went to the house of deceased, found him in bed, and killed him; that he stated to one witness a short while before the killing that he would load his gun and go there for that purpose. The testimony of the appellant himself shows that he complained to the deputy sheriff and county attorney about deceased living with his wife. Appellant then testified: "I went down to my house, got my gun, and went to where deceased lived. I went to his room, and told him that I came to settle the matter with him about the crack talk he had made to me about my wife. At this time he attempted to go under his pillow I shot him. * * * I killed him because of the crack-shot talks he had been making about me in connection with my wife, and because he was attempting, as I thought, to kill me after I went into the room where he was. He was lying in bed awake when I went into

the room, and I said, 'How about those crack-shot talks you have been making about me and my wife?' and he raised up and reached as if for something under the pillow, and I shot him with my shotgun. He was sitting on the side of the bed when I shot him." We have copied this statement of appellant's testimony because the main insistence is that it raises the issue of self-defense, and that the court erred in failing to charge thereon. We do not think this testimony of appellant raises the issue of self-defense, but, on the contrary, shows he loaded his gun and went to the place of the killing for the purpose of killing deceased, and that he did not shoot deceased because he was attempting to shoot him. The tenor of the entire testimony shows that no element of self-defense actuated or moved appellant at the time of the shooting, but that his act was prompted by animus towards deceased on account of supposed intimacy with his wife. The evidence on the part of the state shows that deceased and appellant had frequently met at the house of deceased, where appellant's wife was staying, drank whisky together, talked, and were very friendly. There is nothing in the record to authorize the court to charge the jury on the law of self-defense.

Appellant also insists that the evidence is insufficient to support the verdict. To this contention we cannot agree, for, in our opinion, the evidence is sufficient.

Appellant's other contention is that the jury, after being sworn and impaneled, were permitted to separate. There is no bill of exceptions presenting this matter, but it is merely urged in motion for new trial, and therefore cannot be revised.

No error appearing in the record, the judgment is affirmed.

McFARLAND v. STATE.

(Court of Criminal Appeals of Texas. June 24, 1903.)

CRIMINAL LAW — SWINDLING — EVIDENCE — FLIGHT — CONSPIRACY — CONFESSION.

1. Defendant and another were arrested a few days after swindling witness, who testified that on their arrest he followed them to the city hall without being seen by them, and that, when he there confronted them, one of them uttered an exclamation indicating guilt or surprise, and both jumped from a window and fled. The court excluded the evidence of the exclamation, directing the jury to disregard it. *Held*, that there was no error in leaving the balance of the evidence before the jury.

2. Defendant and B. were arrested a few days after swindling witness with a trick lock. Witness testified that on their arrest, and unknown to them, he followed them as they were being taken to the city hall, and saw B. put his hand to his pocket and finger the pocket flap, and on searching him the lock was found in the flap of the pocket. *Held*, that this evidence was admissible against defendant, and was not objectionable because defendant had not been warned.

Appeal from District Court, Tarrant County; M. E. Smith, Judge.

James McFarland was convicted of swindling, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The indictment charges appellant with swindling by means of a trick lock, and it is shown that he and Barnett acted together in swindling Murphy. The evidence discloses the swindling occurred in Ft. Worth on Saturday morning, about 8 or 8:30 o'clock; that the parties, by their devices, representations, and acts, induced the injured party to bet with one of the two conspirators that he could open one of the locks. It seems they had two, one of which could be opened and the other not. After inducing him to make the bet, the locks were changed without his knowledge, and of course he failed to open the lock. This shows a clear case of swindling, so far as the state's evidence is concerned. In a day or two after the alleged offense the parties were arrested. While en route from the place of arrest to the city hall, Murphy testified that he followed the officer and defendant and Barnett; that they entered the city hall before his arrival; that they had not seen him until he entered the city hall. When he entered they were sitting on a bench in the police office, and, as he entered the door, both looked at witness, and one of them said, "Jesus Christ!" and both of them immediately ran and jumped out of the window and fled. Witness chased Barnett and caught him, and an officer chased and caught defendant. This evidence was objected to because appellant was under arrest and not warned as required by law. The court qualified this bill by stating that on objection he excluded the expression used by one of the defendants, and in the charge instructed the jury to disregard that expression. It would seem from this that the testimony in regard to jumping out of the window and flight from the city hall was left before the jury. In this there was no error. *Buchanan's Case* (Tex. Cr. App.) 52 S. W. 769; *Waite's Case*, 13 Tex. App. 169.

Witness Murphy was further permitted to testify: "After Officer Newby arrested defendant and Barnett, I followed along behind the three on the way over to the city hall. I saw Barnett put his hand in his pocket and raise the flap of his coat pocket, as if he was fingering with the flap of his pocket. After we arrived at the city hall, I saw the officer search Barnett, and saw them find in the flap of the pocket, between the linings of the flap of the coat pocket, a pair of locks, the same locks as those used by them on the morning of October 4, 1902, the time they got my money; there was a small hole in the lining of the flap of his coat pocket. The officers got the locks out

of the hole." Objection was urged because appellant was under arrest at the time these matters occurred and was not warned, and on the further ground that defendant was not responsible for any of these acts; that, if a conspiracy had previously existed between them to swindle Murphy, these acts were long subsequent to the consummation of such conspiracy. Usually the acts and declarations of a party under arrest are not evidence. But where a party is found in possession of the fruits of the crime, or the instrument with which a crime is perpetrated, it is admissible against the party in whose possession it is found, and as well against those who acted with him in the crime. This is not an act or declaration in the nature of a confession or admission. It is a physical fact. The locks are shown to be the same as those used by Barnett and defendant in the perpetration of their swindling game. Barnett is the man shown by the testimony who had the locks in his possession at the time Murphy was swindled, and which were used by himself and McFarland in carrying out their swindling scheme. The possession of these locks by either or both is not an admission or confession, no more than the possession of a pistol in a homicide case would be the act and declaration of the man who perpetrated the homicide with that pistol. Under the peculiar facts of this case, it would be wholly immaterial which of the parties had in possession the before-mentioned locks. They are shown to have acted together at the time of the commission of the crime; their friends show them intimately associating with each other about that time, though they say at a different place; they were together on the day of their arrest, and up to the time of their arrest; upon witness Murphy entering the city hall they became badly demoralized, and instantly jumped through the window and fled. There was a conspiracy and an acting together between them. While the fact that they were together after the crime would not be a basis, perhaps, for the admission of the testimony in regard to Barnett's possession of the locks, still this was relevant testimony, not as a confession, but as a fact or circumstance which would tend to prove the guilt of appellant. Barnett's possession of the locks, under all the facts and circumstances detailed, was an independent physical fact of an inculpatory nature, and admissible against either. The question of warning was not involved. Barnett was not on trial. *Pleron v. State*, 18 Tex. App. 524; *Pace v. State* (Tex. Cr. App.) 20 S. W. 762; *Rodriguez v. State*, 32 Tex. Cr. R. 259, 22 S. W. 978; *Thompson v. State*, 33 Tex. Cr. R. 217, 26 S. W. 198; *Angley v. State*, 35 Tex. Cr. R. 427, 34 S. W. 116; *Munson v. State*, 34 Tex. Cr. R. 498, 31 S. W. 387; *Clark v. State*, 28 Tex. App. 189, 12 S. W. 729, 19 Am. St. Rep. 817; *Conde v. State*, 33 Tex. Cr. R. 10, 24 S. W. 415; *Jackson v. State*, 28 Tex. App. 370,

18 S. W. 451; *McAnally v. State* (Tex. Cr. App.) 73 S. W. 404.

These seem to be the main errors suggested for reversal. We do not believe they are well taken. The judgment is affirmed.

Ex parte SULLIVAN.

(Court of Criminal Appeals of Texas. June 24, 1903.)

INTOXICATING LIQUORS—LOCAL OPTION ELECTION—PUBLICATION OF RESULT—ENTRY OF JUDGE.

1. An entry of the county judge, made December 19th on the minutes of the commissioners' court, showing that the order of such court declaring the result of a local option election prohibiting the sale of intoxicating liquors was published in a weekly newspaper November 21st, November 28th, December 5th, and December 12th, shows that the order was published for four successive weeks, as required by law.

Appeal from Madison County Court; C. E. Gustavus, Judge.

Application of John Sullivan for writ of habeas corpus. From a judgment remanding him to the custody of the sheriff, he appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. This is an appeal from a judgment of the county court of Madison county in a habeas corpus proceeding. Relator was held in custody by W. A. Berry, sheriff of said county, by virtue of a warrant of arrest issued by the clerk of the county court upon an information charging relator with a violation of the local option law of said county. He applied to the judge of said court for the writ of habeas corpus, and the same was granted; but upon a hearing thereof said county court at a regular term remanded him to the custody of the sheriff. It was admitted on the trial that prohibition was in force in Madison county if the order of the commissioners' court declaring the result of the election which resulted in favor of prohibition had been published in the weekly newspaper for four successive weeks, as is required by law. It was also admitted that relator was held in custody by said sheriff by virtue of a warrant of arrest issued as aforesaid upon an information which in due form charged him with unlawfully selling intoxicating liquors in Madison county after the qualified voters of said county had determined at an election that the sale of such liquors should be prohibited in said county. It is alleged in said information that the sale in question was made on June 13, 1903. It was shown by an entry which had been made by the county judge on the minutes of the commissioners' court that the order of the commissioners' court declaring the result of the election and prohibiting the sale of such liquors was published in the Madisonville Meteor, a weekly newspaper published

in Madison county; that said order, as shown by said entry of the county judge, was published in said paper on the following dates, to wit, November 21, November 28, December 5, and December 12, 1902. This entry was made on December 19, 1902. Relator contends that the entry of the county judge made on the minutes of the commissioners' court shows that the order declaring the result of the election and prohibiting the sale of intoxicating liquors was not published for four successive weeks in the Madisonville Meteor, but that the said order was only published in said paper for 27 days, the entry of publication being made on December 19, 1902; and therefore the local option law is not in force in Madison county. He concedes that, if the county judge had entered the fact of publication on the minutes on December 20th, it would have shown that said order had been published the required length of time—4 weeks, or 28 days. We think that the entry of the publication made by the county judge shows that the order of the commissioners' court declaring the result of the election and prohibiting the sale of liquor in Madison county was published for four successive weeks, as is required by law. It was published in four weekly issues of the paper, the last publication being on December 12, 1902, six months before relator is charged with having made a sale.

We find no error in the record, and the judgment is affirmed.

WILLIS v. STATE.

(Court of Criminal Appeals of Texas. June 24, 1903.)

HOMICIDE—EVIDENCE—INSULTS TO FEMALE RELATIVE—ADEQUATE CAUSE—SUDDEN PASSION—DEFENSES—BILL OF EXCEPTIONS—EXCLUSION OF EVIDENCE—PRESENTATION—REVIEW.

1. Where an assignment that the court erred in overruling defendant's motion to quash the array of talesmen summoned, and in compelling defendant to select five jurors from the list, was not supported by proof of the facts alleged, except by a recital thereof in the motion for a new trial, such assignment cannot be reviewed.

2. The exclusion of testimony cannot be reviewed where the object or purpose sought to be subverted by the evidence is not assigned in the bill of exceptions.

3. In a prosecution for homicide, evidence relating to a difficulty between third persons, having no bearing on any issue in the prosecution on trial, is inadmissible.

4. Where, in a prosecution for homicide, defendant introduced evidence that two other persons were carrying guns for each other, which was irrelevant to any issue in the prosecution on trial, the introduction of such evidence did not authorize defendant to introduce the details of such transaction.

5. In a prosecution for homicide, a remark of the court, in excluding certain testimony, that he had previously ruled on the same question, and desired his ruling respected, was not prejudicial.

6. Where, in a prosecution for homicide, it was contended that the killing was induced by information of cruelty practiced by deceased's cousin on his wife, who was defendant's sister, a bill of exceptions alleging error in the ex-

Shortly after the separation of Jim Shaw and his wife, defendant and Jim Shaw had a fight; and some months afterwards Jack Willis, a brother of appellant, assaulted Jim Shaw, and knocked him down, in the town of Ennis, on account of the alleged maltreatment by Jim Shaw of their sister Lella. It is shown that, some time during the fall of 1902, Jim Shaw, on account of apprehension from the Willis boys, left Ellis county, and went to Milam county, to a relative's named Lindsey, who lived some six miles from Cameron. He remained there until some time in February. During his sojourn there, Jack Willis went down to Milam county and located Jim, and then sent for his brothers, appellant and Arthur, to come down. They went out from Cameron to where Jim lived, for the purpose, as alleged, of giving him a beating for the way he had treated appellant's sister. On the way out, they met Lindsey and Jim Shaw coming into town in a wagon. Jim jumped out of the wagon and escaped. Some months after this, Jim returned to Ellis county, to his father's. About this time, deceased, Claude Shaw, a cousin of Jim's, appears to have espoused his cause as against the Willis boys, and was generally found in his company. Shortly after Jim returned to Ellis county, at the instance of the Willis boys he was arrested on some misdemeanor. However, he continued in the neighborhood, and on various occasions met up with the Willis boys, and among them appellant. On one occasion, some time in the early part of December, he and Claude attended a party in the neighborhood, at one Schultz's; and some of the Willis boys, including defendant, were also there. It is shown that Jim Shaw became alarmed, and was afraid to go home that night, and asked the owner of the house to let him remain there that night. However, Claude persuaded him to go home, and no trouble ensued on that occasion. On the night before the homicide, appellant, who had come from his father's to his brother Nin Willis', stayed all night at Snipe's house, who lived on the same road, east of said Willis house. Claude and Jim Shaw were then stopping at Shaw's house, some 750 yards further east of Snipe's house. They passed up and down the road, going to and from Ennis, several times during the day of the homicide. Some time in the evening appellant was seen with his shotgun apparently hunting along the branch in front of Nin Willis' house, and about 500 or 600 yards from Boren's house, some half mile west of the place of the killing. Subsequently he was seen coming down the road in the direction of the place of the killing with a shotgun. Jim and Claude Shaw were seen about the same time coming down from the Shaw house, going west, in the direction of Ennis. Matilda Herron, a witness for the state, at this juncture relates as follows: "I was cooking supper—frying some meat—and saw a man passing the road, with

a shotgun lying across his arm." She gives the location of the surroundings as follows. "Ennis is west of my house. The residence of Shaw is east. Snipe's house is east from my house. My house and Snipe's house are on the south side of the road. Shaw's house is further on. On the north side of the road is the schoolhouse, Buck Wood's house, and Nin Willis' house. [See these houses marked on the map, with the respective distances.] I was standing at the stove, turning some meat, and happened to look out the kitchen window, and saw a man passing, with a gun on his arm. The gun was lying across his left arm, near the elbow, and his right hand was on the breech. It was a shotgun. Before I finished turning the meat, I heard a gun fire twice; and I moved to the table, and the gun fired again, and I stepped to the kitchen door. The stove and table are about a step apart. When I got to the kitchen door, I saw Mr. Mullins. I went out toward the cistern, three or four steps from the kitchen door, and saw a man's head in the road. A man was standing up in the road, with a shotgun. I could just see the man's head in the road. He appeared to be on all fours. The gun was fired again. It was pointed toward the man in the road. Up to this time I had heard three shots. They were from the shotgun. They were heavy reports, like the report of a breech-loading shotgun. After I saw this last shot from the gun, I saw the man with the gun stoop over, and as he raised up he began the fast shooting, which appeared to be with a pistol. He was not using the gun then, and appeared to be shooting right in the road in front of him. I could not see anybody but the man doing the shooting. He went from there to Mr. Snipe's. Nobody else left there, where the shooting occurred." The state also proved the dying declarations of Claude Shaw, who stated that they met Henry Willis in the road, with a double-barreled shotgun, and that he was just passing, and he shot him with one barrel, and Jim with the other, and took Jim's pistol off of him and finished him. Appellant himself testified as to what occurred at the time of the shooting as follows: That he was out hunting, and had a shotgun. That when he got into the road he went down to his brother Nin Willis', and saw no one was at home, and then turned and went back toward Snipe's, where he had stayed the night before. "When I got on the rise of the hill, I saw two boys. I did not recognize them at first. I was going east, and they were going west. I was hunting on the south side of the road, and came into the road between Buck Wood's house and Nin Willis' house. It was hardly half mile where I came into the road to Snipe's house. I recognized the boys when I was about 75 or 100 yards from there. Jim was on the south side of the road, and Claude was on the north side. Jim motioned with his head, as though beckoning Claude to

come over to him. Claude stepped right over close to Jim. All this time we were walking towards each other. The next move, I saw Claude pull off his right-hand glove. We were then tolerably close together. I was carrying my gun across my left arm, with my right hand near the breech. After Claude pulled off the glove, he ran his hand back under his coat and pulled out a pistol, and held it down by his side. I then dropped my gun into my hand, and the shooting commenced. When I saw him pull off his glove, I thought we were going to have trouble. It is hard to tell how the shooting ended. I was so excited. I thought when he pulled the pistol he was going to use it on me, and immediately I dropped the gun into my hand. The pistol and gun were raised about the same time. I shot, and he fell, and I shot Jim with the other barrel. Of course, I was excited. I do not know how many times I shot with the gun—three or four times. They were scrambling around on the ground. I supposed they had two pistols, and I ran up and grabbed the one in front, and shot it two or three times, and then went on down to Snipe's. I dropped the pistol as soon as I quit shooting it. Mullins was about Snipe's. I remember seeing him. I was pretty badly scared. * * * I do not know why I shot with the pistol. I was so excited. I was pretty sure they had two guns, and did not know where the other one was, and there was right smart of smoke there, and I supposed they were still shooting. Sounded like to me there was more than one gun shooting at the time. I believed myself to be in danger. Of course, I was excited. I did not know where my brothers were when the killing occurred. When I got in the road I did not know the Shaw boys were in the road, coming west; nor did I know I was going to meet them till I recognized them. The bad feeling between me and Jim Shaw grew out of the mistreatment of my sister Lella by Jim Shaw. Claude Shaw had nothing to do with it, only he was taking up for Jim—taking the lead. I believed he was taking the lead since my sister died. Shortly after the death of my sister, myself and brother had a conference, and agreed to drop the matter of differences with the Shaws. There was no other cause of our animosity toward the Shaws, except the treatment of Lella by Jim Shaw."

It may be proper to state that both Jim and Claude Shaw were shot with buckshot. Claude Shaw was also shot one time with a pistol, and Jim Shaw was shot twice with a pistol. This is a sufficient statement of the case in order to discuss the bills of exceptions.

Appellant assigned as error the action of the court in overruling his motion to quash the array of talesmen summoned by the sheriff and his deputies, and compelling defendant to select five jurors from said list of talesmen. In motion for new trial, appellant says

that this matter is presented by a bill of exceptions. We find the motion to quash the list of talesmen summoned by the sheriff, and the order of the court sustaining said motion. Then follows the second motion to quash the list of talesmen: "First, because the court failed to instruct the officer summoning said jurors as required by law, in that he failed to instruct said officer to summon as jurors such parties as are not prejudiced against defendant, or biased in his favor, if he knew of such bias or prejudice; second, that the jurors last drawn, being twenty-six in number, with the exception of one, to wit, J. H. Hamblin, are the same identical persons formerly summoned on yesterday, April 9, 1903, and to which a challenge was made to the array, and sustained by the court, all of which is apparent from the list of talesmen hereto attached." Then follows the order of the court overruling said motion, to which ruling defendant excepted. This does not present the matter in a shape for review. The grounds alleged should have been shown as facts by some means, which was not done.

On the trial, appellant offered the record of the civil proceedings in the divorce suit between Lella Shaw and Jim Shaw, including the petition for divorce, citation, with the return of the officer thereon showing service on Jim Shaw, and the judgment of the court granting said divorce. No object or purpose is assigned in the bill of exceptions for the admission of this testimony. We understand this to be necessary, in order that a bill of exceptions properly present the matter for review. See White's Ann. Code Cr. Proc. § 1123, subd. 5, for authorities.

Bill of exceptions No. 2 is to the action of the court in refusing to permit appellant to prove the particulars of a difficulty between Snipe and H. M. Shaw. Appellant says he desired to show the particulars of this difficulty, or enough thereof to demonstrate that it had nothing to do with the difficulty between defendant and deceased. We understand that the details of difficulties, even between appellant and deceased, should not be admitted, unless they have some bearing or illustrate some issue in the case on trial. But we know of no rule that authorizes the admission of the details of difficulties between third parties. Besides, we understand appellant introduced this matter; that is, that Snipe and H. M. Shaw were carrying guns for each other. We fail to see the reason for the introduction of this testimony, but certainly its introduction did not authorize appellant to go into the details of the transaction. Further than this, it was in evidence that this matter had nothing to do with the homicide, or the cause therefor, and there was no controversy in regard to it. It is also objected that the court remarked, in connection with his ruling on this question, that he had previously ruled on a similar question, and he desired the ruling of the court respected. It does not occur to us that

any harm to appellant could have ensued from this remark.

Appellant desired to prove by Willie Reeves that after the separation of Jim Shaw from his wife, Lelia Shaw, née Willis, Jim Shaw told her that he was to blame for the separation, and that he had mistreated her, and that no woman could live with a man that had treated her as he had treated the said Lelia; and, in that connection, defendant further offered to show that said facts were communicated to defendant before the homicide. It will be noticed that this bill is subject to the same defect discussed in appellant's first bill of exceptions; that is, appellant failed to state the object and purpose of the introduction of said testimony. Besides this, no fact is shown in said bill of exceptions as to any act of cruel treatment, but merely a conclusion of the witness.

Appellant also complains of the action of the court in refusing to permit Lula Wakefield, a sister of defendant, and a sister of Lelia, who married Jim Shaw, to testify that after Jim Shaw married Lelia they lived for a while in the same house with witness, and that during said time Jim Shaw more than once assaulted his wife; that he practiced excesses upon her when she was sick with menstruation, and that he compelled her to submit to him in copulation from two to four times at night; that he ruptured her with his fingers, and tried to produce an abortion upon her; that he continued the excesses for the greater part of their married life, while they lived together; that his treatment was most cruel and brutal, and that his wife pleaded with him to desist; that the excesses made her a physical wreck, and reduced her to a state of nervous prostration, on account of which she finally left him and went to her father's home, and from the effect of which excesses she died. Defendant says that he expected to prove a knowledge of these facts on the part of defendant at the time of the homicide, and that he believed same to be true; that, in connection with his claim of self-defense on account of the assault by one of the deceased Shaws, the facts stated, which he proposed to show, all taken together, might be an adequate cause to at least reduce the grade of the offense, if any, and that, at the time the fatal shots were fired which killed Shaw, defendant, in any event, was in a state of mind that ought to or might reduce the grade of the offense, if any. The court explains this bill by stating as follows: "It is further shown, in connection with the aforesaid testimony of Lula Wakefield, that Jim Shaw and Lelia Shaw, née Willis, were married about March, 1901; that it was shortly afterwards (within a month or two) that said Jim Shaw and wife lived for three or four months in the house with witness, and it was during this time that said witness learned the facts to which she would have testified; that these acts and facts she would have testified to occurred three or

four months before the separation of Jim Shaw and wife, about August, 1901, nearly a year before Lelia Shaw's death, about March, 1902, and nine months before the killing of Claude Shaw and Jim Shaw. It was shown by the evidence that after the brutal treatment claimed to have been perpetrated upon Mrs. Shaw by the husband, James Shaw, defendant had met up with deceased; that in October or November, 1901, defendant and two of his brothers followed James Shaw from Ellis county to Milam county for the purpose of whipping him or doing some harm; and it was further shown by other evidence in this case, before this evidence, that defendant had at other times met up with deceased before the killing. Wherefore the court is of opinion that the maltreatment of James Shaw of his said wife, if it could have been established, could not be shown, in any aspect of the case, as affording adequate cause to reduce the homicide of Claude Shaw to the grade of manslaughter." We would observe with reference to this bill of exceptions that the rule requires a bill to be so full and complete as to show the error of the court in rejecting or refusing to admit the testimony. Here appellant should have shown affirmatively that, after appellant may have been informed of the matters to which the witness would testify, he slew the party using the language on the first meeting thereafter. Now, if it be conceded that, because Jim Shaw was guilty of excesses and cruel treatment toward his wife, appellant could kill him, and only be guilty of manslaughter, and if Claude interfered when he attempted it, to prevent the killing of Jim, and he killed him on account of the interference, such killing would only be manslaughter, still the bill should show that what was done was on the first meeting after appellant had been informed of Jim's misconduct. *Howard v. State*, 23 Tex. App. 265, 5 S. W. 231. The bill does not even show when appellant may have been informed of what the witness Wakefield knew, and it does not attempt to show that the killing occurred on the first meeting between appellant and Jim Shaw; nor does it show how appellant would have a right to slay Claude Shaw because Jim Shaw treated his sister cruelly.

By appellant's next bill of exceptions, he complains of the action of the court in refusing to permit him to introduce in evidence a book or manuscript written by Lelia Willis during her lifetime, entitled, "The Description of My Married Life for Five Months and Nine Days." This bill of exceptions covers some 17 pages of typewritten matter, and we will only quote or refer to so much of it as manifests the action of the court in this regard. The bill recites that appellant was on the stand, and testified that he had known Jim Shaw about 15 years, and Claude Shaw about 2 years; that Jim Shaw married his youngest sister, Lelia Willis, on March 6,

1901, and that they lived together about 5 months, when they separated, and after that, until the time of her death, in March, 1902, she lived at her father's, where defendant lived; that she informed defendant, in a general way, that Jim Shaw had mistreated her, but did not go into the details of such treatment. Defendant then identified the handwriting of his sister Lella to the manuscript which he proposed to introduce in evidence, as being in her handwriting. He further stated: That he read this statement in full two or three weeks before the homicide, for the first time. That he had never read the contents of said statement so made by his sister until two or three weeks before the homicide. That he had read only a part thereof prior to that time. That he met Jim Shaw and Claude Shaw in the road near Ennis about a month before the homicide, and, as he passed them, Jim Shaw said (addressing defendant), "Where in the hell are you going?" and witness made no reply, and Jim Shaw then stated, "You are mighty brave when with others, but are a coward by yourself." Claude Shaw said, "We have read that book [referring to the statement written out by Lella], and that no Willises have nerve enough to take it up." Witness went on by without speaking or stopping. This was the last time witness ever saw either Jim or Claude Shaw up to the time of the homicide. That, about a week after this meeting, defendant got the said written statement from his father's trunk, took it upstairs to his room, and read it over from beginning to end, for the first time, and then for the first time did he learn of matters and things of which he had never heard or known before, and that he believed the statement so made and written by his sister Lella, and that the homicide occurred on the first meeting after such information on the part of defendant, and that at the time defendant's mind was incapable of cool reflection. That his mind was, on account thereof, in a state of passion. Witness was then asked to state what it was, if anything, that he learned that he did not know before (referring to what he may have learned from said statement). The state objected to such question because the matters sought to be elicited were improper and irrelevant, and the court then ordered the jury withdrawn from the courtroom, and defendant announced what it was he proposed to prove by the witness: That he could prove by defendant that he for the first time read the statement entirely (written by his sister Lella, in her own handwriting, just before she died, March, 1902) about two or three weeks before the homicide, and that after he read it over, two or three weeks before the homicide, he had never seen or met Jim Shaw or Claude Shaw up to the very time of the homicide; that he believed said recitals in said statement; and that among the things he learned from said statement for the first time on reading it in full

were these: "That Jim Shaw had during his married life, while living with his wife, gone to a whorehouse in Ennis, and caught the clap, and transmitted it to his wife, Lella; that Jim Shaw frequently, during his married life, and while living with his wife, compelled his wife to submit to his lusts while she was sick with menstruation, against her consent and protestations, from three to four times a night; and that at one time Jim Shaw got some rat poison, and threw his wife, Lella, down, and got on top of her, held her nose, and poured the same down her, causing her to be sick several days." In offering this testimony, appellant stated, it was done in connection with other testimony already in evidence, which was, in substance, that Claude Shaw and Jim Shaw were cousins and companions, and were together at the time of the homicide, and that Claude Shaw had stated before then that, if Jim Shaw got into trouble with the Willis boys, he would help Jim out. And also, by the witness Brown, that Claude Shaw had stated at Ennis that they (he and Jim) were going to a party that night, and expected to meet some of the Willis boys, and that they (he and Jim) were going to wind up their affairs. And also by witness Newt Wilson that he knew Claude Shaw, and had frequently heard him talk about the differences between Jim Shaw and the Willises, and had heard him say that he (Claude) was not afraid of any of the "damn sons of bitches" (referring to the Willis boys), and that, if Jim Shaw got into trouble with them, he would help Jim. And defendant further announced that all this testimony was offered on the theory that Jim and Claude Shaw were acting together at the time of the homicide, and, further, that the offered testimony was competent and relevant on the question of manslaughter as an adequate cause, under the law, and also in connection with the claim of self-defense, and that, both together, in showing the state of mind of defendant, and to reduce the grade of homicide, if no more. The court, in rejecting this testimony, made the following explanation: "Defendant had himself testified that about September, 1901, about 14 months before the killing, he and Jim Shaw had a fight over the conduct of Jim Shaw to his wife, and that previous thereto (same being after the separation of Jim Shaw and his wife) he (defendant) and Jim Shaw had a wordy altercation about said conduct, and that after that, about December 1, 1901, he (defendant), acting with his brothers Arthur and Jack, followed Jim Shaw to Millam county to whip him, on account of said conduct and misconduct to his wife, met him, but he escaped them; that after that, both before and after Lella Shaw's death, nine months before the homicide, he repeatedly met defendant." It will be seen by reference to said bill of exceptions that appellant was familiar with all that said book contained, except three things. The first of these is that he for the first

time learned on reading the book in full that Jim Shaw had, during his married life, while living with his wife, gone to a whorehouse in Ennis, and caught the clap, and transmitted it to his wife, Lelia. Now, if the book in question does not contain this information, then appellant cannot avail himself of it. We have examined the transcript of the bill in that connection, and this is the language used: "I told him he was just like him, too (meaning his pa); that if he could get the money, when he couldn't get it otherwise, he would go as straight to that old house as he could go, which he did before we were married, but I didn't know it, of course; but I soon found it out, after we were married, and found out besides that he had caught some bad disease that I had never heard of before. But he never told me that he had it and I never knew it until his sister asked me one day if he had ever gotten well of the clap. And I was surprised to know of such a thing, and asked what it was, and where he got it. I didn't know whether he was well or not, and she up and told me all about it. I had noticed some peculiar instrument in his trunk, but never thought anything about it, and never said anything about them. And he got mad because I asked him what made him keep it from me when he knew he would give it to me at the rate he was going. He said he didn't have no such, and wanted to know who told me. I told him Dollie told me all about it, and then I told him if I was like many a woman I would leave him; and he said that wasn't nothing, and I just let it pass." The next information alleged to have been derived from a full perusal of the book is that Jim Shaw frequently, during his married life, and while his wife had her menses, copulated with her, against her consent, from three to four times a night. While this was highly indecent, not to say filthy, yet it does not occur to us to have been that character of insult from a husband to his wife which would authorize a relative to kill the husband, even during her lifetime, and only be guilty of manslaughter. The other information alleged to have been derived was that at one time Jim Shaw got some rat poison, and threw his wife, Lelia, down, and got on top of her, held her nose, poured some down her, and caused her to be sick several days. Here is how she relates this transaction: They were about to move, and she says: "So we commenced packing our things, and he came across a box of rat poison, but never noticed what it was; and I came in, and saw what it was on the box, and asked him where he got that rat poison. And he said he had been wanting some poison ever since I came back without buying it; and so he threw me down, and got on top of me, held my nose, and poured the stuff in my mouth, and I couldn't move an inch, until he thought I had swallowed enough of it to kill me, maybe, and let me up. I was so scared, but spit all out I could,

and rinsed my mouth out with water, and took a dose of liver medicine, unbeknown to him, that my sister had left there. I was sick for two or three days, but it didn't hurt me much. He saw his brother Bill coming, and told me if I told him he would kill me, and then kill himself." Of course, a serious attempt on the part of the husband to poison his wife would cause resentment, and would likely create passion in every one who might be attached to that wife by the bonds of relationship or affection; and we are not prepared to say that this was not such an attempt. This is shown to have been the first meeting after the consummation, and, if the testimony was otherwise admissible, it was at least a question for the jury to pass on. It may be proper to state here that we are confronted with two questions which, so far as we are advised, have not been directly passed upon by this court: First. Does our statute relating to insults toward a female relative refer to and comprehend a female relative who may be dead at the time of the alleged insult, or the communication thereof to the slayer? Second. Does the fact that one's female relative has married take such female relative out of the statute, so far as the insults toward her by the husband are concerned? While the statute, by its literal terms, would appear to concern only the living, yet it occurs to us that it is broad enough to cover the memory of the character of a dead female relative. The fair fame and good name of one deceased is as dear to us as the living; and, if anything, we cherish their memory by more sacred and hallowed ties, and are just as ready to resent an insult directed toward such a person as if they were alive. Whether the above is a correct interpretation of the statute or not, as has often been held by this court, there are adequate causes not enumerated by the statute; and we believe that a grievous insult or injury directed toward a cherished female relative would be adequate cause, or, if made during life, and communicated afterwards, the result would be the same. As to whether an intermarriage by a daughter, sister, or other female relative would destroy the relationship theretofore existing, we do not believe there can be any serious question. True, in such case the husband would have all the privileges which the law accords him, and many things which in others would be an insult to the female relative would not be so with him. At the same time, some things, such as assaults and brutal and outrageous treatment, might be such insults on his part as would authorize relatives, such as father or brother, to interfere. The new insult here offered in evidence—that is, one which appellant claims he had not previously heard of—was both an assault and an attempt to poison his sister. While we are not prepared to hold that this was, in law, adequate cause, yet we do hold that the testimony should have been

admitted, and the jury permitted to say, under appropriate instructions, whether or not this was adequate cause, in connection with all the other facts and circumstances in evidence, to reduce the killing to manslaughter.

This brings us to another question, which is whether or not this character of evidence was admissible when appellant was on trial for killing Claude Shaw, and not Jim Shaw, the former husband of his deceased sister. We understand the authorities to hold, as a general proposition, that, in felonious homicide, the slayer is punished according to his intent. So that, if A., intending to kill B., accidentally kills C., but, if he had killed B., the offense would be only manslaughter, he could not be convicted of a greater offense than manslaughter in killing C. *Clark v. State*, 19 Tex. App. 495. Here, however, it is said the killing of Claude Shaw was not accidental, but intended. On this point appellant testifies that Claude drew his pistol and attempted to shoot him, which caused him to shoot Claude. Of course, if his statement be true, the killing of Claude was self-defense. However, the jury may not have believed this, but they may have believed one of two other theories, to wit, that he did not kill either of said parties in self-defense; that when he met them his passion was aroused because of the insults—the new as well as the old—of Jim Shaw towards his deceased sister, and that he intended to manslaughter Jim Shaw; and that Claude interfered to prevent it, and in consequence thereof he shot and killed Claude. Or the jury may have believed from the evidence that Claude had adopted all the insults that had been used by Jim Shaw toward appellant's deceased sister, inasmuch as appellant testified that, on his last meeting with Claude and Jim Shaw before the homicide, they stopped him in the road, and Claude Shaw said, "We have read that book [referring to the statement written by his sister Lelia], and that no Willises have nerve enough to take it up."

With reference to the first proposition, while the statute says that the provocation must be extended by the person killed, in order to reduce it to manslaughter, the writer is inclined to the opinion that if one has manslaughter in his heart toward another, and some third party interferes and makes the quarrel his own, and such third party is slain in the difficulty, it might be manslaughter, on account of the original intent of the slayer. My Brethren, however, do not agree to this proposition. However that may be in this particular case, as was shown above, the deceased, Claude Shaw, had by his language to appellant on their last meeting before the homicide, by his express declaration, made all the insulting language and conduct of his cousin Jim Shaw toward the deceased, sister of appellant, his own, and whatever of insult was contained in that document he then avowed directly to appellant,

and dared him to take it up. So that whatever of adequate cause was contained in said book of memoirs of her married life by Lelia Shaw in favor of appellant, as against Jim Shaw, equally existed as between appellant and Claude Shaw. And we hold that the new testimony offered in the foregoing bill of exceptions was admissible on the trial of appellant for killing Claude Shaw. And when the evidence of the new insult was admitted, it then opened the doorway to the admission of all the evidence of insults given by Jim Shaw to Lelia Shaw, as shedding light upon, and giving character to, the new insult, or that insult which appellant subsequently ascertained, in order that the jury might know the exact state of mind of appellant at the time of the homicide, and what caused that state of mind. *Jones v. State*, 33 Tex. Cr. R. 492, 26 S. W. 1082, 47 Am. St. Rep. 46; *Utzman v. State*, 32 Tex. Cr. R. 426, 24 S. W. 412.

Outside of the question of manslaughter, there is another view under which we believe this evidence was admissible, under the circumstances of this case, regardless of the killing having happened on the first meeting after the utterance of the same, or if there was some question about this being the first meeting. It will be seen from the record that the jury were deprived of all this character of testimony showing what actually brought about the killing. They evidently did not believe appellant's theory and testimony on self-defense. Disbelieving self-defense, they ought to have found appellant guilty of murder in the first degree, unless they believed there was some theory undisclosed by the testimony. Now, even if this testimony was not admissible as affording adequate cause, it seems to us that it should have been admitted as showing, or tending to show, appellant's state of mind at the time of the homicide; that is, that it was not cool and deliberate, and consequently he was not capable of forming the intent to kill upon express malice. True, they found appellant guilty of murder in the second degree, but they gave him a term of 40 years in the penitentiary. If the jury had been possessed of the excluded testimony, they might equally have found appellant guilty of murder in the second degree, if they did not believe that adequate cause existed, but the evidence might have been used by them as extenuating or mitigating the punishment.

The view we have taken of the questions heretofore discussed contravenes the view taken by the court in the submission of manslaughter, which he confined alone to the pistol shot fired by appellant into the body of Claude Shaw. This was predicated on the idea that appellant may have been justified in shooting Claude Shaw in the first instance with the shotgun, but that the last shot was not necessary in his self-defense, and he may have seized the pistol from Jim or Claude Shaw and shot Claude Shaw while his mind

was excited and he was incapable of cool reflection; that this shot was not necessary, and consequently he might be guilty of manslaughter. Of course, if the learned judge was right in excluding all testimony relating to insults as affording adequate cause, then he was justified in refusing to charge on manslaughter otherwise than was done; but, inasmuch as we hold that the court erred in excluding said testimony relating to insults toward a female relative, on another trial of this case, if the evidence should be the same, the court should give a charge on manslaughter, authorizing the jury to say whether or not, under all the circumstances, they believed the provocation afforded was adequate cause, and whether or not appellant slew deceased in the heat of passion engendered by such cause, and, if so, to find him guilty only of manslaughter.

Appellant also questions the court's charge on self-defense, because he alleges the court, in his charge, groups a number of facts testified to by appellant, and requires the jury to believe each and all of said facts before they would be authorized to find he was justifiable. We believe the charge is subject to that criticism. In such case the court should have submitted, in general terms, that if, when the parties met in the road, Claude or Jim, one or both, did any act or made any demonstration which, under the circumstances, reasonably caused appellant to believe that his life was in danger, or he was in danger of serious bodily injury, in such case he had a right to slay.

There are other errors presented and discussed in appellant's able brief, some of which are not likely to occur again; and, in the view we have taken of this case, we do not deem it necessary to discuss them.

For the errors pointed out, the judgment is reversed and the cause remanded.

BROOKS, J. I think many of the propositions in this opinion are incorrect, and hereby dissent.

YOUNG v. STATE.

(Court of Criminal Appeals of Texas. June 23, 1903.)

THEFT—CONVERSION BY BAILEE—INDICTMENT.

1. An indictment for theft, charging that "Y., having possession of two head of cattle, then and there the property of R., by virtue of his contract of hiring and borrowing with the said R., did then and there unlawfully, and without the consent of the said R., the owner thereof, fraudulently convert said two head of cattle to his, the said Y.'s, own use and benefit, and with the intent to deprive the said R., the owner, of the value of the same," was sufficient under White's Ann. Pen. Code, art. 877, § 1501, declaring that any person having possession of the personal property of another by virtue of any contract of hiring, or other bailment, who shall, without the consent of the owner, fraudulently convert the same to his own use, with intent to deprive the owner of the same, shall be guilty of theft.

Appeal from District Court, Denton County; D. E. Barrett, Judge.

F. Young was convicted of theft, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted for the theft of two head of cattle, and his punishment assessed at confinement in the penitentiary for a term of two years. The indictment contains two counts; the first charges theft generally, and the second charges conversion as hirer and bailee. The second count is as follows: That F. Young, " * * * having possession of two head of cattle then and there the property of Mary Rayborne, by virtue of his contract of hiring and borrowing with the said Mary Rayborne, did then and there unlawfully, and without the consent of the said Mary Rayborne, the owner thereof, fraudulently convert said two head of cattle to his, the said F. Young's, own use and benefit, and with the intent to deprive the said Mary Rayborne, the owner, of the value of the same, against the peace and dignity of the state." Appellant urges various objections to this count of the indictment. The indictment is sufficient. See White's Ann. Pen. Code, art. 877, § 1501.

Appellant requested various special charges. As far as the same were applicable to the facts of this case, they were covered by the main charge of the court. The charge of the court was very full on every phase of the evidence. The evidence is ample to support the conviction; in fact, shows beyond dispute that appellant was a hirer and bailee of the cattle, and as such sold the same.

There is no error in the record, and the judgment is affirmed.

RAY v. STATE.

(Court of Criminal Appeals of Texas. June 3, 1903.)

HOMICIDE—APPLICATION FOR CONTINUANCE—NEWLY DISCOVERED EVIDENCE—ABSENT WITNESSES.

1. A party failing to examine witnesses present at the trial as to their knowledge of the transaction cannot set up, as newly discovered evidence, facts elicited from such witnesses after the termination of the trial.

2. It is not error to deny an application for a new trial, based on the testimony of absent witnesses merely cumulative in its nature, and which had been made the basis of a second application for a continuance.

3. In a prosecution for murder the testimony for the state showed that deceased had no pistol; that immediately before the shooting he was sitting on his horse, with both legs on the same side, leaning towards defendant, who was standing four or five feet away. Immediately after hearing the first shot, witnesses heard a groan, looked in the direction of the shooting, saw deceased on the ground, and defendant going through the motions of loading his gun and saw him approach the prostrate

¶ 1. See Criminal Law, vol. 15, Cent. Dig. § 2319.

form of deceased and shoot again. Deceased was shot in the shoulder, and the side of his head was also shot off, both wounds being mortal. Defendant testified that deceased advanced on him with a pistol, and that he shot in self-defense. His application for continuance was based in part on the affidavit of a witness to the effect that deceased fell from his horse after the last shot. *Held*, that such evidence was neither material nor probably true in the light of the record, and the application for continuance was properly overruled.

Davidson, P. J., dissenting.

Appeal from District Court, Houston County; John Young Gooch, Judge.

Felix Ray was convicted of murder, and appeals. *Affirmed*.

Moore & Newman and Adams & Adams, for appellant. J. M. Crook, Dist. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of 15 years.

The application for continuance is for the want of the testimony of Mrs. Eli Hogan and I. G. Garner, alleged to reside in Houston county, and Isam Garner and Frank Lively, alleged to reside in Anderson county. The application states that defendant expected to show by his own testimony that Mark Denson was trying to shoot him when he shot Denson. The state will attempt to show that Mark Denson was unarmed when he was shot, while defendant can show by other witnesses that Cason Bush took something from the person of Mark Denson, and that Mrs. Hogan is the only witness who will positively swear that, after the shooting of Mark Denson, Cason Bush took a pistol from the person of Mark Denson. She will also testify that Denson was standing up when shot. And defendant is informed that the state will prove that he shot Denson after he fell. By Isam Garner defendant expects to show that on Monday night before the killing on Tuesday morning he heard Mark Denson say that he would kill defendant before 10 o'clock the next day, and by I. G. Garner defendant expects to show that on Monday night before the killing on Tuesday he heard Jim Spurger say that Mark Denson had shot at defendant twice on the Sunday before. And defendant now is informed and believes that Spurger will deny such fact, and will state that Denson did not shoot at defendant on the occasion referred to. Defendant will testify that Denson did shoot at him on said occasion. By Frank Lively defendant expects to show that on Sunday evening, just after the shooting by Denson at defendant, witness met Denson, who told him that he had just shot at defendant—which facts become material as corroborative of defendant's testimony and of the hearing of the shots. Isam Garner and Frank Lively are alleged to have been duly

subpoenaed. Appellant alleges that Mrs. Hogan is now sick in bed with a child only eight days old, and is physically unable to attend court. That Isam Garner was in court yesterday, under process as a witness, but developed a case of smallpox, and, defendant is informed, was forced to leave by the authorities. I. G. Garner, defendant is informed, is sick. Why Frank Lively is not present defendant cannot say. The application also shows that at the last day of the term defendant continued the case because neither Kirkland nor Isam Garner had been served and were absent, and also because of the absence of Mrs. Eli Hogan; that Mrs. Hogan was then unwell, but had started to Crockett, and on the way heard of the continuance, and went back home; that under such circumstances defendant could hardly get out any further process for her, as she had not really disobeyed any subpoena; and, even if she had, it would not aid to secure her presence. The court overruled the application for continuance, and appellant assigns this as error, as well as the overruling of his motion for new trial on this ground.

In motion for new trial, to which appellant swears, he still states that Mrs. Hogan will swear that she saw Bush take a pistol from the body of deceased. He insists that said testimony is material from the fact that deceased was in the act of shooting him with a pistol, that the pistol shot was fired by him, and that the shooting by defendant was in self-defense. And is material because some of the witnesses who testified for the state testified that Bush did not take anything from the person or body of deceased. That Mrs. Hogan would have testified, had she been present, that at the time the second shot was fired, deceased was not lying on the ground, as testified by the state's witnesses, but was at that time standing on the ground in front of defendant, and did not fall until after the second shot was fired. Appellant insists that this testimony was material from the fact that it was a material inquiry whether deceased was standing or lying on the ground when the second shot was fired, and her testimony would have corroborated the testimony of appellant, and would have contradicted the statements of the state's witnesses who testified that deceased was lying on the ground when the last shot was fired. Mrs. Hogan's affidavit, attached to the motion, is as follows: "On the morning the killing of Marcus Denson by Felix Ray, I was at home near Percilla, and saw Ray and Denson meet a little southeast from my house in the public road, about one hundred yards distant from my house. * * * They stood there several minutes before my attention was attracted in that direction, which was by the report of a gun. When I heard the gun I was some three or four steps from my kitchen window. I stepped to the window as soon as I heard the first shot, and

looked out, and just as I looked out of the window the second shot fired. The horse pulled the reins from hands of deceased immediately after the second shot, and deceased fell to the ground. I saw deceased just as he fell over. Don't know what position he was standing in, but he fell after the last shot. The first person that came to deceased after he was killed was Cason Bush. He went close to the body, about three or four feet, as best that I could tell. If he picked up anything I could not see it. Chas. Bush came, and got Cason, and carried him off. If he picked up a gun or anything before Chas. Bush took hold of him, I don't know anything about it."

After insisting upon a new trial for want of the testimony of the other witnesses alleged in the motion for continuance, appellant further insists that a new trial should be granted on the ground of newly discovered and material testimony, showing that there were no gunshots in the ground, as shown by the affidavit of Will Langham, which absolutely contradicts the testimony, as appellant insists, that defendant shot deceased while lying on the ground, which evidence he contends is newly discovered since the trial, and came to light by accident in discussing the case. Langham's affidavit is as follows: "I was at the scene of the killing of Marcus Denson about one hour after the killing, and examined the wounds on him, both on the head and on the collar bone. So far as I could tell, the body had not been moved from the time it had been shot. From the character of the wound in the head and the range of the shot, caused me to make a close examination of the ground around there to ascertain whether the shot that struck his head went into the ground, and I saw no evidence to that effect, and made the examination for that purpose. The ground was not disturbed." The district attorney filed a counter affidavit as to witness Will Langham. Attached to the district attorney's controversion of the motion is the affidavit of J. B. Stanton, stating that Will Langham, by whom it was proposed to prove newly discovered evidence, was a witness and present during the trial of defendant. This cannot be regarded as newly discovered evidence, because the statute says that on motion for new trial the question of newly discovered evidence must be treated the same as in civil cases, and, where a witness is present, the evidence cannot be regarded as newly discovered; but it is the duty of appellant to examine the witness present to ascertain his testimony, and, if he knows any fact pertinent to the issue then on trial, to place such witness on the stand, and let him detail the facts he may know to the jury. Clearly, it would be a novel proposition to say appellant could have witnesses present, make no examination of them touching their knowledge of the transaction, and then, after the termination of the trial, talk with the

witnesses, and, after eliciting facts from them, set up such facts as newly discovered evidence. Such practice should not be tolerated. This exact question was decided against appellant in *Halliburton v. State*, 34 Tex. Cr. App. 411, 81 S. W. 297. Furthermore, the testimony being cumulative, it would not be ground for new trial, this being the second application for continuance. In *Pruitt v. State*, 30 Tex. App. 158, 16 S. W. 773, the court said: "It is not in every case, however, even where the absent testimony is material, and probably true, that this court will revise the trial judge in refusing a new trial considered with reference to the application for continuance. It is only in a case where, from the evidence adduced upon the trial, we would be impressed with the conviction, not merely that defendant might probably have been prejudiced in his rights by such ruling, but that it was reasonably probable that, if the absent testimony had been before the jury, a verdict more favorable to defendant would have resulted." Citing *Browning v. State*, 26 Tex. App. 443, 9 S. W. 770; *Covey v. State*, 23 Tex. App. 388, 5 S. W. 283; *Massey v. State*, 30 Tex. App. 64, 16 S. W. 770.

Now, reverting to the affidavit of Mrs. Hogan, we say that, although appellant states in his sworn motion that she would swear that she (witness) saw Bush take a pistol from the body of deceased, still said witness in her affidavit expressly denies any such statement. Then this application must be viewed in the light of this proposition alone: Does the fact that Mrs. Hogan swears that she knows what position deceased was in, but that he fell after the last shot, make a material issue, and one so probably true, in the light of this record, as authorizes this court to reverse this case because the lower court refused to grant the motion for new trial on this account? We say not. In the first place, said testimony, in the light of this record, is not material. In the second place, it is not probably true. The testimony for the state shows that deceased had no pistol. The substance of the testimony of the four eyewitnesses for the state establishes the fact that deceased was sitting on his horse, with both legs on the same side of the saddle, leaning forward towards defendant, who was standing on the ground, some four or five feet from deceased. Immediately before the shooting this was the attitude of the parties. Immediately after hearing the first shot, witnesses heard a groan, looked in the direction of the shooting, and saw deceased on the ground, and defendant going through the motions of loading his gun (which he admits himself), approaching the prostrate form of deceased, and shoot again. Deceased was shot in the shoulder, and the side of his head was also shot off; both wounds being mortal. The evidence established the fact that blood was spattered on the fence, and that a hole was shot through the brim of the

bat of deceased, showing that deceased was sitting on his horse in a leaning posture when the shot was fired, and that the first shot went through the brim of the hat and into the deceased's shoulder, and that deceased received the last shot while lying on the ground. Defendant's theory was that deceased advanced on him with a pistol; that he shot once, and immediately reloaded and shot again. All of the state's testimony renders utterly improbable the testimony of the absent witnesses. It is possible that the first wound inflicted in the collar bone could have been inflicted by appellant on deceased at the first shot, provided deceased was approaching appellant in a stooping posture. But, as described in this record, the wound is of such a character as renders it highly improbable, and nearly impossible, for it to have been so made. Of course, if deceased was standing up, as appellant insists, and approaching him, he could not have shot him in the side of the head. But the entire record shows conclusively that his testimony is a pure fabrication, and that deceased was sitting sideways on his horse in a leaning posture; that appellant fired, the ball passing through deceased's hat, entering his shoulder; deceased fell off his horse, and while prostrate on the ground defendant reloaded his gun (which he admits), approached the prostrate form of deceased, and shot off the left side of his head. The malice is abundantly established. Previous preparation is demonstrated. The formed design to take life is manifest from a casual inspection of this record. There is a total absence of any evidence indicating any demonstration on the part of deceased, except the testimony of appellant. The absent testimony would not strengthen his own testimony (as it is not pretended that Mrs. Hogan saw the beginning of the difficulty), but to a certain extent contradict him; and especially wherein he swears that deceased started at him with a pistol in his hand. The absent witness swears that she saw no pistol, and the physical facts demonstrate that he had none; that all the state's witnesses swear he had none; and one state's witness testified that his pistol was at another and different place, and had been sent to such place some time prior to the difficulty. We therefore hold that this testimony is neither material nor probably true in the light of this record.

The demonstration by the district attorney as to the relative position of deceased and defendant at the time of the shooting could not have been erroneous, as indicated by the affidavits in this record; but such demonstration by the district attorney was legitimate argument in answer to the argument made by appellant's counsel.

The judgment is affirmed.

DAVIDSON, P. J. (dissenting). I cannot agree with my Brethren in the affirmance of the judgment in this case. By the witness

75 S.W.—51

Mrs. Hogan appellant expected to prove that deceased was standing up when the second shot was fired. The state's theory was that deceased was sitting on his horse sideways—that is, with both legs on the same side of the horse—at the time the first shot was fired, and that he fell off and was lying on the ground when defendant fired the second shot. There were five young men standing not far away when the difficulty occurred. They all testify to the fact that defendant and deceased met; that deceased was sitting on his horse with both legs on one side, defendant standing on the ground, and they engaged in conversation. None of these young men were looking at the parties when the first shot was fired, and there is no witness who testifies he saw the first shot, except defendant himself. The first shot attracted the attention of these young men, and upon looking around four of them testify that deceased was on the ground, and defendant walked up and fired the second shot at his prostrate form. Cook, the other young man, testified that deceased was in a falling position at the time the second shot was fired. Mrs. Hogan's affidavit is attached to the motion for new trial, in which she states that: "On the morning of the killing of Marcus Denson by Felix Ray, I was at home, near Percilla, and saw Ray and Denson meet a little southeast from my house, in the public road, about one hundred yards distant from my house. The best that I could recollect, they stood there several minutes before my attention was attracted in that direction, which was by the report of a gun. When I heard the gun I was some three or four steps from my kitchen window. I stepped to window as soon as I heard the first shot, and looked out; and just as I looked out of the window the second shot fired. The horse pulled the reins from hands of deceased immediately after the second shot, and deceased fell to the ground. I saw deceased just as he fell over. Don't know what position he was standing in, but he fell after the last shot. The first person that came to deceased after he was killed was Cason Bush. He went close to the body—about three or four feet, as best that I could tell. If he picked up anything, I could not see it. Chas. Bush came and got Cason and carried him off. If he picked up a gun or anything before Chas. Bush took hold of him, I don't know anything about it." Mrs. Hogan's testimony, if true, places deceased erect at the time the second shot was fired. Defendant testified that deceased was advancing on him when he fired both shots, and that deceased brought on the difficulty by attempting to use a pistol. On the day before deceased shot at appellant twice, and had, subsequent to the shooting, threatened to take his life before 10 o'clock of the day of the killing. These threats were communicated to appellant. Now, Mrs. Hogan's testimony was of a most material character to appellant in aid of his defensiv

theory, and to meet the state's case that deceased was shot while on the ground. If defendant was standing up at the time the second shot was fired, the state's case was broken down, because it turned upon the testimony of the four young men that deceased had already been shot down at the time the second shot was fired. Mrs. Hogan's testimony was material for two purposes: First, in support of defendant's testimony on the theory of self-defense; and, second, that if deceased was standing up or was advancing on defendant, either or both, it tended to break the force of the state's case, which showed deceased was shot on the ground, and therefore the malice in defendant's mind.

My Brethren refer to the case of *Pruitt v. State*, 30 Tex. App. 158, 16 S. W. 773, in support of their conclusion that no injury was done appellant. The writer herself also wrote the opinion in the *Pruitt Case*, and still believes the general proposition announced there as correct. That decision lays down the rule, as copied from the *Browning Case*, 26 Tex. App. 443, 9 S. W. 770, that it is only where, viewed in the light of the evidence upon the trial, we would be impressed with the conviction not merely that defendant might probably have been prejudiced in his rights by refusing the continuance, but it is reasonably probable that, if the absent testimony had been before the jury, a verdict more favorable to defendant would have resulted. Then it would follow that if the testimony, being probably true, would tend to bring about a verdict more favorable to defendant, the court should grant the continuance. That is the proposition for which I am now contending. If Mrs. Hogan had been before the jury, and testified as claimed by appellant, and as she sets out in her affidavit, it is very reasonable and probable that a milder verdict would or might have been obtained.

Appellant sought a new trial based on the newly discovered testimony of Will Langham. His affidavit is to the effect that after the homicide he was at the place where the body of deceased lay, and examined the ground carefully, to ascertain if any shot (defendant being killed with a shotgun) had entered the ground at the point where the head of deceased was when state's witnesses say the shots were fired into it. It is an admitted fact that the shot passed out through the back of the head. This witness states in his affidavit that he examined the ground carefully for evidence that these shots passed into the ground and found none. This was most material testimony for appellant, because it was directly contradictory of the state's witnesses, and the entire theory of the prosecution, and was one of the most vital questions to be decided by the jury. But defendant's right to this testimony is met by my Brethren with the statement that the witness was present during the trial, and not placed upon the stand. This is true;

but it is further true that the subpoena in the records shows he was brought by the state, and defendant had no knowledge that he would testify to these facts, as is made apparent by the motion for new trial, until after the trial; and it was called to his attention by hearing some argument of counsel. It makes no difference that he was in attendance upon the trial if he knew the facts and they were unknown to defendant. Defendant was, therefore, placed in no worse light than if witness had not attended the trial. Appellant could not be held responsible for what a state's witness knew when he (defendant) had no knowledge of it. This is the very basis of newly discovered testimony. Of course, if defendant knew it, the rules in regard to newly discovered testimony would not apply; but it is the first time, so far as I can ascertain, that a defendant has been held responsible for his ignorance of testimony within the knowledge of the state's witness, and made to suffer infamy simply because that witness was in attendance at the trial. The opinion refers to the case of *Halliburton v. State*, 34 Tex. Cr. App. 410, 31 S. W. 297, as conclusive against appellant. The opinion in that case shows appellant sought a continuance for five witnesses, four of whom had been served with process. "By each of these witnesses he expected to prove the same facts, to wit, that they were present and witnessed the entire transaction; that the assault was not made with intent to murder; that the accused had no malice towards Mullins, the assaulted party, and that he had no desire and intent to kill or injure Mullins. * * * But, conceding this to be the first application, and the facts properly stated, still the motion for a new trial was properly overruled, because two of the mentioned witnesses were in attendance upon the trial, and were not placed on the stand to testify in appellant's behalf, and in fact did not testify. The same facts could have been proved by these two witnesses as by the three who did not attend said trial. He should have called on them to testify." The *Halliburton Case* has absolutely no application to the case in hand, because there two of the five witnesses for whom appellant sought continuance were present. Each of the five were alleged to be cognizant of the same facts, and would, therefore, give the same evidence; two of them being present, and not placed on the stand. In this case no witness would testify to facts detailed by Mrs. Hogan, and the testimony of Langham was clearly newly discovered. If the testimony of Mrs. Hogan and that of Langham had been before the jury—as, in my judgment, it should have been—the verdict in this case may have been entirely different. The fact that the verdict was 15 years, instead of imprisonment for life, or the death penalty, indicates that the jury did not believe the state's theory in toto, and with this additional evidence before them it occurs to

me it is at least fully reasonable, if not patent, that the verdict would have been more favorable still. If defendant had been negligent in regard to Mrs. Hogan, or if he had known or had reason to believe Will Langham would testify to the facts stated by him in the affidavit, his case would not present this so favorably. But Mrs. Hogan was confined in bed from childbirth, and could not attend, and appellant knew nothing of the facts detailed by Langham until after the trial. Appellant ought to have had the opportunity of a fair trial, which, in my judgment, has been denied him. For these reasons I dissent.

GULF, C. & S. F. RY. CO. v. HOWARD
et al.

(Court of Civil Appeals of Texas. March 25, 1903.)

MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE OF FELLOW SERVANT—MASTER'S LIABILITY—CONSTRUCTION OF STATUTE—INSTRUCTIONS.

1. Batts' Ann. Civ. St. art. 4560ea, which provides that a railroad company shall be liable for all damages sustained by any servant, while "engaged in the work of operating the cars, locomotives or trains," by reason of the negligence of a fellow servant, applies to employes operating locomotives in yards at stations, roundhouses, or coal chutes.

2. Where, in an action for the death of a railroad employé, defendant pleaded contributory negligence, and plaintiff's testimony showed that decedent left defendant's roundhouse, going towards two engines moving on a track, that he had a lighted lantern, that he was found in a dying condition by the side of the track with one leg across one rail, and that the employes operating the engines took their orders from decedent or the roundhouse foreman, an instruction that the burden was on defendant to prove contributory negligence was misleading as causing the jury to believe that they should not consider plaintiff's evidence, which was sufficient to support the contention that deceased was guilty of contributory negligence.

Appeal from District Court, Bell County; John M. Furman, Judge.

Action by Lizzie Howard and others against the Gulf, Colorado & Santa Fé Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

J. W. Terry and A. H. Culwell, for appellant. John W. Parker and W. C. Halbert, for appellees.

KEY, J. This is a statutory action to recover damages resulting from the death of J. D. Howard, the plaintiffs alleging that his death was caused by the negligence of the defendant. The defendant answered by general demurrer, special exception, general denial, and pleaded, specially, contributory negligence on the part of Howard, and that the defendant's servants who were charged by the plaintiffs as committing the negligent acts were fellow servants of Howard. A verdict and judgment were rendered for the plaintiffs, and the defendant has appealed.

The testimony shows the following facts: J. D. Howard was in the employ of the defendant as a hostler at Temple, Tex. His duties were to take charge of, operate, and handle all engines in and about the roundhouse, coal chute, and cinder pit. He had two assistants, one named Hoherd and the other Langford, but, in the absence of specific authority, neither of them were authorized to take charge of and move engines. Their duties were to assist in coaling, removing cinders, switching, etc. On the occasion in question, about 3 o'clock a. m. during a dark night, two engines coupled together, called a "double header," were left in the yard at Temple. These engines were taken charge of by Hoherd and Langford, and placed at the coal chute, where one was coaled. They were then started back to the roundhouse, both engines, while going to the roundhouse, moving backward. A few minutes before the engines left the coal chute, Howard left the roundhouse, 200 or 300 yards away, going in the direction of the two engines, for the purpose, presumably, of taking charge of them and running them to the roundhouse. In a very few minutes after the two engines started from the coal chute, Howard was found lying by the side of the track over which the engines had just passed, one of his legs being across one of the rails and cut almost in two. There were also other severe and fatal wounds upon his body, and he died in about 30 minutes after he was found, without giving any explanation as to how the accident occurred.

We rule against the appellant on the contention that Hoherd and Langford were Howard's fellow servants, and for that reason the defendant is not liable. According to the rule of the common law, the employes referred to would be fellow servants; but on that subject the common law has been modified in this state by statute, one article of which reads as follows: "Every person, receiver or corporation operating a railroad or street railway the line of which shall be situated in whole or in part in this state, shall be liable for all damages sustained by any servant or employé thereof while engaged in the work of operating the cars, locomotives or trains of such person, receiver or corporation, by reason of the negligence of any other servant or employé of such person, receiver or corporation, and the fact that such servants or employes were fellow-servants with each other shall not impair or destroy such liability." Batts' Ann. Civ. St. art. 4560ea. Counsel for appellant contend that employes operating locomotives in yards at stations, or in and about roundhouses, coal chutes, etc., are not within the purview of the statute quoted. The argument is that such service is merely preparatory to operation, and does not constitute "operating" such locomotives. While there may be some apparent plausibility in such argument, still it is not believed to be sound. It may be true that

such service in reference to a locomotive is incidental and preparatory to the operation of railway trains, and, if the statute had omitted the word "locomotives," the construction urged might be sound. But the Legislature saw proper to insert the word "locomotives," and to use the disjunctive conjunction "or," thereby making the statute apply to employes who might operate locomotives without cars, and under such circumstances as not to constitute trains. It is often the fact that railroad yards cover a considerable area, and in this case some of the witnesses state that it was about 900 feet from the roundhouse to the coal chute. To move locomotives in and about such yards involves the same character of service and risk that it does to move them upon the main line in hauling freight and passenger trains, and, in our opinion, the one constitutes operating as much as the other. Hence we hold that the statute quoted applies to this case, and that the defense of fellow servant is not available.

All of the objections urged against the charge of the court are overruled, except that presented by the eighth assignment, which complains of the charge given on the burden of proof. The paragraph of the charge referred to instructed the jury that the burden was on the plaintiffs to prove the material allegations of their petition, "and on the defendant to prove the material allegations of its defense of alleged contributory negligence on the part of the deceased." The instruction quoted is objected to on the ground that it was calculated to cause the jury to believe that, in considering the question of contributory negligence, they were not to consider evidence submitted by the plaintiffs. It seems now to be the established rule that if evidence coming from the plaintiff's side raises the issue of contributory negligence, and that issue is presented by the defendant's answer, such a charge on the burden of proof as was given in this case will constitute reversible error, unless the jury are further instructed that, in determining the question of contributory negligence, they may consider all the evidence bearing on that issue, whether offered by the plaintiff or the defendant. *Ry. Co. v. Shelton*, 72 S. W. 165, 6 Tex. Ct. Rep. 734; *Ry. Co. v. Reed*, 88 Tex. 439, 31 S. W. 1058; *Ry. Co. v. Hill* (Tex. Sup.) 69 S. W. 136; *Id.*, 70 S. W. 103, 4 Tex. Ct. Rep. 799; *Ry. Co. v. Martin* (Tex., Civ. App.) 63 S. W. 1089; *Ry. Co. v. Lewis* (Tex. Civ. App.) 63 S. W. 1092.

In *Railway Co. v. Shieder*, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538, while the plaintiff's evidence perhaps raised the question of contributory negligence, a charge similar to the one under consideration was approved; but it does not appear that that charge was objected to as misleading. In that case the contention on behalf of the defendant was that the burden of proof rested upon the plaintiff on the issue of contributory negli-

gence. The Supreme Court ruled against that contention, and held that, unless the facts pleaded by the plaintiff show a *prima facie* case of contributory negligence, or the undisputed evidence adduced on the trial establishes contributory negligence as a matter of law, the burden of proof on that issue is upon the defendant. It does not appear from the report of the case that any objection was urged against the form of the instruction, or that it was complained of as calculated to mislead the jury.

In *Ry. Co. v. Reed*, 88 Tex. 439, 31 S. W. 1058, such an instruction was held to be misleading, the court saying: "Clearly, if plaintiff's own testimony showed that he was negligent, he could not recover. By one learned in the law, the court's charge would not have been construed as excluding that testimony in determining the question; but the jury may have understood it as instructing them that, in order for the defendant to prevail upon the issue, it must have adduced some evidence; or, in other words, that there must have been some evidence coming from its own side tending to show contributory negligence, although the plaintiff's evidence may have made that fact apparent."

Counsel for the plaintiffs make the contention that the testimony submitted by the plaintiffs did not raise the issue of contributory negligence; and if it be true that there was no evidence coming from the plaintiffs' side tending to establish any fact, proof of which was necessary to show contributory negligence, then the charge complained of was not misleading, and it was not error to give it. But it was the defendant's right to have the jury consider any evidence submitted by the plaintiffs, as well as that offered by the defendant, tending to prove any fact essential to show contributory negligence.

The defendant charged Howard with contributory negligence in failing to look and listen before going on or near the track on which he was injured. Did the plaintiffs submit any testimony tending to prove that charge? We think so. It is true that neither side produced any direct testimony on that subject. Howard was dead, and none of the witnesses saw him at the very time he received his injuries. But some of the plaintiffs' witnesses testified that a few minutes before the accident he left the roundhouse, going in the direction of the two engines: that he had a lighted lantern, and was found in a dying condition by the side of the track, with one leg across one rail. And Hoherd, one of the plaintiffs' witnesses, while testifying that he and the other assistant hostler worked under Howard, and had no right to move engines without specific authority, stated that they also worked under the control, orders, and direction of the roundhouse foreman; and the witness used this language: "I performed the duties of my employment

subject to the orders of J. D. Howard *when the roundhouse foreman did not order otherwise.*" This last phrase, which we have italicized, tends to show that the roundhouse foreman was superior to Howard, and could direct the assistant hostlers to handle engines in the yard, contrary to Howard's orders. This was supplemented by testimony, given by the defendant's witness Langford, to the effect that Hoherd sometimes moved engines into the roundhouse and elsewhere, without authority from Howard. And there were circumstances tending to show that Howard must have known of such previous conduct on the part of Hoherd, whether authorized by the roundhouse foreman or done without any authority whatever.

Surely these circumstances formed some basis for contention, on behalf of the defendant, that it was Howard's duty, before attempting to go on or across the track, to look and listen for the engines, and that he did not do so, for the reason that, if he had pursued that course, he would have discovered the approach of the engines in time to have avoided the catastrophe; and that therefore he was guilty of contributory negligence. And, if the defendant had the right to urge that theory in argument before the jury, it had the right to have it submitted to and decided by the jury.

In saying this, we do not wish to be understood as intimating any opinion as to how the question of contributory negligence, or any other issue of fact, ought to be decided. All that we decide on this subject is that the issue of contributory negligence was in the case, and that some of the testimony raising that issue came from the plaintiffs' witnesses.

The case of *Lee v. Railway Co.*, 89 Tex. 583, 36 S. W. 63, relied on by appellees' counsel, does not, as we understand it, support their contention. In that case, Lee was walking in the railroad yard at night when a train came by, and, in attempting to get out of the way of the train, he stepped in an open frog connecting a switch with the track, and his foot became fastened so that he could not escape, and he was killed by the train. The Court of Civil Appeals held, as a matter of law, that he was guilty of contributory negligence. The Supreme Court overruled that holding, and remanded the case for another trial. It is true that the court there said: "The law presumes that deceased was in the exercise of due care when he was killed, and it devolved upon the defendant to show that he was not, in order to relieve itself of the liability fixed upon it by its negligent acts causing the death." But in another portion of the opinion it is also said: "In order for the railroad company to relieve itself from liability for the negligence of its servants, the burden was upon it to prove the contributory negligence of the deceased, unless it appeared from the pleading of the plaintiff or the

evidence introduced by her. *Railway v. Shieder*, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538." And to show the exact point decided in that case, we make this further quotation from the opinion: "These facts to our minds strongly indicate negligence, but they are not so conclusive as to exclude a difference of opinion among ordinary men as to whether the deceased did what a man of ordinary prudence would have done at that time and under like circumstances, and they did not warrant the holding, as matter of law—a necessary conclusion—that deceased was negligent in taking that step. In so holding, the Court of Civil Appeals was in error."

Our conclusion is that the instruction complained of constitutes reversible error.

There are some other points of law presented in appellant's brief, on all of which we rule against it.

On the merits of the case, as developed by the testimony, we express no opinion.

For the error indicated, the judgment is reversed and the cause remanded.

Opinion on Motion for Rehearing.

(June 24, 1903.)

At a former day of this term this case was reversed and remanded, because this court was then of the opinion that the trial court's charge on the burden of proof was misleading. The question referred to has been certified to the Supreme Court, and decision of appellees' motion for rehearing reserved to await the opinion of that court. That opinion, overruling the decision of this court, has been received, and therefore the judgment of this court will be set aside and the judgment of the district court affirmed.

In addition to what was held in our former opinion, we now hold that the verdict of the jury is supported by the testimony, which verdict involves the following findings of fact: (1) The defendant was guilty of negligence, as charged in the plaintiffs' petition. (2) J. D. Howard, the deceased, was not guilty of contributory negligence. (3) The plaintiffs are his heirs, as alleged in their petition. (4) The defendant's negligence was the direct and proximate cause of Howard's death. (5) As a result of that death, the plaintiffs were damaged to the extent of the several sums awarded to them.

This disposes of the entire case, and results in an affirmation of the judgment appealed from.

Motion granted, and judgment affirmed.

GULF, C. & S. F. RY. CO. v. HOWARD
et al.

(Supreme Court of Texas. June 4, 1903.)

MASTER AND SERVANT—INJURY TO EMPLOYE—INSTRUCTIONS.

1. Where, in an action for the death of a railway employé by being run over by an engine, the court charged that if the jury believed from

a preponderance of the evidence that decedent, in going on the track, failed to use ordinary care, or was attempting to mount the engine, and on that account sustained injuries causing his death, they should find for the company, and that, if they believed "from the evidence" that at the time decedent was killed he failed to exercise ordinary care, and that such failure contributed to his death, they should find for defendant, an instruction that the burden of proving contributory negligence was on defendant was not misleading, as causing the jury to believe that in considering the question of contributory negligence they should not consider plaintiff's evidence.

Certified Questions from Court of Civil Appeals of Third Supreme Judicial District.

Action by Lizzie Howard and others against the Gulf, Colorado & Santa Fé Railway Company. From a judgment for plaintiffs, defendant appealed to the Court of Civil Appeals, which reversed the judgment (75 S. W. 803) and certified a question to the Supreme court. Question answered.

J. W. Terry, A. H. Culwell, and Chas. K. Lee, for appellant. John W. Parker and W. C. Halbert, for appellees.

BROWN, J. Certified question from the Court of Civil Appeals of the Third Supreme Judicial District, as follows:

"At a former day of this term the Court of Civil Appeals reversed and remanded this case, because it was of opinion that the trial court's charge on the burden of proof was misleading. 75 S. W. 803. Authorities in support of our view on that question are cited in our opinion, a copy of which is hereto attached and made a part hereof. In addition to those there cited, we refer to the case of *Stooksbury v. Swan*, 85 Tex. 556, 22 S. W. 963. The case is now pending in this court on a motion for rehearing, and we desire to certify for decision the question referred to.

"It is contended in the motion for rehearing that all the facts were established by witnesses on both sides, and, there being no controversy about the facts from which contributory negligence was to be adduced, if found at all, the contention is that the jury could not have been misled by the charge on the burden of proof. It is true that most of the facts upon which appellant's contention of contributory negligence is founded were proved by both sides, but the testimony given by the plaintiffs' witness Hoherd, as stated on the fifth page of our opinion, went further and was more specific in support of the theory that Hoherd and his associate, Langford, worked under the control and direction of the roundhouse foreman, and that the latter was superior in authority to Howard than any testimony given by any other witness.

"We deem it proper, however, to explain that the testimony referred to was given by Hoherd while being cross-examined by the defendant; but if, for that reason, it follows that the jury understood it as evidence submitted by the defendant, then the rule cuts

the other way when applied to certain testimony given by the defendant's witness Lee Langford while being cross-examined by the plaintiffs. During his cross-examination, Langford testified: 'Hoherd was assistant hostler. Sometimes the assistant hostler would spot engines for water. He sometimes moved engines into the roundhouse. It was against the hostler's rules for the assistant hostler to move engines. It usually caused trouble.' There was no other testimony tending to show that on former occasions Hoherd had moved engines into the roundhouse in disobedience of the rules and regulations; and if the testimony given by Hoherd in reference to receiving orders from the roundhouse foreman is to be regarded as evidence of the defendant, because drawn out on cross-examination, then the testimony given by Langford, as quoted above, must, for the same reason, be regarded as plaintiffs' testimony.

"The testimony referred to is believed to be important, because the circumstances indicate that Howard had knowledge of the facts testified to by Hoherd and Langford, as stated above; and therefore, by considering such testimony, the jury might conclude that Howard had no right to assume that the engines would not be moved before he reached them, and should have been on the lookout to ascertain if they were moving. The other facts relating to the question of contributory negligence were proved by witnesses on both sides, and were uncontroverted.

"We deem it proper to further add that the court specifically submitted to the jury the question of contributory negligence in the main charge, and in a special charge requested by the defendant. The main charge on that subject reads as follows: '(4) You will also find a verdict for the defendant company if you believe from a preponderance of the evidence that the said J. D. Howard, in going upon the track before the said engines, if he did, failed to use ordinary care, as hereinbefore defined to you, and on that account was struck and killed, you will find a verdict for defendant company, or if you believe from the evidence that the deceased was attempting to mount said engine or tenders, and on that account sustained the injuries which caused his death, you will likewise find for defendant company.'

"The charge requested by the defendant, and given by the court, reads as follows: 'If you believe from the evidence that at the time he was killed the deceased was on the railroad track, or, after he entered thereon, had looked or listened for the engine or engines, he would have discovered the presence or the approach of the same in time to have either remained off the railroad track or to have gotten off the same without injury to himself; and if you further believe from the evidence that a man of ordinary care and prudence, under the same or similar circumstances, would have so looked or listened,

and that in any of the particulars herein mentioned the said Howard failed to exercise such care and caution for his own protection as would have been exercised by a person of ordinary prudence under the circumstances, and that such failure caused or contributed to his death—that is, that but for the same his death would not have happened—then you are instructed to find a verdict for the defendant.'

"The court's charge on the burden of proof is set out in our opinion, a copy of which is attached. We understand the Supreme Court to hold that it is not error to charge on burden of proof when the charge is so found as not to be misleading. *Chittim & Parr v. Martinez*, 94 Tex. 141, 58 S. W. 948.

"With the foregoing statement and explanation, the Court of Civil Appeals for the Third District certifies to the Supreme Court for decision this question:

"Did we rule correctly in holding that the charge of the trial court on the burden of proof was misleading and constituted reversible error?"

Answer.

The charge of the court on the burden of proof of contributory negligence, when taken in connection with the charges set out in this certificate, was not calculated to mislead the jury.

The fourth clause of the charge given by the court embraced two acts, alleged by defendant to have been negligently done by the deceased, that contributed proximately to his death. The court charged the jury that, if they found from a preponderance of the evidence that either of said acts had been done by the deceased, and that he was guilty of negligence as defined in the charge, then they would find for the defendant. To obey this charge in determining the question of contributory negligence, the jury must necessarily have considered all of the testimony introduced upon the subject of contributory negligence by both the plaintiffs and defendant, for in no other way could the preponderance of the testimony upon that issue be determined. In addition to this, the court, at the request of the defendant, gave the charge stated in the certificate upon the subject of contributory negligence, in which the language is used, "if you believe from the evidence," etc. The words "the evidence" embrace all the evidence of both parties, and the effect was to submit that issue to the jury, not upon the evidence offered by the one side nor the other, but upon all the evidence. Considering the charges given upon the specific issue of contributory negligence, the jury could not have reasonably understood that any testimony which was introduced by either party tending to prove negligence on the part of the deceased could be rejected from their consideration, or that they would be confined, in determining the question, to any part of the evidence. The general terms

of the charge upon contributory negligence, whereby the formal statement of the burden of proof resting upon each one of the parties was made, must have had much less force and effect upon the minds of the jurors than the clear, direct, and specific charges on the very issue itself.

GULF, C. & S. F. RY. CO. v. BROWN.

(Court of Civil Appeals of Texas. June 17, 1903.)

PERSONAL INJURIES—COMPULSORY EXAMINATION BY PHYSICIANS—CONTINUANCE—APPLICATION—VERIFICATION—SUFFICIENCY—SECOND APPLICATION—DISCRETION OF COURT.

1. A verification to an application for a continuance by an attorney, which avers that the facts set forth in the application "are true, to the best of his information and belief," is insufficient, within Rev. St. 1895, art. 1276, providing that no continuance shall be granted except for cause "supported by affidavit."

2. A second application for a continuance, not made in strict compliance with the statute, is addressed to the sound discretion of the court.

3. The refusal to compel plaintiff, in a personal injury action, to submit to a physical examination by physicians summoned by defendant or to be appointed by the court, is not erroneous.

Appeal from District Court, Bell County; John M. Furman, Judge.

Action by A. E. Brown against the Gulf, Colorado & Sante Fé Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. W. Terry and A. H. Culwell, for appellant. John W. Parker and W. C. Halbert, for appellee.

KEY, J. This is a personal injury suit resulting in a verdict and judgment for the plaintiff for \$10,000, and the defendant has appealed.

The verdict, in effect, finds (1) that the defendant was guilty of negligence, as charged in the plaintiff's petition; (2) that the plaintiff was not guilty of contributory negligence; and (3) that, as a direct result of the defendant's negligence, the plaintiff was injured to such an extent as that \$10,000 was reasonable compensation for his injuries.

The plaintiff submitted testimony which amply supports the verdict in all respects, and we therefore find as did the jury on the issues of fact referred to.

The charge of the court was a full and fair presentation of the law of the case, and all assignments urged against it are overruled. Nor was error committed in refusing special instructions. The court's charge on the burden of proof is similar to the one approved by the Supreme Court in *G. & S. F. Ry. Co. v. Howard* (decided a few days ago) 75 S. W. 805.

No error was committed in overruling the

¶ 3. See *Damages*, vol. 15, Cent. Dig. § 531; *Discovery*, vol. 16, Cent. Dig. § 92.

second application for a continuance. It was not properly verified, the attorney who swore to it merely stating "that the facts set forth in the foregoing application for continuance are true, to the best of his information and belief." Rev. St. 1895, art. 1276; *Graham v. McCarty*, 69 Tex. 324, 7 S. W. 342; *Spinks v. Mathews*, 80 Tex. 374, 15 S. W. 1101. Furthermore, being a second application, and not in strict compliance with the statute, it was addressed to the sound discretion of the court, and we are of opinion that such discretion was not abused.

We also hold that no error was committed by the trial court in refusing to compel the plaintiff to submit to a physical examination of his person by physicians summoned by the defendant or to be appointed by the court. *Railway Co. v. Cluck* (recently decided by this court) 73 S. W. 569; *Ry. Co. v. Sherwood* (Tex. Civ. App.) 67 S. W. 777; *Ry. Co. v. Botsford*, 141 U. S. 250, 11 Sup. Ct. 1000, 35 L. Ed. 734.

We also hold that no error was committed in the several rulings complained of by appellant in reference to the admission and exclusion of testimony.

The judgment is affirmed.

GRESHAM v. HARCOURT.

(Court of Civil Appeals of Texas. July 1, 1903.)

PARTNERSHIP — ACCOUNTING — EVIDENCE — HEARSAY — RES GESTÆ — VALUE OF PROPERTY — AUDITOR'S REPORT — EXCEPTIONS — WAIVER.

1. Plaintiff's testimony as to the number of sheep belonging to the partnership existing between her decedent and defendant was not inadmissible as hearsay, it appearing that she was present when the sheep were counted, heard the men who did the counting call out the numbers, and at the time put the numbers down in a book.

2. The testimony was admissible as *res gestæ*.

3. An exception to the report of the auditor in an action for a partnership accounting, embodied in a pleading entitled "plaintiff's first amended supplemental petition," was not waived by the filing of another amended supplemental petition which did not include any exceptions to the auditor's report.

4. In an action brought by the administratrix of a deceased partner for an accounting, a contract whereby defendant sold to a third person an undivided half interest in the partnership property was not admissible on the question of value of the property when the sale was made.

Appeal from District Court, Tom Green County; J. W. Timmins, Judge.

Action by Mrs. John J. Harcourt, as administratrix of John J. Harcourt, deceased, against Walter Gresham, to obtain an accounting of the partnership affairs of her decedent and the defendant. Judgment rendered, and defendant appeals. Affirmed.

W. B. Lockhart, for appellant. J. W. Hill, for appellee.

KEY, J. This is the second appeal in this case. On the former appeal it was heard by the Court of Civil Appeals at San Antonio, and finally went to the Supreme Court. The nature of the case is fully stated in 50 S. W. 1058, and 93 Tex. 149, 53 S. W. 1019. At the second trial in the court below the plaintiff was successful, and the defendant has appealed, and presents the case to this court on two assignments of error.

1. It is claimed that the court erred in permitting the plaintiff to testify as to the number of sheep belonging to the partnership of Gresham & Harcourt on May 28, 1895. Two objections were urged to her testimony; the first being that it was hearsay, and the second that it was contradictory of the auditor's report, which was conclusive, because not excepted to. These objections were properly overruled. Mrs. Harcourt was present when the sheep were counted. She heard the two men who did the counting call out the numbers, and she at the time put the numbers down in a book. Her evidence was not hearsay, but was original testimony coming within the rule of *res gestæ*. *Ry. Co. v. Collier*, 62 Tex. 320; *Ry. Co. v. Sherwood*, 84 Tex. 136, 19 S. W. 455, 17 L. R. A. 643; *Ry. Co. v. Musette*, 7 Tex. Civ. App. 177, 24 S. W. 520. Appellee excepted to the report of the auditor, which exception included an objection to his finding the number of sheep on hand. It is true that the exception referred to was embodied in a pleading entitled "plaintiff's first amended supplemental petition," and thereafter the plaintiff filed another amended supplemental petition which did not include any exceptions to the auditor's report; but we do not think filing of the latter pleading should be construed as an abandonment of the exceptions to the auditor's report.

2. The other assignment charges that the court committed error in refusing to admit in evidence a contract of sale from appellant to James Welch, by which appellant sold to Welch an undivided half interest in the partnership property of Gresham & Harcourt. The statement submitted under this assignment does not support the assignment, because it shows that the court did admit the contract in evidence for the purpose of showing that appellant had made a sale of a one-half interest in the partnership property, and the date of the sale. It is contended, however, on behalf of appellant, that the contract was also admissible on the question of value of the property at the time the sale was made. This contention is not believed to be sound. The appellee was not a party to that contract, and was in no wise bound by its terms and recitals.

This disposes of the only questions presented for decision, and results in an affirmance of the judgment. Affirmed.

TEXAS & FT. S. RY. CO. v. HARTNETT.*

(Court of Civil Appeals of Texas. June 17, 1903.)

RAILROADS—INJURIES TO SERVANT—DUTY OF MASTER—SAFETY OF APPLIANCES—NEGLIGENCE—ASSUMPTION OF RISK—PRESUMPTION OF LAW—INSTRUCTIONS—WEIGHT OF EVIDENCE—EXCESSIVE VERDICT.

1. A railroad company owes its engineer the duty of using ordinary care to see that the engine and tender furnished him for use are reasonably safe, and of using ordinary diligence to keep them in a reasonably safe condition.

2. An engineer, entering the employ of a railroad company, has a right to assume that the engine and tender furnished him are reasonably safe.

3. A servant is not required to use ordinary care to ascertain whether the master has performed his duty of exercising ordinary care to furnish him with reasonably safe instrumentalities with which to perform his duties.

4. There is no presumption of law that the steps to a locomotive cab, by defects in which an engineer was injured, were in a proper condition when the locomotive was delivered to the engineer for his run.

5. Where a charge given at a party's request embraced the substance of other requested charges, the party cannot complain of the court's refusal to give the latter.

6. In an action, by an engineer against a railroad company for injuries caused by the breaking of a step on the engine, the court properly refused to charge that it was the duty of plaintiff to make such repairs on the engine as he could with the tools he had at hand, and to examine the engine to discover the need of such repairs, as the instruction would have been not only contrary to law, but on the weight of the evidence.

7. Even though it may be assumed that an engineer, who was injured by the breaking of a step on his engine, knew that during the run no inspection of the engine was being made, except what he made, and that it therefore follows that he assumed any risk arising from the absence of any inspection by the company during that time, he still had a right to assume that the step was safe when the engine was handed over to him, and that it would remain so, except for defects discoverable by ordinary observation, until the company might deem it its duty to make an inspection.

8. A verdict of \$15,000, in favor of a railroad engineer who had lost his left hand in an accident, held excessive, and reduced to \$10,000.

Appeal from District Court, Jefferson County; J. D. Martin, Judge.

Action by Eugene Hartnett against the Texas & Ft. Smith Railway Company. Judgment for plaintiff, and defendant appeals. Modified.

Greer, Greer & Nall, Lathrop, Morrow, Fox & Moore, and J. P. Gilmore, for appellant. Smith, Crawford & Sonfield and Lovejoy & Malevinsky, for appellee.

NEILL, J. This is a suit to recover damages for personal injuries inflicted upon appellee by the alleged negligence of appellant. The allegations of plaintiff are substantially that on the 9th day of June, 1900, he, while in the employment of defendant as a locomotive engineer, in the discharge of his duties undertook to climb into the cab of the engine furnished him by the defendant, which was then being operated by a co-employé,

and while in the act of climbing into the cab, the step near the cab door, on which he placed his foot, broke or came loose, and threw him on the track, and the wheels of the locomotive ran over and cut off his left arm near the elbow joint, causing great physical pain and mental anguish, and the loss of the use of his arm and hand; that the defendant company negligently and carelessly furnished plaintiff for his use a defective and unsafe engine and tender, with defective and unsafe appliances; that the step near the cab door, used for the purpose of enabling him to climb into the engine, was in a dangerous and unsafe condition; and that the nut and screw holding the step in place were old, worn, defective, and out of repair, one nut and bolt being entirely gone, which caused the step to break or pull loose, which caused the fall and injury to plaintiff as before stated. The defendant answered by a general demurrer and general denial, and pleaded specially (1) that by the terms of his contract of employment plaintiff was required to act as his own inspector of the engine, and to do such light repairs thereon as he could with the tools furnished him for that purpose; (2) contributory negligence; (3) assumed risk; and (4) that plaintiff attempted to climb into the cab in violation of the rules of the company when he was injured, and was not performing nor attempting to perform any duty within the scope of his employment. The case was tried before a jury, and resulted in a verdict and judgment in favor of plaintiff for \$15,000.

Conclusions of Fact.

On the 9th day of June, 1900, plaintiff, while in the employ of defendant in the capacity of a locomotive engineer, in pursuance of the duties of his employment, and in the exercise of ordinary care, undertook to climb into the cab of the engine furnished for his use by the defendant, and in doing so placed his foot on the step below and near the cab door, and, while in the act of climbing into the cab, the step came loose, and threw him to the ground on the railroad track, and the locomotive wheels ran over and cut off his left hand. The injury thus inflicted by plaintiff was caused by the negligence of defendant in failing to exercise ordinary care to furnish plaintiff a reasonably safe engine and tender, and in failing to use such care to inspect and keep them and their appliances in a reasonably safe condition with which to perform the duties of his employment, in that the step near the cab door, provided for climbing and entering into the cab, was insecurely fastened; it having no nut on the bolt to hold it securely in place when used by defendant's servants for the purpose of stepping thereon and entering the engine cab. It was not made plaintiff's duty, by his contract of employment, to inspect the engine, tender, or their appliances, nor to discover or repair defects thereon not open to ordinary

*Writ of error pending in Supreme Court.

observation; nor did plaintiff, by his contract with defendant, expressly or impliedly assume the risk of dangers resulting from the negligent failure of defendant to use ordinary care in furnishing him with a reasonably safe engine and tender, equipped with appliances, with which to perform the duties of his employment with ordinary safety. The plaintiff was guilty of no negligence, nor did he violate any rule of the defendant which contributed to his injuries; but the negligence of defendant was the sole and proximate cause of the injuries sustained by him.

Conclusions of Law.

To the plaintiff, as its servant, the defendant owed personally the duty of using ordinary care and diligence to provide for his use a reasonably safe engine and tender as instrumentalities of his service, and was bound from time to time to inspect and examine such instrumentalities, and to use ordinary care, diligence, and skill to keep them in a reasonably safe condition. *Shear. & Red. Neg. §§ 194, 194a.* When plaintiff entered defendant's employment, he had a right to rely upon the assumption that the engine and tender furnished him were reasonably safe. He was not required to use ordinary care to see whether plaintiff had used such care in furnishing him such reasonably safe instrumentalities for his use. Not knowing of defendant's negligent failure to discharge its duty in this regard, and the defects not being obvious, or such as would have necessarily been discovered by him in the ordinary discharge of his duties, and it not being made his duty, by the terms or nature of his employment, to inspect the engine, tender, or their appliances, plaintiff was not required to use ordinary care to see whether defendant had performed its duty of using ordinary care to furnish him with reasonably safe instrumentalities with which to perform the duties of his employment. *Railway v. Hannig, 91 Tex. 347, 43 S. W. 508; Railway v. Bingle, 91 Tex. 287, 42 S. W. 971; Railway v. O'Fiel, 78 Tex. 486, 15 S. W. 33; Railway v. Engelhorn (Tex. Civ. App.) 62 S. W. 561; Railway v. Winton (Tex. Civ. App.) 66 S. W. 481; Railway v. Davis (Tex. Civ. App.) 65 S. W. 217; Railway v. Lindsey, Id. 669; Railway v. Abbey (Tex. Civ. App.) 68 S. W. 293; Railway v. Buch (Tex. Civ. App.) 65 S. W. 681; Railway v. Newport, Id. 657; Railway v. Blackman (Tex. Civ. App.) 74 S. W. 74; Finnerty v. Burnham (Pa.) 54 Atl. 996; Whitaker's Smith on Neg. p. 155, and authorities cited in note "d," p. 157.*

The conclusions of fact we have deduced from the evidence in the record and principles of law just stated, which we deem applicable to them, dispose of, adversely to appellant, the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, and twentieth assignments of error.

There is no repugnancy or contradiction in

the several paragraphs of the court's main charge complained of in the seventeenth, eighteenth, and nineteenth assignments of error. The paragraphs of the charge mentioned in the assignments referred to are in perfect harmony, and enunciate well-established principles of law applicable to the case as made by the pleadings and evidence.

The special charges Nos. 3, 5, and 7, the failure of which to give, at appellant's request, is assigned as error, are clearly upon the weight of evidence, and were properly refused.

There is no presumption of law that the step of the engine cab was in a proper and safe condition on May 27, 1900, when the engine and tender were first delivered to the plaintiff by the defendant. Therefore the court did not err in refusing to give, at appellant's request, special charges Nos. 6, 8, and 9, as complained of in the twenty-fourth, twenty-fifth, and twenty-sixth assignments.

There was no error in the refusal of the court to give special charge No. 11, complained of in the twenty-seventh assignment of error, because the evidence does not tend to show that plaintiff had left his engine contrary to rule 348, as is contended by appellant; but, on the contrary, it indisputably shows that he was with his engine, within the meaning of said rule.

The substance of special charges Nos. 12 and 15, requested by appellant, is embraced in special charge No. 10 given at its request. Therefore the twenty-eighth and thirtieth assignments of error cannot be sustained.

If the court had instructed the jury, as requested by appellant, in special charge No. 14, that under the evidence it was the duty of plaintiff, during the time he was operating the engine and tender, to make such light repairs thereon as he could with tools and material available to him, and that it was also his duty to have made such examination or inspection as would disclose to him the necessity, if any, of such repairs, etc., such instruction would have been upon the weight of the evidence, and would have been tantamount to stating that as a matter of law such duties rested upon plaintiff, and consequently his failure to discharge them would be negligence per se. As a general rule, the duty of inspecting instrumentalities of work and repairing their defects, if disclosed, rests upon the master, and is non-delegable in so far as it has relation to intrinsic defects. The evidence in this case is sufficient to warrant the conclusion that the insecure fastening of the step was an inherent defect in the construction of the engine, and to have given the requested charge would have been to ignore, not only a legitimate conclusion deducible from the evidence, but a general principle of law applicable to the facts in the case.

The thirty-third assignment of error is directed against the action of the court in refusing to give, at appellant's request, the

following special charge: "The jury are further instructed that if, at the time of accepting the employment and assignment upon the so-called 'Port Arthur Run,' plaintiff knew that there was no other engine inspector provided at either Beaumont or Port Arthur, or at any intermediate point, and knew that there was no roundhouse or repair shop at either Beaumont or Port Arthur, or at any intermediate point, and during the time that he was working upon said Port Arthur run knew that no inspection of the engine and tender was being made, except what he made, and continued to the time of his injury upon said run without complaint or objection, then he must be held to have assumed the risk arising from the absence of any separate inspection by another, and cannot recover because no other inspector or inspection was provided." Let it be assumed that the evidence is sufficient to establish the matters of fact submitted in this charge, and, from them, that it follows as a matter of law that plaintiff assumed the risk arising from the absence of any inspection of the engine during the time it was in his use; yet it does not follow, from such assumption of fact and law, that plaintiff was precluded thereby from a recovery. For, notwithstanding the assumption thus made *pro hac vice*, plaintiff had the right to assume, from the duty resting upon the defendant to exercise ordinary care to furnish him a reasonably safe engine, that the defect in the fastening of its step did not exist when it was turned over to him, and, the defect not being open and discoverable by ordinary observation on his part, that it would continue in a reasonably safe condition for use until 'such time as defendant might deem it its duty to have the engine and appliances inspected. We do not think the proper construction of plaintiff's pleadings restricted him to proof of the condition of the engine when it was first furnished him for use by the defendant. To us it seems that the allegations relate to its condition, not only at the time it was originally furnished, but at the time of the occurrence of the accident. *Railway v. Blackman*, *supra*. But, however this may be, there was no evidence tending to show that the defect did not exist when the engine was originally turned over by defendant to plaintiff for his use.

The assignment which complains of the verdict being excessive we have concluded, after careful consideration of the testimony and of analogous cases, is well taken. We have not been able to find a single case where damages in the amount assessed by the verdict have been adjudged any one for injuries similar to those sustained by the plaintiff. In our best judgment \$10,000 will be full compensation for the loss of his left hand and the physical and mental suffering incident thereto. The excessiveness of the verdict is the only error that we have found in the judgment. If, therefore, the plaintiff

will within 10 days enter a remittitur in this court of \$5,000, the judgment will be reformed and affirmed; otherwise, it will be reversed, and the cause remanded.

MISSOURI, K. & T. RY. CO. OF TEXAS v. McFARLAND.

(Court of Civil Appeals of Texas. June 17, 1903.)

ASSIGNMENTS OF ERROR—SUFFICIENCY—REQUESTED INSTRUCTIONS.

1. An assignment of error, without any proposition under it and explanatory of it, is bad.
2. Requested instructions, covered by the main charge, are properly refused.

Appeal from District Court, Bell County; John M. Furman, Judge.

Action by E. A. McFarland against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff. Defendant appeals. Affirmed.

T. S. Miller and Geo. W. Tyler, for appellant.

FISHER, C. J. The appellee, as plaintiff below, sued the railway company for damages to his lands, caused by overflows which occurred in June, 1899, and April, 1900, with the result of injuring and destroying his crops of corn and grain. He alleges that the overflows were due to an embankment erected by the railway company adjacent to plaintiff's land, which caused the water to overflow or accumulate and stand to a great depth on the plaintiff's land for a number of days, and but for said embankment the water would have flowed off without injury or damage to plaintiff's crop. Defendant for answer pleaded a general denial, and that the embankment was constructed with reasonable care and diligence and precaution, so as to provide against ordinary rainfalls and floods, and for the drainage of the adjacent lands according to the natural lay of the surface, and with sufficient culverts and sluices to pass off water accumulated from ordinary rainfalls and floods, and that the overflow of plaintiff's lands was due to an extraordinary and unprecedented flood. Verdict and judgment resulted in plaintiff's favor for \$1,404.60.

We find the facts substantially as alleged by plaintiff in his petition. The crops were destroyed and injured, as alleged by him; and there is evidence tending to show that the rainfalls and floods that overflowed his lands were not extraordinary and unprecedented, and that the embankment caused the water to accumulate, collect, and stand upon his land, and thereby destroy the crops, to the value as found by the verdict of the jury. And there is evidence which has a tendency to show that, if the embankment had been provided with sufficient sluices and culverts to have permitted the escape of the water, the plaintiff's crops would not have

been damaged to the extent claimed by him in his petition; and for the failure to provide such sluices and culverts, the evidence warrants the inference that the railway company was guilty of negligence.

The testimony of the witness Huckabee, as found in the record, is substantially the same as that which appellant, in its first assignment of error, states was, upon the objection of the plaintiff, excluded; but, if we are not correct in this, we are of the opinion that we ought not to consider this assignment as sufficient. It is not a proposition, nor is there any proposition submitted under it and explanatory of it.

Appellant's second, third, and fourth assignments of error complain of the refusal of the court to submit special instructions which were requested by it. The court indorsed upon this request a refusal upon the ground that the charges were substantially covered by the main charge of the trial court. A comparison of the charges requested, and which were refused, with the questions submitted by the main charge of the court, shows that the issues presented in the special instructions were substantially given by the court in its main charge.

We overrule appellant's assignments that complain of the verdict as being contrary to the evidence. There is evidence in the record which will support the verdict of the jury and the findings of fact of this court.

We find no error in the record, and the judgment is affirmed.

Affirmed.

GREENLAW et al. v. CITY OF DALLAS.*
(Court of Civil Appeals of Texas. June 17, 1903.)

TAXES—LIMITATIONS—REPEAL OF EXCEPTION.

1. Act July 4, 1879 (Acts 1879 [Sp. Sess.] p. 15, c. 17, § 16), providing that no delinquent taxpayer should have the right to plead limitation against any taxes, was omitted in the revision of the statutes of 1895, and was re-enacted five weeks later by Laws 1895, p. 60, c. 3, § 1. *Held*, that thereafter limitations were not a defense to taxes which would have been barred prior to the act of 1895, except for the provisions of the act of 1879.

Error from District Court, Dallas County; Richard Morgan, Judge.

Action by the city of Dallas against W. B. Greenlaw and others. Judgment for plaintiff, and defendants bring error. Affirmed.

F. M. Etheridge, for plaintiffs in error. W. T. Henry and J. J. Collins, for defendant in error.

STREETMAN, J. The city of Dallas brought this suit October 25, 1895, to recover the taxes due said city upon real estate of plaintiffs in error for the years 1887, 1888, 1889, 1890, 1891, 1892, 1893, and 1894, and recovered judgment, with foreclosure of lien

upon said property. Plaintiffs in error plead the two-year statute of limitations. Plaintiffs in error concede the correctness of the judgment as to the taxes for 1894, and also that the judgment as to the previous years is correct, unless their plea of limitation should have been sustained.

The act of the Legislature approved July 4, 1879, contained the following provision: "No delinquent taxpayer shall have the right to plead in any court or in any manner rely upon any statute of limitation by way of defense against the payment of any tax due from him or her, either to the state, or any county, city or town." Acts 1879 (Sp. Sess.) p. 15, c. 17, § 16. This provision continued in force until the revision of the statutes in 1895. In that revision, which became effective September 1, 1895, this clause was omitted. By an act of the special session of 1895, which went into effect October 9, 1895 (Laws 1895, p. 6, c. 3, § 1), this clause was re-enacted. Plaintiffs in error contend that the omission in the Revised Statutes of 1895 operated to repeal this clause, and that from that time, as to taxes then due, the statutes of limitation operated against cities and towns, as if there had never been any law to prevent limitation from running; and they further insist that, the bar of the statute having become complete by the repeal of this statute, its operation could not be prevented by the re-enactment of this provision.

The same question has been passed upon by the Court of Civil Appeals of the Fourth District in the case of *Hernandez v. City of San Antonio*, 39 S. W. 1022, and by this court in *Abney v. State*, 20 Tex. Civ. App. 101, 47 S. W. 1043. The reason for the decision is not stated in the former case; the court simply saying that the article saving cities from the statute "was in effect until September 1, 1895, and was re-enacted with the emergency clause on October 9, 1895, and, the taxes of 1877 and those due for the following years not being barred at that time, the statute denying the right to plead limitation as to taxes was applicable." In the case of *Abney v. State*, a decision of the question was perhaps unnecessary, as the suit was for taxes due the state and county. In discussing it, however, Judge Collard said: "If it could be said that limitation would run against the state, when the statute is silent upon the subject, it could only run from the time that the Revised Statutes took effect to the time the law was re-enacted, from September 1 to October 9, 1895. * * * The period during which the statute was silent was not sufficient to create a bar, and there was, therefore, no vested right."

It may be conceded that the statutes in such cases only affect the remedy, and that, when an exception operates to prevent the running of the statute of limitations, such exception may be repealed, and causes of action which would have been barred, but for such exception, will be barred after its

*Rehearing pending.

repeal as if it had never been in existence. It may also be conceded that, when the bar of the statute has once become complete, its effect cannot be destroyed by subsequent legislation. The first rule, however, is subject to an important qualification. To repeal such an exception without allowing a reasonable time to sue would be unconstitutional. It is customary, therefore, in repealing an exception which has prevented limitation from running, to allow a reasonable time after the repeal to sue upon causes of action which would be otherwise barred. But when the Legislature, as in the present instance, has failed to make such provision, the repeal is not held invalid because of such omission; but the court, while giving effect to the law, will nevertheless construe it as if it contained a provision allowing parties a reasonable time to assert rights which would be barred. *Boon v. Chamberlain*, 82 Tex. 480, 18 S. W. 655; *Rucker v. Dailey*, 66 Tex. 284, 1 S. W. 316. What is a reasonable time may sometimes become a question of fact. *Link v. City of Houston* (Tex. Sup.) 60 S. W. 864. The evidence may sometimes be such that the court can determine it as a question of law. *Williams v. Bradley*, 67 S. W. 170, 3 Tex. Ct. Rep. 968.

In this case, only one month and nine days elapsed from the repeal of the clause and its re-enactment. It is unnecessary to determine whether we should hold, as a matter of law, that a failure to sue within this time was not unreasonable. There are no conclusions of fact or law in the record, and we may presume, if necessary, that the court passed upon this as a question of fact, and we should certainly be authorized in sustaining such finding. *Link v. Houston*, supra. It follows, therefore, whether we say that limitation only ran from the repeal of the article on September 1, 1895, or that the city after that time had a reasonable time within which to sue, that there was no time before this law was re-enacted when the statute of limitations could have been effectively pleaded as a defense. This being the case, there is no reason why the law as re-enacted should not be made to apply to the taxes prior to the year 1894, so as to prevent them from being barred by limitation.

There being no error in the judgment, it is therefore affirmed.

Affirmed.

McAFEE v. MEADOWS.

(Court of Civil Appeals of Texas. June 15, 1903.)

SALES—BREACH OF WARRANTY—INSPECTION BY BUYER—INSTRUCTIONS.

1. In an action by the vendee of a horse for breach of a warranty of soundness, it was error to charge that if it was injured by ill care or improper driving to find for defendant, where there was no evidence that it had been injured by ill care or hard driving.

2. The horse was "buck-kneed," and there was evidence that the defect was apparent, but that whether it would injure him or not could be ascertained only by actual use. It was undisputed that plaintiff saw the defect, inquired about it, and, according to his testimony, received a warranty against any bad results therefrom. Held error to charge that if, though warranted sound and proven unsound, plaintiff could by looking at the horse have seen that his knees were defective, defendant was not liable.

3. The fact that the excluded issues were submitted elsewhere in other charges did not cure the error.

Appeal from Rusk County Court; W. W. Moore, Judge.

Action by O. W. McAfee against S. T. Meadows. Judgment for defendant, and plaintiff appeals. Reversed.

J. H. Turner, for appellant. Buford & Buford, for appellee.

GILL, J. This action originated in the justice court, and is a suit upon breach of warranty of soundness of a horse purchased by appellant from appellee. The answer was a general denial. On appeal to the county court, a jury trial resulted in a verdict for appellee. The appellant has brought the judgment here for revision.

McAfee bought from the agent of S. T. Meadows a black horse named "Midnight," for which he paid him \$125. McAfee testified that the seller warranted the horse to be sound, and agreed that if the buyer was not satisfied with his purchase he could return it and get his money back. Ed Meadows, who sold the horse, testified that this was not true. The horse was "buck-kneed," and this defect or peculiarity was apparent. There was testimony to the effect that any one could see that the horse was "buck-kneed," but that whether it would injure him or not could be ascertained only by actual use. The testimony adduced by plaintiff tended further to show that the first time the horse was driven after the sale he became lame in his left knee, and that thereupon plaintiff at once returned the horse, expressed himself dissatisfied, gave his reasons, and demanded a rescission. This was refused. Other like demands were refused, after which this suit was brought.

On the trial the judge gave no general charge, but submitted several special charges requested by one or the other of the parties to the suit. The assignments of error which we shall notice relate to the charges given at the request of defendant.

By the first assignment plaintiff complains of special charge No. 2 given at the request of defendant. The charge submits as a defense that, if the horse "was injured by ill care or improper driving, the jury should find for defendant." The objection urged is that the issue is not raised by the evidence, and we think the objection is sound. There is no evidence that the horse had been injured by ill use or hard driving.

By the second assignment plaintiff complains of special charge No. 3 given at the request of defendant, to the effect that, if defendant did not warrant the horse sound, they should find for defendant, and that, though warranted sound and proven unsound, plaintiff could not recover if by looking at the horse he could have seen that his knees were defective. In view of the evidence the charge was erroneous upon both points, as pointed out in the proposition and statement. There was evidence to the effect that the horse might be returned if plaintiff became dissatisfied. This was a valid ground of rescission if established, yet the charge precluded it. There was evidence that the defect in the knees was apparent, but that whether it would prove injurious would not be disclosed by inspection. It was undisputed that plaintiff saw the condition of the knees and inquired about their effect, and, according to his testimony, received a warranty against bad results from the condition of the knees. Yet the charge acquits the defendant if the plaintiff saw the defective knees. The assignment must be sustained. The fact that the excluded issues were submitted elsewhere in other charges does not cure the error. The charges are not so framed and related to each other as to be given the effect of modifying each other.

For the errors indicated, the judgment is reversed and the cause remanded. Reversed and remanded.

INTERNATIONAL & G. N. R. CO. v. COLLINS.*

(Court of Civil Appeals of Texas. June 12, 1903.)

**RAILROAD EMPLOYE—INJURIES—DEFECTIVE
BRAKESTAFF—INSPECTION—PLEADING—
VARIANCE—EVIDENCE—EXPERTS—LEADING
QUESTIONS—CONCLUSIONS—INSTRUCTIONS
—APPEAL—OMISSIONS IN CHARGE.**

1. In an action for personal injuries, plaintiff's testimony that he was nursed by his sister, while apparently irrelevant and immaterial, was not prejudicial error.

2. In an action for personal injuries, the mere asking of a question whether plaintiff was a married man, which the court on objection refused to allow, was not error.

3. Plaintiff had testified that his injuries caused him to suffer pain in the back of his testicle, and defendant's attorney asked him on cross-examination whether he had any private trouble, which he answered in the negative, whereupon the attorney asked, "You have been a railroad man 30 years and never had a private trouble?" to which plaintiff answered, "Not quite 30 years. I have been married 21 years." *Held* not error to refuse to strike out that part of the answer showing plaintiff to be married, since defendant's question insinuated that the suffering complained of might have been caused by some private disease, to repel which plaintiff was entitled to testify that he was a married man.

4. Where defendant's attorney, by an unwarranted insinuation in a question put by him, had brought out a statement that plaintiff had

been married 21 years, it was not error for plaintiff's counsel on redirect examination to repeat the plaintiff's former statement of that fact in asking the question whether plaintiff was still married, which, on objection, was disallowed.

5. Where, in an action for injuries, plaintiff testified that he had been in the railroad business for more than 20 years as a brakeman and conductor, and was inspector of cars on an important railroad for 4 years, he was competent to testify, as an expert, whether a defect in a brakestaff, which caused his injuries, could have been discovered by proper inspection.

6. Where a witness had shown himself qualified to testify as an expert, his affirmative answer to a question whether he was qualified, from experience and knowledge, to state whether a certain defect in a railroad brakestaff could have been discovered by a proper test, was harmless.

7. In an action for injuries, questions asked an alleged expert whether he was qualified from experience and knowledge to state whether a defect, if any, that existed in a certain brakestaff could have been discovered by a proper test, and asking him to state from his experience, etc., whether in his opinion the condition of the brake was such as could have been ascertained by proper inspection, were not objectionable as leading.

8. Where a witness was qualified as an expert, a question asking his opinion whether a defect in a brakestaff could have been ascertained by proper inspection was not objectionable as calling for a conclusion.

9. A petition alleged that plaintiff, a brakeman, while passing from one car to another, took hold of a brakestaff to support himself, and was injured by reason of the breaking of the staff. The evidence showed that he was not passing from one car to another at the time, but was standing at the brake, with one foot on one car and the other on another, and turning the brake for the purpose of setting it. *Held*, that the variance was immaterial.

10. Where the undisputed evidence showed that a defect in a brakestaff which caused plaintiff's injuries would have been discovered by proper inspection, an instruction that though defendant did not exercise ordinary care to discover the defect, yet if, had such care been exercised by defendant, it would not have discovered such defect, plaintiff could not recover, was properly refused.

11. Where defendant failed to request additional charges, it could not complain, on appeal, of omissions in the charge given.

Appeal from District Court, Harris County; Chas. B. Ashe, Judge.

Action by O. H. Collins against the International & Great Northern Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. A. Read, for appellant. Lovejoy & Malevinsky, for appellee.

PLEASANTS, J. This is a suit brought by the appellee against the appellant to recover damages for personal injuries to appellee, alleged to have been caused by the negligence of the appellant.

At the time he received the injuries complained of, appellee was in the employment of appellant as a switchman in its railroad yard in the city of Houston. In the performance of the duties of his employment he went upon a car in a train which was being switched in said yard, and attempted to set the brake upon said car. While thus engaged

*Rehearing denied.

the brakestaff broke, and appellee was thrown to the ground from the car, and was seriously and painfully injured. There was an old crack in this brakestaff down in the ratchet wheel or socket, which rendered it unsafe and dangerous, and caused it to give way when appellee attempted to set the brake. This defect in the brakestaff was latent, but could have been discovered by a proper inspection on the part of appellant. The car did not belong to appellant, but had been received by it from a connecting carrier a short time before the appellee was injured. Appellant's servant, whose duty it was to inspect cars handled by it, made an inspection of this car when it was received, but failed to discover the defect in the brakestaff because he did not go upon the car and try the brake. He testified that the staff looked all right, and that he did not get on the car and try the brake because the lumber with which the car was loaded pressed against the brake wheel and would have prevented him from turning the brake. If the inspector had taken hold of the brake wheel and tested the brake in a proper manner by turning it, he would have discovered the defect.

The first assignment of error, which is submitted as a proposition, is as follows: "The court erred in its actions, as shown in defendant's bill of exception No. 1, as follows: While plaintiff, during the trial of said cause, was on the witness stand, defendant asked permission of the court to object, and objected beforehand, to the question that the plaintiff's attorneys had signified their intention of asking the plaintiff, as to whether he had a family, plaintiff's attorneys having stated that they differed with the Supreme Court on that, and intended to ask the question anyhow, said objection being made in the presence and hearing of plaintiff's attorneys, and with their acquiescence, the objection being that such testimony was, and would be, irrelevant and immaterial to the issues, and defendant's attorney asked the court to forbid in advance such question, and the court refused to do so, to which defendant excepted; and thereafter plaintiff's attorneys asked the plaintiff the following question: 'Who nursed you while you were sick?' to which the witness responded: 'My sister, Mrs. Jordan.' Ques. 'Who nursed you here?' To this question the defendant objected, unless it was expected to follow up the evidence by showing the materiality of identifying the person who nursed him, because it was irrelevant and immaterial to the issues. The court stated that it thought so, too, but that it could not anticipate what plaintiff's attorneys desired to prove by the plaintiff, and thereupon plaintiff's attorneys asked the following question: 'Q. I will ask you this question, if you have got a family here in Texas to wait on you?' To which question defendant objected, and the court sustained the objection, and defendant ex-

cepted to the asking of the question, and to its tacitly being permitted by the court, on the ground of irrelevancy and immateriality, as hereinabove indicated." There is no merit in this assignment. The statement of the witness that he was nursed by his sister, while apparently irrelevant, and therefore inadmissible, could not have had any effect upon the jury or in any way prejudiced defendant, and its admission in evidence was immaterial and harmless error. Conceding, as an abstract proposition, that it was not permissible for plaintiff to show whether or not he was a married man, the mere asking of the question, the answer thereto being forbidden by the court, could not possibly have injured defendant, as the form of the question did not suggest the answer desired or expected, and there is nothing in the statement of the proceedings shown in the bill of exception which would authorize the conclusion that plaintiff's attorney in asking this question was improperly attempting to get before the jury evidence which he knew to be inadmissible.

Upon cross-examination plaintiff was asked by defendant's attorney if he had any private trouble, and he answered in the negative. Defendant's attorney then asked this question: "You have been a railroad man 30 years and never had a private trouble?" To this question plaintiff answered, "Not quite 30 years. I have been married 21 years." Appellant objected to this answer, and moved the court to exclude it from the consideration of the jury, on the ground that it was not responsive to the question, and was irrelevant. There was no error in the refusal of the court to sustain the objection to this testimony. The plaintiff, in testifying as to his present condition and the suffering caused him by his injuries, had stated that he suffered pain in his back and testicle. The question propounded by defendant's attorney plainly insinuated that the pain and suffering complained of by plaintiff was or might have been caused by some private trouble or disease with which plaintiff was afflicted, and in repelling such insinuation—which was not justified by any evidence in the case—it was not improper to allow plaintiff to state that he had been a married man for 21 years.

The third assignment of error complains of the action of plaintiff's counsel in asking the plaintiff, while on the stand as a witness, the following question: "Mr. Read [defendant's attorney] asked you if you had any venereal disease, and you said not, and that you had been married 21 years. We will ask you whether you are still married." The defendant objected to the repetition by plaintiff's attorney of the statement previously made by plaintiff that he had been married 21 years, and also objected to the question as to whether plaintiff was still married, on the ground that it was irrelevant and immaterial. The court sustained the objection,

and plaintiff was not permitted to answer it. Thereupon defendant excepted to the action of plaintiff's attorney in repeating the former statement of the plaintiff and in asking the question above set out, on the ground that it tended to prejudice defendant's case. The assignment presents no error. As before stated, we think defendant's attorney, by an unwarranted insinuation in the question put by him to the plaintiff, brought out the statement from plaintiff that he had been a married man 21 years, and cannot be heard to complain of such statement as irrelevant and immaterial to any issue in the case. It is unnecessary for us to determine whether it was proper for plaintiff to testify as to whether he was married at the time of the trial, as the trial court sustained defendant's objection to this question. No injury could have possibly resulted to defendant by the action of plaintiff's attorney in propounding the question.

Plaintiff, while testifying, was asked by his attorneys the following question: "Are you qualified, from experience and knowledge, to state to the jury whether or not the defect, if any, that existed in that brake, could have been discovered by a proper test?" Having answered this question in the affirmative, he was asked to "state to the jury, from your experience as an inspector and your knowledge about the business, whether or not, in your opinion, the condition of that brake was such as could have been found out by a proper inspection." To this question he answered: "The defect should have been discovered by a proper test; could have been found out by proper handling and inspection." The defendant objected to these questions and answers, on the grounds that the witness was not shown to be qualified as an expert, and that the questions were leading, and called for the mere conclusions of the witness. The plaintiff testified that he had been in the railroad business for more than 20 years as brakeman and conductor, and was inspector of cars on the New York Central Railroad for 4 years. Upon these facts the trial court correctly held that the witness was qualified to give his opinion as an expert upon the question of whether the defect in the brake could have been discovered by a proper inspection. The witness having shown himself qualified to testify as an expert, his statement that he so considered himself was immaterial and harmless. The objection that the questions were leading cannot be sustained. Under the rule generally laid down by the best text-writers, the questions would be leading in that they embody a material fact and may be answered by a simple affirmative or negative, but our Supreme Court has modified this rule, and holds that a question which may be answered by a simple "Yes" or "No" is not leading, unless the form of the question suggests the answer. It would be impossible to tell from the form in which these

questions were put what answer was desired, and therefore the questions cannot be considered leading. *Lott v. King*, 79 Tex. 292, 15 S. W. 231; *Ry. Co. v. Dulwich*, 92 Tex. 655, 51 S. W. 500. The objection that the questions call for the conclusions of the witness is likewise untenable. All expert testimony is necessarily but the opinion and conclusion of the witness, and an objection to such testimony on this ground can only be sustained when the witness is not shown to be qualified as an expert to express an opinion, or when the issue is one which is not susceptible of proof by expert testimony, but must be determined by the jury from the facts before them and their common knowledge, and by the exercise of the best judgment. As before shown, this witness was qualified to testify as an expert, and it is clear the question of what was a proper inspection of the car, and whether such inspection would have discovered the defect in the brake, was a question upon which the opinion of those familiar with the railroad service and the ordinary and usual manner in which cars are inspected, and who were informed as to the exact character of the defect, could be properly received in evidence. *Ry. Co. v. Thompson*, 75 Tex. 503, 12 S. W. 742.

The sixth assignment of error complains of the refusal of the trial court to instruct the jury to find for the defendant, on the ground that the evidence shows that the appellee was not injured in the manner and under the circumstances alleged in his petition. The petition alleges that appellee was passing from one car to another, and in order to support himself took hold of the brakestaff, when said staff broke, and caused him to fall and receive the injuries complained of. The evidence shows that appellee was not passing from one car to another at the time of the accident, but was standing at the brake, with one foot on one car and one upon the other, and was turning the brake for the purpose of setting same. We think this variance between the allegation and the proof is immaterial. Appellee's cause of action, as alleged in his petition, was grounded upon the negligence of appellant in furnishing him a defective and dangerous instrument with which to perform his work, by reason of which he was injured. It is a fundamental rule of evidence that only the substance of the issue need be proven. Proof that the brakestaff was defective, and that this defect was the direct cause of appellee's injury, certainly met the requirement of the rule before stated, and it was wholly immaterial whether, at the time the staff broke, appellee was simply holding onto same for support, or turning same for the purpose of setting the brake, no issue of contributory negligence being raised under either circumstance. *Hicks v. Ry. Co.* (Tex. Sup.) 72 S. W. 836; *Ry. v. Lee*, 7 Tex. Ct. Rep. 40, 74 S. W. 345.

The seventh assignment complains of the refusal of the court to submit to the jury a

special charge requested by appellant to the effect that, if the jury believed from the evidence that the plaintiff was not injured substantially in the manner alleged in his petition, they should find for the defendant. This charge was properly refused, because the undisputed evidence shows that the plaintiff was injured substantially in the manner and under the circumstances alleged in his petition. The immaterial variance between the evidence and the allegation of the petition discussed under the preceding assignment did not raise the issue sought to be submitted by this charge.

The appellant requested the trial court to charge the jury as follows: "If you believe that the defendant did not exercise ordinary care to discover the defects in the brakestaff in this case, but if you yet believe that had such care been exercised by the defendant it would not have discovered such defect, then you will find for the defendant." The refusal of the trial court to give this charge is complained of in the eighth assignment of error. The assignment is without merit. The requested charge was properly refused, because the undisputed evidence shows that the defect in the brakestaff would have been discovered by a proper inspection of the car, and therefore the charge presented an issue not raised by the evidence.

There was no affirmative error in the charge on the measure of damages. If the defendant desired fuller instructions to the jury upon this subject, it should have presented a correct special charge and requested its submission to the jury, and, having failed to do this, it cannot complain of omissions in the charge given by the court.

There is ample testimony to sustain the verdict of the jury on the issue of the liability of appellant, and the amount of the verdict is not shown to be excessive. The record discloses no material error, and the judgment of the court below is affirmed.

Affirmed.

SOUTHERN OIL CO. v. CHURCH.

(Court of Civil Appeals of Texas. June 10, 1903.)

Additional findings of fact. For former opinion, see 74 S. W. 797.

FISHER, C. J. The appellant, when it furnished to Hammil & Bro. the derrick, could by the exercise of ordinary care have known that it was defective, as stated in our original finding, and at the time knew that it would be used by the servants of Hammil & Bro. in drilling the well. Hammil & Bro. used the derrick in the ordinary and usual way in drilling the well, and the defective condition of the crown piece of the derrick did not arise by reason of the use by Hammil & Bro., but existed when furnished to them

by the appellant. The appellant also furnished Hammil & Bro. the piping or casing used in the well. The iron bolt that struck the plaintiff was not in the crown piece, but in the crown block.

The above are additional findings.

ROGERS v. McGUFFEY.

(Court of Civil Appeals of Texas. June 24, 1903.)

LANDLORD AND TENANT—RAISING CROPS ON SHARES—BREACH OF CONTRACT—MEASURE OF DAMAGES—VALUE OF EXPECTED CROP—VALUE OF LABOR PERFORMED.

1. The measure of damages for the breach of a rental contract, whereby defendant was to furnish the land, tools, teams, and food necessary to make a crop, and was to receive half of the crops produced, was one-half of the crop which plaintiff would reasonably be expected to have raised during the term of the lease, less such amount as he was shown to have earned, or by the use of reasonable diligence might have earned, after the breach of the contract.

2. The value of labor performed by plaintiff in breaking land and mowing weeds prior to the breach of the contract, and removing corn subsequent to and in consequence of the breach, was not a proper item of damage.

Appeal from Collin County Court; J. H. Faulkner, Judge.

Action by O. W. McGuffey against B. D. Rogers. From a judgment for plaintiff, defendant appeals. Reversed.

Abernathy & Mangum, for appellant. H. L. Davis, J. S. Gresham, and W. C. Jones, for appellee.

FLY, J. This suit was instituted by appellee to recover of appellant damages in the sum of \$583.75, resulting from the breach of a rental contract as to 50 acres of land for the year 1901. The trial resulted in a verdict and judgment in favor of appellee for \$30.

Appellant rented 50 acres of land to appellee for 1901: the terms being that appellant was to furnish the land, and tools, teams, and food necessary to make a crop, and was to receive as compensation one-half of what crops were produced on the land. Appellee plowed a few acres of the land, and about January 1, 1901, the contract was breached by appellant.

The court gave the following charge on the measure of damages: "And in determining plaintiff's damages, if any, you are instructed that the measure of damages would be the reasonable market value of one-half of all the corn and cotton which plaintiff would be reasonably expected to have raised upon said premises during the term of said lease, less such amount as plaintiff is shown to have earned, or by the use of reasonable diligence he might have earned, by engaging in a similar or different business after the breach of said contract; and in addition thereto, if you find and believe that plaintiff broke some land and mowed some weeds on said prem-

ises, the plaintiff would be entitled to recover the reasonable value of said work, and that in consequence of said breach of said contract was compelled to move and remove some corn, then he would be entitled to recover the reasonable costs of moving said corn."

The charge was correct, in so far as it instructed the jury that the measure of damages would be one-half of all the corn and cotton that would reasonably have been raised on the leased premises, less what was earned, or should, by ordinary diligence, have been earned, by appellee after the breach of the contract. *Rogers v. McGuffey* (Tex. Sup.) 74 S. W. 753. The charge is erroneous, however, in permitting a recovery for labor performed in breaking some of the land. That item of damages is embraced in the probable profits to be derived from the crops. Breaking the land, cutting down weeds, and cultivating and harvesting the crops were means to the end of raising the crop, and to allow compensation for performance of those means, as well as one-half the crops, would be to allow double damages.

For the error in the charge, the judgment is reversed, and the cause remanded.

STATE v. COLORADO BRIDGE CO. et al.
(Court of Civil Appeals of Texas. June 17, 1903.)

RAILROADS—AID IN CONSTRUCTION—EXEMPTION FROM TAXATION—FORFEITURE—CONSTITUTIONAL LAW.

1. Act March 10, 1875 (Sp. Laws 1875, p. 69, c. 49), which, in compromise of a claim of a railroad company against the state for bonds to be given in aid of the construction of the railroad, exempts from state taxes for 25 years all property which may be owned by it or its successors in virtue of the act incorporating it, is constitutional.

2. Such exemption is not forfeited by sale of the railroad.

3. Nor is it forfeited by failure of the company to construct and complete its road between the places and within the time required by its charter.

Appeal from District Court, Travis County; R. L. Penn, Judge.

Suit by the state of Texas against the Colorado Bridge Company and others. Judgment for defendants. The state appeals. Affirmed.

C. K. Bell, Atty. Gen., Jno. W. Brady, Co. Atty., D. A. McFall, L. D. Brooks, and Gardner Ruggles, for the State. N. A. Stedman and S. R. Fisher, for appellee.

FISHER, C. J. This suit was instituted on the 7th day of February, 1901, in the name of the state of Texas, as plaintiff, against the Colorado Bridge Company, a corporation, to recover of it taxes due the state of Texas and Travis county for the years 1881 to 1899, both included, on a railroad bridge alleged to belong to it and erected across the Colorado

river, in Travis county, between the points where the International & Great Northern Railroad Company's railroad touches said river on either side. The petition asks for the recovery of penalties, interest, and costs, as well as the principal sums alleged to be due, and for a decree of foreclosure on the bridge as described, and for its sale to satisfy the claims of plaintiff. The International & Great Northern Railroad Company was made a party defendant under the allegation that it was claiming some interest, right, or title to said bridge, the exact nature of which, while unknown to plaintiff, was alleged to be subordinate to the claim and lien asserted by plaintiff. Plaintiff filed a first amended original petition on August 30, 1902, and a second amended original petition on December 9, 1902, the day on which the case was called for trial. The defendant the Colorado Bridge Company filed an answer consisting of a general demurrer and general denial on October 3, 1902, and on December 9, 1902, filed a first amended original answer, wherein, in addition to its general demurrer and general denial, it adopted the answer of its codefendant, the International & Great Northern Railroad Company. The answer of the International & Great Northern Railroad Company consisted of a general demurrer and general denial and special pleas to the effect that it owned the bridge under an executory contract of sale made by and between it and its codefendant, the Colorado Bridge Company, and that it owned the bridge by and through the Colorado Bridge Company, which is and was a mere agency or instrumentality of the International & Great Northern Railroad Company, and that the said bridge company was incorporated by it to be used as an instrument and agent, and that it has been under the control and direction of the International & Great Northern Railroad Company from the time of its incorporation; that by reason of the foregoing the bridge, being the property of the International & Great Northern Railroad Company, was not subject to taxation during the 25 years from August 5, 1875, to August 5, 1900, but was exempt under and by virtue of the act of March 10, 1875 (Sp. Laws 1875, p. 69, c. 49). The court rendered judgment in favor of defendants, and adjudged that plaintiff take nothing, and pay the costs.

We find that the facts alleged in appellees' answer, as above stated, are substantially true; that the railway company is and was the owner of the bridge in question during the time that it was sought to be held liable for taxes claimed in this suit. Therefore it was exempt from taxation under the act of March 10, 1875. There is no dispute as to the remaining facts in the case. We hold that the exemption statute above referred to is constitutional, and that such exemption was not forfeited by reason of the sale of the railway to Kennedy and Sloan; nor was the exemption forfeited by reason of the failure

of the International & Great Northern Railroad Company to construct and complete its road between the places and within the time as required by its charter. The authorities cited by appellees on these several questions are, in our opinion, in point, and decide the questions against the contention of appellant.

We find no error in the record, and the judgment is affirmed. Affirmed.

COX et al. v. THOMPSON.

(Court of Civil Appeals of Texas. June 8, 1903.)

INTOXICATING LIQUORS—CIVIL DAMAGE ACTS—MINORS—ENTRY AND REMAINING IN SALOON—GOOD FAITH OF LIQUOR DEALER—SALE TO MINORS.

1. To render a liquor dealer and the sureties on his bond liable under the statute giving a cause of action to a parent whose minor child is permitted by the saloon keeper to "enter and remain" in the saloon, it is necessary that such minor both "enter" and "remain" in the saloon.

2. Whether the child "remained" in the saloon within the meaning of the law was for the jury, and it was error for the court to charge upon that subject that the length of time that the minor remained in the saloon was immaterial.

3. If the minor entered the saloon for a lawful purpose, having no intention to remain, and immediately after the accomplishment of such purpose left, there would be no violation of the law.

4. The fact that a liquor dealer in good faith believes a minor, whom he permits to enter and remain in his saloon, to be of age, is no defense to an action on the statute giving a parent a cause of action against the saloon keeper and his sureties for permitting such entry and remaining.

5. But if the minor enters the saloon, and remains no longer than necessary to procure a drink given him by the saloon keeper in good faith believing him to be of age, then no liability arises against the saloon keeper under the statute.

Appeal from District Court, Hamilton County; W. J. Oxford, Judge.

Action by W. B. Thompson against P. O. Cox and others. From a judgment for plaintiff, defendants appeal. Reversed.

Dewey Langford, for appellants. Main & Chesley, for appellee.

FISHER, C. J. This is an action by appellee, Thompson, against Cox and the sureties on his liquor dealer's bond for the sum of \$3,000, arising from three violations for selling intoxicating liquor to his minor son and three violations for permitting the minor to enter and remain in the saloon. The appellants answered by general and special demurrers, general denial, and special answer denying that Cox or his employes ever permitted the minor to enter and remain in the saloon, or ever sold any intoxicating liquors to said minor; that the plaintiff, the father of the minor, had, long prior thereto, emanci-

pated and relinquished all control over the minor, and, if the minor entered and remained in the saloon, or there was sold to him any intoxicating liquor, the same was sold in good faith, with the belief that the minor was of age. Verdict and judgment resulted in plaintiff's favor against the defendant for three infractions of the bond for permitting the minor to enter and remain in the saloon, and assessing the aggregate damages at \$1,500.

The trial court instructed the jury as follows: "In this case W. B. Thompson, plaintiff herein, sues the defendants P. O. Cox, Sam Levy, and W. M. Evans to recover statutory penalties for alleged breaches of the defendant P. O. Cox's liquor dealer's bond. The defendants plead a general denial, and, further, that if P. O. Cox, his agents or employes, sold or gave, or caused to be sold or given, intoxicating liquor to Wm. W. Thompson, that such sale or gift was made in good faith, with the belief that the said Wm. W. Thompson was of age, and that the seller had good ground for such belief. You, gentlemen, are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given to the testimony; but you will receive and be governed by the law as herein given you. In the first place, then, you are instructed that whisky and beer are each intoxicating liquors, within the meaning of this charge. Now, if you believe and find from the evidence in this case that on or about the date alleged in plaintiff's petition the defendant P. O. Cox procured a license, and executed and filed the bond exhibited in evidence before you, and that thereafter he engaged in the business of a retail liquor dealer under said license and bond in Hico, Hamilton county, Texas, and that he was so engaged on the 30th day of May, 1902; and you further believe from the evidence that on said last-named date the said defendant P. O. Cox, his agents or employes, permitted Wm. W. Thompson to enter and remain in his said house or place for selling spirituous liquors; and you further believe from the evidence that said Wm. W. Thompson was then and there a person under the age of twenty-one years, and that W. B. Thompson, plaintiff herein, is his father, and did not consent for said son to enter and remain in said house—then you will find for the plaintiff under paragraph 3 of his petition, and assess his damages at five hundred dollars for each time you find that said Wm. W. Thompson was so permitted to enter and remain in said house and place of business, not to exceed the number of breaches alleged in said paragraph 3 of plaintiff's petition in any event. If you do not so find from the evidence, you will find for the defendants and against the plaintiff on said paragraph of said petition. You are further instructed that if you believe from the evidence in this case that after the defendants executed the bond exhibited in

¶ 4. See *Intoxicating Liquors*, vol. 29, Cent. Dig. § 153.

evidence, and after the defendant P. O. Cox engaged in the business of a retail liquor dealer under said bond in the town of Hico, Hamilton county, Texas, that he, the said Cox, or his agents or employes, sold or gave, or permitted to be sold or given, in his said house or place of business, intoxicating liquors to Wm. W. Thompson on or about the 30th day of May, 1902, and that the said Wm. W. Thompson was then and there a person under the age of twenty-one years, and that plaintiff herein, W. B. Thompson, is his father, and that plaintiff did not consent to such sale or gift, if any, then you will find for plaintiff under paragraph 4 of his petition, and assess his damages at five hundred dollars for each sale or gift, if any, to said Wm. W. Thompson, unless you find for defendants on this issue under subsequent instruction herein. You are further instructed, gentlemen, that if the defendant P. O. Cox, his agents or employes, sold intoxicating liquor to Wm. W. Thompson, as alleged in paragraph 4 of plaintiff's petition, and you so believe from the evidence in this case; and you further believe that Wm. W. Thompson was a person under the age of twenty-one years at the date of such sale or gift, if any; but you further believe from the evidence that the person making such sale or gift did so in good faith, with the belief that the said Wm. W. Thompson was of age (that is, was 21 years of age), and you further believe that such person had good ground for such belief—then you will find for the defendants on the issue of sale or gifts. By the term 'enter and remain,' as used in this charge, is meant that the person under the age of twenty-one years must have entered or remained in the house or place for retailing spirituous liquors with the knowledge and consent of the person or persons in charge of said house or place, and the length of time he so remained therein, if any, is immaterial." The trial court erred in the following part of its charge: "By the term 'enter and remain,' as used in this charge, is meant that the person under the age of twenty-one years must have entered or remained in the house or place for retailing spirituous liquors with the knowledge and consent of the person or persons in charge of said house or place, and the length of time he so remained therein, if any, is immaterial." The statute, and the bond executed under it, give a cause of action to the parent when the minor enters and remains in the house or place of business for retailing spirituous liquors. To "enter or remain" does not bring the conduct within the terms of the law or the bond. It requires the concurrence of both. He may enter and not remain, and it cannot be said that a bare entry in all cases also constitutes remaining. While we are satisfied that this

was an unintentional error of the learned trial judge in the haste of preparing the charge, we cannot say that the expression may not have misled the jury.

This charge is also erroneous in that it instructs the jury that the length of time he so remained is immaterial. The law does not undertake to define what constitutes remaining in or upon the premises. Whether a party remains in the saloon, so as to bring the offense within the meaning of the law, is a question of fact for the jury. Doubtless, remaining within the premises may be for such a length of time that there can be no reasonable dispute as to the fact; and, on the other hand, the remaining may be for such a short period of time that it would be doing violence to the common acceptance and use of the expression to say that the act comes within its definition and meaning. The Legislature, in framing the law upon this subject, did not see fit to prohibit a mere entry upon the premises, but the prohibition extends to an entry and remaining; and, if the minor enters the premises for a lawful purpose, and the facts and circumstances indicate that it was not his intention to remain, and he did not remain, but immediately upon the accomplishment of the purpose for which he entered he departed, there would be no violation of the law, unless it was the purpose to hold the owner of the premises responsible for a bare entry, which is clearly not the case. These views may be opposed to what is said by the court in *Qualls v. Sayles*, 18 Tex. Civ. App. 400, 45 S. W. 839.

In view of another trial, there is another subject upon which we think it proper to indicate our views. The law does not hold the saloon keeper responsible if at the time he sells intoxicating drinks to a minor he in good faith believes that the minor is of age. As said by the Supreme Court, the good faith which protects the saloon man in the sale to the minor would afford no protection where he permits the minor to enter and remain in the saloon; that the statute does not authorize the good faith to operate as a defense when the cause of action is based upon entering and remaining in the saloon. But we are of the opinion that when a minor enters a saloon, and the keeper furnishes him an intoxicating drink under the belief, in good faith, that the minor is of age, and he remains in the saloon no longer than necessary to procure his drink, then in such a case no more liability would arise or exist than would be the case if the minor entered the saloon for any other purpose and immediately left it.

We find no other error in the record. For the reasons stated, the judgment is reversed, and the cause remanded. Reversed and remanded.

ALLEN v. BRUNNER et al.

(Court of Civil Appeals of Texas. June 24, 1903.)

LANDLORD AND TENANT—DISTRESS WARRANT—RENT NOT DUE—WHERE RETURNED—COUNTY COURT—JURISDICTION—ATTACHED GOODS.

1. Rev. St. 1895, art. 3240, which declares that where the tenant shall be about to remove from the premises, or to remove his property therefrom, it shall be lawful for the person to whom the rent is payable to apply for a warrant to seize the property, authorizes the issue of a warrant whether the rent is due or not.

2. Under Rev. St. 1895, art. 3242, relating to distress warrants, which declares that, if the amount in controversy exceeds \$200, and does not exceed \$500, the writ shall be made returnable to the county court, the writ was properly returned to the county court where \$420 rent was claimed, and at the time of the trial \$262.50 was due, though when the warrant was issued and the petition was filed less than \$200 was due.

3. Rev. St. 1895, art. 3251, provides that persons leasing storehouses, etc., shall have a lien on all the property therein for rent due and that may become due, but that the lien for rent to become due shall not continue for a longer period than the current contract year. A landlord rented a storehouse for five years commencing May 1, 1900. February 19, 1902, the tenant executed a deed of trust on the goods therein to secure certain indebtedness. The trustee took possession at once. February 22, 1902, a creditor of the tenant attached the goods, but they remained in the storehouse until December, 1902. Held that, the goods having been in the storehouse on May 1, 1902, the beginning of the contract year, the landlord had a lien on them for the whole of that year.

Appeal from Robertson County Court; Tom M. Taylor, Judge.

Petition filed by E. Brunner against C. E. Rudd, M. Hirsch, and B. H. Allen. Judgment in favor of petitioner, and defendant Allen appeals. Affirmed.

J. Felton Lane and Davis & Cocke, for appellant.

STREETMAN, J. Appellee Brunner, by written contract, rented to J. D. Rudd & Bro. a storehouse in the town of Calvert for a term of five years beginning May 1, 1900. J. D. Rudd sold his interest to his brother, C. E. Rudd, who assumed the contract and continued the business. On February 19, 1902, C. E. Rudd, being insolvent, executed a deed of trust on the stock of goods and fixtures to M. Hirsch, trustee, to secure certain indebtedness. This deed of trust authorized the trustee to sell the property, but fixed no time in which the property should be sold. We find no evidence that any of the creditors named accepted under the deed of trust before the levy of appellant's attachment. The trustee, however, took possession of the property at once, and assumed the lease contract. On February 22, 1902, appellant, B. H. Allen, sued C. E. Rudd in a justice's court of McLennan county, and caused an at-

tachment to be issued and levied upon the property in controversy in this suit. The property, however, continued to remain in and occupy the rented premises up to the trial of this case in December, 1902. The trustee, Hirsch, became a party to this attachment suit, but the landlord, Brunner, was not a party. On May 30, 1902, judgment was rendered in the attachment suit foreclosing the attachment lien as against Rudd and Hirsch. An order of sale was issued upon this judgment, and the property was sold July 2, 1902, to appellant, B. H. Allen. In the meanwhile, on June 4, 1902, appellee Brunner had filed his affidavit and bond, and caused a distress warrant to issue out of the justice's court of Precinct No. 1, Robertson county, claiming \$420 rent for the year beginning May 1, 1902. Notice was given of appellee's claim at the sale above mentioned, and immediately afterwards the distress warrant was levied upon the property involved in this suit. The distress warrant was made returnable to and was filed in the county court of Robertson county on September 1, 1902. On the same day appellee Brunner filed his original petition in that court in which he claimed \$420 as rent, and sought a foreclosure of his lien for that amount. A trial was had December 15, 1902, and judgment was rendered in favor of Brunner for \$262.50, the amount of rent then due since May 1, 1902, with foreclosure of landlord's lien as against Rudd and Hirsch and appellant, Allen. It was shown that all rent had been paid up to May 1, 1902.

The first contention of appellant is that the county court did not have jurisdiction, because the rent due when the distress warrant was issued and when the petition was filed did not amount to \$200. Article 3240, Rev. St. 1895, authorizes the issuance of a distress warrant under the circumstances there stated whether the rent is due or not. *Du Bose v. Battle* (Tex. Civ. App.) 34 S. W. 148. Article 3242 requires the writ to be returned to the court which has jurisdiction of the amount in controversy. In this case \$420 was claimed, and at the time of the trial \$262.50 was due. No judgment was rendered for rent not due at the time of the trial. The writ was properly returned to the county court, and that court had jurisdiction of the case.

The other contention of appellant is that, because the current contract year ended on May 1, 1902, and the attachment was levied on February 22, 1902, the landlord could not assert a lien for any time after May 1, 1902, and, as all rent was paid to that time, judgment should have been rendered for appellant. Appellant relies upon article 3251 of the Revised Statutes to support this view. As we understand, the effect of this article is to prevent a landlord from ever asserting a claim for more than one year's rent to become due in the future; that is, no matter how many years may be covered by th

¶ 1. See *Landlord and Tenant*, vol. 32, Cent. Dig. § 1069

rental contract, the lien can only be enforced for a period up to the end of the current contract year. It does not prevent the making of a lease for more than one year, but it divides such a contract, as far as the lien is concerned, into a series of yearly contracts, and when the tenant has occupied the premises for any part of any of said series of years the landlord has a lien for the balance of such year. So, in this case, if Rudd himself had continued to occupy the premises until after May 1, 1902, we think there could be no question that the landlord would have had a lien for the contract year beginning May 1, 1902. *Marsalis v. Pitman*, 68 Tex. 624, 5 S. W. 404. Instead of occupying it himself, he turned the property over to the trustee, Hirsch, who assumed the lease contract, and then the property was levied upon under appellant's attachment. It continued, however, to occupy the building until another contract year had begun. Under a similar state of facts in the case of *Meyer, Weis & Co. v. Oliver & Griggs*, 61 Tex. 584, it was held that the occupancy by the tenant was not terminated by the levy of the attachment, but that the occupancy of the officer was the occupancy of the tenant. We regard these views as conclusive upon the questions raised in this appeal.

There being no error in the judgment, it is therefore affirmed. Affirmed.

HENZE v. INTERNATIONAL & G. N. R. CO.

(Court of Civil Appeals of Texas. June 24, 1903.)

RAILROADS—INJURIES AT CROSSING—FRIGHTENING HORSES—EVIDENCE—ADMISSIBILITY.

1. In an action against a railroad for injuries sustained by plaintiff at a crossing by reason of defendant's negligently running a hand car in front of his team as he was about to cross, thereby frightening them, etc., it was error not to permit plaintiff to testify how close the hand car was to the team as it passed in front of them.

Appeal from District Court, Comal County; L. W. Moore, Judge.

Action by Heinrich Henze against the International & Great Northern Railroad Company. Judgment for defendant. Plaintiff appeals. Reversed.

F. J. Maler and E. Z. Mast, for appellant. S. R. Fisher and N. A. Stedman, for appellee.

STREETMAN, J. Appellant brought this suit on account of personal injuries sustained at a public road crossing on defendant's railway. It was alleged that, just as plaintiff was about to cross said railroad, defendant negligently ran a hand car in front of his team, and frightened them so that they ran away and threw plaintiff off the wagon, inflicting serious personal injuries. At the close of the plaintiff's evidence the court,

upon motion, instructed a verdict for the defendant, and the principal question is whether said instruction was correct. We do not deem it proper, in view of another trial, to enter upon a discussion of the evidence, but, after a careful consideration of the statement of facts, we are convinced that the case should have been submitted to the jury. There was also error, as pointed out in appellant's tenth assignment, in refusing to permit the plaintiff to testify how close the hand car was to his mules as it passed in front of them. While the case might not be reversed on this ground alone, as it is to be reversed, we deem it proper to say that the plaintiff should be permitted, if he can do so, to state this fact. We have considered the other assignments, but find no error, except as above indicated. Because of the error in instructing a verdict for defendant, the judgment is reversed, and the cause remanded.

Reversed and remanded.

WESTERN UNION TEL. CO. v. SIMMONS.

(Court of Civil Appeals of Texas. June 10, 1903.)

TELEGRAMS—DELAYED DELIVERY—DAMAGES—MENTAL ANGUISH—EVIDENCE—CROSS-EXAMINATION.

1. Where mental anguish, predicated on delay in delivering a telegram announcing death of plaintiff's brother, was inability to be present at the funeral, it was error for the court to exclude on cross-examination of plaintiff testimony as to the nature and duration of his grief on hearing of the death of his brother, and whether it was increased by his inability to attend the funeral.

Appeal from District Court, Tom Green County; J. W. Timmins, Judge.

Action by Jeff Simmons against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed.

O. O. Harris and M. C. Smith, for appellant. Dubois & Allen, for appellee.

STREETMAN, J. Appellee brought suit for damages on account of delay in delivering to him the following telegram: "Dublin, Tex., June 25, 1900. To Jeff Simmons: Dave Simmons shot and killed by M. A. Brown. Come. Tom Sanders." Appellee was at San Angelo, Tex., where he lived, and his brother, on the date mentioned, was killed at Dublin, Tex. The telegram was sent about 4 o'clock p. m. on that date, and it was claimed that it should have been delivered on the same day, but it was not delivered until about 3 o'clock p. m. of the next day. Appellee was thus delayed 24 hours in reaching Dublin, and arrived there too late to attend his brother's funeral. Upon the trial appellee testified to the blood relationship and to the close friendship between him and his brother, and that he wanted to attend his funeral. Upon cross-

examination, defendant's counsel, for the purpose of laying the predicate for proving by said witness that he did not suffer any increased or augmented mental anguish by reason of the fact that he was not present at his brother's funeral, and for the purpose of proving by said witness that, if he suffered mental anguish after he reached Dublin and ascertained that his brother had been buried, said mental suffering was the prolonged suffering natural to the death of his brother, asked the following question: "Is it not a fact that you experienced feelings of grief and suffering—mental anguish—upon receiving the news of the death of your brother, and is it not a fact that such mental suffering continued up to the time you reached Dublin, and for a long time thereafter?" Appellee objected, and the witness was not required to answer the question. Appellant then asked the following question: "Was your grief and mental suffering any greater when you reached Dublin, Texas, and learned that your brother's funeral had taken place the day before, than it had been from the time you first received the news of his death until you reached Dublin and received information that the funeral had taken place?" Upon objection the witness was not required to answer. Appellant then asked the following question: "Was your mental suffering increased or augmented by reason of the fact that you were not present at your brother's funeral?" Objection was sustained to this question, and the witness was not required to answer.

It was error not to require the plaintiff to answer these questions. The injury for which a recovery was sought was mental anguish occasioned by the inability to attend the funeral. Whether mental anguish was occasioned by said cause was an issue of fact. It is true that from the fact of blood relationship, as proved, the jury might, without other proof, infer that mental anguish was occasioned by the failure to be present at the funeral. *Tel. Co. v. Coffin* (Tex. Sup.) 30 S. W. 896. We do not understand, however, that the inference which may be drawn from such facts cannot be rebutted, nor that the character of proof mentioned is the only method by which the fact of mental anguish may be established or disproved. If a plaintiff suffers mental anguish, that is a fact which he knows, and we do not think it is necessary to establish it solely by circumstances, but that the witness may testify to it as a fact within his knowledge. If he did not suffer mental anguish, that is a fact equally known to him, and we see no reason why a defendant has not the right to compel him to so testify. In the case of *Tel. Co. v. Adams* (Tex. Sup.) 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920, a recovery was sought for mental suffering of Mrs. Clara Adams on account of failure to see her brother before he died. Judge Henry says: "A witness was permitted to testify that Mrs.

Clara Adams, while waiting for a train to Waco, after the message had been delivered to her, seemed to be in great distress, and said that she would give everything that she possessed to see her brother and talk with him before he died. As the jury would be instructed that they might, in assessing damages, include her mental anguish in their estimate, it was doubtless thought that evidence of her mental condition, including expressions of it at the time, might be given. As juries may, from their own knowledge and experience of human nature, estimate damage proceeding from that cause without any evidence, it is not important to produce it, and, when produced, it ought not, as a general rule, to have a controlling effect; and yet we are not able to see why the fact that mental anguish was felt, and was exhibited by speech or otherwise, may not be proved for what it may be worth. It at least furnishes no ground for setting aside a verdict that might be sustained without any evidence as to the existence or degree of mental pain." In *G. C. & S. F. Ry. Co. v. Moore*, 68 S. W. 559, 5 Tex. Ct. Rep. 100, damages were claimed on account of mental suffering arising from certain personal injuries. The court there says: "Appellant complains of the admission over its objections of testimony to the effect that before the accident Moore's disposition was pleasant, bright, and sunny, and that, after he was injured, he was depressed in spirits and melancholy. The evidence was admissible as tending to show that he suffered physical pain and mental anguish on account of his injuries." In *M. K. & T. Ry. Co. v. Miller*, 61 S. W. 978, 2 Tex. Ct. Rep. 295, the plaintiff was permitted to testify as follows: "There are times, when I am thinking of what I have been, the prospects are so heavy for me that I can hardly bear the weight. I have been a very active man in my days, and when I think of what I have been, a powerful man, and when I think that I have got to be laid up the balance of my life, the load is a little heavy for me." In discussing the admissibility of this evidence, the court says: "Since mental anguish or suffering is a proper subject for damages in cases where one in good health and strength, sound in mind and members, by reason of the wrongful act of another is reduced to the state of a physical wreck, maimed and crippled for life, broken in body and spirit; and since the jury may presume mental anguish, in the absence of affirmative evidence thereof, in cases where such would be the natural consequence of such injury—we can see no good reason, since parties to a suit may testify, why they may not relate their mental anguish as well as their physical sufferings." A writ of error was refused in this case.

It follows from these authorities that the plaintiff in this case might have testified that he did experience mental anguish as a result of being absent from his brother's

funeral, although such mental suffering, in the absence of other evidence, might have been inferred. We do not think it is inconceivable or impossible, however, that the plaintiff may not have experienced mental anguish on said account. It is obvious that the degree of suffering incident to such a cause will vary under the circumstances presented in different cases; and we do not think it impossible that cases might arise in which no mental anguish would be experienced, notwithstanding the fact of a relationship from which such anguish might be inferred. We conclude that the court should have required the plaintiff to answer the questions above set out, and that the defendant had the right, in this manner, to require him to testify whether, in fact, he suffered mental anguish by reason of his being absent from the funeral.

We have carefully considered the remaining assignments, and find no other error. Because of the error above indicated, the judgment is reversed, and the cause remanded.

Reversed and remanded.

McCOLPIN et al. v. McCOLPIN'S ESTATE et al.

(Court of Civil Appeals of Texas. July 1, 1903.)

HEIRSHIP — EVIDENCE — SUFFICIENCY — DISTRICT COURT—PROBATE APPEALS—JURISDICTION.

1. In a probate proceeding, where petitioner claimed as heir by adoption of deceased, evidence examined, and *held* insufficient to show heirship.

2. The district court trying a probate case appealed from the county court has no jurisdiction to try a question of title founded on an alleged contract for adoption and heirship made with deceased on behalf of petitioner by an orphans' home society.

Appeal from District Court, Llano County; M. D. Slaton, Judge.

In the matter of the estate of M. McColpin, deceased. From a judgment of the district court on appeal from the county court, finding that Savannah Cummins was the adopted daughter and sole heir of deceased, C. A. McColpin and others, collateral relatives of deceased, appeal. Reversed.

Jno. C. Oatman, for appellants. Chas. L. Lauderdale, for appellees.

KEY, J. This is an appeal from the judgment of the district court in a probate proceeding, the only contest being one of heirship. J. H. Cummins, as administrator of the estate of M. McColpin, filed his final account, showing that, after the payment of all debts owing by the estate, certain real and personal property remained on hand, and stating that his wife, Savannah Cummins, was the adopted daughter of M. McColpin, and sole heir to the residue of said estate. C. A. McColpin and other collateral relatives

of the deceased filed an answer, contesting the right of Mrs. Cummins to inherit the property, and claiming that they were the heirs of M. McColpin, deceased. Thereafter Mrs. Cummins filed an elaborate petition, alleging, in substance, that M. McColpin and his wife, M. B. McColpin, had duly and legally adopted her in the state of Kentucky, and in accordance with the laws of that state. She also pleaded in the alternative that, if she had not been adopted, as alleged, that McColpin and his wife had made a contract with the Louisville Baptist Orphans' Home, by which they had agreed and promised to adopt her and make her their heir; that upon the faith of such promise made to said orphans' home, which was acting for Mrs. Cummins, she was delivered to McColpin and his wife when she was about seven years of age, and, acting upon the faith of said promise, she continued to reside with them as their child until after the death of Mrs. McColpin, and until the petitioner married her husband, John Cummins, and during all that time treated said McColpins as a child should treat a parent; and that McColpin and his wife frequently declared that they had adopted the petitioner and that she was their heir. Wherefore Mrs. Cummins asserted that, she having fully complied with the oral contract for her adoption, said contract is now binding upon his estate and the contestants. To this plea the contestants responded to the effect that under the laws of Kentucky there could be no adoption, except by an instrument of writing, duly acknowledged and recorded, and averred that no such writing was executed and recorded by McColpin and his wife in reference to Savannah Cummins, the petitioner. The case is submitted in this court on the following conclusions of fact filed by the trial judge:

"(1) The petitioner, Mrs. Savannah Cummins, was regularly received into the Louisville Baptist Orphans' Home, of Louisville, Kentucky, under the name of Savannah Salyer, on the 3d day of March, 1884, being at that time about ten years old, and her father and mother both being dead, and she remained in said home continuously until about the 20th day of October, 1887.

"(2) Said Louisville Baptist Orphans' Home was at that time and is now duly incorporated under a special act of the Legislature of the state of Kentucky, and by the said special act of incorporation said orphans' home was specially authorized to execute contracts for the adoption of such children as were inmates of said home, which contracts were to be in writing, signed by the president of such institution and by the person or persons contracting to adopt such child or children; which contracts were to be acknowledged as deeds are required to be acknowledged by all the parties thereto, and to be recorded in the office of the clerk of the county court of Jefferson county, Kentucky;

by the execution of which instrument the child so adopted was to become the heir at law of the person so adopting, and capable of inheriting as such. Said institution was specially authorized to take and care for destitute orphan children, and to apprentice them or deliver them into the care and custody of other persons under such contract or agreement as it might see proper to do in the interest of such child or children.

"(3) On the 20th day of October, 1887, for the consideration hereinbelow stated, M. McColpin and his wife, M. B. McColpin, went to the said home, and made with it—the said corporation acting on behalf of said Savannah Salyer and under its charter—a verbal contract to adopt said Savannah Salyer as their own child, to take her home with them into their custody, to educate, care for, nurture, and train her as their own child, to leave her their property at their death, and that at their death all of their property should and would descend and pass to and vest in her in the same manner and to the same extent and proportion as though she had been born to them in lawful wedlock and was their natural heir, in consideration for which contract and agreement on the part of said M. McColpin and his wife the said Louisville Baptist Orphans' Home, for itself and on behalf of said Savannah Salyer, and she through said home, agreed and contracted with said M. McColpin and his wife that said Savannah Salyer should be by said home delivered into the custody of said M. McColpin and his wife, and should and would during the same time, in the same manner and to the same extent as though she were their natural child, remain and reside with them, and to them devote her companionship and services; and the said M. McColpin and wife, in consideration for said agreement and contract on the part of said home and on behalf of said Savannah, further agreed and promised to execute said contract in writing, and in the manner required by the laws of said state. Under said contract, and upon the faith that it would be executed in writing by said M. McColpin and his said wife, and would be fully performed by them, said home delivered said child Savannah, on October 20, 1887, to the custody of said M. McColpin and his wife, and said Savannah, believing and relying upon their said contract, willingly went into their custody, and from said date until the date of the death of said M. B. McColpin, in 1891, she remained with and faithfully and continuously resided with and devoted to said M. McColpin and his said wife all of her time, companionship, and services of the same character in the same manner and to the same extent as though she had been their natural daughter, and after the death of M. B. McColpin at said date said Savannah continued in the same manner and to the same extent to reside with and devote her companionship, services, and attention to the

said M. McColpin as though she were his natural daughter, until her marriage, in 1892; she during all of that time believing and relying upon the belief that said contract was valid and binding upon said M. McColpin, and that he had also executed the same in the manner and form required under the laws of Kentucky incorporating said home. In 1892 said Savannah, with the consent of said M. McColpin as though she were his Prior to that time M. McColpin had paid all the expenses of and taken care of said Savannah, sending her to the country schools at different times. In 1892 M. McColpin moved away from the place where said Savannah was residing, but in 1898, requested her and her husband to move to Llano, where said M. McColpin was in business, in Texas, which she did at his request, and he then went into the home of said Savannah, and resided there with her until the time of his death, in 1900, she devoting to him at all times the same character of companionship, services, and attention as though she had been his natural daughter. During all the time from said 20th October, 1887, up to the time of his death said McColpin repeatedly declared that said Savannah was his adopted daughter, and she believing she was so, and all of her actions and conduct towards him during all of that time were induced by and done upon that belief, and by reason of her reliance upon said contract.

"(4) On October 20, 1887, before said McColpin took said Savannah from said home, said home caused to be prepared in writing an adoption contract, such as is described in the preceding paragraph, No. 3, in substance, and said McColpin and wife and the officers of said home took said writing to the courthouse to sign same, but did not so sign it owing to the courthouse being closed, and said officers permitted said McColpin and wife to take said child home with them on the promise and agreement that they would in a short time execute said contract, and return same to said home (and they would not have permitted said McColpin and wife to have taken said child away except upon said promise); but there is no evidence that said contract was ever so executed and returned to said home, and it is not among the papers of said home, and there is no record of its having been returned to the same.

"(5) Said M. McColpin was never married but one time, and both he and his wife, M. B. McColpin, are dead, and neither of them left any child or children. The father and mother of each of them died before they did. C. A. McColpin, M. E. Lindsey, N. H. Stayton, M. A. Wolf, J. H. McColpin, B. O. McColpin, W. A. Page, E. M. Page, and J. O. Page, petitioners herein, are the sole surviving brothers and sisters, and descendants of brothers and sisters, of said M. McColpin, deceased.

"(6) Said Savannah Cummins complied in every particular with and fully performed her part of the contract made on her behalf with said M. McColpin and his wife, described in the preceding paragraph No. 3.

"(7) M. McColpin died in Texas about the middle of February, 1900, intestate, and he left an estate consisting of real and personal property."

Opinion.

1. If it had been shown that Mrs. Cummins had been adopted by M. McColpin in the state of Kentucky, and in conformity with the statute of that state, it would have been necessary to decide whether or not such adoption would be effective in this state, and make Mrs. Cummins McColpin's heir; but, such adoption not having been shown, and no effort made to show adoption in this state in conformity with our statute, we hold that Mrs. Cummins failed to show that she was an heir of M. McColpin.

2. The other ground of title asserted by Mrs. Cummins was one that the court below was without jurisdiction to try. *Wadsworth v. Chick*, 55 Tex. 241. In the case cited it was held that the district court trying a probate case appealed from the county court had no jurisdiction to decide a question of title founded upon a gift from an intestate. Following the doctrine announced in that case, we hold that the district court had no jurisdiction to try the question of title founded upon the alleged contract made on behalf of Mrs. Cummins with the intestate, M. McColpin. This point is not presented in appellant's brief, but constitutes fundamental error.

The judgment of the district court will be reversed, with instructions to that court to render judgment against Mrs. Cummins and in favor of the appellants on the question of heirship and title to the property, and to partition the same among the appellants in the manner prescribed by statute. The judgment here rendered will be without prejudice to any right Mrs. Cummins may have to maintain a suit in the proper court founded upon the alleged cause of action which we hold the district court had no jurisdiction to try.

Reversed and remanded.

HOUSTON & T. O. R. CO. v. LENSING.
(Court of Civil Appeals of Texas. July 1, 1903.)

OVERFLOWING LAND—ACTION FOR SUCCESSIVE OVERFLOWS—DAMAGES.

1. Where an action is for successive overflows of land, the measure of damages is the sum of the differences between the market value of the land immediately before and after the several overflows.

Appeal from District Court, Travis County; N. A. Rector, Judge.

Action by A. L. Lensing against the Houston & Texas Central Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

S. R. Fisher and Baker, Botta, Baker & Lovett, for appellant. John Dowell and H. N. Swain, for appellee.

KEY, J. Appellee sued appellant to recover damages on account of his farm being overflowed, and alleged that appellant and its predecessor, the Austin & Northwestern Railroad Company, in the construction of the railroad now owned by the appellant, had failed to construct and maintain the necessary sluices and culverts required by statute. Appellant's answer contained a general demurrer, special exceptions, general denial, prescriptive right resting upon continuous use for more than 20 years, and contributory negligence on the part of appellee. There was a jury trial, resulting in a verdict and judgment for the plaintiff for \$600. The defendant has appealed, and presents the case in this court on 38 assignments of error; but, from the manner in which the case is presented, it is difficult for us to determine which of the many questions thus presented appellant regards the most important. Therefore, while it is the duty of this court to consider and pass upon all the questions presented, and while we have done so in consultation, it is not our duty to discuss them all in detail in this opinion; and as many of them present questions heretofore definitely settled, and none of them present novel questions or questions of special importance, we do not feel called upon to write an elaborate opinion, or to give extended consideration to any of them.

We will say, however, that, of the several exceptions urged to the plaintiff's petition, we think there was no merit in any, except perhaps the one which pointed out the fact that the plaintiff was seeking to recover damages for injury to a portion of the land before he acquired it, and the one which related to the prayer for a mandamus; but, if error was committed in not sustaining these exceptions, it was controlled by the charge of the court and the judgment rendered. No writ of mandamus was awarded, and the court's charge restricted the plaintiff's right to recover damages to the land for injuries caused after the plaintiff acquired the same. The court's charge, especially when considered in connection with a special instruction given at the instance of the defendant, is not subject to the criticisms urged in appellant's brief. It followed, in the main, the rules of law applicable in cases of this kind, as announced in *Ry. Co. v. Schofield*, 72 Tex. 500, 10 S. W. 575; *Ry. Co. v. Anderson*, 79 Tex. 428, 15 S. W. 484, 23 Am. St. Rep. 350; *Ry. Co. v. Hener*, 85 Tex. 414, 18 S. W. 441; *Ry. Co. v. Richards*, 83 Tex. 208, 18 S. W. 611.

On the measure of damages, the court in-

structed the jury that the injury to the land would be the difference between its market value immediately before and immediately after the overflow, and that this rule would apply to successive overflows, if there was more than one. Appellant contends that this is an incorrect statement of the law, and that the correct measure of damages in case of more than one overflow is the difference between the market value of the land immediately before the first and immediately after the last overflow. *Owens v. Railway Co.*, 67 Tex. 679, 4 S. W. 593, is cited in support of this contention, but we do not understand that case to hold that the rule referred to is the only correct rule applicable to cases of this kind. The plaintiff could have brought separate suits immediately after each overflow, and, if he had done so, the measure of damage in each case would have been the difference in the market value of the land immediately before and immediately after the injury. And we can see no reason why the measure of damages should be different because, instead of bringing separate suits for each injury, he has waited until others occurred, and brought his action in one suit to recover for all the injuries.

We hold that no error was committed in giving and refusing instructions, nor in the several rulings complained of in reference to the admission of testimony. The two-years statute of limitation was not pleaded, and the requested charge on that subject was properly refused.

The verdict of the jury involves findings to the effect that the defendant failed to properly construct the necessary culverts and sluices required for drainage purposes, and thereby caused surface water to be diverted upon the plaintiff's farm, and injured the same and the crops growing thereon to the extent of \$600, and that the plaintiff was not guilty of contributory negligence. These findings are sustained by the testimony.

No reversible error has been shown, and the judgment is affirmed. Affirmed.

NABOURS et al. v. McCORD et al.
(Court of Civil Appeals of Texas. June 3, 1903.)

ASSIGNEE FOR CREDITORS—BREACH OF DUTY—PURCHASE OF TRUST PROPERTY—INDIRECT PURCHASE—GUARANTY—EXECUTORY CONTRACTS—INSTRUCTION.

1. In an action against an assignee for creditors for breach of trust, in indirectly purchasing trust property, evidence showed that the assignee guarantied to a purchaser that certain of the property would be sold at the price paid for it, and, in pursuance of such guaranty, took over that property some time after making the contract of sale. The court charged that this agreement and the transfer subsequently made thereunder were valid if made by the assignee in good faith for the purpose of obtaining a fair price for the property, and not with a view to his own benefit as a purchaser, and provided the purchaser was under no promise to allow the assignee to take the

benefit of the purchase. *Held*, that the charge was erroneous, as being on the evidence, and on the legal effect of one circumstance of the transaction, which should have been left to the jury, in connection with other circumstances, on the issue as to the assignee's motives of self-interest.

2. In an action against an assignee for creditors for breach of trust, in indirectly purchasing trust property, evidence showed that defendant guarantied a purchaser of the property to find a market for it at the price paid for it, and, in pursuance of such guaranty, took over the property himself on demand of the purchaser. The property never came into the hands of the purchaser, except to be transferred by him by indorsement, but remained in the hands of the assignee; and the purchaser never actually paid for it, but purchased it in expectation that his guarantor would take it off his hands. *Held*, that the evidence raised the question as to whether the contract of sale to the purchaser was executed or executory, and it was error for the court to treat it as executed.

3. While a trustee may acquire property which he has fairly sold in his fiduciary capacity after the sale has been completed and title vested in the purchaser, yet, if the transaction remains executory, and title has not vested, his relation to the property as trustee still continues, and his disqualification to buy exists, as in a purchase from himself in the first instance.

4. Where an assignee for creditors guaranties a purchaser of trust property to find a market for it, for the purpose of thereafter becoming the purchaser of the property himself, and, in furtherance of such guaranty, purchases the property on demand of the purchaser, such purchase is invalid as to the assignee, although the purchaser may not have been aware of the object of the guaranty.

Key, J., dissenting in part.

Error from District Court, Milam County; J. C. Scott, Judge.

Action by W. A. Nabours and others against A. P. McCord and others. There was judgment for defendants, and plaintiffs bring error. Reversed.

D. W. Doom, W. K. Homan, Hefley, McBride & Watson, and Etheridge & Baker, for plaintiffs in error. Ford & Chambers, J. M. Ralston, T. S. Henderson, M. J. Moore, Crane, Greer & Wharton, and N. H. Tracy, for defendants in error.

COCHRAN, Special Judge. The plaintiffs in error, Nabours and others, brought this suit for their own use, and for the use of all other accepting creditors of W. F. and F. M. Crawford, under a deed of assignment made to defendants McCord and Henderson as assignees, naming as defendants the assignees and their bondsmen and the Milam County Oilmill Company. At the trial the plaintiffs dismissed their suit as against the defendants Henderson and the bondsmen, and, upon the verdict of a jury for the remaining defendants, judgment was accordingly entered, from which the plaintiffs have sued out this writ of error. The suit, as against McCord, is predicated upon the charge of breach of duty on his part in negotiating and making a pretended sale of part of the assigned estate to a third party under circumstances contemplating a retransfer to him, followed by such transfer, and subsequent appropri-

ation of the property to his own use. The property which it is alleged that McCord thus acquired consisted of stock in the defendant oilmill of the par value of \$24,200, an undivided interest of 1,300 acres of land in Jefferson county, a like interest of 1,000 acres in Milam county, and a one-half interest in five notes, of the face value of \$5,743.75, secured by a vendor's lien on 510 acres of land in Milam county. The oilmill was made defendant for the purpose of protecting the rights of creditors in the above stock pending this suit as to the payment of dividends and otherwise.

The plaintiffs in error seek a reversal of the judgment upon three grounds, viz.: (1) Error in the court's charge as given; (2) error in refusing a special charge asked; and (3) error in refusing to set aside the verdict on motion for a new trial, because contrary to the evidence. It is sufficient for the purposes of this opinion to find the facts of the case, as shown by the record, to be:

(1) W. F. Crawford and F. M. Crawford, bankers at Cameron, Tex., under the firm name of Milam County Bank, failed in business March 16, 1896, owing debts secured to the amount of \$45,190.97, and unsecured in the sum of \$79,619.40. On that day they executed a statutory deed of assignment, naming McCord and Henderson as assignees, who qualified on the following day, and proceeded with the administration of the trust until they filed their final report on June 23, 1900.

(2) This report shows that the remnant of the estate, consisting of the property sued for, and other lands and chattels, was sold to O. W. Lawrence on May 5, 1897, for the sum of \$22,500; that the total receipts were \$90,271.21, a large part of which was used in redeeming such of the assets held in pledge as were thought to be to the interest of the estate, and the balance, after paying expenses, was sufficient to pay five dividends, aggregating 40.82 per cent., to the unsecured creditors, who had filed claims amounting to \$76,624.22, leaving unpaid practically 59 per cent. of these claims, or more than \$45,000.

(3) The plaintiffs were among those who accepted under the deed of assignment, filed their claims, duly verified, as required by law, and have rights entitling them to prosecute this suit.

(4) The facts connected with the sale to Lawrence, as disclosed by the testimony of himself and Ralston, and other witnesses for the defendants, are as follows: Lawrence and one Sprinkle had for some time been considering the joint purchase of the remnant of the assets, after the assignees had indicated a desire to close the administration by sale in bulk, if necessary, and had made a list of what remained, and attached a value or selling price to certain articles, among which was the property in controversy. Ralston and his law partner were

employed by these parties under an agreement that Lawrence and Sprinkle should furnish the money to make the purchase, and the lawyers were to assist in making collections and sales, and the net profits, after repaying the money advanced and interest, were to be equally divided. Mr. Henderson, as one of the assignees, appears to have been anxious to close out the assets, and received a bid of about \$20,500 for the remnant from one Hefley. Notice of this reached Lawrence and Ralston, and they began to consider what amount they would offer. There is no evidence that the bid made by Hefley was his final offer, and it is shown that, as soon as he heard of the deal with Lawrence for \$22,500, he offered him \$2,000 for his bargain. Lawrence did not want to buy the oilmill stock and the other property sued for, to which values were affixed in the list, and objected particularly to the stock. Ralston, who lived with McCord, and was related to him, told him of Lawrence's objections, to which McCord replied, as shown by Ralston's testimony, "The oilmill stock is worth that much money [\$8,000], and ought to sell for that much money, and if he makes a proper bid, and gets the oilmill stock, and wants to sell it for that amount, I can get him a purchaser for it at that." Ralston states that in talking with Lawrence the next day he stated to him "that we need not be afraid of not being able to turn the oilmill stock, if we wanted to, at that price; that, if we bought it, that a party told me that he would have a purchaser for it at that price if he [we] wanted to sell it." Ralston did not tell Lawrence who made the statement, and the only inquiry made by Lawrence was if the party was responsible and could be relied on. He then raised objections to the other properties sued for. This was also reported to McCord by Ralston. The same assurances being given, and reported back to Lawrence, he concluded that he would be safe in making an offer of \$22,500 for the remaining assets, provided he could get terms. The record does not show what terms were asked, but the contract, as closed, resulted in the assignees giving him until June 1st to pay \$8,500, and until October 15th to pay the remaining \$14,000; they to retain possession of everything, and to surrender the different items to him as he was able to realize upon them and pay their list value. A written proposition was then drawn to the above effect, and carried by Lawrence to Henderson, who objected to signing an acceptance of it until he could consult with McCord. Being assured by Lawrence that, if it was not satisfactory to McCord, the trade would not be closed, Henderson signed the paper, and it was subsequently signed by McCord, but the date of his doing so is not shown. While Lawrence, in giving his views as to the effect of what occurred in connection with the contract, states that he did not know who the party

was that gave the assurance of guaranty of a purchaser to Ralston, and that there was no contract or agreement, expressed or implied, that he was buying for McCord, or was to retransfer any part of the property to him, he nevertheless says, "but for the guaranty, he would not have bought" the stock and other property sued for; that he made the inquiry as to the responsibility of the party because he "felt or expected that he would sell that stuff to that man," and wanted to know if he was able to carry out his contract; that he did not want to handle this part of the property, because he did not think there was anything in it; that after the contract was closed he paid but little attention to these items of property, because he expected, in pursuance of that guaranty, for them to be taken off his hands. This witness further states that "after the trade was closed I saw Mr. Ralston about his land, and I insisted on its being closed up. These were matters that I thought were important, and should be closed up." Lawrence testifies that, when he made the proposition to buy, Sprinkle was interested with him; that he went to Sprinkle, told him that there was not enough in the trade for three, and offered to withdraw in his favor, but that Sprinkle declined the offer and withdrew from the transaction.

(5) The record shows that after signing the contract of sale, and while the mill stock still remained in the possession of the assignees, McCord borrowed \$8,000 from one Flato, in Kansas City, with which to pay for this stock, agreeing to hypothecate the same as security, and that on May 27th, the stock still remaining with the assignees, Lawrence, by Ralston's direction, indorsed the certificates to Flato, and his check to McCord for \$8,000 was used to pay for the stock; Lawrence testifying that this was the only time he ever had his hands upon this stock. He also testifies that he never had possession of the Steele notes sued for, and, having directed Ralston to call on the "guarantor," he paid very little attention to what became of these items, and only signed such transfers as Ralston prepared. Ralston testifies that on May 20th he called upon McCord to produce a purchaser for the mill stock, and this he said he would do, and on the 27th directed it to be indorsed to Flato, and, when he asked him who the lands should be sold to, he said "he didn't know yet, but that he would be responsible for it—considered it was sold to him." It appears that McCord in this way became responsible for and paid to himself \$8,000 for the mill stock, and \$2,500 for the other properties; but as to how and when this last payment was made, is not shown.

(6) The record shows that McCord and Henderson, as assignees, executed a deed conveying to Lawrence seven different parcels of land, among them the two tracts involved in this suit. This deed bears date May 5, 1897, was acknowledged May 7, 1897,

and filed for record August 3, 1897, but it is not shown when it was in fact delivered to Lawrence. The consideration is recited in the two notes of Lawrence for \$8,500, due June 1, 1897, and \$14,000 due October 15, 1897; and the instrument expressly retains the vendor's lien on all of the lands conveyed, except the two tracts here sued for, on which tracts the vendor's lien was expressly waived. The Steele notes were conveyed by a separate instrument, dated May 10, 1897, but not acknowledged until March 15, 1898. As to when this document was written and delivered, the record is silent. It appears, however, that Steele on January 4, 1898, conveyed the land—one-half—to McCord, in satisfaction of his interest in the notes. The record shows a deed from Lawrence to McCord conveying the Jefferson county land, dated May 31, 1898, and a conveyance of the same land by McCord to another party, dated September 19, 1898, for the sum of \$2,166 paid, of which McCord received net \$2,000. The title to the other tract of land remained in the name of Lawrence until November 22, 1898, when he executed a deed conveying the same to F. J. and W. R. Fitzwilliams; the only consideration recited being the settlement of the note for \$10,000 given by F. M. to W. F. Crawford, and which was secured by vendor's lien on the land.

(7) We find that, when the contract of sale was made with Lawrence, a separate bidder for the interest of 1,000 acres in Millam county had indicated to McCord a willingness to take this property at the price asked for it; that this occurred on April 30, 1897, and this party had returned to his home to arrange for the purchase money, and, after so arranging for about one-half of the agreed price, he heard that the land had been sold. We also find that Flato had indicated a disposition to buy the oilmill stock at one-third of its face value. The record does not show that these items of property had any connection with each other, or with the balance of the estate, so as to require that all should be sold together; and we therefore find that the giving of the guaranty or assurance by McCord was not necessary, under the circumstances, to secure a bidder for these properties, since there was no time fixed or required within which the sale should be made.

(8) While the record discloses, by the direct testimony of W. F. Crawford, an agreement entered into between him and McCord, prior to the sale, to acquire the property sued for through Lawrence, in the manner it was, and a corroboration of this witness by the declaration of McCord to Ralston after the sale that Crawford was interested with him in the lands, and other facts and circumstances in support of this contention, we have not thought it necessary to refer to this branch of the case; preferring to make our findings upon the undisputed facts, and the testimony of Ralston and Lawrence, and other witnesses produced by the defendants.

We feel called upon to remark that defendant McCord did not testify at the trial, and the record offers no explanation for his failure so to do.

Conclusions of Law.

The charge complained of, and in giving which we think there was error, was as follows:

"Although an assignee would have no right to make an agreement with a proposed purchaser of the property of an assigned estate by which the purchaser was bound to sell to such assignee any portion of the property after his purchase, yet such assignee, in order to procure an advantageous sale of the property, would have the right to guaranty to such prospective purchaser a sale of certain of such assets at a designated price. So if you believe from the evidence that the defendant McCord, in good faith, for the purpose of having the property bring a fair price, and not with a view to his own benefit as purchaser thereof, but as an inducement to Lawrence to buy the property at a fair price, caused the statement to be made to Lawrence that a purchaser would be furnished who would take the property off his hands, should he wish to sell it, at the price Lawrence gave for it, then said statement would not vitiate the sale, provided Lawrence was under no promise, express or implied, to allow McCord to take the benefit of his purchase; and if you believe that Lawrence purchased said property under said circumstances, and afterwards, in pursuance of said statement, sold a portion of said property to said McCord, said sale to Lawrence and by him to McCord would be valid, and you will find for defendants."

This charge should not have been given, because, in our opinion, it was a charge upon evidence, and an instruction as to the legal effect of one circumstance in the transaction, which should have been left to the jury, in connection with all other facts and circumstances in the case, on the issue as to whether McCord, in making the contract to sell, was actuated by motives of self-interest, and a desire to acquire trust property indirectly through Lawrence. Occupying a position of trust for the benefit of creditors, in whose selection or appointment they had no voice, and invested with a very broad discretion under the law, McCord should be held to the use of the most jealous care for the interests of those whom it was his duty to serve, and cannot be permitted to have a personal interest in opposition thereto. 2 Pomeroy's Equity, § 1077.

When a trustee is found with trust property in his hands, which he is charged to have sold in breach of his duty, and to have repurchased for himself, the burden of showing the fairness and regularity of his conduct is upon him; and, if wrongful, the fact that his vendee may have been innocent of the fraud, and had no conscious participation

in it, will not protect him. *Ellis v. Singletary*, 45 Tex. 41; *Everett v. Henry*, 67 Tex. 404, 3 S. W. 566; *Perry on Trusts*, §§ 222, 830.

It is the fraud or wrongdoing of the trustee which gives a right of action to those for whom he is acting, and the concurrence or participation of a third party is not an essential feature in it. McCord was a trustee to sell the trust property to the best advantage. This the law says can only be done when he has no self-interest to promote. A direct sale to himself is a patent fraud, and is easy of solution. When the sale is indirect, while it may be, and usually is, difficult to bring the case clearly within fixed rules, and say that this or that state of facts establishes an indirect sale, the principles of law which govern the one case are the same as in the other. The law is well settled that, when a trustee is charged with becoming the purchaser at his own sale, he cannot defend on the ground of his own good faith, by showing that he was paid full value for the property, and that in the particular case no injury has resulted. *McLaury v. Miller*, 64 Tex. 382; *Perry on Trusts*, § 197.

While the charge of the court, in the main, recognizes these principles, the paragraph complained of makes the case turn on a sale to Lawrence, and a promise, express or implied, on his part, to reconvey to McCord, and states that the giving of a guaranty in order to obtain a fair price would be legal, even if the property was subsequently reconveyed to McCord in pursuance of the agreement by which the guaranty was given. If the good faith of a purchase by a trustee at his own sale and the payment of full value is no defense in one case, we fail to see that good faith through a guaranty resulting in the acquisition of the property by the trustee can change the rule. The giving of the guaranty may have been in the utmost good faith, so far as getting Lawrence to pay a fair price for the property is concerned, yet it may be a means, and perhaps have been the only means, by which the trustee could hope to acquire the property.

The case at bar may serve as an illustration. The mill stock may have had an intrinsic value above the \$8,000 asked for it, and the trustee alone knew this, or it may have had a value to him in controlling the management of the corporation or otherwise. Lawrence wants to buy the other property, but does not want this stock, and no one but the trustee may want it. While Lawrence is hesitating about making an offer, the trustee causes the assurance or guaranty of a purchaser to be communicated. No promise to hold the stock for him is asked. Indeed, why should there be, when the trustee, in fixing the time of payment, requires that a sum about equal to the price of this stock shall be paid in less than 30 days, and knows that the purchaser expects to pay by converting the assets into money? What could

be more certain than that he would be called upon to produce a purchaser—"make his guaranty good"—and thus by necessary sequence he becomes the purchaser? The good faith as to making the stock bring the price asked is perfect, but the giving of the guaranty becomes the direct means of acquiring the property.

The charge would require that the purchaser should be under promise to reconvey to the trustee, as a condition necessary to render the sale invalid. This rule might apply if the suit was against the purchaser. But if the purpose or intent of the trustee in making the sale was to wrong the beneficiaries by becoming the owner of the trust property, through Lawrence, by means of the guaranty, and the trustee does become the owner, the trust in the property is revived. The wrong need not be attended with pecuniary loss to the beneficiary or personal gain to the trustee. It consists in doing what the law says he cannot do.

The vice in the transaction, if any there be, must depend upon motives of self-interest actuating the trustee in making the contract of sale, and if there is to be any fixed rule of law applicable to the giving of a guaranty to the purchaser by a trustee in making a sale, followed by a repurchase of the property by the trustee, it should be a rule of censure, and not of encouragement, because of the danger of abuse by the trustee of his discretion in choosing the time and terms of sale, and the person to be favored by his guaranty.

We need not go to the extent of holding that a guaranty against loss given by the trustee to the intending purchaser would, in a given case, per se, invalidate the sale. What we do hold is that it is at most but a circumstance, proper to be considered as evidence in connection with all other facts and circumstances connected with the transaction. Its probative force must be left to the jury, for while it may, under the circumstances of one case, have little or no bearing in proof of the charge that the trustee became the purchaser indirectly at his own sale, it may, under other circumstances and surroundings, be a circumstance, cogent and convincing, that the guaranty was but an artifice or indirect means by which the trustee becomes invested with trust property.

Counsel for defendants in error rely upon the case of *Ives v. Ashley*, 97 Mass. 198, as sustaining the charge of the court. We have carefully considered the opinion in that case, and are not inclined to follow it, or hold it applicable to the facts of this case. The question before the court was as to the effect of a guaranty given by an administrator prior to a sale made by him at public auction. We must assume that such a sale was made by order of court, and subject to its approval. While it may be safe to permit an administrator to become the purchaser of property thus sold by him at public sale, through his per-

sonal guaranty to the purchaser, the powers of an assignee in making a sale under our assignment laws, when the sale is made privately, and he may choose the time to sell, the person to buy, and fix the terms of sale at his own discretion, are so entirely different from a public sale ordered and approved by the court that we are unwilling to open the door to possible fraud by announcing as a fixed rule that a guaranty followed by a trustee's purchase would be valid as a matter of law. The exception to the general rule announced by some courts, which permits a trustee, under some circumstances, to become interested in the purchase of trust property, rests upon the fact that it is made under the control of a court or its officers, and is therefore public and free from suspicion or opportunity for fraud by the trustee. *Am. & Eng. Ency. of Law*, vol. 27, p. 210. This exception is not a settled rule, and courts of the highest authority deny its application. *Davoue v. Fanning*, 2 Johns. Ch. 252, and cases cited. Fraud and wrongdoing by persons occupying positions of trust and confidence have always been the subject of the most jealous care on the part of courts of equity, and, where the sale has been made indirectly to the trustee, it would be difficult, if not impossible, to lay down a rule which would apply to each case; and when the transaction is to be reviewed by a jury, under a charge from the court, where there is no fixed rule applicable to the particular facts, a charge which assumes that one fact or state of facts would constitute fraud and invalidate the sale, or would not do so, and that the sale is valid, invades the province of the jury, and would be a charge upon the weight of evidence. The law seeks to remove all temptation from the trustee, and often disapproves of his acts, performed in apparent good faith, because of the danger of collusion, and to avoid inquiry into the intricacies of his motives and conduct, in which evil would often escape detection, and the truth be discovered, if at all, at great disadvantage.

Holding, as we do, that the giving of the guaranty was not a proper subject to be singled out and charged upon by the court, disposes of the error claimed as to the refusal of a special charge upon the same subject asked by the plaintiffs, presenting what we would otherwise hold to be a correct proposition of law.

In view of another trial, it is our opinion that the evidence raises the question of executory or executed contract of sale, and that the court erred in treating the transaction with Lawrence as a sale.

The rule seems to be well settled that while a trustee may buy property, which he has once fairly sold in his fiduciary relation, after the sale has been completed and the title vested in the purchaser, yet if only a contract for the sale of the property has been entered into, and the transaction remains in fieri, and the title has not finally vested in the pur-

chaser, his relation to the property as trustee has not ceased, and the same disqualification to buy or acquire an interest in the property exists in such case as in a purchase from himself in the first instance. *Cook v. Berlin Woolen Mills Co.*, 43 Wis. 433. The reason for the rule seems to be that if the contracting purchaser becomes dissatisfied with his trade, or be unable to carry it out, and there should exist any reason why the trustee should want to possess himself of the property, he should be required to give the cestui que trust the benefit of it, and cancel the trade, instead of purchasing for his own interest. This rule applies with special force to the mill stock and to the Steele notes converted by McCord into the land for which they were given, for the reason that it appears from the evidence that the only right which Lawrence ever had in these properties was based upon his contract of purchase, and that the title to these had not become vested in him prior to the time that McCord was called upon to take them under his assurance of a purchaser or guaranty against loss.

In addition to the authorities cited, it occurs to us that the right which the creditors had to object to the sale to Lawrence because made on credit or for other reasons, and to have brought suit to compel a sale for cash or to set it aside for any other reason, so long as it remained executory, as held in *Keller v. Smalley*, 63 Tex. 516, and *Moody v. Carroll*, 71 Tex. 146, 8 S. W. 510, 10 Am. St. Rep. 734, furnishes a further reason why McCord could not lawfully acquire the rights of Lawrence, whatever they may have been, under the contract. To permit him to do so, would place him in the attitude of having a personal interest to enforce the contract, and the duty as trustee to resist it. The inconsistency of permitting a trustee to thus place himself is apparent.

While counsel have urged with much force that the case should be reversed on the facts, we have not thought it necessary to indicate our opinion on this point.

The judgment will be reversed for error in the charge of the court, and remanded for further proceedings in accordance with the views of the law herein expressed, and it is so ordered.

KEY, J. Concurring with the majority of the court in the conclusion that this case should be reversed, but not agreeing with so much of the majority opinion as holds that there is error in that portion of the trial court's charge that is copied in that opinion, the writer, as required by statute, will state the grounds upon which his dissent is based.

Plaintiffs in error address two assignments to the charge referred to, both charging error in general terms and neither assignment stating any reason why the charge was erroneous. Therefore the assignments could not be, and were not, submitted as propositions, and the propositions submitted under them

should be looked to, to ascertain wherein it is claimed the charge was incorrect. Of these propositions, the first declares that "a charge which is upon the weight of the evidence is erroneous." That proposition is abstract, and cannot be considered as pointing out error in the charge complained of. It states a general rule of law applicable to all cases, but does not charge that the instruction complained of in this case was upon the weight of evidence. The second, third, fourth and fifth propositions submitted by appellants contend that the charge was upon the weight of evidence with reference to the question of guaranty, and for particular reasons stated in the several propositions. Without considering these objections in detail, and discussing the evidence in the case, the writer is of the opinion that the objections so pointed out are untenable. The sixth proposition alleges that the charge was misleading, in that it was calculated to imbue the jury with the idea that the pretended sale to Lawrence was valid, unless Lawrence was a party to the unlawful intent and purpose of McCord. It is not believed that this objection is sound, because the instruction referred to required the jury to find, in order to uphold McCord's title, that the sale made by McCord to Lawrence was, in effect, without unlawful intent or purpose on the part of McCord. The seventh and last proposition assailing the charge under consideration complains of it as tending to imbue the jury with the idea that the purported guaranty of McCord was made for the purpose of enabling the assignees to obtain a fair price for the assigned estate, whereas the evidence, without dispute, established the fact that such pretended guaranty was but a guise and device whereby McCord expected to, and did, become the purchaser by indirection, at his own sale, of such property of the assigned estate as he coveted. This objection is also untenable. The charge was so framed as to leave all questions of fact to the jury, and contained no intimation of the judge's opinion as to whether or not the alleged guaranty was made for the purpose of enabling the assignees to obtain a fair price for the property, nor as to any other question submitted to the jury.

This, in my opinion, disposes of all the objections which the plaintiffs in error have made to the charge referred to. However, my associates do not agree with me in this construction of plaintiffs in error's brief, and hold that the trial court should not have given any charge whatever upon the question of guaranty, and that that point is presented in plaintiffs in error's brief. The writer has no disposition to enter upon any further consideration of the manner in which the case is presented in this court, and will now consider the question of law dealt with in the majority opinion, upon the assumption that it is properly presented, and should be decided by this court.

In my opinion, the charge referred to announced a correct rule of law, and was applicable to this case. It is a well-settled proposition of law, and is not denied by any one connected with this case, that when a trustee, acting within the scope of his authority, in good faith makes a sale of the trust property, without any reservation, contract, or agreement, express or implied, by which he is thereafter to acquire the property or derive some other benefit from the sale, then, after the sale has been fully consummated, he may buy the property from the purchaser at the trust sale. In bringing their suit, the plaintiffs in this case have recognized the correctness of this proposition, and have assailed McCord's title by charging collusion between him and Lawrence, the purchaser, and that the sale was made upon an agreement or understanding between them to the effect that Lawrence was to convey the property back to McCord; and, if the facts alleged by them are true, they are entitled to maintain their action, because in that event the law would regard McCord as a purchaser at his own sale, made as trustee, and such sales, however honestly and fairly made, and however beneficial to the cestuis que trustent, are in law fraudulent, and the trustee so acquiring the property holds the same impressed with the original trust.

The defendants' general denial put in issue all the averments of fraud, collusion, and improper conduct charged in the plaintiffs' petition, and it was upon the issues thus presented that the case was tried. Before giving the paragraph of the charge complained of, the court instructed the jury as follows:

"An assignee is not permitted by law to sell to himself, either directly or indirectly, the property of the assigned estate. So if you believe from the evidence that on or about May 5, 1897, the assignees, T. S. Henderson and A. P. McCord, made to C. W. Lawrence a transfer of the properties herein sued for, and then belonging to the assigned estate of said Crawford and Crawford and the Milam County Bank, or any of said properties, and you believe that it was either expressly or impliedly agreed or understood at the time on the part of the said A. P. McCord and C. W. Lawrence that said transfer should not be an absolute sale of said property to said Lawrence, but that it was either expressly or impliedly understood at the time of or prior to said sale to Lawrence that the said McCord should have the right and privilege of purchasing all or any part of said property from the said Lawrence, and that the said Lawrence would sell the same to said McCord, and you believe that after said transfer to said Lawrence, said McCord, either for himself or for other persons, did purchase said property, or any part thereof, either in his own name, or in the name of other persons for his own benefit, then you are instructed that said sales and transfers of so much of said property as was included within said agreement between Mc-

Cord and Lawrence were invalid, and that the title to such portion of said property did not pass by said sale from said assignees, and you will find for plaintiffs as to such property.

"If you believe from the evidence that Lawrence purchased the assigned property from Henderson and McCord absolutely, without any promise, agreement, or understanding, either express or implied, with McCord, that he (McCord) should have any interest in said purchase, or that he should be permitted to purchase it, then you will find for defendants."

The charge complained of follows immediately after the instructions just quoted, and was, it is believed, a correct statement of the law upon a phase of the case presented by the testimony, unless it be that a contract of guaranty, made in good faith, by McCord to Lawrence, would secure, or purport to secure, to McCord a right to purchase the property from Lawrence, or some other valuable right. Would a contract of guaranty have such effect? This question, I think, must be answered in the negative. A contract of guaranty does not secure to the guarantor any right as against the other party to the contract. On the contrary, such contract is always for the benefit of such other party, and not the guarantor. It is a unilateral contract purporting to bind the guarantor only. So, in this case, if McCord, as trustee, sold the property to Lawrence under a guaranty made in the manner and for the purpose stated in the charge, and there was no promise by Lawrence, either express or implied, to allow McCord to take the benefit of his purchase, then after such sale McCord could lawfully purchase from Lawrence, because, if the facts were as stated, and as the charge complained of required the jury to find in order to protect McCord's purchase, then there could have been no collusion between McCord and Lawrence, and the latter acquired absolute title to the property, and was under no obligation or promise to sell to McCord, and McCord had no greater right than any other person to purchase from Lawrence. In other words, the facts referred to and grouped together in the charge, if found to exist, would necessarily negative the charge of collusion between McCord and Lawrence, alleged in the plaintiffs' petition as the basis of the plaintiffs' suit.

It is held in the majority opinion that the charge complained of should not have been given, because "It was a charge upon evidence, and an instruction as to the legal effect of one circumstance in the transaction, which should have been left to the jury, in connection with all other facts and circumstances in the case on the issue as to whether McCord, in making the contract to sell, was actuated by motives of self-interest, and a desire to acquire trust property indirectly through Lawrence." In my judgment, the

charge does not single out and declare the legal effect of only one circumstance, though it is not error to do this, when the legal effect of such circumstance is decisive of the case on trial. The charge deals with three facts or circumstances grouped together, and tells the jury that, if the group of facts referred to is shown by the testimony, the verdict should be for the defendants. The facts referred to are (1) a guaranty on the part of McCord that Lawrence would be able to sell the property for the price at which he bought it; (2) that McCord, in making the contract of guaranty, acted in good faith for the purpose of having the property bring a fair price, and not with a view to his own benefit as purchaser thereof; and (3) that Lawrence was under no promise, express or implied, to allow McCord to take the benefit of his purchase. The charge was so framed as to leave it for the jury to decide whether or not the facts referred to existed, and then declared the legal result of the facts, if found by the jury to exist, by telling them, if they found the facts referred to, to return a verdict for the defendants. As said before, if the facts referred to existed, they negatived the existence of the essential averments in the plaintiffs' petition and broke down the plaintiffs' case. A charge which directs the attention of the jury to a feature of the case presented by evidence, without assuming that it is established by the testimony, but for the purpose of announcing the law applicable thereto, is not a charge on the weight of evidence. *Owens v. Railway Co.*, 67 Tex. 679, 4 S. W. 593. It has frequently been held in this state that where the charge given by the court correctly states the law on an issue, but does not apply it directly to the evidence, a party has the right to prepare and have given a charge requiring the jury to find whether the evidence establishes the existence of any specified group of facts, which, if true, would, in law, establish his cause of action or defense, and instructing them, if they find such group of facts proven, to find in his favor. *Railway Co. v. Shleder*, 88 Tex. 166, 30 S. W. 902, 28 L. R. A. 538; *Railway Co. v. McGlamory*, 89 Tex. 635, 35 S. W. 1058. If a party has the right to have a particular group of facts submitted to the jury in a charge requested by him, of course it is not improper for the court, of its own motion, and without request, to submit such group of facts to the jury, and declare what would be their legal effect. This is what the writer believes was done by the charge complained of in this case, and condemned by the majority opinion. A charge similar to the one under consideration was approved in *Ives v. Ashley*, 97 Mass. 198.

However, in my opinion, the third assignment points out reversible error. It complains of the action of the trial court in refusing the following requested instruction:

"If McCord authorized Ralston to assure Lawrence that a purchaser would be found

for him (Lawrence) for certain of the assets which he (Lawrence) did not want, if such was the case, and if you find that the object and purpose of McCord in having such assurance made to Lawrence, if such assurance was made, was to enable him (McCord) to thereafter become the purchaser from said Lawrence of said assets, or any part thereof, and that, in furtherance of such object and purpose, McCord did thereafter become the purchaser from Lawrence, then you are instructed that such sale was, and as to said McCord is, invalid, and this notwithstanding Lawrence may not have been aware of the object and purpose of McCord in having him so assured."

The fifth proposition submitted by plaintiffs in error under the assignment complaining of the refusal of this charge asserts that it embodied a correct proposition of law, directly applicable to the facts, in that, if McCord acted in bad faith, it was wholly immaterial that Lawrence may have been unaware of that fact, and the jury should have been so instructed. On this point, it is believed, appellants are correct. Courts of equity are so rigid in requiring good faith, honesty, and integrity on the part of trustees, that when they fall short in these respects, in purpose or intent only, though no actual harm results, if they reacquire the property which they have disposed of with such fraudulent intent, it will be reimpressed with the trust, although the purchaser to whom it has been sold, and from whom the trustee has acquired it, may not have been a party to, or had knowledge of, the trustee's wrongful intent. *Perry on Trusts*, §§ 222, 830; *Ellis v. Singletary*, 45 Tex. 41.

While the refused instruction might have been so framed as to present the question more definitely, it embodied a correct principle of law applicable to a phase of the case presented by the testimony, and not covered by the main charge, and which it was the right of plaintiffs in error to have submitted to the jury. In other words, if McCord resorted to the alleged promise of guaranty, not for the purpose of securing a fair price for the property, but as a scheme on his part to enable him to finally acquire it, then, in my judgment, he should not be permitted to hold it as against the plaintiffs.

I concur with the majority opinion in what is said on the subject of executed and executory contracts of sale, as applied to this case.

FISHER, C. J. I agree to what is said by the court in its opinion, and also agree with the dissenting justice that the trial court erred in refusing plaintiffs in error's requested instruction, set out in the dissenting opinion, provided the subject of guaranty was a proper issue to be submitted to the jury. I am fully satisfied with the views of the majority of the court, as expressed in the opinion of Associate Justice Cochran; and, in addition, I offer the suggestion that if it could

be assumed that the contract of guaranty between the purchaser, Lawrence, and the trustee, McCord, was made in good faith, with the object of having the property sell for a fair price, and with no purpose to benefit the guarantor, but at the time that the guaranty was entered into, and at the time that the sale was made by the trustee, it was the purpose and design and intention of the parties to the guaranty that the sale was made in reliance upon the guaranty, and that this contract should be performed and become executed by the purchaser thereafter delivering the property to the guarantor, and within a short time thereafter, in pursuance of said previous agreement, there was a performance of the contract of guaranty by the purchaser delivering the property to the guarantor, then, in my opinion, it inevitably follows that the guaranty was the prominent fact that led to the attempted acquisition of title by McCord. Prior to and at the time of sale McCord, as trustee, would not be permitted to enter into a contract with the prospective purchaser, by virtue of which it was the purpose and intention that McCord should ultimately acquire the title, although there should be no purpose and intention to defraud, or to acquire any benefit or right, other than the mere title to the property. McCord, as trustee, could no more be protected in the acquisition of the property under the guise of a guaranty, where it appears that in selling the purpose and intention was that the guaranty should be performed, than would be the case if he had acquired the property from the purchaser at trustee's sale predicated upon a previous agreement that such purchaser should sell to him. The evidence bearing upon this subject clearly shows that, when Lawrence purchased at the trustee's sale, his purpose and intention was to require a performance of the contract of guaranty, at least to the extent of much of the property involved in this action. The guarantor and trustee, who was McCord, did not testify in the case; but the direct evidence in the record, together with the deductions to be drawn from the facts and circumstances testified to, leads inevitably to the conclusion that it was the expectation and intention of McCord to acquire the title to the property in question from Lawrence after the trustee's sale, and the evidence shows that the acquisition followed within a short time thereafter.

RICHARDSON et al. v. BRUCE.

(Court of Civil Appeals of Texas. May 27, 1903.)

TRESPASS TO TRY TITLE — PRINCIPAL AND AGENT—REPUDIATION OF AGENCY—KNOWLEDGE OF PRINCIPAL—STATUTE OF LIMITATIONS.

1. Where it appeared, in trespass to try title, that an agent selected certain land for his prin-

cipal, and took possession thereof as agent or tenant, and there was some evidence that he asserted a claim to it, but none that he repudiated his agency or tenancy and that knowledge of such fact was brought home to the principal, there was nothing requiring the submission of any question on the statute of limitations.

Appeal from District Court, McLennan County; M. Surratt, Judge.

Action by D. H. Bruce against Martha J. Richardson and others. Judgment for plaintiff, and defendants appeal. Affirmed.

For former opinion, see 64 S. W. 785.

Baker & Ross, John S. Patterson, and Chas. A. Jennings, for appellants. Sleeper & Kendall, for appellee.

FISHER, C. J. This is an action by appellee in trespass to try title against appellants to recover 100 acres of land, a part of the Thomas M. Blake 1,280-acre survey. Verdict and judgment resulted in appellee's favor.

The appellants claim under Geo. W. Richardson, deceased, who was the husband of Martha J. Richardson and the father of the other appellants. Appellee claims under a deed executed to D. H. Bruce by Coleman Blake and wife. In 1871, Blake and wife executed a deed to Geo. W. Richardson for 295 acres of land out of the south end of the 1,280-acre survey; and about the same time executed a deed to D. H. Bruce for 100 acres to be selected out of said 1,280-acre survey. Geo. W. Richardson, as the agent of D. H. Bruce, selected the 100 acres in controversy as the land Bruce was entitled to under said deed, and took possession of the same, and inclosed this land by a fence about 1884.

In submitting the issues raised by the evidence, the trial court charged the jury as follows: "Now, if you believe from the evidence that D. H. Bruce delivered his said deed to Geo. W. Richardson, and that he (Richardson) brought the same to this state for Bruce, and had the same placed upon record, and selected for him the said 100 acres of land; and that the said Richardson thereafter took possession of the same for the said D. H. Bruce, as his agent or tenant, then, if you so find, you will find for the plaintiff. Otherwise, you will find for the defendant." This charge was in accord with the facts, and we find that Richardson did take possession of the land as the agent or tenant of Bruce, and that such agency or tenancy was never repudiated, or, if such was the case, Bruce was not so informed. The evidence bearing upon the question of possession by Richardson clearly establishes the fact that he took possession of the 100 acres in question and remained in possession of the same, and that this was the land that he had selected for Bruce. There is some evidence to the effect that Richardson, during his lifetime, asserted a claim to this land, but there is no evidence in the record

¶ 1. See Adverse Possession, vol. 1, Cent. Dig. §§ 289, 290, 321.

that he repudiated his agency or tenancy and that knowledge of that fact was brought home to Bruce. What we said upon this subject in the former appeal of this case, which is found reported in 64 S. W. 785, applies to the facts as stated. Consequently, the conclusion must be reached that the evidence does not develop a state of facts which would require the trial court to submit any question of limitation.

We have carefully considered the assignments, and think that none are well taken; therefore the judgment of the trial court is affirmed. Affirmed.

SAN ANTONIO & A. P. RY. CO. v. THIGPEN et al.

(Court of Civil Appeal of Texas. June 27, 1903.)

APPEAL—REVIEW—MOTION FOR NEW TRIAL.

1. Defendant in an action for overflows of land cannot complain, on appeal, that the evidence showed the overflows were so extraordinary and unprecedented that it was not required to guard against them, where its motion for new trial alleged merely that the verdict was contrary to the law and the evidence, in that there was no evidence of the damage to the land, and, if there was, the verdict was excessive.

Appeal from District Court, Falls County; Sam R. Scott, Judge.

Action by Mattie Thigpen and others against the San Antonio & Aransas Pass Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

A. W. Houston and W. S. Baker, for appellant. Martin & Eddins and Rice & Bartlett, for appellees.

KEY, J. Appellees brought this suit against appellant to recover damages alleged to have been sustained on account of overflows of a tract of land belonging to them, alleging that the injuries complained of resulted from a defective and negligently constructed trestle across Cow Bayou. Appellant in its answer, in addition to a general denial, averred that the overflows referred to were caused by such extraordinary and unprecedented floods as could not be anticipated and guarded against. At the trial, the jury returned a verdict for the plaintiffs for \$1,000 and 6 per cent. interest thereon, damages to the land, and found for the defendant on the issue of damages to crops.

The defendant has appealed, and submits the case in this court on about 20 assignments of error, which we deem it unnecessary to set out and consider in detail in this opinion. The trial judge of his own motion submitted to the jury a reasonably full and fair charge, and also gave several special instructions requested by the respective parties. To the court's charge, and those

given at the instance of the plaintiffs, numerous objections are urged; but we are of the opinion that the objections are untenable, and that, considering all the instructions given, the jury were properly advised as to the rules of law by which they should be governed. We also hold that error is not shown by the assignments and bills of exception which complain of the action of the court in ruling upon the admissibility of testimony.

The verdict of the jury is vigorously assailed in this court upon the contention that the testimony shows that the overflows which caused the injuries complained of were so extraordinary and unprecedented as that appellant was not required to guard against them. This ground of complaint was not made against the verdict in appellant's motion for a new trial in the court below, and for that reason, if for no other, it cannot avail in this court. The motion for a new trial alleged that the verdict of the jury "was contrary to the law and the evidence, in that there was no evidence of the damage to the land, and, if there was, the verdict was excessive." And no other complaint was made against the verdict. The rule is well settled in this state that if a party desires to have a verdict set aside he must in his motion for a new trial specifically point out wherein the verdict is not supported by testimony, and on appeal he is limited to the particular objections thus made, and will not be heard to complain that the verdict is unsupported in other respects. *Clark & Loftus v. Pearce*, 80 Tex. 146, 15 S. W. 787, and authorities there cited. However, we deem it proper to add that we have read the testimony of the witnesses, and are not prepared to say that the verdict is not supported by evidence.

No reversible error has been pointed out, and the judgment will be affirmed. Affirmed.

SHECKLES et ux. v. LEWIS et al.

(Court of Civil Appeals of Texas. June 10, 1903.)

HOMESTEAD—ESTOPPEL TO ASSERT—MORTGAGE—FALSE REPRESENTATION.

1. Where husband and wife own and occupy a tract of land as a rural homestead, and, in order to mortgage part of it, falsely represent to a lender that they own and use adjacent lands actually owned and occupied by another, so as to show by that device an apparently mortgageable excess over 200 acres, they are not estopped from afterwards claiming such portion of the mortgaged lands so used and occupied by them as, with the unmortgaged part, will make up the full homestead exemption.

Appeal from District Court, Milam County; J. C. Scott, Judge.

Action by A. J. Lewis and others against W. G. Sheckles and wife. Judgment in fa-

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. §§ 1752, 1753.

¶ 1. See Homestead, vol. 25, Cent. Dig. §§ 229, 231, 244.

vor of plaintiffs. Defendants appeal. Reversed.

Henderson, Streetman & Freeman and N. H. Tracy, for appellants. Spencer Ford, Monta J. Moore, and Hefley, McBride & Watson, for appellees.

MILLER, Special Justice. The appellees brought this action of trespass to try title to 62 acres of land against appellants W. G. Sheckles and wife, and obtained a verdict and judgment.

Appellees claim title through a sale of the land under a deed of trust executed by appellants to C. H. Silliman, trustee; while appellants contend the instrument is void on the ground that, when it was made, the land was a part of their rural homestead. Appellants also claim rent for the time appellees have had possession of the land under sequestration proceedings.

Sheckles and wife owned and had inclosed a tract of about 221 acres, including the land in dispute, and they were actually using and occupying all of it for homestead purposes, when they wished to cut off of the southwest end, and mortgage, 62 acres of it. Adjacent to the inclosed tract on the northeast side was a strip of about 86 acres that appellants seem to claim, but which for 13 years continuously was claimed and actually used and occupied by the adjoining landowner. This strip, with the inclosed tract, made about 308 acres, or 246 acres besides the 62 acres appellants wished to mortgage. They applied to Silliman for the loan, representing that their homestead consisted of the 308 acres. He had the lands surveyed, Sheckles going with the surveyor and pointing out to him his corners and boundaries, so as to include the 86-acre strip as a part of his homestead, and thus embrace the 308 acres. Sheckles and wife then executed and recorded a formal designation of the 246 acres, all but the 62 acres, as their homestead, and Silliman made the loan, and took their deed of trust on the 62 acres for security. Silliman had no actual knowledge that the 86-acre strip included in the 246-acre designation was not appellants' land, and was not in fact used and occupied by them.

A part of the 62 acres, and also of the rest of the 221 acres of inclosed land, was cultivated, and between these parts was pasture land used by appellants for their stock. Their house, stable, etc., were not on the 62 acres, but they cultivated a part of it and used the rest of it for their stock. A tenant house was on it, but the tenant did not cultivate or use any of the 62 acres, and no fence divided that part from the rest of the 221 inclosed acres.

The court instructed the jury to find for appellees if they believed that appellants owned, used and occupied as a home 200 acres of land in addition to the 62 acres sued for when they made the deed of trust, and

also to find for appellees on the ground of estoppel, if they believed that appellants represented, to obtain the loan, that they owned 200 acres besides the land in dispute, and their representations were false, and the lender in good faith relied upon them as true in making the loan, and appellants at the time of getting the loan did not actually reside upon the land sued for.

The appellants requested special charges, which the court refused to give, embodying the idea that where husband and wife own and actually use and occupy a tract of land as a rural homestead, and, in order to mortgage a part of it, falsely represent to a lender that they own and use adjacent lands actually owned and occupied by another person, so as to show by that device an apparently mortgageable excess over 200 acres, they are not estopped from afterwards claiming such portion of the mortgaged lands so used and occupied by them as, with the unmortgaged part, will make up the full homestead exemption.

We are of opinion that the court's charge on the issue of estoppel was wrong, and that, instead, the law is as contended for by appellants. Since the Blalock decision (76 Tex. 89, 13 S. W. 12), an estoppel, it would seem, cannot arise in favor of a lender who attempts to secure a lien on any part of a homestead in the actual use and possession of the family, when based on representations of the husband and wife made contrary to the fact. Whatever the members of this court may think of the utility or good morals of such a ruling, they must accept it as law. In Parrish v. Howes, 66 S. W. 211, the Supreme Court, referring to the Blalock Case, says: "In that case Blalock and wife, at the time they gave the mortgage, were living upon the mortgaged property as their home, and used no other property as such. They represented that it was not their homestead, but that other land was, which they did not then and had never resided upon or used as a home. In fact and in law, the property mortgaged was their only home, and the court so held, saying: 'If property be homestead in fact and in law, lenders must understand that liens cannot be fixed upon it, and that declarations of husband and wife to the contrary, however made, must not be relied upon.'"

The strip of 86 acres adjoining appellants' inclosed lands, and included in their homestead designation for the purpose of making a greater showing of acreage to the lender, and by such means getting a loan on part of the land actually used and occupied by them as a home, whether in law owned by them or not, was claimed and actually used and in possession of the adjacent landowner, and under our decisions the lender relied upon appellants' declarations and acts to the contrary at his peril. The means of ascertaining how much and what lands appellants owned, and were actually using and occupy-

ing, were open to the lender. They could not have deceived him as to their boundaries if the surveyor had made his own investigations instead of accepting Sheckles' statements.

If, on the next trial, the evidence shows that appellants, when they got the loan, were actually using and occupying as a home only the lands inclosed, and that the adjacent strip was used and in possession of the adjoining landowner, then appellants would be entitled to elect out of the tract sued for a sufficient quantity to make up, with the rest of the inclosed land, 200 acres, and to recover of appellants the rent on the part so elected, and appellees should recover the rest of the land in dispute.

For the reasons given, the judgment is reversed and the cause remanded.

SHAIN PACKING CO. v. BURRUS.

(Court of Civil Appeals of Texas. May 20, 1903.)

NUISANCE—DAMAGES—POLLUTION OF STREAM—EVIDENCE.

1. Where plaintiff sought to recover from defendant for so negligently conducting its packery as to pollute a stream on plaintiff's premises, and cause a disagreeable and unhealthy stench about his residence, it was error to exclude evidence by defendant that the stench complained of originated wholly or in part from another stream on plaintiff's premises, polluted by others.

2. Defendant was entitled, on cross-examination of plaintiff's witness, to inquire as to certain facts, though in part contradictory to other testimony given by the witness.

Appeal from District Court, Collin County; J. E. Dillard, Judge.

Action by W. C. Burrus against the Shain Packing Company. From a judgment for plaintiff, defendant appeals. Reversed.

Abernathy & Beverly, for appellant. Abernathy & Mangum, for appellee.

KEY, J. This is a suit to recover damages and abate a nuisance, and upon trial resulted in a verdict and judgment for the plaintiff for \$1,250, and the defendant has appealed.

We sustain the seventh assignment of error, and reverse the judgment. The evidence which the bill of exception shows was tendered and excluded would have tended to show that there was a stench, at or near the plaintiff's premises, originating from a source other than the defendant's packery. The plaintiff sought to recover, and did recover, upon the theory that the defendant had so negligently conducted its packery as to pollute a stream of water on the plaintiff's premises, and cause a disagreeable and unhealthy stench at and about his residence. Such being the theory upon which the plaintiff sought

to recover damages, the defendant had the right, if it could, to show that the stench and pollution complained of by the plaintiff originated, either wholly or in part, from another and different source than the defendant's packery.

We cannot agree with counsel for appellee in the statement that the witness Finley, referred to in the bill of exception, testified fully on the matters referred to in the bill. As a matter of fact, another bill of exception shows that the court refused to permit the defendant's counsel to fully cross-examine the witness as to the matters referred to. It is true that, after the refusal referred to, the plaintiff recalled the witness, and he then stated that he had not testified that there was any stench at the flour mill, and did not think there was any, but that he smelled a stench when passing under the railroad. The bill of exception under consideration shows that the defendant offered to prove, and the court would not permit it to prove, by the witness Finley, that there was another branch running nearly parallel with and about 300 yards from the branch alleged to have been polluted, and that along this other branch the witness had often noticed a stench; and, further, that refuse water, filth, and refuse matter from a flouring mill in which the plaintiff was interested was emptied into the other branch.

We understand the bill of exception to state, in substance, and signify, that the witness would have testified as therein stated, and, if he would, the defendant had the right to place such testimony before the jury, even though it might conflict with other testimony formerly given by the witness. But a portion of it would not have been in conflict with what the witness had previously stated. The trial court held that the testimony offered was irrelevant and immaterial, which holding, we think, was erroneous.

At the instance of the plaintiff, the court instructed the jury as follows: "The fact that suits may be brought by other parties would not impair or defeat plaintiff's cause of action, if any, against defendant." Without holding that this charge was reversible error, we content ourselves with saying that no reason is perceived why such instruction should have been given. Ordinarily, the charge of the court should be confined to the issues presented by the pleadings and evidence, and should not go beyond such issues and deal with speculations. Circumstances might exist, on account of improper argument to the jury, which would warrant the court in giving some such admonitory instruction, but the record in this case does not disclose any such circumstances.

The other assignments of error, relating to questions of law, are overruled.

No opinion is expressed upon the merits of the case as developed by the testimony.

Judgment reversed, and cause remanded.

¶ 1. See Nuisance, vol. 57, Cent. Dig. § 114.

HOLLER et al. v. SCOTT et al.*

(Court of Civil Appeals of Texas. May 9, 1903.)

APPEAL—RECORD—QUESTIONS FOR REVIEW.

1. Where the record on appeal contains neither findings of fact nor bills of exceptions, the only question for determination is whether or not there is sufficient evidence to support the judgment.

Error from District Court, Haskell County; P. D. Sanders, Judge.

Action by S. W. Scott and others against E. W. Holler and others. From a judgment for plaintiffs, defendants bring error. Reversed.

L. D. Brooks, for plaintiffs in error. S. W. Scott, for defendants in error.

SPEER, J. Appellees seek to recover from appellants 320 acres of land in Haskell county upon substantially the following allegations: That appellant R. A. Rutherford was, on January 29, 1889, indebted to R. G. Smith and others, and was then in failing circumstances, and soon thereafter became wholly insolvent; that on said date, in contemplation of insolvency, and with intent to hinder, delay, and defraud his said creditors, he exchanged certain lands belonging to the community estate of himself and wife for other property, the title to which he took in his wife's name; that the land in controversy was a part of the property so received in exchange, and that the conveyance to the wife was voluntary, without consideration, in fraud of creditors, etc.; that the debt of said R. G. Smith, which was at that time some \$8,000, but afterward reduced by payments to the sum of \$3,232.63, was, on January 25, 1892, merged into a judgment; that, after several ineffectual efforts to collect this judgment by the issuance of executions, said Smith caused an execution to issue to Haskell county, which was levied upon the land in controversy, and the same was sold as the property of R. A. Rutherford, and bought in by Smith, who subsequently conveyed to appellee Chas. Stephenson, who in turn conveyed an interest to appellee S. W. Scott. Appellants answered by plea of not guilty, and interposed some special pleas, not necessary to notice here. The court rendered judgment in favor of the appellees for the land, and the only question for our determination is whether or not there is sufficient evidence to support the judgment, there being neither findings of fact nor bills of exceptions.

We cannot resist the conclusion that the evidence wholly fails to support the judgment of the court. The evidence does not show that the conveyance was made to the wife with the intent to hinder, delay, or defraud creditors, nor that it was for any other reason void as to Rutherford's creditors. Especially is this true as to Smith,

since the evidence tends very strongly to show that he is precluded from attacking the conveyance because of his participation and acquiescence in the transaction.

We purposely refrain from a discussion of the testimony in view of another trial.

The judgment is reversed, and the cause remanded.

SOMES v. AINSWORTH et al.

(Court of Civil Appeals of Texas. June 10, 1903.)

TRIAL—CLOSING TO JURY—REMARKS OF COUNSEL.

1. On a former appeal the court decided that, if plaintiff's husband's credit was used at all in the procurement of money loaned, such money would be community property. On the retrial plaintiff's counsel was permitted to argue to the jury that the court held that, if the lender of the money looked to plaintiff's separate property for security, the money would be her separate property. The jury decided for plaintiff, although the evidence to rebut the statutory presumption that the money was community property was very meager. *Held*, that the construction of the opinion by plaintiff's counsel was erroneous and prejudicial.

Appeal from McLennan County Court; G. B. Gerald, Judge.

Action by Pearl Ainsworth and another against Mont Somes. From a judgment for plaintiffs, defendant appeals. Reversed.

Clark & Bolinger and J. A. Kibler, for appellant. J. T. Sluder, for appellees.

KEY, J. This is the second appeal in this case. The nature of the case is stated in our former opinion in 67 S. W. 468. We sustain the ninth assignment of error, which complains of the action of the trial court in permitting the plaintiffs' counsel to discuss before the jury the opinion of this court rendered on the former appeal, and to urge before the jury a construction of that opinion not justified by its terms; in which argument it was contended that the decision referred to held, in effect, that, if the lender of the money to Mrs. Ainsworth, for which the note in controversy was executed, intended to and did look to the separate property of Mrs. Ainsworth as security for the debt, then the money so obtained by mortgage upon her separate property would be the separate property of Mrs. Ainsworth. It was held on the former appeal, and is still held, that if the money referred to was, by agreement or understanding between Mrs. Ainsworth and her husband, borrowed for her separate estate, and under a contract which required it to be paid out of her separate property, with no intention that the husband should be looked to for payment of the debt, then it would be her separate property; otherwise it would be community property. In other words, if the husband's credit was used at all in the procurement of the money, then it was community property. The husband signed the note,

*Rehearing denied July 3, 1903.

and the lender testified that he looked to the husband, as well as the mortgage, for the payment of the debt. If the transaction was in fact as stated by the lender, then the money was community property. Under the statute the money referred to was presumed to be community property, and the testimony contained in the statement of facts tending to show the contrary is very meager indeed. Hence it seems probable that the jury, in reaching the conclusion that the note sued on was the separate property of Mrs. Ainsworth, were influenced by the erroneous construction of our former opinion, which her counsel was permitted by the court to urge upon the jury over the protest of the defendant.

Judgment reversed, and cause remanded.

MCCLELLAN v. MANGUM.

(Court of Civil Appeals of Texas. July 1, 1903.)

EXECUTORS AND ADMINISTRATORS—DEATH—SETTLEMENT OF ACCOUNTS—JURISDICTION OF COUNTY COURT.

1. In view of Batts' Ann. Civ. St. art. 3357, which makes limitations begin to run, as to suits on bonds of executors and administrators, from their death, resignation, removal, or discharge, and other provisions of the statutes, it must be deemed the legislative intent that the death of an executor or administrator should sever the relation theretofore existing between him and the estate, and therefore it is not within the jurisdiction of the county court, sitting in probate, to determine the amount due from the deceased executor or administrator to the estate.

Error from District Court, Collin County; J. E. Dillard, Judge.

Hugh McClellan, as executor of R. C. White, deceased, filed a final settlement in the county court for R. C. White, as administrator of John W. Baker, deceased. T. F. Mangum, as administrator de bonis non of John W. Baker, filed exceptions. From the judgment of the county court an appeal was taken to the district court, where the final settlement was stricken out. McClellan brings error. Affirmed.

J. M. Pearson, for plaintiff in error.

KEY, J. The nature and result of this suit is stated as follows in the brief filed for plaintiff in error: "John W. Baker died in Collin county, Tex., and left an estate, consisting of real and personal property. R. C. White was appointed by the county court of Collin county, Tex., administrator of the estate of said John W. Baker. R. C. White administered the estate of said John W. Baker for about two years, and, before he had fully and finally administered the estate, the said R. C. White died. At the time of the death of the said R. C. White, the said White owed the estate of the said Baker, and the estate of the said Baker owed White certain commissions, etc. Hugh McClellan was appointed

independent executor of the estate of said R. C. White under the terms of a will left by the said White, which appointment was confirmed by the county court of Collin county, Tex., and the said McClellan proceeded to administer the estate of the said R. C. White, deceased. T. F. Mangum was appointed administrator de bonis non of the estate of said John W. Baker, deceased. For the purpose of adjusting the accounts of R. C. White, as administrator of the estate of said John W. Baker, deceased, and in order to close the administration of R. C. White as administrator of the estate of John W. Baker, the said Hugh McClellan, as executor of the estate of R. C. White, deceased, filed a final settlement for R. C. White as administrator of the estate of John W. Baker, deceased, to which final settlement T. F. Mangum, as administrator de bonis non of the said John W. Baker, deceased, filed exceptions in the county court of Collin county, Tex., sitting as a court of probate. From the judgment of the county court, sitting as a court of probate, an appeal was taken to the district court of Collin county, Tex., where, at the March term, 1902, a judgment was rendered by the district court, striking out the final settlement filed by Hugh McClellan, as executor of the estate of R. C. White, deceased, of the administration of the said R. C. White, as administrator of the estate of John W. Baker, deceased, and refusing to adjudicate the issues raised by said final settlement. The district court held, in substance, that, where an administrator or executor dies before he finally administers an estate, the county court, sitting as a court of probate, has no authority or jurisdiction to determine the matters in dispute between the deceased administrator in his representative capacity and the administrator de bonis non who succeeds in the administration, and held, further, that the county court cannot ascertain the amount due by the deceased administrator to the estate which he represented, and cannot grant a discharge of the deceased representative and his bondsmen from further liability on account of said administration."

The ruling referred to is the only question presented for decision, and, while not entirely free from difficulty, we have reached the conclusion that the trial court was correct. The relation of the executor or administrator to the estate of the decedent is one of trust, and the general rule is that a trust, not coupled with an interest, ceases to exist when the trustee dies, and that the legal representative of the estate of the trustee does not succeed to the original trust, in the absence of a statute declaring that result. Counsel for plaintiff in error concedes that there is no statute expressly requiring or authorizing the representative of a deceased executor or administrator to file a final account for and on behalf of such decedent, but contends that certain provisions of the

statute regulating the administration of estates lead to that result. Of the several provisions of the statute relied on to support that contention, the most cogent seems to be the one which makes the common law applicable to executors and administrators when not in conflict with the statute, followed up by authorities which sustain the contention that, according to the common law, it was the duty of an administrator of a deceased administrator to settle the account of his decedent. However, there are other provisions of the statute which, in our view, lead to the conclusion that the Legislature understood and intended that, when an executor or administrator died, his relation to the estate was thereby severed, and the probate court had no jurisdiction over the heirs or legal representatives of the deceased administrator. For instance, according to article 3357, Batts' Ann. Civ. St., limitation begins to run as to suits on bonds of executors, administrators, or guardians from and after the death, resignation, removal, or discharge of such executor, administrator, or guardian.

It seems clear that when probate jurisdiction has once attached, and as long as it continues to exist, no suit by the heirs can be maintained in another court against the administrator or the sureties on his bond. And therefore, while such probate jurisdiction continues, it would seem that the statute of limitation could not be operative. Hence we reach the conclusion that, in enacting the article of the statute referred to, it was the legislative intention that death of an executor or administrator should entirely sever the relation theretofore existing between such executor or administrator and the estate, and that no other person, nor the probate court itself, could restore that relation and adjudicate the rights of the first estate as against the estate of the deceased executor or administrator, nor the rights asserted by the representative of the deceased executor or administrator against the first estate.

We have found no Texas case entirely analogous to this, but cite the following cases as tending to support the views here expressed: *Ingram v. Maynard*, 6 Tex. 130; *Fort v. Fitts*, 68 Tex. 593, 1 S. W. 563; *Marlow v. Lacy*, 68 Tex. 154, 2 S. W. 52; *Timmins v. Bonner*, 58 Tex. 558; *Davis v. Harwood*, 70 Tex. 71, 8 S. W. 58. The case of *Bopp v. Hansford*, 18 Tex. Civ. App. 340, 45 S. W. 744, relied on by plaintiff in error, is not entirely analogous. That was a suit on the bond of a guardian who had been removed by the probate court. The decision in that case was rested upon a provision of the statute regulating guardianships, which does not by its terms, nor by any other provision of the statute to which we have been cited, apply to executors and administrators, and it was not there held that the death of a guardian would not terminate the fiduciary relationship, and deprive the probate court of all jurisdiction

to adjudicate the rights of the former estate and of the estate of the deceased guardian.

No error has been pointed out, and the judgment is affirmed. Affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS v. McGEHEE.

(Court of Civil Appeals of Texas. May 20, 1903.)

NUISANCE—DAMAGES—HARMLESS ERROR.

1. On the erection of live stock pens constituting a nuisance of a permanent nature near plaintiff's premises, the measure of damages is the depreciation in value of the premises arising from the maintenance of the nuisance.

2. Where a complaint stated a good cause of action for the maintenance by defendant of stock pens near plaintiff's premises, but contained averments of damages from the driving of cattle along the street to the pens, and for the language used by the drivers, for which defendant might not have been liable, and objections to these averments were not followed up by objections to the evidence, and it appeared from the instructions that this feature did not enter into the consideration of the jury in arriving at a verdict for plaintiff, the judgment will not be reversed.

Appeal from Hays County Court; Ed. R. Kone, Judge.

Action by George T. McGehee against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

Fiset, Miller & McClendon, for appellant. O. T. Brown, for appellee.

FISHER, C. J. As to the main question involved in the case, that is, as to whether the stock pens in question were a permanent nuisance, the case of *Denison & P. S. Ry. Co. v. O'Maley* (Tex. Civ. App.) 45 S. W. 227, is controlling. In the case cited, a writ of error was denied by the Supreme Court.

As to the question of the stock pens being so constructed as to divert the surface water, and the liability of appellant therefor, the case of *Gembler v. Echterhoff* (Tex. Civ. App.) 57 S. W. 314, is against the contention of appellant; but, however, it is not necessary for us to pass upon this latter question, because it is apparent from the charge of the court and the verdict of the jury that the liability of the appellant for injury and destruction of the fence was not submitted to and passed upon by the jury. The only issue of damages submitted by the charge of the court was the depreciation in the market value of appellee's lands arising from the nuisance occasioned by the erection and operation of the stock pens. We are of the opinion that the appellee's petition in effect alleges a permanent injury and nuisance arising from the stock pens, and therefore there was no error in overruling appellant's demurrers upon this subject.

It may be the case, as contended by appellant, that it would not be liable in this ac-

¶ 1. See *Nuisance*, vol. 37, Cent. Dig. §§ 118, 119.

tion on account of damages arising by driving the cattle along the public street to the pens, or on account of the language indulged in by parties in so driving the cattle and in penning the same; and, if the demurrer had been sustained as to these averments, still the petition would have presented a good cause of action on the ground that the injury complained of constituted a permanent nuisance. The objections to the pleadings pointed out in these special exceptions were not followed by objections to the evidence, and it is clear, though, from the verdict of the jury, when considered in the light of the charge of the court, that these matters did not enter into the consideration of the jury in reaching a verdict. There is evidence in the record which authorized the jury to draw the conclusion that the cattle pens so erected and used were a permanent nuisance, and we are of opinion that the testimony complained of tending to establish this issue was admissible.

There was no error in refusing the charges requested by appellant.

We find no error in the record, and the judgment is affirmed. Affirmed.

WESTBROOK et al. v. BELTON NAT. BANK et al.

(Court of Civil Appeals of Texas. May 20, 1903.)

NOTES—SURETIES—TRUST DEED FOR INDEMNITY—RENEWAL NOTE.

1. Where the wife of the maker of a note executed a trust deed to indemnify a surety, such deed did not continue in force to indemnify the surety on a renewal note executed by the same parties without her consent.

Appeal from District Court, Bell County; Jno. M. Furman, Judge.

Action by the Belton National Bank and others against M. S. Westbrook and others, to which Mrs. Harrison was made a party by defendants. From a judgment for plaintiff and in favor of defendant Harrison, the other defendants appeal. Affirmed.

Chas. A. Jennings and Baker & Thomas, for appellants. A. L. Curtis, for appellees.

STREETMAN, J. This suit was brought by the Belton National Bank on a note for \$1,300, dated October 27, 1900, due November 4, 1901, payable to said bank, and signed by Richard H. Harrison, M. S. Westbrook, and Waller S. Baker. It was alleged that Harrison was dead, and only Westbrook and Baker were made defendants. They answered, and, among other things, alleged that the note sued upon was given in renewal of a certain other note for \$1,575, dated November 4, 1899, and due October 27, 1900, executed by said defendants, together with Jas. A. Harrison, as sureties, and R. H. Harrison as principal, to said bank. That,

at the time said \$1,575 note was executed, Mrs. Mary S. Harrison, in order to indemnify said sureties against any loss on account of their suretyship, executed to W. H. Jenkins, as trustee for them, a deed of trust on certain land which was her separate property. It was alleged that when said note became due an extension was granted, and the note in suit was given in renewal of the balance due thereon, but it is not alleged that Mrs. Harrison consented to the renewal and extension. Mrs. Harrison and the trustee in said deed of trust were made parties by the defendants, and it was sought to subject said property to the payment of such judgment as should be recovered by the bank before the defendants should be held liable. Mrs. Harrison interposed a general demurrer to that part of the answer seeking judgment enforcing said deed of trust, which was sustained, and the plaintiff recovered judgment for the amount due upon the note against the original defendants.

Notwithstanding the action of the court in sustaining the general demurrer, the facts seem to have been fully developed, and they show the execution of the deed of trust by Mrs. Harrison to indemnify the sureties upon the original note, but fail to show that Mrs. Harrison agreed to the renewal and extension.

Appellants insist that as Mrs. Harrison was not a surety to the bank, and the deed of trust was not given by her to secure the payment to the bank, but only to indemnify the sureties upon her husband's note, the ordinary rule, which releases a surety by an extension of a note without his consent, does not apply. It may be conceded that Mrs. Harrison, or her property conveyed in the deed of trust, did not occupy the position of surety to the bank; that the bank could not have enforced the deed of trust for its own benefit, or resorted to it as security; still it does not appear to us that this would change the effect of the extension of the note.

In support of their contention, appellants cite the following from 1 Jones on Mortgages, p. 382: "A mortgage given to indemnify an indorser or surety on a note is a continuing security for all renewals of such note until it is finally paid. So long as the liability continues, the security continues also." This principle is undoubtedly true, but it has generally been applied in cases where the mortgage was given by the principal in the note to indemnify his sureties, and in such cases, of course, the principal executed the renewals, and the question of his consent to the change in the contract could not arise. In one case only, so far as we have been able to find, has it been held that the mortgage would continue in force to secure a renewal note—where the mortgage was executed by a person who did not sign the renewal note. *Mayer v. Grottendick*, 68 Ind. 1. This case cites no other authority for this doctrine than the passage above quoted

¶ 1. See *Principal and Surety*, vol. 46, Cent. Dig. § 127.

from Jones on Mortgages, which we think has reference to the case of a mortgage executed by the principal debtor to indemnify his sureties.

In this case, however, the contract really made by Mrs. Harrison is that, if her husband should fail to pay the \$1,575 note which was due October 27, 1900, her property should stand good to the sureties on that note. While she occupied no contract relation to the bank, yet her attitude to the sureties on that note was precisely that of surety for her husband, and we see no reason why the parties to that contract should be permitted to make a different contract, granting an extension of time to her husband, without her consent. Her contract was to indemnify them against loss upon the original note, and not upon a new and different note. The reasons why a surety is released by an extension of time to the principal debtor are clearly stated in *Lane v. Scott*, 57 Tex. 367, and they seem to us to apply in every respect to the attitude of Mrs. Harrison in this suit.

We are of opinion that no error has been shown, and the judgment is therefore affirmed. Affirmed.

WESTERN UNION TEL. CO. v. CRAWFORD.

(Court of Civil Appeals of Texas. May 27, 1903.)

TELEGRAPH COMPANIES—DEATH MESSAGE—FAILURE TO DELIVER—NEGLIGENCE—NOTICE OF CLAIM—EVIDENCE—INSTRUCTION—APPEAL—ASSIGNMENTS OF ERROR.

1. A party desiring an additional instruction should request it.

2. The Court of Civil Appeals will not consider assignments of error submitted together when the questions raised by them are separate and independent, and are presented in one proposition.

3. In an action against a telegraph company for failure to deliver promptly to a third person a telegram requesting him to notify plaintiff of the death of the latter's mother and of the time of the funeral, evidence of the whereabouts of plaintiff on the day the message was sent was admissible to show that, if it had been promptly delivered to the addressee, he could have delivered it on the same day to the plaintiff.

4. The filing of suit and the issuance and service of citation within 90 days of the date the message was sent relieved plaintiff of the necessity of presenting his claim in writing within that time, as required by the stipulation subject to which the message was sent.

5. There being evidence that would authorize the jury to conclude that, under the circumstances, the funeral would not have been postponed in order to await the delayed arrival of plaintiff, he was not negligent in failing to send a telegram requesting such postponement.

Appeal from District Court, Mills County; Jno. W. Goodwin, Judge.

Action by E. G. Crawford against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Arch Grinnan, for appellant. R. L. H. Williams and Cox & Anderson, for appellee.

FISHER, C. J. The appellee, Crawford, sued the telegraph company for failure to promptly deliver the following telegram: "Crandall, Texas, June 15th, 1901. To Bob Atkinson: Mother is dead. Will bury tomorrow. Notify Ed. [Signed] J. D. Crawford." Verdict and judgment were in appellee's favor.

We find the following facts: J. D. Crawford, the sender of the message, is a brother of E. G. Crawford, and it was for the purpose of notifying E. G. Crawford of the death of his mother. The person Ed., mentioned in the message, was the plaintiff. The party to whom it was sent, Bob Atkinson, was the friend of the plaintiff, and he and the plaintiff, at the time the message was received at Goldthwaite, Tex., both resided at that town within the free delivery limits. The message was received at Goldthwaite about 3:50 o'clock p. m. on June 15th, but was not delivered until the following day. If it had been delivered to Bob Atkinson, he would have promptly notified the plaintiff, who could have boarded a train on the night of the 15th, and have reached the town of Crandall before the burial of his mother. The delay in the delivery of the message deprived him of his privilege of being present at the funeral of his mother, and we find that the appellant was guilty of negligence in not promptly delivering the message to Bob Atkinson on the evening of June 15th. From the date of the message up till late in the evening of that day Bob Atkinson was in the town of Goldthwaite, and the message could have been delivered to him, if appellant's messenger had exercised ordinary diligence and care to have found Bob Atkinson.

The charge of the court complained of in the eighth assignment of error, was proper under the facts. As a matter of fact, it was an issue brought into the case, and insisted upon by appellant as one of its defenses. If the defendant desired any additional instruction on the subject of its not being required to deliver outside of the free delivery limits, it should have been requested.

The tenth and twentieth assignments of error are submitted together, and the questions raised by them are presented in one proposition. The two questions are separate and independent; that is, they do not relate to the same subject. Therefore we decline to consider the proposition submitted under these assignments further than to state that the evidence as to the whereabouts of plaintiff, E. G. Crawford, was admissible, in order to establish the fact that, if the message had been promptly delivered to Atkinson, it could, upon June 15th, have been by him delivered to the plaintiff.

Our findings of fact dispose of those assignments that complain of the verdict and judgment being contrary to, and not supported by,

the evidence. The evidence complained of in appellant's nineteenth assignment of error was not admissible. The letter written by the agent, Church, addressed to his superintendent, long after the transaction, was hearsay. The same objection may be urged to the evidence set out under the twenty-first assignment of error. What the messenger boy, Adams, said to Church, was hearsay.

The filing of suit and the issuance and service of citation within 90 days of the date of sending the message relieved the appellee of the necessity of presenting his claim in writing within that time. *Western Union Telegraph Co. v. Phillips* (Tex. Sup.) 69 S. W. 63; *Id.* (Tex. Civ. App.) 69 S. W. 997.

In disposing of the sixteenth assignment of error we cannot say that the facts establish the proposition that the appellee was guilty of negligence in not sending a telegram requesting a postponement of the funeral of his mother. There is some evidence that would authorize the jury to conclude that under the circumstances the funeral would not have been postponed in order to await the delayed arrival of the plaintiff.

We find no error in the record, and the judgment is affirmed. Affirmed.

SUPREME RULING OF THE FRATERNAL MYSTIC CIRCLE v. CRAWFORD.*

(Court of Civil Appeals of Texas, June 8, 1903.)

LIFE INSURANCE—EXAMINATION—WARRANTIES AS TO HEALTH—EXPRESSIONS OF OPINION—EVIDENCE—SUFFICIENCY.

1. A fraternal order, after receipt of assessments from a person and delivery to him of a benefit certificate, cannot question his membership, though he were not initiated.

2. Where an applicant for membership in a fraternal order is examined by a physician having authority from the state deputy to examine his own applicants for membership and have physicians of his own selection sign the reports, and such examination is signed by an approved examiner of the order, it is sufficient, though the laws of the order declare that no examination shall be legal unless made by an examiner approved by the supreme medical director.

3. The applicant's answer that he has never had any serious illness may be considered as a mere expression of opinion, which will not avoid the policy, though untrue, unless he knew of its falsity.

4. An applicant for life insurance answered negatively questions as to whether he had had any serious illness, local disease, disease of the lung, pleurisy, pneumonia, or inflammation of the lungs. The evidence tended to show that he was suffering from tuberculosis, and had had pleuropneumonia when he made the several answers. Physicians stated that, because he died of general tuberculosis, they attributed his former illness to a tubercle. The applicant stated he had been treated for la grippe, and the physician who treated him stated that his lungs were not attacked until just prior to his death. The examining physician examined him thoroughly, and found him sound. The physicians

did not tell his wife he had tuberculosis until after his death. There was other similar testimony. *Held* sufficient to sustain a finding that deceased's answers in his application were true.

Appeal from District Court, Parker County; J. W. Patterson, Judge.

Action by L. P. Crawford against the Supreme Ruling of the Fraternal Mystic Circle. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

McCall & Temple and W. D. Williams, for appellant. J. M. Richards, for appellee.

SPEER, J. Appellee is the surviving widow of W. H. Crawford, deceased, and appellant is a fraternal insurance order chartered under the laws of the state of Pennsylvania, having agents and subordinate rulings or lodges in this state. The suit was instituted by appellee, as beneficiary in a benefit fund certificate issued by appellant to her deceased husband, and the defenses were general denial, nonmembership in the order, and pleas of fraud and false statements upon the part of deceased in his applications for membership and reinstatement in the local ruling. Appellee replied by a plea of estoppel to appellant's rights to deny deceased's membership. Upon a trial before the court, judgment was entered in favor of appellee for the amount of the certificate, and the insurance order appeals.

The first assignment of error is that the court erred in rendering judgment against appellant, because deceased was never initiated into the Fraternal Mystic Circle. The evidence does show that deceased never appeared before the local ruling for initiation and was never initiated into the order, but it further appears that, with a full knowledge of this fact, the ruling received all his assessments and dues, and delivered to him the benefit certificate. We think that in thus treating him as a member, and in delivering to him the certificate, the appellant cannot be heard to question his membership. It has waived the matter. *Order of Columbus v. Fuqua*, 60 S. W. 1020, 1 Tex. Ct. Rep. 639; *McCorkle v. Tex. Ben. Ass'n*, 71 Tex. 149, 8 S. W. 516; *Knights of Pythias of the World v. Bridges* (Tex. Civ. App.) 39 S. W. 833.

The second and third assignments complain that, deceased never having been duly examined by an authorized medical examiner of the order, the judgment was for that reason erroneous. The laws of the order provide that "no examinations for the order shall be legal unless made by an examiner approved by the supreme medical director," and it seems that there was such approved examiner—one Dr. W. W. Wilkes—at Waco, where deceased applied for membership and was examined, whose name is subscribed to the report of the medical examination of the deceased. He denies that he made the examination, but admits that he probably signed the report at the instance of Dr

*Rehearing denied July 3, 1903.

¶ 1. See Insurance, vol. 28, Cent. Dig. § 1866.

Southworth, a deputy organizer for the order. Dr. Southworth testified that Dr. Wilkes was present during the latter part of the examination and signed the report. He further testified that he examined deceased himself, through an arrangement with the state deputy of the order, by which he (Southworth) was to examine his own applicants for membership, and to have physicians of his own selection to sign the reports, which were to be approved without further examination, and that he had examined many of his applicants and never heard the matter questioned. In this state of the evidence we cannot say the examination was not sufficient.

Appellant complains that certain answers of deceased to the medical examiner, the truthfulness of which by the terms of the certificate he had warranted, were in fact false and a concealment of the real facts, and that he knew them to be false and incomplete, notably to the fourth and seventh questions, which were: "(4) Have you had any serious illness, local disease, or personal injury?" to which he answered "No"; "(7) Have you ever been subject to, or had any of the following disorders or diseases? — Disease of the lung; — pleurisy; — pneumonia, or inflammation of the lungs." To each of which the deceased answered "No." It seems to us that the answer of an applicant for life insurance upon his own life that he has never had any serious illness should be considered as a mere expression of opinion as to the character of the sickness, and should not avoid the policy, even though such answer was untrue, provided, of course, the applicant did not know of its falsity. The form of the question necessarily calls for an opinion, and an agreement to warrant the truthfulness of the answer is no more than to warrant that the applicant will make a bona fide answer as to his opinion of the character of his ailment. See *Hogle v. Ins. Co.*, 29 N. Y. Super. Ct. 567; *Illinois Mas. Ben. Soc. v. Winthrop*, 85 Ill. 587; *Bacon, Ben. Soc. § 234*. But whether this be the true doctrine or not, we are not prepared to hold that there is not sufficient evidence in the record to support a finding that the answers of deceased were true. There is evidence tending to show that he was suffering from tuberculosis, and had had pleuropneumonia, at the time he made the several answers and warranties. But the physicians who testified for appellant say that, because deceased died of general tuberculosis, they attributed his former illness to a tubercular origin. In answer to the question whether or not he had been professionally treated by a physician for sickness in the past five years, deceased replied that he had for "la grippe," and gave the name and residence of the physician who treated him. This physician testified that his lungs were not seriously attacked till just before his death, which occurred in Oc-

tober, 1901, while the representations of deceased were made in March and May preceding. Dr. Southworth testified that he examined deceased thoroughly, and found him all right—as sound as a dollar. Appellee testified that deceased had a spell of la grippe in June or July, 1900, and was confined to his bed for a week or ten days, though this sickness was not serious or dangerous; and was again sick in April, 1901, for about five days, but that she did not consider this at all serious or dangerous, and that he was soon out and attending to his business as usual; and that he was in good health from about May 1, 1901, to last of August, 1901. That she never heard either of his physicians say that he had general tuberculosis, or consumption, until after his death. That she never heard her husband complain of lung trouble. We think, from this and other similar testimony contained in the record, that the trial court was warranted in finding that deceased's various answers and warranties complained of were true.

This disposes of all assignments of error but the fifth, which is to the effect that the court erred in not finding for defendant because the evidence shows a conspiracy upon the part of Crawford and Southworth to defraud the appellant order. But, after having carefully examined the testimony, we conclude that this assignment, too, should be overruled. The deceased was a traveling salesman, and, while at Waco on business, met Dr. Southworth, whom he had formerly known, and there underwent the examination and applied for membership in the local ruling. This is probably sufficient explanation of his not applying to the local ruling in his home city—Weatherford, Tex. While the evidence raises a probable suspicion of fraud, it lacks that certainty or conclusiveness which would require of us a reversal of the trial court's judgment upon this issue.

Appellee's cross assignment of error is also overruled, and the judgment of the district court in all things affirmed.

GULF, C. & S. F. RY. CO. v. ROANE.

(Court of Civil Appeals of Texas. May 6, 1903.)

MASTER AND SERVANT—RAILROADS—PERSONAL INJURIES—NEGLIGENCE—INSTRUCTIONS.

1. It was not error to instruct that, where a carpenter, working on a railroad bridge, seeing an approaching train about three-quarters of a mile distant, started to leave the bridge, but, seeing an iron rod on the track, and apprehending danger to the train, ran on the track and removed the rod, but the train was moving faster than he had reason to suppose, and, in order to avoid being run down, he expeditiously placed himself on the abutment of the bridge, it appearing to him to be the only safe place then accessible, and the engineer saw plaintiff's danger, or could have done so by the use of ordinary care, and the high rate of speed and the momentum thereof threw plaintiff from the abutment, and the engineer, by ordinary care,

could have stopped the train or slackened its speed after he discovered plaintiff's danger, or after the danger could have been discovered by a man of ordinary prudence, thereby averting the danger, such failure on his part was negligence, and plaintiff could recover against the company.

2. Where the charge of the court correctly presented all the issues, there was no error in refusing requested instructions.

Appeal from District Court, Bell County; Jno. M. Furman, Judge.

Action by J. L. Roane against the Gulf, Colorado & Santa Fé Railway Company for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

J. W. Terry and Ballinger Mills, for appellant. W. O. Halbert, for appellee.

FISHER, C. J. The appellee, J. L. Roane, instituted this suit in the district court of Bell county to recover of appellant damages for injuries sustained by him, alleged to have been caused by the negligence of the appellant, the appellee alleging, in substance, that on or about the 11th day of October, 1899, he was employed by the appellant as a bridge carpenter, and was on that date working for the appellant on its bridge over what is known as "Knob Creek," about two miles southeast of Temple, Tex., repairing the same; that about 1 o'clock in the afternoon of that date, while the appellee and other laborers were working on said bridge, a train of the appellant was seen approaching from the north, rising over a hill some half or three-quarters of a mile away from the bridge. The appellee and all the other laborers who were working with him started to leave the bridge to get out of the way of the approaching train, and that, as the appellee was so leaving the bridge, he caught sight of an iron bar about five or six feet long lying on the track on the bridge between the rails, and parallel to them. Appellee alleged that the said bar in that position was dangerous to the safety of the approaching train, and that he turned back to remove the bar from the track before the train should reach the bridge. Appellee alleged that the train was approaching at a rate greater than the usual speed of the appellant's trains, and that when he turned back to remove the bar he thought he had ample time to do so and then to escape to a place of safety; that he picked up the bar, and threw it off the track, and then, glancing back, discovered that the train was right upon him. He alleges that when he discovered his danger there was no way of escape from his position of danger except to get on the end of one of the abutments of one of the rock piers of the bridge, which he did, going on the north end of the pier, which was near him; that just as he reached the said pier the train rushed by, and that the dust, etc., caused by the train and its motion and inertia were so great as to cause him to fall off the pier onto the rocks below, receiving the injuries of which he complains, which

he alleges have injured him for life. He alleged that his injuries were caused by the negligence of appellant's engineer in charge of the train in not slowing or stopping the train as it approached him. The appellant answered by general denial, and that the appellee was guilty of contributory negligence in stepping off the track, and stopping so near the same as to cause the injuries he complains of. Verdict and judgment were in appellee's favor for \$10,000.

The court, after stating the case and the issues involved, and defining negligence and contributory negligence, instructed the jury as follows: "(8) Now, if you find from the evidence that at the time and place as alleged the plaintiff was working on the defendant's track, and, seeing a train of cars approaching, and also at the same time seeing a bar or rod of iron lying on the track, and apprehending danger to such moving train, he ran upon the track to move and did move the same, but that the said train was moving faster than he supposed and had reason to suppose, and that when he did remove said bar that said train was almost upon him, and, in order to avoid being run down and crushed thereby, he expeditiously placed himself (having barely time to do) upon the abutment of said bridge, it appearing to plaintiff in the emergency to be the only safe place then accessible; and if you further find that the engineer operating the engine drawing said train saw plaintiff's danger, or by the use of ordinary care and diligence could have seen his danger, but made no effort to stop said train or slacken the speed thereof; and if you further find that the high rate of speed at which said train passed plaintiff, and the force, momentum, and motion thereof, threw plaintiff from said abutment to the ground, injuring him as alleged; and if you further find that said engineer, by the use of ordinary care (such as a prudent man under like circumstances would have used to avoid injury to plaintiff), could have stopped said train or slackened the speed thereof, after discovering plaintiff's danger (or after, by the exercise of ordinary care, his danger could have been discovered by a man of ordinary prudence), and thereby averted the danger and avoided the injury to plaintiff—then such failure, under such circumstances, on the part of such engineer, would be such negligence as would entitle plaintiff to recover damages for such injuries as are the proximate and direct result of such negligence; and if you so find, you will find a verdict for plaintiff." We find that there is evidence in the record which authorized the above quoted charge. We also find that the appellee was not guilty of contributory negligence, and that the verdict and judgment are not excessive. The court, in its charge, also submitted the issue of contributory negligence. The charge of the court, when considered as a whole, correctly presented all the issues that arose from the evidence and the

pleadings, and there was no error in refusing the appellant's requested instructions. There was no error in the ruling of the court concerning the argument of counsel, as complained of in appellant's bill of exceptions. There is no complaint that the verdict is excessive, and the argument of Mr. Halbert, complained of, was promptly withdrawn, and the jury instructed not to consider the same. But, however, we do not think it was so objectionable as was calculated to wrongfully influence the jury. The argument of Judge Banks, which is complained of, we think was admissible. It was based upon the evidence, and he had the right to draw the conclusions stated in his argument from the conduct of these witnesses.

We find no error in the record, and the judgment is affirmed. Affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS v. STOREY.

(Court of Civil Appeals of Texas. April 29, 1903.)

CARRIERS OF STOCK—DELAY IN SHIPMENT—MEASURE OF DAMAGES—INSTRUCTIONS—EVIDENCE.

1. In an action for delay in shipment of cattle, the court charged that the measure of plaintiff's damages was any difference between the market price of the cattle at the time they were delivered and such price at the time when they should have arrived, "and in addition, if any, the market value by reason of loss in weight sustained, if any, during the time elapsing between the time that they did reach their destination and the time that they should have reached it if transported and delivered with reasonable dispatch." *Held*, though not clear, not misleading, the court evidently intending in the first clause to submit the item of damages based on a decline in the market price, and in the second the damages on account of shrinkage, and it appearing that the jury did not assess double damages.

2. The petition alleged a contract for shipment to East St. Louis, Ill., but did not allege whether the contract was written or oral. The written contract offered in evidence was to ship to St. Louis, Mo. It was not set out in full in the statement of facts and bill of exceptions, which simply stated that, "among other terms, it provided that defendant agrees to transport the cattle in question * * * to * * * St. Louis, Mo." *Held* not to negative the fact, which the other evidence tended to establish, that the contract further bound defendant to transport the cattle to East St. Louis, Ill.

Appeal from Hays County Court; Ed. R. Kone, Judge.

Action by H. C. Storey against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Affirmed.

Fiset, Miller & McClendon, for appellant. Will G. Barber, for appellee.

STREETMAN, J. Appellee brought suit to recover damages for delay in shipment of beef cattle. The damages alleged were

\$218.12 on account of extra shrinkage; and \$136.45 on account of decline in market; aggregating \$354.57. The verdict and judgment was for \$354.57.

The first assignment of error complains of the charge on measure of damages, which was as follows: "If you find from the evidence before you that plaintiff, Storey, under the foregoing charge given you, has sustained damages as alleged, then you are instructed that the measure of his damages will be the difference, if any, between the market price of the cattle shipped at the National Stock Yards in East St. Louis, Ill., at the time they were delivered and could have been placed upon the market, and such price at the time when they should have arrived and been placed upon the market, and in addition, if any, the market value of said stock by reason of loss in weight sustained, if any, by such cattle, during the time elapsing between the time that they did reach their destination and the time that they should have reached such destination if transported and delivered with reasonable dispatch." This charge is not as clear as it might have been, but we cannot say that it is necessarily misleading. The court evidently intended in the first clause to submit the item of damages based on a decline in the market price, and in the second clause the damages on account of shrinkage. Looking to the evidence and the verdict, as we may do in such cases, we discover that the jury did not assess double damages. The evidence, without any conflict, showed that the total weight of the cattle when sold was 136,450 pounds, and that the market price when they were sold was 10 cents per hundred lower than on the day before. If the defendant was liable for this delay, it followed that the damages on this account were \$136.45, and no more and no less. On the other item it is apparent that the jury estimated the shrinkage at 35 pounds per head, allowing \$218.12 on this item. Most of the witnesses estimated the shrinkage at from 35 to 50 pounds per head. None of them placed it lower than 30 pounds. The jury might therefore have adopted 30 pounds per head as the shrinkage. Had they done so, the damages on this account would have been one-seventh less, that is, \$31.16. Under the most favorable aspect of the testimony, therefore, the jury could only have allowed \$31.16 less than they did as damages. Had they considered either of the items of fall in price, or shrinkage, twice, they must necessarily have found a much larger verdict than they did. Looking to the verdict and the whole of the testimony, we are convinced that the jury were not misled, but properly understood the charge. *Ry. Co. v. Randell* (Tex. Civ. App.) 69 S. W. 1013; *S. A. & A. P. Ry. Co. v. Corley*, 87 Tex. 432, 29 S. W. 231.

Several assignments of error are based upon a supposed variance between the contract alleged and proved. The petition alleged a

¶ 1. See Carriers, vol. 9, Cent. Dig. § 964.

contract for shipment to East St. Louis, Ill. It did not allege whether the contract was written or oral. There was evidence tending to show that such a contract was made. The plaintiff, however, testified that his contract was in writing. He seems to have rested without offering the written contract, and the defendant then objected that he could not recover without putting the written contract in evidence. The plaintiff then offered the written contract, and it was objected to because it showed a contract to ship to St. Louis, Mo., instead of East St. Louis, Ill. The contract is not set out in full in the statement of facts nor in the bill of exceptions. It is simply stated that, "among other terms, it provided that defendant agrees to transport the cars of cattle in question from San Marcos to St. Louis, Mo." It does not negative the fact, which the other evidence in the case tended to establish, that the contract further bound the defendant to transport the cattle to East St. Louis, Ill. This other evidence remained in the record, and was, in our opinion, sufficient to sustain the allegations of the petition that the destination was East St. Louis, Ill.

We have considered all of the assignments, and, finding no error, the judgment is affirmed. Affirmed.

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**KENTUCKY FURNACE CO.'S TRUSTEE
v. CITY NAT. BANK OF PADUCAH, KY.**

(Court of Appeals of Kentucky. May 26, 1903.)

**PLEDGES—WAREHOUSE RECEIPTS—BULKY
ARTICLES—FRAUD—RIGHT TO RE-
MOVE PROPERTY.**

1. A furnace company leased certain land, and placed on the ground so leased its pig iron, for which the lessee issued warehouse receipts, which the company pledged to defendant for money loaned. The transactions were in perfect good faith, the property subject to the lien was separated and marked, and was left in the lessee's possession as agent for defendant, and the lien was recognized by the furnace company. *Held*, that the pledge was valid. The fact that the property, being of great weight, was left in possession of the pledgor's lessee, was not a badge of fraud.

Appeal from Circuit Court, McCracken County.

"Not to be officially reported."

Action by the Kentucky Furnace Company's Trustee against the City National Bank of Paducah, Ky. From a judgment for defendant, plaintiff appeals. Affirmed.

J. D. Mocquot, for appellant. Greer & Reed, for appellee.

HOBSON, J. The Kentucky Furnace Company leased to J. P. Holt a part of its ground, and then placed upon the ground so leased its pig iron, and Holt issued to it warehouse receipts therefor. These warehouse receipts it pledged to appellee for money loaned. The pig iron was stacked on the ground, and was marked by Holt with chalk marks, "C. N. B.," after the pledge of the certificates, to show that it belonged to the appellee, the City National Bank. The bank officers saw Holt, who told them that the receipts were all right, and they also examined the iron. The arrangement was in perfect good faith. The property on which the bank held a lien was separated and marked, and the lien of the bank was recognized by the furnace company. After all this, on August 6, 1900, the furnace company became bankrupt, and appellant was elected trustee of the bankrupt estate. At the time of the adjudication in bankruptcy the bank had brought a suit in the McCracken circuit court to enforce its lien, and the court had taken possession of the property. Appellant, after this, brought the suit before us, alleging that he had demanded the possession of the property from the bank that he might administer upon it as part of the bankrupt estate, and praying judgment against it for the property. The two suits were consolidated. The property was sold under an agreed order, by which the proceeds were to be held subject to the judgment of the court, and on final hearing appellant's petition was dismissed.

It is insisted for appellant that the warehouse receipts issued by Holt were not warranted by section 4771, Ky. St. 1899, on the ground that he was not a warehouseman within the meaning of the statute. We do not deem it necessary to decide this point, and no opinion is intimated thereon. The evidence clearly shows that appellee was given a lien on the 113 tons of pig iron in controversy, and that it was set apart and identified beyond question. Holt had charge of it as the agent of the bank. He held it for the bank. It was placed in his possession for this purpose, and the evidence is undisputed that he informed the bank that he held the iron for it, and the bank instructed him to keep it safely. This was a valid pledge, and the circuit court properly enforced it. The property was cumbrous, and in regard to heavy property like this the rule as to things easily carried off or concealed does not apply, and it is not a badge of fraud that the 113 tons of iron was ricked up on that part of the furnace company's lot which had been rented to Holt.

¶ 1. See Pledges, vol. 40, Cent. Dig. §§ 4, 11, 24, 28.

ILLINOIS CENT. R. CO. v. WHITWORTH.

(Court of Appeals of Kentucky. June 20, 1903.)

Dissenting opinion. For majority opinion, see 73 S. W. 766.

HOBSON, J. A very delicate duty is imposed on the state courts when called upon to define the jurisdiction of the federal courts under the acts of Congress. Conflicting decisions, always unfortunate, are here more than usually to be regretted. The court follows the numerical weight of authority, and seems to rely entirely thereon. But as the question turns simply on the proper construction of the statute, and has not been determined by the United States Supreme Court or Circuit Court of Appeals, it seems to me it should be decided by this court on the construction of the statute itself. The contrary view to that followed by the court is adopted in an able opinion in *Foulk v. Gray* (C. C.) 120 Fed. 156, and in that opinion a number of other cases holding the same view are collected.

The first section of the act of March 3, 1887, as amended by the act of August 13, 1888 (25 Stat. 433, c. 866 [U. S. Comp. St. 1901, p. 508]), confers jurisdiction on the Circuit Courts of the United States, among other things, of all suits of a civil nature where the matter in controversy, excluding interest and cost, exceeds \$2,000, in which there is "a controversy between citizens of different states." Then this is added: "But no person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court. And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but, where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." By the second section of the act, "any civil action of which the Circuit Courts of the United States are given original jurisdiction by the preceding section * * * may be removed by the defendant or defendants therein into the Circuit Court of the United States for the proper district." By the third section, the defendant entitled to remove the case may, at or before the time for answer, file a petition "for the removal of such suit into the Circuit Court to be held in the district where such suit is pending and file therewith a bond with good and sufficient surety," for his entering a copy of the record in that court at its next term, and paying all costs, if the case be improperly removed. It is then provided: "And the said copy being entered as aforesaid in said Circuit Court of the United States the same shall then pro-

ceed in the same manner, as if it had been originally commenced in the said Circuit Court."

The three sections must be read together. By section 1 a civil suit, where the jurisdiction is founded only on the fact that the action is between citizens of different states, can only be brought in the district of the residence of either the plaintiff or the defendant. By section 2, any civil action of which the Circuit Courts of the United States are given original jurisdiction by the preceding section may be removed by the defendant to the Circuit Court of the United States for the "proper district." By section 3, the removal must be to the Circuit Court of the United States in the district where the suit is pending, and the case must then proceed in the same manner as if it had been originally brought in that court. When the three sections are thus read together, it is apparent that the case cannot by removal be taken out of the district in which it is brought, and that it stands in the court to which it is removed just as if brought originally in that court. It will also be observed that the only authority in the act for the removal of a case is section 2, and that thereby any civil action of which the Circuit Courts of the United States are given original jurisdiction by the first section may be removed by the defendant into the Circuit Court of the United States "for the proper district." As by section 3 the removal must in all cases be to the Circuit Court of the district in which the action is pending, the words "proper district" in section 2 must refer to the provisions of section 1 defining the district in which suit may be brought, for there is nothing else in the act to which they can refer.

The meaning of sections 1 and 2, so far as here material, is, therefore, that the Circuit Courts of the United States are given jurisdiction of civil actions, involving the required amount, in which there is a controversy between citizens of different states; but the suit must be brought in the district of the residence of the plaintiff or defendant, and, if brought in a state court, it may be removed to the United States Circuit Court in the district, if the suit might have been properly instituted in that court. That this is the meaning of these sections is also shown by the provision of section 3, that the action when removed, shall proceed "as if it had been originally commenced in the said Circuit Court." To hold otherwise is not only to ignore this provision, and to allow the action to proceed on removal, although it could not have proceeded except by consent, if begun in that court, but also to omit the words "for the proper district" from section 2, and read it as though it provided that any civil action "of which the Circuit Courts of the United States are given original jurisdiction by the preceding section * * * may be removed by the defendant or defendants

therein into the Circuit Court of the United States." To do this seems not to give fair effect to the act of Congress. The second section was not intended to confer jurisdiction on the federal court of cases excluded from their cognizance by the first section. The words "for the proper district" were obviously added to prevent its being so construed, and to show that the right of removal to the federal court was confined to cases which might properly be brought therein in the first place. This view of the statute was taken by the United States Supreme Court in *Davidson v. Railroad Co.*, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672, where it said: "The jurisdiction of the Circuit Court on removal by the defendant under this section is limited to such suits as might have been brought in that court by the plaintiff under the first section."

Previous to the act of 1875 (Act March 3, 1875, 18 Stat. 470, c. 137) there could be no removal where the plaintiff and defendant were citizens of different states, and neither resided in the state where the suit was brought. *Shute v. Davis*, Pet. C. C. 431, Fed. Cas. No. 12,828; *Moffat v. Soley*, 2 Paine, 103, Fed. Cas. No. 9,688; *White v. Fenner*, 1 Mason, 520, Fed. Cas. No. 17,547. That act extended the jurisdiction of the federal courts, and under it the right to remove this class of cases was upheld; but the words of that act under which this right was maintained are omitted from the present statute, and the record of its passage clearly shows it was aimed to confine the federal courts in this class of actions to cases between parties one of whom lived in the district. It is also clear that the purpose of the act was to restrict the jurisdiction then exercised by the federal courts. The right to removal does not exist except as it is conferred by statute. It is apparent that Congress aimed to place the plaintiff and defendant on an equal footing, and the fair effect of the act is denied when this is not done. The plaintiff could not have brought his suit in the court to which the removal was asked, as neither he nor the defendant resided in that district. He had the right to sue in the state court. The defendant, by removing the case and failing to object to the forum, may waive its right to object to it, but the plaintiff has not waived his right to object, and the suit cannot be maintained in that court without the consent of both the parties. The fallacy of the entire argument for the defendant is aptly illustrated by the order made in the United States Circuit Court on the motion to remand. It was in effect held that the case would be remanded unless the defendant would consent to try the case in that forum. But its consent alone could not confer jurisdiction. This would follow if the plaintiff had sued in that court, but this he declined to do. He had the right to a trial of his case, if tried in the federal courts, in the district of his residence. He has not consented to

try elsewhere, and by the act of the defendant alone he cannot be required to try his case in the United States Circuit Court out of the district of his residence.

The purpose of the statute is to relieve the defendant of the burden of trying his case in the state court at the home of the plaintiff, where, from local reasons, he may be at a disadvantage. But where neither of the parties reside in the state, this does not apply, and no reason exists for removing the case to the federal court. There is in this event no "proper district" to which the case may be removed.

I therefore dissent from the opinion of the court.

NUNN, J., concurs with this dissent.

LOTT v. STATE.

(Supreme Court of Arkansas. June 27, 1903.)
CRIMINAL LAW—INSTRUCTIONS—TESTIMONY
OF ACCOMPLICE.

1. On the examining trial of defendant, charged with grand larceny, his alleged accomplice testified that defendant stole the money and gave him part of it. On the trial in the circuit court he testified that his testimony on the examining trial was not true, that so far as he knew defendant did not steal any money, and that he testified as he did on the examining trial to exonerate himself. The court charged that, if the accomplice was corroborated, the jury should convict defendant. *Held* error for assuming that the accomplice's testimony tended to show defendant to be guilty, which in fact it did not.

Appeal from Circuit Court, Crawford County; Jephtha H. Evans, Judge.

William Lott was convicted of grand larceny, and appeals. Reversed.

The appellant was jointly indicted with Ed Shaw for grand larceny, charged with having stolen \$20 in money from Jim Bryant. He pleaded not guilty, was tried and convicted, and filed a motion for a new trial, which being overruled, he excepted and appealed to this court. The appellant had been tried before Esquire Wells in examining court, and Ed Shaw had testified in that court, on the appellant's examination on this charge there, that "Lott had stolen the money and given me [him] part of it." On the trial in the circuit court Shaw testified that he swore in the magistrate's court as stated above, but that he did it in order to escape punishment; that Lott did not turn over any money to him, or tell him that he had taken any money from Bryant, or any one else; that he "did not take any money from Jim Bryant, or any one else," and "so far as I know William Lott did not."

Chew & Fitzhugh, for appellant. Geo. W. Murphy, Atty. Gen., for the State.

HUGHES, J. (after stating the facts). On the trial of this cause in the circuit court, the court, over the objection of the defendant, gave to the jury the following instruction, to which the defendant excepted, to wit: "An

accomplice is one who participates in the guilt of the transaction. If Shaw is an accomplice in the larceny charged to have been committed, then Lott could not be convicted upon the uncorroborated testimony of Shaw. In such a case there must be some other evidence, direct or circumstantial, tending to connect defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense and the circumstances thereof. But the testimony of an accomplice may be corroborated by direct evidence, or by circumstantial evidence, tending to connect defendant with the commission of the offense. It is not necessary that the defendant's guilt should be made out by evidence other than Shaw's, if Shaw is in fact an accomplice. It is only necessary in the respect that there is other substantive evidence than Shaw's, if Shaw is an accomplice, tending to connect the defendant with the commission of the offense, and that upon all the evidence the jury are satisfied beyond a reasonable doubt that defendant is guilty. If these conditions are met, the defendant should be convicted; if these conditions are not met, the defendant should be acquitted." This instruction is erroneous and misleading, and for the error in giving it the cause must be reversed.

The vice in this instruction is that it assumes that the testimony of Shaw tended to show that the appellant was guilty of the offense with which he was charged, which it did not do. Though the testimony of Shaw on the examining trial of the defendant in this case did tend to show the guilt of the defendant, yet on the trial of the defendant in the circuit court Shaw stated in evidence that his testimony on the examining trial was not true, and that he gave it to exonerate himself. He said: "I swore in the examining trial of Lott that he had stolen the money and given it to me; but that was not true. What I swear here is true. So far as I know, William Lott did not steal any money from the parties. Defendant did not turn over any money to me, nor tell that he had taken any money from Bryant, or any one else. * * * I did tell Mr. Chastain that the defendant had stolen the money and given me part of it; but that was not true." This was all his testimony on the trial in the circuit court. Yet the court told the jury that, if Shaw was corroborated, the defendant should be convicted.

For the error in giving this instruction, the judgment is reversed, and the cause is remanded for a new trial.

TANKS v. STATE.

(Supreme Court of Arkansas. June 27, 1903.)

MURDER—EVIDENCE—SUFFICIENCY—MANSLAUGHTER—BURDEN OF PROOF—REASONABLE DOUBT.

1. Evidence held insufficient to support a conviction of murder in the second degree.

2. Sand. & H. Dig. § 1660, providing that the killing of a human being, without design to effect death, in the heat of passion, but in a cruel and unusual manner, unless under circumstances that would constitute excusable or justifiable homicide, shall be adjudged manslaughter, is not applicable to a killing with a pistol.

3. In a prosecution for murder, an instruction that, if the evidence failed to satisfy the jury beyond a reasonable doubt of the guilt of defendant, it was their duty to give him the benefit of such doubt and acquit, was erroneously modified by adding the words, "unless you further believe that the killing by the defendant has been established by the state, and the defendant has failed to show by the evidence that he was justifiable or excusable."

4. In a prosecution for murder, the evidence showed that deceased, while in a playful mood, was attempting to extract a pistol from the pocket of defendant, and that during the struggle by defendant to prevent her from doing so the pistol was discharged, probably by catching upon the pocket of the coat. Held, that at most deceased was guilty only of manslaughter, so that, under Sand. & H. Dig. § 1643, providing that, the killing being proved, the burden of proving mitigation or justification shall devolve upon accused, "unless it is sufficiently manifest that the offense only amounts to manslaughter," it was error to charge that the burden was on defendant to show justification, after proof of the killing by the state.

Appeal from Circuit Court, Ashley County; Zachariah T. Wood, Judge.

Wesley Tanks was convicted of murder, and appeals. Reversed.

Robert E. Craig, for appellant. Geo. W. Murphy, Atty. Gen., for the State.

BUNN, C. J. This is an indictment for murder in the first degree, tried at the January term, 1903, of the Ashley circuit court, and resulting in a conviction of the defendant for murder in the second degree. Motion for new trial made and overruled, and judgment upon the verdict, and defendant appealed to this court.

The evidence in the case does not justify the verdict of the jury for murder in the second degree, the offense being murder in the first degree or involuntary manslaughter, if anything. There is absolutely no evidence upon which the charge of murder in the first degree can be supported, since it is not shown that the defendant did the killing, nor is there any evidence whatever that he had deliberated upon or premeditated the killing or designed it in any way, nor was there shown any motive in the defendant to commit such a crime.

The facts are that a party of young people had been in attendance upon the session of a debating society, and were returning to their homes in a frolicsome and merry mood, laughing and talking good-humoredly as they went. One of the party had a pistol, but, being without a coat in which to carry the pistol, or, more probably, with which to conceal it, gave it to the defendant, who wore a coat, to carry it for him. The defendant was walking abreast with the deceased girl, Emiline Moony, and another, and the de-

ceased, in a playful mood, was endeavoring to take the pistol from his pocket, the muzzle being up. The defendant was endeavoring to prevent her getting the pistol. In the struggle between them, the pistol was discharged, apparently by being caught in the pocket, and in the effort of the deceased to draw it out. The ball entered and went through the head of deceased, killing her instantly, the pistol dropping to the ground.

Such was the evidence on the part of the defendant, and the state could adduce none to the contrary, and relied mainly upon inferences and conclusions to be drawn from the act of carrying a pistol in violation of law, and other circumstances of even less conclusiveness, and upon the careless manner in which the pistol was carried and handled. If any evidence could have been adduced showing a previous design and present intent to commit the homicide on the part of the defendant, the jury, of course, might have found the defendant guilty of murder, but none such was adduced in the trial. In this state of case, the trial court failed to instruct the jury on the subject of involuntary manslaughter and to define the same, and this was made a ground of objection by the defendant, especially as the court, in instructions, had defined the higher grade of homicide. This, of itself, might not have been greatly prejudicial to the defendant, but the peculiar wording of its definition of manslaughter was calculated to mislead and confuse the jury in their efforts to make an application of it to the facts of this case. That instruction, which is a liberal copy of section 1660, Sand. & H. Dig., reads as follows, to wit: "The killing of a human being without design to effect death, in the heat of passion, but in a cruel and unusual manner, unless it be under circumstances that would constitute excusable or justifiable homicide, shall be adjudged manslaughter, and if you believe from the evidence that Wesley Tanks did not design, in the heat of passion, to effect the death of Emiline Moony, yet if you further believe that he did kill her in a cruel and unusual manner, and without excuse, then he will be guilty of manslaughter." The statute was evidently intended to cover a case of homicide committed unintentionally, but with such wanton savagery and cruelty, and in such an unusual manner, as to imply recklessness of design. In one sense, it is true, all killing is cruel, but, in the sense of this statute, killing with such a common and effective instrument of death as a pistol cannot be regarded as cruel; still less is this manner of death unusual. Illustrations of the difference might easily be given. Thus, where a person or a number of persons undertake to torture and maltreat another, without the design to kill, and carry their treatment to such an extent as to result in death, it would not be manslaughter, notwithstanding the absence of design to kill. It was, of

course, prejudicial error to make application of this statute to the case at bar.

The defendant asked the court to give the fourth instruction, which is as follows, to wit: "You are instructed that the burden is on the state to prove that the defendant is guilty as charged in the indictment, and, if the evidence fails to satisfy your minds beyond a reasonable doubt of the guilt of the defendant, then it is your duty to give him the benefit of such doubt and acquit. If any reasonable view of the evidence is or can be adopted which admits of a reasonable doubt of the guilt of the defendant, then it is your duty to adopt such view and acquit." This instruction was proper, and should have been given as asked, but the court modified it by this addendum, "That unless you further believe that the killing by the defendant has been established by the state, and the defendant has failed to show by the evidence that he was justifiable, or excusable in committing the act." The instruction, as asked, sufficiently defined the law as to reasonable doubt. The modification was not only unnecessary, but positively harmful to the defendant, in this: that it had the effect of rendering negative the rule on the subject of reasonable doubt which had been laid down in the instruction as asked, and thus the defendant was deprived of the benefit of the reasonable doubt, the very thing, or, at least, one of the things, he was claiming the benefit of in asking the instruction. Moreover, in this instruction, as well as in the eleventh instruction given by the court, and possibly in others, the idea is involved that the burden of proof is shifted to the defendant when once the killing has been proven by the prosecution. The idea or thing appears to be based upon the language of section 1643, Sand. & H. Dig., which reads as follows, to wit: "The killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve upon the accused, unless by the proof on the part of the prosecution, it is sufficiently manifest that the offense committed only amounts to manslaughter, or that the accused was justified or excused in committing the homicide." Now in this case it is, we think, sufficiently manifest that the evidence on the part of the prosecution shows that the offense committed only amounted to manslaughter at most. This being true, it follows that, under the statute quoted, there could be no shifting of the burden of proof from the state to the defendant in this case. Therefore, wherein the instructions given, and in the modifications of those asked by the defendant and given as modified, this theory of the shifting of the burden of proof is given or suggested to the jury as the law of the case, there is error.

For the errors indicated above, the judgment is reversed, and the cause remanded for a new trial.

HUBBARD v. STATE.

(Supreme Court of Arkansas. June 27, 1906.)

CRIMINAL LAW—APPEAL—FINE—PAYMENT—SECURITY.

1. Act March 3, 1897 (Acts 1897, p. 47, No. 37), amending Sand. & H. Dig. § 2321, provides that when any person convicted of a misdemeanor shall give security for the fine and costs, the officer taking such security shall file with the clerk of the court or justice of the peace rendering the judgment the bond or note so taken, which shall have the effect of a judgment, and execution may be issued thereon. *Held*, that the act intended a personal security, and not a mortgage or lien on property.

2. There being no authority for taking a mortgage to secure a fine imposed by a justice of the peace, a defendant convicted of a misdemeanor by executing such a mortgage did not lose his right of appeal from the judgment under Gantt's Dig. § 2103, providing that there can be no appeal from the judgment of a justice after it has been paid.

Appeal from Circuit Court, Sebastian County; Styles T. Rowe, Judge.

Arthur Hubbard was convicted by a justice of the peace of a misdemeanor, and from an order of the circuit court dismissing an appeal he appeals. Reversed.

T. B. Pryor, for appellant.

BATTLE, J. Arthur Hubbard was accused, before a justice of the peace, of gaming, and was, on the 23d of November, 1900, convicted of that offense, and was fined in the sum of \$10. After conviction he executed a note and mortgage to secure the payment of the fine and costs. On the 29th of December, 1900, he prayed an appeal to the circuit court, and filed a bond, which was approved by the justice, and the appeal was granted. In the circuit court the prosecuting attorney moved the court to dismiss the appeal on the ground that the defendant had executed a note and mortgage to the state of Arkansas in payment of the fine and costs adjudged against him by the justice of the peace, and the court sustained the motion, and the defendant appealed to this court.

Section 2103 of Gantt's Digest provides: "No appeal shall be taken from the judgment of a justice's court after it has been paid or collected, nor after sixty days from the rendition of the judgment."

In *Floyd v. State*, 32 Ark. 200, the appellant was accused and convicted of a misdemeanor in a justice's court, and his punishment was assessed at a fine of \$20, and judgment was rendered against him for the fine and costs. He paid the costs and executed a mortgage for the fine. Thereafter he appealed to the circuit court. The prosecuting attorney moved the circuit court to dismiss the appeal on the ground that the appellant had paid and satisfied the judgment before taking the appeal. The circuit court sustained the motion. This court held that no

one had any legal authority to take a mortgage for the fine adjudged to the state, and treat the judgment as "paid and collected," and that the circuit court erred in dismissing the appeal.

In *Schlieff v. State*, 38 Ark. 522, this court followed the ruling of *Floyd v. State*, *supra*, and in both cases held that the execution of a mortgage for a fine was not a payment or collection of the fine within the meaning of section 2103 of Gantt's Digest.

Since the opinions in the cases cited above were delivered section 2103 has been amended by an act approved February 21, 1893, to read as follows: "No appeal shall be taken from a judgment of a justice's court after sixty days from the rendition thereof" (Act No. 33, 1893, p. 50), and an act entitled "An act amending section 2321 of Sandels & Hill's Digest," approved March 3, 1897, has been passed, which is, in part, as follows: "Whenever any person shall be convicted of a misdemeanor by any court or justice of the peace, and shall give security for the fine and costs adjudged against him, the sheriff or other officer taking such security shall forthwith file with the clerk of the court or justice of the peace rendering the judgment the bond or note so taken, which bond or note when so filed, shall have the force and effect of a judgment, and if the same be not satisfied at the maturity thereof, the clerk of the court, or justice of the peace, as the case may be, shall issue an execution against the defendant and the said securities, which execution so issued shall have the same force and effect as other executions in criminal cases." Acts 1897, p. 47, No. 37.

It is obvious that the security mentioned in the act of March 3, 1897, is personal security, and not a mortgage or lien upon property, and that no one had authority to take a mortgage for the fine in this case. According to *Floyd v. State* and *Schlieff v. State*, appellant was not deprived of, or estopped from taking, an appeal by the execution of his note and mortgage, and the circuit court erred in dismissing the same.

The weight of authority goes to the extent of holding that, in the absence of a statute to the contrary, "a judgment defendant does not waive the right to appeal and to reverse the judgment for error by paying the amount thereof, either before or after taking his appeal, no matter whether the payment is made voluntarily or after execution has issued and been served upon him." *State v. Conkling* (Kan. Sup.) 37 Pac. 992, 45 Am. St. Rep. 272; *Page v. People*, 99 Ill. 418; *Hayes v. Nourse*, 107 N. Y. 577, 14 N. E. 508, 1 Am. St. Rep. 891; *Pittsburgh, etc., Ry. Co. v. Martin*, 53 Ohio St. 386, 41 N. E. 690; *Chapman v. Sutton*, 68 Wis. 657, 32 N. W. 683; *O'Hara v. McConnell*, 93 U. S. 150, 23 L. Ed. 840; *Elliott on Appellate Procedure*, § 152, and cases cited.

Reverse and remand, with instructions to

¶ 2. See Criminal Law, vol. 15, Cent. Dig. § 2617.

the court to overrule the motion to dismiss the appeal, and for other proceedings consistent with this opinion.

KLONDIKE LUMBER CO. v. WILLIAMS BROS.

(Supreme Court of Arkansas. April 18, 1903.)

LABORER'S LIEN—PRIVITY OF CONTRACT—USE OF TEAM—CONTRACTORS.

1. Under Sand. & H. Dig. § 4766, giving laborers a lien on the product of their labor for the amount due them, laborers who cut and hauled timber to a sawmill for a person who had a contract with the owner of the mill to furnish such timber were not debarred from claiming a lien on the product of the mill, merely by the fact that they were not directly employed by the owner of the mill.

2. As such labor contributed directly to the production of lumber, the laborers were entitled to a lien on such lumber not exceeding the sum which the mill owner agreed to pay the contractors.

3. The contractors were entitled to a lien to the extent of labor actually performed by them.

4. One using a team in the performance of such labor is entitled to a lien for the value of labor of the team in addition to the value of his own labor.

Appeal from Circuit Court, Little River County, in Chancery; Will P. Frazee, Judge.

Action by Williams Bros. against the Long Pine Lumber Company, in which the Klondike Lumber Company intervened. From a judgment for plaintiffs, intervenor appeals. Affirmed.

The Long Pine Lumber Company in 1898 owned and operated a sawmill in Little River county for the purpose of making lumber. This company made a contract with the firm of Williams Bros., composed of J. M. and A. D. Williams, to cut and deliver logs on the skidway at their mills. To carry out this contract, Williams Bros. employed a number of persons to assist in cutting and hauling the lumber to the mill. They did part of the labor themselves, but did not work all the time, or make regular hands. The Long Pine Company had a contract with the Klondike Lumber Company by which the Klondike Company was to purchase and become the owner of all the lumber manufactured by the Long Pine Company. The Long Pine Company afterwards became financially involved, was unable to meet its debts, and quit business about January, 1899. At the time it quit business it had a considerable quantity of lumber on its yards, which was claimed by the Klondike Lumber Company. This lumber was attached in an action brought by Williams Bros. in the circuit court against the Long Pine Company to recover the sum of \$1,032.22 due on the contract above mentioned, and to enforce a laborer's lien which they claimed on the logs. The men employed by Williams Bros. to cut and haul the logs to the mill brought actions before a justice of the peace to enforce labor liens on the lum-

ber. Besides these parties employed by Williams Bros., the laborers employed by the Long Pine Company to run the sawmill which cut the timber also brought suits of attachment against the lumber to enforce liens which they claimed upon the property by reason of work and labor performed in manufacturing the lumber. The property was seized under the several actions. The circuit judge, on the application of Williams Bros., issued in vacation an order for the sheriff to sell the property on the ground that it was of a perishable nature, and likely to depreciate in value. After this order was made, and before the sale of the property, the laborers who had brought suits and recovered judgments before a justice of the peace intervened in the suit brought by Williams Bros. The Klondike Lumber Company also intervened, and filed a petition claiming to be the owner of the lumber, and offering to pay off any valid lien existing against the property, and asked that the case be transferred to the equity docket so that the rights of the various parties could be determined. The case was thereupon transferred to the equity docket, and, after hearing the evidence, the court found that the Klondike Lumber Company was the owner of the property; that both Williams Bros. and the laborers employed by them in cutting and hauling the timber had liens on the property for the amounts claimed by them, but that the lien of Williams Bros. was subject to that held by the men employed by them. The court also found that certain of the men employed by the Long Pine Lumber Company in and about their mill in the sawing of the lumber attached had liens upon the same; that certain other parties to whom the Long Pine Lumber Company was indebted had done no labor towards the manufacturing of the lumber, and had no liens. The court rendered a decree in accordance with its findings, and the Klondike Lumber Company appealed.

L. A. Byrne and W. R. Cowley, for appellant. J. D. Cook, for appellees.

RIDDICK, J. (after stating the facts). The question presented by this appeal is whether certain contractors and laborers had a lien on lumber manufactured by the Long Pine Lumber Company and sold by them to the appellant Klondike Lumber Company. Our statute gives laborers who perform work and labor a lien on the production of their labor for the amount due them for such work and labor. Sand. & H. Dig. § 4766; Acts 1895, p. 39. The statute, as it now stands in the Acts of 1895, is silent as to whether the labor shall be done under a contract or not, but of course it was not intended that a mere trespasser should have a lien. The labor must be done either under a contract with the owner or under circumstances showing that the owner consented thereto, though a majority of us are of the opinion that it is

¶ 4. See Logs and Logging, vol. 33, Cent. Dig. § 66.

unnecessary that the laborer should perform the work under a contract in direct privity with the owner of the property. If it is done under a contractor who has a contract with the owner for the performance of the work, then it sufficiently shows the consent of the owner, though in such a case the lien could not exceed the amount agreed to be paid by the owner to the contractor for the performance of the work. It might even be limited to the amount due the contractor at the time the action to enforce the lien is commenced, but under the facts of this case that question need not be considered. All that we need say here is that the laborers who cut and hauled the timber to the mill are not debarred from claiming a lien by the mere fact that they were not directly employed by the owner of the timber. It is sufficient that they worked under one who had a contract with the owner to do the work, and that the owner has paid neither the contractor nor the laborer. *Munger v. Lenroot*, 32 Wis. 541; *Winslow v. Urquhart*, 39 Wis. 260; *Parker v. Bell*, 7 Gray, 429; *Moore v. Erickson*, 158 Mass. 71, 32 N. E. 1031; *Reeve v. Elmendorf*, 38 N. J. Law, 125; *Boisot's Mechanics' Liens*, 239. The case of *Tucker v. Railway Co.* (Ark.) 26 S. W. 375, may seem to some extent in conflict with this ruling, but it is sufficient to say that the statute construed in that case is a different statute from the one which controls this case, and that, taking the object, purpose, and history of this act into consideration, we think that the construction contended for by the appellant is too narrow, and would, if adopted, to a large extent defeat the purpose of the statute.

On the question as to whether these men who cut the timber into logs and hauled and placed them on the skidway at the mill of the owner are entitled to a lien on the lumber made from the logs there may be more reason to doubt. But their labor was part of the work necessary to change the timber into lumber. It contributed directly towards the production of the lumber, and we are of the opinion that they have a lien, though the aggregate amount of these liens cannot exceed the sum which the owner agreed to pay the contractors for performing the work.

As to the contractors, we have several times held that a contractor is not a laborer within the meaning of the statute giving persons liens who perform work and labor, the statute being intended to protect the actual laborer, and does not apply to contractors, or those who only superintend the labor of others. The mere fact, therefore, that Williams Bros. contracted to do this work, and hired persons to do it, gives them no lien; but they also themselves performed work and labor under their contract, and to the extent of the value of their own labor they have liens as other laborers have. This lien, we think, should include the value of the use of their wagon and team when actually driven and used by them in performing the work;

for in such a case the labor of one who uses a wagon and team or other instrumentality furnished by himself in the performance of his work includes both the work of himself and that of the instrumentality by which he performs it, and he has a lien for the value of all his labor. *Martin v. Wakefield*, 42 Minn. 176, 43 N. W. 966, 6 L. R. A. 362; *Hale v. Brown*, 50 N. H. 567.

While we approve of the ruling of the circuit court sustaining the lien of the laborers employed by Williams Bros., we are of the opinion that the court erred in holding that Williams Bros., the contractors, had a lien for the full amount due them by the Long Pine Lumber Company. As before stated, they had a lien only to the extent of the value of the work actually performed by them. As the evidence does not show the value of this work, we are unable to enter a final decree here. The judgment in favor of Williams Bros. declaring a lien on the lumber to the full extent of the amount claimed by them under the contract will be reversed, and the case remanded for further proceedings that the amount for which they have a lien may be determined. In all other respects the decree is affirmed.

KLONDIKE LUMBER CO. v. BENDER WAGON CO.

(Supreme Court of Arkansas. April 18, 1903.)
CONSOLIDATION OF ACTIONS — LABORERS' LIENS—SALE MADE IN VACATION—WANT OF NOTICE—VALIDITY.

1. In an action to enforce laborers' liens the property was sold by order of court, and subsequently a corporation claiming it by a sale from defendant in the action to enforce the liens antedating the sale by order of the court brought replevin against the purchaser at the latter sale to recover the property. *Held*, that a motion by the plaintiff in the replevin action to consolidate was properly denied.

2. *Sand. & H. Dig. § 348*, provides for the sale of perishable property in attachment, and declares that no such sale shall be made in vacation without notice in writing to the opposite party or his attorney. In an action to enforce laborers' liens against certain property the property was sold by order of court, made in vacation. The court subsequently found that the defendant in the action to enforce the liens was not the owner of the property, which had prior thereto been purchased by a corporation which had no notice of the sale. *Held*, that as to this corporation the sale was void.

Appeal from Circuit Court, Little River County; Will P. Frazee, Judge.

Action by the Klondike Lumber Company against the Bender Wagon Company. From a judgment for defendant, plaintiff appeals. Reversed.

This is an action of replevin, brought by the Klondike Lumber Company against the Bender Wagon Company to recover certain lumber. For a history of the main facts out of which this controversy about the possession of the lumber arose we refer to the statement of facts in the case of *Klondike Lumber Co. v. Williams Bros.*, 75 S. W. 854.

In that case it was stated that certain lumber was seized in an action brought by Williams Bros. against the Long Pine Lumber Company. This lumber was sold under an order of the circuit judge, made in vacation. At the sale the lumber was purchased by the Bender Wagon Company. Afterwards the Klondike Lumber Company brought this action of replevin to recover the lumber. There was a motion made by the Klondike Lumber Company to transfer this case to the equity docket, and to consolidate this action with the action in case of Williams Bros. and others. The court overruled the motion to transfer and consolidate, and on the hearing gave judgment in favor of the Bender Wagon Company, from which judgment the Klondike Lumber Company appealed.

L. A. Bryne and W. R. Cowley, for appellant. J. D. Cook, for appellee.

RIDDICK, J. (after stating the facts). This is an appeal from a judgment in an action of replevin. There was a motion to consolidate this action of replevin brought by the Klondike Lumber Company against the Bender Wagon Company to recover lumber with an action brought by Klondike Lumber Co. against Williams Bros., 75 S. W. 854, to enforce laborers' liens against the lumber. This motion was made in the case of Klondike Lumber Co. v. Williams Bros., but it is just as convenient to dispose of the point raised here as in that case, and we do so by saying that, in our opinion, the court committed no error in refusing to consolidate the two actions. The parties plaintiff and defendant were not the same in the two actions, and the issues presented were not the same, and are not such as would be properly joined.

One action was a suit by certain parties against the Long Pine Lumber Company to enforce liens on certain lumber. The other action was brought by the Klondike Lumber Company to recover this lumber from the Bender Wagon Company, and the two actions raised entirely different questions. The title of the Bender Wagon Company rested upon a sale made by virtue of an order of the circuit judge in vacation. Whether this was a valid sale and passed the title of the lumber was the question raised by the action of replevin. If the sale was valid, then the wagon company was entitled to the lumber, otherwise not; and there was no need to consolidate this with the other action when the question raised concerned the validity of certain liens on the proceeds of the lumber. For it must be remembered that the lumber had already been sold, and had passed from the possession and control of the court and its officers, before the action of replevin was commenced. The proceeds of the lumber—that is, the money for which it was sold—took the place of the lumber, and the action to recover the possession of the lumber did not thereupon affect the other action to en-

force liens against the proceeds of the lumber, and there was no necessity of consolidating them. It may be that, had the Klondike Company chosen to do so, it could have raised the question as to the validity of this sale by filing a motion in the other case to set the sale aside. But, having chosen to bring a separate action of replevin, it has no room to complain that the court afterwards refused to consolidate the two cases.

The only remaining question for us to determine is whether the sale of the lumber made under the order of the circuit judge in vacation was a valid sale. The order for the sale was, as before stated, made in an action brought in the circuit court by Williams Bros. against the Long Pine Lumber Company to enforce a lien for labor upon the lumber replevied in this action. Now, we find in the statute regulating the proceedings for the enforcement of laborers' liens no provision authorizing the sale of the property by an order of the judge, made in vacation, and there is room for doubt as to whether the judge in vacation can order such a sale in actions of that kind. But there is a provision in the statute regulating proceedings in actions of attachment authorizing the judge in vacation to order the sale of perishable property, and this is no doubt the statute under which the judge acted in this case. That section provides that "no such sale shall be made in vacation without reasonable notice in writing to the opposite party or his attorney, if either of them reside in the county in which the cause is pending, of the time and place of the application therefor." Sand. & H. Dig. § 348. Now, the Long Pine Lumber Company was the party sued in that case, but the evidence shows, and the court found, that this company was not the owner of the lumber sold. The lumber was owned by the Klondike Lumber Company, and that company was not a party to the suit until after the order for the sale of the lumber was made, and had no notice of the application for the sale of the lumber. Under these circumstances the sale of the lumber did not affect any right or interest which the Klondike Lumber Company had in the lumber. The sale did not affect their title. The company, after the sale, still owned the lumber, subject, of course, to any valid liens existing against it, and had the right to recover the same from the purchaser at the sale, for the purchaser acquired only the right, title, and interest therein owned by the Long Pine Lumber Company, the defendant in the action. *Crowell v. Barham*, 57 Ark. 195, 21 S. W. 33. As to whether it acquired the right of subrogation to the rights of parties holding liens upon the property, we need not decide, for a lien of that kind could not be enforced in an action of replevin, nor has any such lien been set up or claimed in this case. On the contrary, the Bender Wagon Company has rested its rights on a claim to the legal title to the

lumber, and has resisted all efforts to transfer the case to the equity docket.

Being of the opinion that the sale of the lumber under the order of the judge, made in vacation, was void for the reasons stated, we think that it passed no title to the defendant, and that the judgment in favor of defendant is not supported by the evidence. For this reason the judgment is reversed, and a new trial ordered.

TRENT v. STATE.

(Court of Criminal Appeals of Texas. June 24, 1908.)

ANIMALS—CATTLE—QUARANTINE—LIVE STOCK SANITARY COMMISSION—POWER.

1. The action of the Live Stock Sanitary Commission in drawing another quarantine line, segregating other counties than those segregated by the federal quarantine line, and seeking to establish another independent line, was ultra vires and void, under Sayles' Ann. Civ. St. art. 5043k, expressly requiring any quarantine line fixed by such commission to conform to the federal quarantine line or that fixed by the United States Department of Agriculture.

Appeal from Fisher County Court; Jesse Wright, Judge.

Riley Trent was convicted of violating the rules of the Live Stock Sanitary Commission, and appeals. Reversed.

Beall & Beall and W. M. Walton, for appellant. D. E. Decker and Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged by information with unlawfully driving 400 head of cattle from Fisher to Lubbock county, in violation of the rules and regulations of the Live Stock Sanitary Commission. In accordance with article 5043k, Sayles' Ann. Civ. St., the Live Stock Sanitary Commission has declared a quarantine line running across the state of Texas in conformity with the federal quarantine line. This article limits the authority of the sanitary commission in the establishment of quarantine lines to that designated by the federal authorities. Across this line from the south and east no cattle could be driven north and west at certain seasons of the year. North and west of this line the sanitary commission had drawn another quarantine line, segregating other counties, which were north and west of such federal quarantine line, and sought thus to establish another quarantine line independent of and additional to the former line. This was ultra vires and void. *Wallace v. State*, 69 S. W. 506, 5 Tex. Ct. Rep. 614, and authorities cited. If, as a matter of fact, these cattle were infected with splenic fever, and this fact had been ascertained by the commission, they could have been segregated or isolated until the disease has been cured, or the cattle restored to health. In the case in hand a party representing himself to be an inspector appointed by the sanitary commis-

sion states that he inspected appellant's herd of cattle, and found several ticks upon one of them; and, while he did not throw down and examine the herd, he thought he observed evidences of ticks on another animal or two. Under this condition appellant moved his cattle from Fisher into Lubbock county, Fisher being south of the second quarantine line sought to be established by the commission north of the federal quarantine line, and Lubbock county just north and west of said second line. For a violation of the rule or regulation prohibiting the carrying of cattle, without inspection, north and west of the second quarantine line, appellant was prosecuted.

The rule or regulation prescribed by the sanitary commission, under which appellant has been convicted, is as follows: "Seventh. The Livestock Sanitary Commission of the state of Texas has ascertained that cattle located north and west of the quarantine line infested with *boophilus bovic* or southern cattle ticks, are infected, and that the pastures in which such infected cattle may be located are infected territory, and that pastures in which ticks have been discovered during the year 1900, are infected territory, and that if said cattle so infected, or cattle from pastures so infected, are permitted to be moved out of said pastures, they are liable to communicate a contagious and infectious disease known as southern or splenic fever, to other cattle located north and west of said quarantine line. It is therefore ordered by the Livestock Sanitary Commission of the state of Texas, that from this date, no cattle shall be moved, shipped or driven, transported or otherwise moved or removed from or out of any pasture or pastures lying north and west of said quarantine line, when such cattle are infested with ticks." The eighth regulation prescribed mentions the counties south and east of the additional or second quarantine line prescribed by the sanitary commission, and north and west of that prescribed by the federal authorities, adopted by the sanitary commission by virtue of article 5043k, supra. The seventeenth regulation is in the following language: "It is further ordered that a violation of any or either of the above rules and regulations shall be an offense and punishable as is provided by the laws of the state of Texas." This was sought to be given vitality by the proclamation of the Governor.

As before stated, the power of the sanitary commission in regard to prescribing quarantine lines was limited by the Legislature as set forth in article 5043k. Beyond this they have no authority to prescribe quarantine lines. Their act in prescribing another and different quarantine line was a nullity, and therefore there can be no violation of law in violating the order so declaring that line.

There are several other questions raised for adjudication, among which the indictment is attacked as being vicious. What

these propositions are correctly asserted, and the indictment is vicious, still the matters discussed finally dispose of this case, and any discussion of the other matters is pretermitted.

The judgment is reversed, and the prosecution ordered dismissed.

BERRY v. STATE.

(Court of Criminal Appeals of Texas. June 23, 1903.)

CRIMINAL LAW—NEW TRIAL—AFFIDAVIT—APPEAL—STATEMENT OF FACTS—BILL OF EXCEPTIONS—EXPLAINING ABSENCE.

1. Defendant is not entitled to a new trial on the ground that he was not prepared because he was induced to believe his case would be dismissed, the county attorney having merely said that he would dismiss if a witness testified as it was said he would, and defendant having said he had no witnesses, and wanted none, and not having shown what defense he had, or what preparation he desired to make.

2. Defendant is not entitled to a new trial on the grounds of newly discovered evidence on his unsupported affidavit, not giving the evidence, or his means or source of information, that he expected to prove a certain fact by a certain person.

3. An affidavit explaining the absence of a statement of facts is insufficient, it not showing that a statement of facts was ever presented to the trial judge.

4. An affidavit stating that a bill of exceptions was prepared and handed to the court, which he refused to sign and approve, saying, however, that he would give a full and complete bill of exceptions, which he failed to do, does not excuse the absence of a bill of exceptions, it not being shown whether the bill was presented in term time, and it being necessary, where it is presented in term time, and the court refuses to sign it, that defendant prepare a bill to be proved up by bystanders.

Appeal from District Court, McLennan County; Sam R. Scott, Judge.

Dave Berry was convicted of burglary, and appeals. Affirmed.

J. T. Sluder, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of burglary, and his punishment assessed at two years' confinement in the penitentiary.

The house is alleged to be in the possession of C. King. Appellant's motion for new trial alleges that he was not prepared for trial because he was induced to believe his case might be dismissed; in support of which he files the affidavit of his brother-in-law, Moorefield, and Sheriff Baker. From these affidavits it is made to appear that the case was set for trial on April 20th, and reset for May 7th. It is alleged that the resetting, however, was without the knowledge of appellant, who was confined in jail. Moorefield states that he was led to believe from his conversations with the sheriff that the case would be dismissed, and for that reason he failed to procure counsel to aid appellant

in his defense; and that he was not apprised that the case would be tried on May 7th, when the sheriff notified him of the fact that the case was then called for trial; that he came to the courthouse, and employed counsel at once. This statement is sustained by the affidavit of the sheriff. The county attorney filed an answer, in which he states that when defendant was brought into court originally, and asked if he had any witnesses he wanted summoned, he replied that "he had none, and did not want any"; that he (county attorney) had several conversations with Moorefield as well as with Baker, in which he expressed sympathy with defendant's people, and in which he got the impression that King (the party alleged to be in possession of the burglarized house) would testify that defendant had the right to enter the house, and that he received a letter from King indicating this would be his testimony; that the county attorney told Moorefield if King would so testify he would dismiss the case, but that he (county attorney) would have to see King, and hear King make the statement himself; that he never promised Moorefield the case would be dismissed, nor did he make any such statement to any one else. It is not contended that under articles 567 and 569 appellant was not served with a copy of the indictment two days prior to being placed upon trial; nor is it claimed that he desired the benefit of the two days in which to file written pleadings and prepare his defense. As made to appear by the county attorney—which is not controverted—he informed appellant and Moorefield that, if King would testify appellant had a right to enter the house, he would dismiss the case; and appellant relied upon this statement, and built his hopes for a dismissal. Appellant had no witnesses, and desired none. What other preparation he desired to make for his defense is not stated. If he had any other defense theory, it should have been set out, so that the court would have been advised.

Appellant filed an affidavit to the effect that he expected to be able to prove by Tom King that the hole in the burglarized house was too small for a person of appellant's size to enter. This he alleges is newly discovered testimony. The evidence is not before us, and we are unable to form any conclusion as to this matter. In fact, the testimony may have demonstrated that he did not enter through a hole in the house at all, but through the door or window. This portion of the motion is supported alone by the affidavit of appellant, and he does not give his means of information, or from whom obtained.

There is an affidavit in the record which seeks to explain the absence of the statement of facts and the failure to reserve a bill of exceptions to the action of the court placing him on trial. The affidavit is signed by counsel, and shows that he prepared a statement of facts, and requested the coun-

¶ 2. See Criminal Law, vol. 15, Cent. Dig. §§ 2394, 2396.

ty attorney to agree to the same; and that he refused to agree to the statement of facts submitted by appellant's counsel, and refused to prepare and submit a statement of facts to the court within ten days; that the statement of facts prepared by affiant and delivered to the county attorney was by said county attorney so mutilated and interlined that its identity was wholly destroyed, so that same could not now be filed herein as a statement of facts prepared by affiant. This showing is entirely insufficient. It fails to show that a statement of facts was ever presented to the trial judge at any time, either within or after the 10 days allowed. If the party on trial seeking a statement of facts fails to get an agreement from the prosecuting officer, it is his duty to present to the court a statement of facts to the end that it may be approved and filed within the 10 days allowed. This was not done. *George v. State*, 25 Tex. Cr. App. 229, 8 S. W. 25.

It is also stated in the same affidavit that a bill of exceptions covering the question raised in the motion for new trial as to the understanding between the sheriff and county attorney was prepared and handed to the court, which the court refused to sign and approve, but stated that he would give affiant a full and complete bill of exceptions covering the point raised as he recollected it, presenting the facts fully and fairly, but which the court failed to do. Whether this bill was presented in term or out of term time is not shown. If presented in term time, and the court had refused to sign the bill, it was appellant's duty to prepare a bill to be proved up by bystanders. This question was also adjudicated in *George v. State*, supra.

As the record is presented, there is no error requiring a reversal of the judgment, and it is affirmed.

EDWARDS v. STATE.

(Court of Criminal Appeals of Texas. June 23, 1903.)

MISDEMEANORS—JOINT VERDICT.

1. A joint verdict in a misdemeanor case against two defendants, assessing their fine at \$75, is insufficient to support a judgment, not showing whether the fine is against each or both.

Appeal from Dallas County Court; Ed. S. Lauderdale, Judge.

John T. Edwards was convicted of counterfeiting a trade-mark, and appeals. Reversed.

A. E. Firmin, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was jointly charged by information with W. H. Wood for counterfeiting and unlawfully using a trade-mark, in violation of articles 918d and 918e

of White's Ann. Pen. Code. Appellant urges various objections to the information, but, after a careful examination of the same, in our opinion it is correct. Upon the trial the jury returned the following verdict: "We, the jury, find W. H. Woods and John T. Edwards, defendants, guilty as charged in indictment, and assess their fine at seventy-five dollars." Defendant Wood was granted a new trial, and the judgment was entered against appellant, Edwards, for the full sum of \$75. The verdict should have been several, and not joint. We cannot ascertain from the verdict whether the jury intended to find each of the defendants \$75, or fine them jointly \$75. The law does not authorize such a verdict, and it does not support a valid judgment. *Cunningham v. State*, 26 Tex. App. 83, 9 S. W. 62; *Whitcomb v. State*, 30 Tex. App. 269, 17 S. W. 258. This being a misdemeanor, the decisions of this court are that the verdict must be several, and not joint, where two defendants are tried. However, in a felony case, where we can reasonably ascertain the verdict of the jury, the rule is different. *Davidson v. State* (Tex. Cr. App.) 50 S. W. 365. In a misdemeanor case, where the fine is against two defendants, as stated, we cannot tell whether the jury intended to render a joint verdict against each, or whether it intended said fine to be several.

There being no valid verdict, such as the law authorizes, and requires, the judgment is reversed, and the cause remanded.

WILLIAMS v. STATE.

(Court of Criminal Appeals of Texas. June 17, 1903.)

CRIMINAL LAW—ACCIDENTAL AND NEGLIGENT HOMICIDE—SELECTION OF JURY COMMISSIONERS—SELECTION OF JURY—CONTINUANCE—ABSENT WITNESSES—INSTRUCTIONS—HARMLESS ERROR.

1. Code Cr. Proc. 1895, art. 372, relating to the appointment of jury commissioners, requires that they be residents of different portions of the county for which they are appointed. *Held*, that the mere fact that the commissioners appointed at one term of court all resided in the same city, which contained two-thirds of the qualified voters of the county, did not disqualify them to act.

2. Where the jury commissioners appointed for a term of court appeared in response to a notice of their appointment, and were sworn and instructed, this amounted to a waiver of the issuance of a citation.

3. The mere fact that all the jurors for a term were selected from one and the same city is not a valid objection to the venire.

4. A continuance for absent witnesses was properly denied, where the evidence of those witnesses would have been merely cumulative.

5. Where the only evidence to indicate negligent homicide was that the victim was killed by the discharge of a pistol which he was either attempting to take away from the accused or trying to prevent the accused from shooting him with, the court properly refused to give a charge on negligent homicide.

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 2095.

¶ 4. See Criminal Law, vol. 14, Cent. Dig. § 1323.

6. Where the entire trend of the court's charge in a prosecution for homicide, claimed by the accused to have been accidental, was that, if the accused intentionally or "purposely" killed the deceased, he would be guilty of either murder or manslaughter, it was harmless error not to present affirmatively the issue of accidental homicide.

Appeal from District Court, Harris County; J. K. P. Gillaspie, Judge.

D. E. Williams was convicted of murder in the second degree, and appeals. **Affirmed.**

Coleman & Abbott, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of five years.

Appellant's son was working for deceased, Dr. De Lipsey, as office boy, and, on account of some indignity offered by deceased to said boy, appellant and two other sons went to the office of deceased, and, meeting deceased, asked him why he pulled his boy's ears and nose. Some words followed between appellant and deceased. Thereupon appellant's two sons began to beat deceased over the head with billiard cues, deceased retreating into an office in the building, appellant and his two sons following. Appellant, having a pistol, shot deceased, from which wound he died. The state's testimony shows that appellant had threatened violence to the person of deceased if he did not apologize for the manner in which he had treated his boy.

Appellant filed a motion to quash the venire of 200 jurors, and also what he terms "a challenge to the array of petit jurors," on the ground that said venire did not constitute a lawful jury, and as ground of said challenge and motion states: (1) The statutes of this state provide that there shall be holden for the county of Harris, among other terms of this court, what is known as the "March, 1903, term," and the "April, 1903, term." (2) That no order was made during the March term, 1903, of this court, appointing jury commissioners. (3) That, notwithstanding no order of this court was made during the March term, 1903, appointing jury commissioners, yet D. Rice, Sam McNeal, and J. E. Archer undertook and pretended to act as jury commissioners, and under such pretenses, and as such, did select and draw the petit jurors now held and retained by this court for the present April term, a part of whom were summoned for each of the four weeks of said term, and from it the 200 veniremen were selected and summoned, from which venire a jury was to be selected to try defendant; and that the state and defendant were required to select jurors on the trial of this case from said venire so selected. (4) That the persons so selected were not selected from the different portions of Harris county, but as a matter of fact said entire list of jurors and special venire were

all selected from and are citizens of the city of Houston, and were such at the time of such selection, except one juror, who is a resident of the town of Houston Heights, a suburb of Houston; and the residence of said jurors is within five miles of the city of Houston. (5) That no persons were notified by the sheriff, constable, or any other person authorized in the premises, or by this court, to meet or act as jury commissioners; and that there is no record of this court showing that said pretended jury commissioners ever appeared before the court, received any instructions as to their duties, or that the judge designated to said person or persons pretending to act as such jury commissioners for what weeks they should select petit jurors, etc. That, when such persons so acting had selected a jury as above stated, they gave the names of said jurors to the clerk of this court, who then made the following entry on the record of this court: "This day D. Rice, Sam McNeal, and J. E. Archer were appointed on Monday, March 9, 1903, by the court jury commissioners, and that, having been duly sworn according to law to select grand and petit jurors for the April term, 1903, of this court, and they having performed all duties required of them, and having made their report in open court, were discharged." This entry is dated March 12, 1903. The bill of exceptions further shows that this constitutes every entry of record on the books of the court, or among its files, relative to the jury commissioners. Then the bill contains a long list of the special venire, showing that they all lived in the city of Houston, with the exception stated. Appended to this bill is the following qualification by the judge: "That the commissioners were appointed as required by law, and were assembled, sworn, and instructed as required by law, and held their session by direction of the court as required by law, and duly made their report, and the lists were handed to the clerk after he was sworn to receive them as required by law. The court, upon being questioned by defendant's counsel, further stated: 'No, sir. There was no written process issued for said jury commissioners. They were summoned orally. Yes, they were summoned orally by the court.' All of the commissioners lived in the city of Houston, but in different portions of the city; and that two-thirds of the population of Harris county reside in the city of Houston. * * * The jury was accepted by defendant without exhausting his challenges allowed him by law." Article 372, Code Cr. Proc. 1895, among other things, provides that the jury commissioners shall be intelligent citizens, freeholders, and qualified jurors in the county. It further provides that they shall be residents of different portions of the county. The mere fact that the jury commissioners all reside within the city of Houston, which contains two-thirds of the qualified voters of the county, would not

render them disqualified to act as jury commissioners, having other qualifications. The statute does not say how far the commissioners shall live from each other, but merely that they shall reside in different portions of the county. It seems that appellant's contention is that by the selection of jury commissioners from the city alone this precludes any knowledge on the part of the jury commissioners of the fitness and qualification of jurors residing outside the limits of the city. If true, this would not be a valid objection to the selection of jury commissioners.

Appellant, as we understand the bill, further insists that the jury commissioners were not summoned. The judge's qualification is that the commissioners were appointed as required by law, and were assembled, sworn, and instructed as required by law. We do not understand that it is absolutely essential to issue citation to the jury commissioners, inasmuch as they were notified in this instance, and came into court. This clearly would be a waiver of any character of citation. Nor is it any valid objection to the venire because the same was selected entirely from the city of Houston. This is not a test as to the qualification of a juror, for, if he is a freeholder in the state, or household-er in the county, and has paid his poll tax as the law requires, he is a qualified juror in the trial of the case in that county, regardless of whether he live in or out of the city. We see no error in the ruling of the court in selecting the jury commissioners and veniremen by said jury commissioners that authorizes a reversal. However, we desire to say that the spirit of these statutes should be complied with and as far as practicable the letter thereof.

Bill No. 2 complains that the court erred in overruling appellant's second application for continuance on account of the absence of Wade, Weaver, Meadows, and Moore. Appellant expected to prove by Wade that deceased carried a pistol, and witness had seen it on several occasions; that said witness identified the pistol found upon the floor where the homicide occurred as deceased's pistol. This fact was abundantly established by other witnesses, and would be merely cumulative. By the witness Meadows appellant expected to prove that he talked with deceased about 12 o'clock noon of the day prior to the killing, and he told witness he had assaulted the little child of defendant, had abused him, but he had no regrets in the matter; that he expected appellant and his boys would be to see him in consequence thereof, and that he (deceased) was armed, and prepared for them, one or all; that he was armed, and proposed to remain so, and that he had no retraction to make, and would back up what he had said and done; that, if necessary, he would shoot. The record is full of evidence showing the desperate character of deceased, and that such character

was known to appellant. It is abundantly established that he went armed. We think this testimony would also be cumulative. Appellant expected to prove substantially the same fact by the witness Weaver. By witness Moore he expected to prove that deceased went armed, and that the pistol found at the homicide was of the same character and size as the pistol he had seen deceased carry. All this testimony is cumulative, even conceding diligence, which we do not deem necessary to pass upon. The court did not err in overruling the application.

In motion for new trial appellant complains that the court erred in his charge on implied malice. The charge of the court follows the statute defining implied malice, and has been approved by this court in numerous decisions.

Appellant insists that the court erred in not charging on the law of self-defense and justifiable homicide. There is not an element of self-defense or justifiable homicide made apparent by this record.

The fifth ground of his motion is that the court erred "in failing to charge the jury on the law relating to negligent homicide, and submit the question of negligent homicide to the jury under the facts and circumstances in evidence. Defendant claimed that the shooting was an accident, and he was entitled to have that question submitted to the jury, and their verdict thereon. There was undisputed evidence of the accident, and how it occurred, and the court should have permitted the jury to pass on the sufficiency thereof." The only evidence insisted upon by appellant in brief and argument presenting the issue of negligent homicide is appellant's own testimony, in effect, that, after he pulled deceased's nose, his boys struck and then followed him into the room; that he pulled his pistol, and, when he got close enough to deceased, struck at him over his son Harold's shoulder. He says that he did so in order to knock deceased down, and prevent deceased shooting his child or himself. "That thereupon deceased backed away, and got up by the fireplace. Then I struck at him with my right hand, and in the meantime deceased did not have the grip. It was six or eight feet away, and he threw up his left hand that way, and his right hand was down upon that gun, and was just pulling it down this way, directly towards Williams' breast, and I reached in with my left hand for my pistol, and deceased caught it above my right hand and tried to wrench it from me, and we surged and pulled around there and got the pistol down this way (indicating next to his breast) between us, and in the scuffle the pistol was fired. The gun was up in that position, right near the side of his neck. Don't know which side. I must have had the gun near the muzzle, because my hand was powder-burned, and was that way two or three weeks or a month after. Deceased fell about the time the shot was fired, and at that time

he had his gun out in his hand. I don't know why deceased did not use his gun. I do not know how my pistol was discharged. I haven't any idea. It was all done in the scramble when he grabbed it, and when the pistol was discharged it surprised me." We have made, in effect, an exact copy of appellant's testimony in reference to the shooting. While it is scarcely intelligible, we understand deceased was endeavoring to take the pistol away from appellant, or was trying to prevent appellant from shooting him with the pistol. If either fact be true, then the issue of negligent homicide is not in the case; that is, if appellant was attempting to shoot deceased, it could not be negligent homicide; if he was not attempting to shoot deceased, and the pistol was accidentally discharged, it would simply be an accident. If the record before us had shown that defendant struck deceased with a pistol, and the same was discharged, then the striking with the pistol might have been at least a misdemeanor; and if the discharge took place in the perpetration of a misdemeanor the issue of negligent homicide would arise; but, if he was attempting to shoot deceased, it would have been either murder or manslaughter, as the facts might warrant. The trend of the entire charge of the court is that, if appellant intentionally killed deceased, or "purposely," as stated in one place, he would be guilty of either murder in the first or second degree or manslaughter. This being true, it certainly was harmless error not to present affirmatively the issue of accidental homicide.

Appellant criticises the charge of the court in various particulars. We have carefully examined the charge in connection with appellant's objections, and, in our opinion, it is not subject to the criticism urged by appellant.

No reversible error appearing in this record, the judgment is affirmed.

ROUSS v. RATLIFF et al.

(Court of Civil Appeals of Texas. June 10, 1903.)

DEED OF TRUST—SALE BY TRUSTEE—VALIDITY—ATTACHMENT.

1. One of the defendants conveyed a stock of merchandise in trust authorizing the trustee to sell the same for cash and apply the proceeds on debts due named creditors, plaintiff's decedent being one of them. All the creditors named accepted except plaintiff's decedent. Thereafter the trustee sold the stock partly on credit. All the creditors named in the deed as well as the maker knew the terms of the sale, and agreed to and ratified it as made. Thereafter plaintiff attached the property. There was no intent to defraud creditors. *Held*, that the sale was not absolutely void, so as to preclude the purchaser from recovering damages on account of a levy of the attachment.

Appeal from District Court, Runnels County; John W. Goodwin, Judge.

Action by W. W. Rouss, executor of Charles B. Rouss, deceased, against J. D. Ratliff, R. M. Ratliff, J. W. Lumpkin, and others. J. W. Lumpkin filed a plea in reconvention. Judgment in favor of plaintiff against the Ratliffs and in favor of Lumpkin on his plea in reconvention, and plaintiff appeals. Affirmed.

R. B. Truly and J. W. Powell, for appellant. C. O. Harris, C. P. Shepherd, and G. N. Harrison, for appellees.

STREETMAN, J. Charles B. Rouss brought this suit to recover of J. D. and R. M. Ratliff, individually and as partners, a balance of \$704 due upon an account for merchandise. The plaintiff died in March, 1902, and his executor, W. W. Rouss, prosecuted the case to judgment. At the time the suit was instituted the plaintiff procured a writ of attachment, and had it levied upon a stock of merchandise then in possession of J. W. Lumpkin, who claimed to have bought the same from C. P. Shepherd, who held it by virtue of a chattel mortgage in the form of a deed of trust executed by J. D. Ratliff to said Shepherd, as trustee. Said Lumpkin and Shepherd were made defendants, as were also Jerry Harbour and W. R. McClellan, who were named as creditors in said deed of trust. The defendant Lumpkin reconvened for damages on account of the levy of the attachment, setting out the facts with reference to the execution of the deed of trust to Shepherd and his purchase from Shepherd. He also made the sheriff who levied the attachment and the sureties upon his official bond parties to the suit, and the sheriff in turn filed pleadings in which he sought a recovery against the plaintiff and the sureties upon the indemnity bond executed to him. The case was tried upon special issues, and from the verdict found by the jury we find the following facts:

Prior to August 3, 1901, J. D. Ratliff and R. M. Ratliff were partners in a mercantile business at Miles, Tex., and owned the stock of goods in question. On that date the partnership was dissolved, and R. M. Ratliff conveyed all of his interest to J. D. Ratliff; J. D. Ratliff assuming all indebtedness of the firm. J. D. Ratliff continued to run the business until August 21, 1901, at which time he executed a deed of trust conveying the stock of merchandise, notes, and accounts then on hand to C. P. Shepherd, as trustee. By this deed of trust Shepherd was authorized to take possession of the stock of goods, and sell the same for cash, and apply the proceeds to the payment of the following indebtedness in the order named: (1) Jerry Harbour, \$350; (2) W. R. McClellan, \$100; (3) C. B. Rouss, \$704; (4) J. Lepold, \$80.15; (5) Geo. Walche, \$19.96; (6) Texas Paper Co., \$22.60; (7) Galveston Dry Goods Co., \$18.36; (8) A. Korey & Son, \$31. The trust

tee accepted said deed of trust, and at once took possession of said stock of goods. All of the creditors named in said deed of trust at once, and before the levy of the writ of attachment, accepted, except C. B. Rouss. All of said indebtedness named in said deed of trust was indebtedness owing by the original firm of Ratliff Bros.; and said deed of trust was made in good faith, and without any intention on the part of said J. D. Ratliff to hinder, delay, or defraud his creditors. Some time in September, 1901, and prior to the levy of the writ of attachment, the trustee, Shepherd, sold said stock of goods to J. W. Lumpkin for \$985, \$500 of which was paid in cash and the balance in three promissory notes of said Lumpkin due two, four, and six months after date. Lumpkin took possession of the stock of goods at once, and on September 27, 1901, the writ of attachment in this case was levied, and the stock of goods was taken out of the possession of said Lumpkin, and was, up to the time of the trial, still in the possession of the sheriff of Runnels county under said writ. The stock of goods at the time of the levy was of the market value of \$900. Judgment was rendered in favor of the plaintiff against J. D. and R. M. Ratliff for the debt; and judgment was rendered in favor of J. W. Lumpkin against the plaintiff and the sheriff and others for \$900 damages on account of the levy of said writ of attachment.

We have carefully examined all of the assignments of error, and, in our opinion, no reversible error is shown. It is earnestly insisted that the title to the goods did not pass by the conveyance from the trustee, Shepherd, to Lumpkin, because the sale was made partly on a credit, instead of entirely for cash, as provided by the deed of trust. The evidence shows that at the time this sale was made all of the creditors named in the deed of trust, as well as the maker of the deed of trust, knew the terms of the proposed sale, and agreed to and ratified the sale as made. The sale was made before the levy of plaintiff's writ of attachment, and before it could be said that the plaintiff had acquired the equity of redemption in said property. The sale was made without any actual fraud or intent to defraud the creditors, and the question presented is whether, under these circumstances, the sale to Lumpkin was absolutely void. We do not doubt that, if the maker of the deed of trust or one of the creditors had, in a proper manner, objected to the sale as made, it might have been set aside; and this would also probably be true as to the plaintiff if he had acquired the equity of redemption at that time, and had placed himself in the position of the maker of the deed of trust. Under the facts as shown by the record, however, we are unable to say that the title conveyed to Lumpkin, as against the plaintiff in this suit, was absolutely void, so that Lumpkin would not

be entitled to maintain the suit for damages on account of the levy of the attachment.

Finding no error in the judgment, it is accordingly affirmed.

BAUM v. CORSICANA NAT. BANK.

(Court of Civil Appeals of Texas. May 27, 1903.)

TRUST DEEDS FOR BENEFIT OF CREDITORS—FRAUDULENT CLAIMS—EVIDENCE—ADMISSIBILITY—PETITION—ALLEGATIONS—ASSERTING LIEN—SUFFICIENCY—ERRORS—PARTY ENTITLED TO COMPLAIN—POWER OF COURT TO CORRECT ITS MINUTES IN VACATION.

1. In an action by a trustee under a deed for the benefit of certain creditors for a wrongful attachment of the property conveyed by the deed, the petition of intervention by a creditor averred that the debtor had executed notes to the creditor, that the debtor had executed the deed to the trustee to secure the notes among other indebtedness, and alleged the institution of the suit resulting in the attachment of the property, together with the sale thereof, and the deposit of the proceeds in court, and prayed for judgment, on final hearing, for its debt, interest, and costs, and that the proceeds of any judgment recovered against defendants in the suit should be applied on the judgment rendered in favor of the creditor against the debtor, together with a foreclosure of its mortgage lien thereon, and execution against the debtor for any balance. *Held*, that the petition asserted a lien on or interest in the proceeds of the sale under the attachment.

2. An assignment of error complaining of several distinct rulings of the trial court presents no question for review.

3. A party could not complain of the action of the court refusing to sustain an exception to the prayer of the opposite party asking for a personal judgment against him where no personal judgment was rendered.

4. An assignment of error that the court erred in refusing to sustain all of appellant's special demurrers is too general.

5. Where a claim against a debtor, who executed a deed to a trustee for the benefit of certain creditors, was fraudulent, it was immaterial as to claimant whether the transaction between the debtor and another alleged creditor was also fraudulent.

6. On the issue whether a landlord's claim for rent against a debtor who executed a deed to a trustee for the benefit of creditors was fraudulent, evidence that a bank's claim against the debtor was fraudulent was admissible where there were circumstances showing that the landlord knew of and participated in the transaction between the bank and the debtor.

7. Where a landlord's claim for rent against a debtor who executed a deed of trust for the benefit of certain creditors was fraudulent, he could not complain of a judgment requiring the proceeds of the sale of the property conveyed by the deed under an attachment by another creditor to be returned into court.

8. A court may, in vacation, correct its minutes so as to make them speak the truth with reference to a judgment actually rendered by it at a term.

Appeal from District Court, Navarro County; L. B. Cable, Judge.

Consolidated actions by Sanger Bros. against N. Cahn, I. Baum against N. Cahn, and J. R. Goodman, trustee, against J. M. Weaver and others, in which the Corsicana

National Bank intervened. From a judgment for the intervener, I. Baum appeals. Affirmed.

Ballew & Wheeler, Frost, Neblett & Blanding, and Callicutt & Call, for appellant. Simkins & Mays, for appellee.

STREETMAN, J. The subject-matter of this suit, as it was finally tried, was the sum of \$2,335, which was the proceeds of a certain stock of goods formerly belonging to the firm of N. Cahn. This firm was engaged in a mercantile business in Corsicana, and on October 24, 1896, being insolvent, executed to J. R. Goodman, as trustee, a deed of trust on their stock of merchandise. Certain indebtedness was preferred, namely, an attorney's fee of \$500, the debt of the First National Bank of Corsicana of \$1,000, rent to I. Baum amounting to about \$2,600, and the expenses of executing the trust. Sanger Bros. were also named in said deed of trust, but their claim was not preferred. The trustee accepted and took charge of the property, and shortly thereafter Sanger Bros., refusing to accept under the deed of trust, brought suit against Cahn for an indebtedness of about \$7,000, and levied an attachment on the stock of goods. The goods were sold under the order made in this suit, as perishable property, for the sum of \$3,325, and the proceeds were deposited in court. Prior to this time Baum, the landlord, sued out a distress warrant, which was levied on the property already in the hands of the sheriff under the attachment, and, the writ being returned to the district court, the two suits of Sanger and Baum against Cahn were consolidated. On February 25, 1897, Sanger Bros. filed their first amended petition, complaining of I. Baum, Wm. Croft, C. W. Croft, the First National Bank of Corsicana, the Corsicana National Bank, J. T. Sullivan & Co., and J. R. Goodman, alleging that said parties were setting up pretended liens on the proceeds of the sale of said stock of goods, and alleging that plaintiff's lien was the only valid lien thereon, and asking for citation, etc. On March 9, 1897, Croft and Croft, the First National Bank of Corsicana, the Corsicana National Bank, J. T. Sullivan & Co., and J. R. Goodman answered in said suit, alleging that the property upon which they had a lien had been converted and destroyed by Sanger Bros., and that said defendants, beneficiaries under said deed of trust, did not claim any lien, and had no legal right to claim any lien, upon the proceeds of said goods or sale of said property, but that J. R. Goodman had sued the sheriff of Navarro county, J. M. Weaver, for the conversion of said property, and that a separate and distinct suit at law was being prosecuted against said J. M. Weaver, and that said defendants were not proper or necessary parties, and should be dismissed. On March 31, 1897, said defendants were dismissed

from said suit. On January 9, 1897, the trustee, Goodman, had entered suit in the district court of Navarro county, Tex., against J. M. Weaver, sheriff of said county, for damages for the wrongful conversion of said stock of goods; the conversion alleged being the levy of the writ of attachment issued in the suit of Sanger Bros. against Cahn. On October 14, 1897, the consolidated case of Sanger Bros. v. Cahn and Baum v. Cahn, was tried. Judgment was rendered in favor of Sanger Bros. against N. and A. Cahn for their full demand, with foreclosure of attachment lien as against I. Baum. Judgment was rendered in favor of Baum against Cahn for the full amount of Baum's claim, but finding that the same was not for rent, and did not constitute a lien upon the goods or the proceeds thereof, and by said judgment the clerk was ordered to pay over to Sanger Bros. the proceeds of said stock of goods then in court. Baum appealed from this judgment, and the case was reversed, and is reported in 49 S. W. 650. In March, 1898, J. R. Goodman recovered a judgment against Weaver and his bondsmen, from which Weaver appealed, and judgment was reversed. 51 S. W. 860. Both of said causes having thus been reversed, on October 16, 1899, upon motion of Sanger Bros., all of said causes were consolidated. On October 12, 1899, the Corsicana National Bank filed its first original petition of intervention in the suit of J. R. Goodman v. J. M. Weaver, alleging that N. Cahn had executed notes for \$500 and \$2,650, respectively, dated August 17, 1895 and January 4, 1896; the first note payable on demand, and the second on May 1, 1896. It further alleged the execution of the deed of trust by Cahn to Goodman to secure said notes, among other indebtedness, and alleged the institution of the suit by Sanger Bros., the sale of the property under attachment, and the deposit of the proceeds in court.

It is contended by appellant that the bank did not, in this pleading, assert any lien upon or interest in the proceeds of said goods. With this contention, however, we are unable to concur. After setting out all of the facts which would entitle the bank to a lien upon the proceeds of said goods, the petition concludes as follows: "That the said goods levied on under the writ of attachment aforesaid have been sold under the order of this court, and the proceeds thereof paid into the hands of the honorable court, subject to the final result; and intervener prays that on final hearing it have judgment for its debt, interest, and costs of suit, and that the proceeds of any judgment that may be recovered against Weaver and Sanger Bros. be applied, to the extent of such money, as a credit on the judgment herein to be rendered against the defendant N. Cahn, composing the firm of N. Cahn, together with a foreclosure of its mortgage lien thereon, and execution against the said N. Cahn and A. Cahn,

individually, for the balance, if any, for costs of suit, and for all such other general relief as may be demanded in the premises." The case thus consolidated was tried on December 8, 1899, and judgment was rendered in favor of I. Baum for the full amount of his claim against N. Cahn, with foreclosure of his landlord's lien upon the proceeds of said goods as against Sanger Bros., and for personal judgment against Sanger Bros. for the value of said goods. Judgment was further rendered that J. R. Goodman and the Corsicana National Bank take nothing in cause No. 4,737 as against J. M. Weaver and Sanger Bros. upon their claim for damages. Upon appeal by the Corsicana National Bank the judgment was reversed as between I. Baum and the Corsicana National Bank, and was remanded for the purpose of trying the issue between said parties, as to which was entitled to the proceeds of said stock of goods. 62 S. W. 812. On October 30, 1901, after the case had been reversed, the Corsicana National Bank filed its first amended original petition, again alleging the execution of said notes and of the deed of trust, and reciting all of the proceedings hereinbefore set out, and particularly alleging that the claim of I. Baum for rent was fraudulent, and asking for judgment foreclosing its mortgage lien upon the money then in court. Baum filed certain exceptions to this pleading, which were overruled, and upon a trial of the case judgment was rendered in favor of the Corsicana National Bank, foreclosing its lien upon the proceeds of said stock of goods. The judgment further proceeded to order Sanger Bros. to return to court said sum of money which had been paid to them under the original order in their suit against Cahn; and it further directed that, if Sanger Bros. had paid said money to I. Baum, said Baum returned said money into court, and provided for the enforcement of said orders by the issuance of execution. Baum alone has appealed from this judgment.

The first, eighth, and thirteenth assignments of error raise the question of limitation, it being contended that the Corsicana National Bank never asserted its right to foreclose a lien upon the proceeds of said goods until the filing of its first amended petition on the 1st of October, 1901. What we have already stated, however, disposes of these assignments. We think it is evident that this cause of action was asserted in the first original petition of intervention filed on October 12, 1899, at which time the suit upon the notes and lien was not barred by limitation.

The second assignment of error is as follows: "The court erred in overruling and in refusing to sustain the special exception of I. Baum to the first amended petition of the bank filed October 30, 1901, setting up *res judicata*, election, and estoppel." The fourteenth assignment of error is as follows: "The court erred in refusing to submit the

issue of election of remedies, waiver of lien, *res judicata*, and estoppel to the jury, as raised in the pleadings of Baum, sustained by the evidence, and requested by the special charges which were refused." Appellee objects to the consideration of these assignments, because they are not in compliance with the rules prescribed by the Supreme Court. It will be observed that the second assignment undertakes to raise three distinct questions, viz., *res judicata*, election, and estoppel; and the fourteenth assignment attempts to raise these questions and the further question of a waiver of lien. We are clearly of the opinion that these assignments do not present the questions in such manner as to require a consideration by this court. *Cammack v. Rogers*, 7 Tex. Ct. Rep. 211, 73 S. W. 795.

The third assignment of error complains of the action of the court in refusing to sustain the exception of I. Baum to the prayer of the bank asking for a personal judgment against said Baum. No personal judgment was rendered against Baum, except such judgment as would require him to return into court the proceeds of said stock of goods in case he had received the same from Sanger Bros.; and, the court having found that the appellee was entitled to the proceeds of said sale, we do not think that Baum is entitled to complain of this feature of the judgment.

The fifth assignment of error is as follows: "The court erred in refusing to sustain all of Baum's special demurrers set forth in the trial amendment." This assignment is too general.

The sixth assignment of error complains of the refusal of the court to give the special charge requested by Baum upon the burden of proof. In our opinion, the court's general charge upon the burden of proof was sufficient.

The seventh assignment of error complains of the action of the court in sustaining the exceptions of appellee to that portion of Baum's pleading setting up the fraud of the bank's claim. The pleading of Baum to which the exceptions were sustained in effect alleged that at the time the notes were executed to appellee an agreement was made between appellee and Cahn that, in case of a failure, Cahn would execute a deed of trust preferring said indebtedness to appellee, and that said agreement was fraudulent, and invalidated the deed of trust subsequently executed to J. R. Goodman, and which was set up as a lien in this suit. Even if such an agreement would invalidate the deed of trust executed to Goodman for the benefit of appellee, yet we think that Baum would have no right to complain of said fact. If Baum's claim for rent was valid, then it was a superior lien to that asserted by the bank under the deed of trust. If, on the other hand it was fraudulent, then Baum had no right whatever to the proceeds of the stock

of goods. This being the case, we cannot see that he could be prejudiced by any fraud existing between Cahn and appellee. The verdict of the jury establishes the fact that Baum's claim was fraudulent, and that he had no right whatever to the proceeds of said sale; and, this being the case, it seems to us immaterial, as far as he is concerned, whether the transaction as between Cahn and the bank was fraudulent or not. *Rillings v. Schulze* (Tex. Sup.) 67 S. W. 401.

The ninth assignment of error complains of the admission of evidence to show that the claim of the First National Bank for \$1,000 mentioned in the deed of trust to Goodman was fraudulent. This evidence was properly admitted. There were circumstances from which the jury might have inferred that Baum knew and participated in this fraudulent transaction, and it was a circumstance which the jury were entitled to consider in passing upon the character of Baum's claim for rent against Cahn.

With reference to the remaining assignments of error, all of which have been carefully considered by the court, we deem it sufficient to state that, if there is any error in the judgment of the court, it is not such as would entitle the appellant, Baum, to a reversal of the case. Sanger Bros. and Cahn have not appealed; and, the jury, under proper instructions, having determined that the lien of appellee was valid, and that the claim of Baum to the proceeds of said stock was fraudulent, Baum certainly has no right to complain that the court has required said proceeds to be returned into court, in order that it may be subjected to the claim of appellee. If Baum has acquired the possession of said property under orders which have been vacated on appeal, it is proper that he should be required to return said proceeds into court, in order that it may be properly disposed of.

After the judgment in this suit had been rendered, motions were made to strike out certain portions of the judgment, and certain orders were entered upon the minutes of the district court of Navarro county striking our certain portions of the judgment as rendered. After the adjournment of court appellee filed a motion to strike out said orders so entered from the minutes of the court. Having determined that said subsequent orders were entered upon the minutes without its authority, and that the judgment as originally entered was the judgment in fact rendered, the court granted the motion of appellee, and struck out said subsequent orders from the record. The proceedings had upon this motion of appellee in vacation are embodied in a supplemental transcript filed in this court subsequent to the filing of the transcript by appellant, and appellant has filed a motion to strike out said supplemental transcript. In our opinion, the court had the right in vacation to correct its minutes so as to make them speak the truth as to the

judgment actually rendered, and for this reason the motion to strike out said supplemental transcript will be overruled.

Finding no error in the judgment, it is accordingly affirmed. Affirmed.

TEXAS LOAN AGENCY v. DINGEE et al.*
(Court of Civil Appeals of Texas. June 20, 1903.)

TRUST DEEDS—POWER OF SALE—REVOCATION—DEATH OF GRANTOR—DECEDENTS' ESTATES—LOSS OF CLAIMS—FAILURE TO PRESENT—ADMINISTRATORS—ADDITIONAL INVENTORY.

1. A purchaser of land assumed, in part consideration therefor, a note given by a former owner, and executed a deed of trust to secure the same. This deed provided that the power of sale should not be revoked by the grantor's death, and that the holder of the note should not be obliged to resort to probate proceedings to enforce his claim. The grantor died, and, pending probate proceedings, the trustee sold the property. *Held*, that the power of sale contained in the deed was revoked by the grantor's death, and the sale by the trustee was void, notwithstanding the provisions of the deed.

2. The *cestui que trust* under the deed having failed to present its claim to the administratrix of the grantor's estate for allowance, and the administratrix having subsequently sold the property, and the administration having been closed, the *cestui que trust* had waived its rights, and lost its debt and lien.

3. *Sayles' Ann. Civ. St. 1897*, art. 1973, expressly authorizes an administrator to make and return an additional inventory of newly discovered property not included in the original inventory.

Appeal from District Court, Tarrant County; Irby Dunklin, Judge.

Action by A. S. Dingee and another against the Texas Loan Agency. From a judgment for plaintiffs, defendant appeals. Affirmed.

Frost, Neblett & Blanding, for appellant. Carlock & Gillespie, for appellees.

SPEER, J. Appellant, by appropriate assignments of error, complains of the judgment of the district court awarding to appellees the land in controversy, and insists that the same should be reversed and here rendered for it, upon the following statement of the facts, which we adopt:

"The title of appellant is as follows: It is shown that C. L. Frost is the common source of title to the land involved. On the 21st of September, 1889, A. C. Renfro and R. E. Renfro, his wife, executed a deed of trust to H. G. Damon, for the benefit of appellant, conveying the land in controversy to secure the payment of a note for \$400 for money loaned, and which note was executed by the said Renfro and wife to appellant. This deed of trust was properly acknowledged and recorded in Jack county, Tex., where the land was located, on the 25th day of October, 1889, in volume 2, p. 286. On the 9th day

*Rehearing denied July 2, 1903.

¶ 1. See *Mortgages*, vol. 35, Cent. Dig. § 1012.

of May, 1890, H. C. Renfro and his wife, R. B. Renfro, executed a general warranty deed to C. L. Frost, conveying the land in controversy, and, as a part of the consideration paid by Frost to Renfro for said land, the said Frost agreed and assumed to pay the note for \$400 executed by said Renfro and wife to the Texas Loan Agency. On the 9th of January 1895, C. L. Frost executed his note payable to the Texas Loan Agency, due on the 1st day of October, 1897, for \$400, which note was executed in renewal and extension of the note above described. This last note executed by Frost was secured by deed of trust and lien on the land in controversy, and the original note executed by Renfro to the appellant was extended and continued in full force, and all of the rights, liens, and equities securing the debt were acknowledged and continued in full force. W. R. Bright was named as trustee in the deed of trust executed by Frost for the benefit of appellant. And the said deed of trust empowered the said Bright or his substitute to sell the land, in default of the payment of the note, at public sale in Jack county, after giving notice, etc. This deed of trust provided, among other things, that the death of the grantor, Frost, should not postpone, affect, alter, or revoke the power of the trustee to sell and convey the property, nor revoke nor alter any other of the covenants or agreements in the deed of trust, and that on default in the payment of the note, 'notwithstanding the death of the grantor,' the property could be sold, and the proceeds applied to the payment of the note; and it was further provided that the holder of the note should not be required to resort to the probate court for the purpose of establishing or collecting the note, or for the purpose of enforcing the lien of the deed of trust; and all of the powers given to Bright, trustee, could be exercised by Bright's substitute. This deed of trust was properly acknowledged and properly recorded in Jack county, Tex., on the 28th day of February, 1895. Bright died in December, 1895, and George Spiller was properly appointed substitute trustee, under the provisions of the deed of trust, by the Texas Loan Agency, who was then the legal owner and holder of the note. Spiller qualified as trustee, accepted the appointment, and on the 3d day of July, 1900, in accordance with the provisions of the trust deed, after giving the required notice for the time required, said trustee sold the property at public outcry to the Texas Loan Agency for \$100, which was credited on the note held by it, and on the 3d day of July, 1900, executed a deed conveying said property to said Texas Loan Agency, appellant, which was properly acknowledged and recorded on the 20th of July, 1900, in Jack county, Tex. At the time the land was sold by said Spiller to the said loan agency the note for \$400 above specified, and the deed of trust securing the same, were owned and held by it.

The note was past due and unpaid, and the note is still owned by the Texas Loan Agency, and is now unpaid, save and except the sum of \$100 credited on said note as above stated. After the execution of the trust deed by Frost to Bright as above stated, the taxes on the land in controversy, amounting to \$40, were paid by the Texas Loan Agency. In 1900, about the time Spiller, as trustee, executed the deed to appellant, it in good faith took possession of the land in controversy, and is now in possession of the same. This substantially is the title of appellant.

"The title of appellees is as follows: C. L. Frost, the common source of title, died in 1896, the exact date of his death not being shown more definitely. The probate court of Tarrant county, Tex., had jurisdiction of the estate of the said Frost, and in November, 1897, Horace Cobb was appointed administrator. Cobb filed the bond and affidavit required by law, and qualified as administrator in Tarrant county, Tex., and on the 9th day of November, 1897, he filed an inventory of the property belonging to said estate in said court. This inventory did not contain the property in controversy. Three tracts of land, all situated in Jack county, Tex., aggregating in value about \$1,500, and about 400 acres, were shown in the inventory. In 1898 Cobb resigned, and Mrs. Frost, the surviving wife of C. L. Frost, was appointed administratrix de bonis non on the 27th of May, 1898. She gave the required bond and qualified in May, 1898. On the 13th of September, 1900, an additional inventory was filed in the administration of said estate, which contained the property in controversy. On the 12th day of June, 1901, Mrs. Frost, as administratrix, regularly applied for and obtained an order from the probate court of Tarrant county to sell at private sale the land in controversy. On the 14th of May, 1902, Mrs. Frost filed her report, showing that she had sold the property in controversy to appellees for \$50, which report, after inspection by the court, was confirmed and approved, and the administratrix ordered to make deed. In 1902, Mrs. Frost, as administratrix, executed and delivered a deed to appellees, conveying the land in controversy. C. L. Frost was insolvent in 1896. He left a wife and children surviving him, and his estate continued insolvent throughout the administration. The estate was closed in September, 1902, and there were probated debts then against the estate remaining unpaid. Appellant's note and trust deed were never presented to the administratrix for allowance."

It has been frequently decided that the death of a mortgagor so far revokes the power conferred upon a trustee to sell that a sale made pending an administration, or within four years after the death of the mortgagor, is void. *Robertson v. Paul*, 16 Tex. 472; *McLane v. Paschal*, 47 Tex. 365; *Black v. Rockmore*, 50 Tex. 94; *Abney v.*

Pope, 52 Tex. 288. This rule has also been held to extend to the purchaser of the mortgaged property, so that upon his death, even though he has not assumed the debt, the foreclosure must be had through the probate court, and not through a sale by the trustee. *Buchanan v. Monroe*, 22 Tex. 537; *Whitmire v. May*, 72 S. W. 375, 6 Tex. Ct. Rep. 731. It is true that in some instances sales made by the trustee after the death of the mortgagor have been upheld, but this has been the decision only in those cases where there had been, and by reason of lapse of time could be, no administration. *Rogers v. Watson*, 81 Tex. 400, 17 S. W. 29; *Swearegin v. Williams* (Tex. Civ. App.) 67 S. W. 1061. But we know of no case where the power of the trustee to sell has been recognized where the sale was made, as in this case, while an administration upon the mortgagor's estate was yet pending.

Where there is an administration, the method prescribed by our statute for the collection of claims due from the estate is exclusive of all others, and must be pursued. Claims secured by liens upon real estate constitute no exception to the rule. *Buchanan v. Wagnon*, 62 Tex. 375. Neither can it make any difference that the lien is to secure the purchase money of the real estate, as was expressly decided in the case of *Robertson v. Paul*, supra.

The land in controversy at all times constituted a part of Frost's estate, and after his death was subject to administration—charged, of course, with appellant's lien—and passed to the control of the administratrix. In this respect the case differs from *Andrews v. Insurance Company*, 92 Tex. 584, 50 S. W. 572, *Fulton v. Nat'l Bank* (Tex. Civ. App.) 62 S. W. 85, and *Williams v. Lumpkin*, 74 Tex. 601, 12 S. W. 488, cited by counsel; for in those cases the property involved was not subject to the control of the deceased during his life, nor to that of his administrator after his death, and therefore constituted no part of the estate for administration. It was not, as counsel urge, so much a question of contract of the parties, as it was the status which the law gave to the property. So we see no force in the contention that it was within the power of deceased to contract that, on default in the payment of the note, the trustee might sell notwithstanding the death of the grantor. Upon Frost's death the property, being, as we have seen, a part of his estate subject to administration, it was for the law to say how liens against it should be enforced. Appellant having failed to present its claim to the administratrix for allowance, and the property having been sold and the administration closed, we think it has waived its rights, and lost its debt and lien.

The action of the administratrix in making and returning an additional inventory embracing the property in controversy is specifically authorized by statute. *Sayles'*

Ann. Civ. St. 1897, art. 1973. No reason is assigned or apparent why appellees did not obtain a good title at the administratrix's sale, and the judgment of the district court is therefore affirmed.

ELLYSON et al. v. INTERNATIONAL & G. N. R. CO.

(Court of Civil Appeals of Texas. June 10, 1908.)

RAILROADS—INJURIES TO PASSENGERS—NEGLIGENCE—SURVIVAL OF ACTION—STATUTORY CONSTRUCTION—LIABILITY—INJURIES RESULTING IN DEATH—PROXIMATE CAUSE—CONCURRENT CAUSES—INSTRUCTIONS—REVERSIBLE ERROR.

1. *Sayles' Ann. Civ. St. 1897, art. 3353a*, provides that causes of action upon which suit has been brought by the injured party for personal injuries other than those resulting in death shall not abate by reason of his death. *Held* to permit the survival of the cause of action only when the personal injuries do not result in death.

2. Prior to her death, deceased sued defendant railroad for personal injuries caused by its negligence. After her death, plaintiffs, her children, filed an amended petition under the statute, alleging the injuries, defendant's negligence, and the expenditure by them of certain sums for medical services, etc., but failed to allege that the death of deceased did not result from the injuries. *Held* that, as defendant was not liable in the action for the injuries, as the action did not survive, it was not liable for expenditures made by plaintiffs in caring for deceased during her last illness, although incurred by reason of the injuries.

3. There was evidence to show that an intestinal disease was the prominent efficient cause of the death of deceased, and that the injuries only slightly contributed to it. *Held* error to charge that the jury might consider the injuries as the cause of her death, if they in part, operating concurrently with the disease, brought about that result.

4. To attribute death to two or more concurrent causes, each must be a prominent efficient cause; for, if one of the alleged causes operates slightly with another, which is the prominent efficient cause, then the proximate cause of death should be traced to the latter.

5. It was error to limit the jury to a consideration of the effect of the intestinal disease after the injury, and they should have been allowed to consider the effect of such disease before as well as after the injuries in operating to produce the death.

6. An error in a charge, invited by the special instructions requested by a party, which were refused, was not ground of reversal.

Appeal from District Court, Williamson County; R. L. Penn, Judge.

Action by John N. Ellyson and others against the International & Great Northern Railroad Company. Judgment for defendant, and plaintiffs appeal. *Reversed*.

Nelms & Sansom and G. W. Glasscock, for appellants. S. R. Fisher and N. A. Stedman, for appellee.

FISHER, C. J. This suit was originally brought by Mrs. Mary Ellyson against the railroad company on the 25th of November,

¶ 4. See *Death*, vol. 15, Cent. Dig. § 12.

1902, for damages for personal injuries received by her while a passenger on one of defendant's trains, said injuries being produced by a collision of the passenger and a freight train at Lewis station. The petition alleges that the collision arose from the negligence of the defendant, and such fact is established by the evidence. It is averred that the nature of the injuries sustained were bruises upon the head and arm, and that her left thigh was broken, all of which caused her to suffer physical and mental pain. On the 1st day of December, 1902, Mrs. Ellyson died, and on January 6, 1903, the appellants, as her children, suggested her death, and made themselves parties plaintiff, and were granted leave to file a first amended original petition. In this petition averments of negligence and injuries sustained by Mrs. Ellyson were alleged by the plaintiffs; and, in addition, they alleged that they had expended certain sums for medical services, nurse hire, and medicine. The court sustained a demurrer to plaintiffs' amended petition on the ground that it did not allege that the death of Mrs. Ellyson did not result from the injuries she had sustained. Thereupon the plaintiffs filed a trial amendment, in which they alleged that Mrs. Ellyson did not die from the injuries complained of in their first amended original petition, and that said injuries were not the direct or proximate cause of her death. There is evidence in the record which tends to establish the fact that Mrs. Ellyson died either from the effect of diarrhea and bowel trouble, or the concurring effect of the bowel trouble and diarrhea and the injuries she sustained in the collision; and there is some evidence which has a tendency to show that the bowel trouble was the proximate, prominent, and efficient cause of her death, and that the injuries may have only slightly contributed to that result.

Appellants, by assignments of error, complain of the action of the trial court in sustaining a demurrer to their amended original petition, and requiring them to proceed with the trial of the case upon the theory that the plaintiffs could not recover if the injuries received by Mrs. Ellyson in the collision were the proximate and efficient cause of her death. The appellants contend that the cause of action as originally brought by Mrs. Ellyson survived, and that they were entitled to recover, although her death was attributable to the injuries she had sustained. In support of this view appellants refer us to articles 4507, 3017, 3021, and 3353a of Sayles' Ann. Civ. St. 1897. In our opinion, this action by the appellants is predicated upon the last article of the statute mentioned, and the others referred to have no bearing upon the subject, except as they may be serviceable in an argumentative way. Article 3353a, is as follows: "Causes of action upon which suit has been or may be hereafter brought by the injured party for personal injuries, other than those resulting in

death, whether such injuries be to the health or to the reputation or to the person of the injured party, shall not abate by reason of his death, nor by reason of the death of the person against whom such cause of action shall have accrued; but in case of the death of either or both, such cause of action shall survive to and in favor of the heirs and legal representatives of such injured party, and against the person, receiver or corporation liable for such injuries and his legal representatives, and so surviving, such cause may thereafter be prosecuted in like manner and with like legal effect as would a cause of action for injuries to personal property." This suit was, prior to the death of Mrs. Ellyson, instituted by her to recover the damages sustained to her person by reason of the collision. If she died as a result of the injuries then received, the plaintiffs could have maintained an action under what is termed the "death statute," as shown by articles 3017 and 3021; but the petition of the plaintiffs was not framed with a view of seeking relief under these provisions of the statutes, but, as said before, was predicated upon article 3353a, which expressly gives a cause of action, and a survival of the same, for injuries other than those resulting in death. There was no survival of an action of this class at common law, and when the remedy is pursued under the statute it must be confined to the class there mentioned, and predicated upon the conditions pointed out by the law. The terms of the statute only permit the survival of the cause of action when the personal injuries do not result in death. This is clear from the meaning of the expression "for personal injuries other than those resulting in death." There was no error in the ruling of the trial court upon this subject.

Appellants, in their eleventh assignment of error, insist that, if the railroad company could not be held liable for the injuries sustained by Mrs. Ellyson, it would nevertheless be liable for the reasonable amounts expended by the plaintiffs in her last illness. We cannot agree with appellants in this contention. If the railroad company was not liable upon the main branch of the case, it would not be liable for the items expended by the plaintiffs in treating and caring for Mrs. Ellyson during her last illness, although such expenses were incurred on account of the injuries she sustained. If the defendant could be held liable under the statute upon which this suit was based, then the plaintiffs could recover for the sums shown to be reasonable that were expended as necessary items in treating Mrs. Ellyson for her injuries.

The charge of the court, after stating the issues raised by the pleadings, is as follows: "(4) Upon the trial the defendant has formally admitted that the said Mrs. Mary Ellyson was at the time alleged a passenger for hire upon said train, and that the said collision of said two trains, and the injuries sustained by

said Mrs. Mary Ellyson, were occasioned by negligence of defendant's servants and employees operating said two trains. (5) This is not a suit by plaintiffs against defendant for damages sustained by them on account of the death of said Mrs. Mary Ellyson, but, on the contrary, they allege that the death of Mrs. Mary Ellyson was not the result of the injuries sustained by her in such collision, and the controlling question in this case is, was the death of said Mrs. Mary Ellyson the result of the injuries sustained by her in such collision? and the burden is upon the plaintiffs to show by a preponderance of the evidence that her death was not the result of such injuries before they can recover in this suit. (6) If you believe from a preponderance of the evidence that, after receiving the said injuries in such collision, the said Mrs. Mary Ellyson became affected with diarrhea or bowel disease, and that such diarrhea or bowel disease arose independently of the injuries sustained by her in such collision, and was not caused by such injuries, and that such diarrhea or bowel disease, acting independently of the injuries sustained by her in such collision, caused her death, then you are instructed as a matter of law that her death was not the result of the injuries sustained by her in such collision. (7) On the other hand, you are instructed that if you believe from the evidence that such diarrhea or bowel disease was caused by the injuries received by the said Mrs. Mary Ellyson in such collision, or arose as a result of the effects of such injuries upon her physical strength or system, or arose as a result of the confinement resulting from such injuries, or if you believe from the evidence that such diarrhea or bowel disease was not caused by such injuries, and did not arise as a result of the effects upon her physical strength and system of such injuries, and did not arise as a result of the confinement resulting from such injuries, but further believe that the death of said Mrs. Mary Ellyson was caused by the concurring effects upon her strength and system of such injuries and of such diarrhea or bowel disease, and that her death would not have resulted from such diarrhea or bowel disease alone, but was, in part, caused by such injuries, then you are instructed as a matter of law that in either of such events her death was the result of such injuries." The charge then proceeds to submit to the jury the measure of damages if the plaintiffs should recover. As before said, there is some evidence in the record tending to show that the diarrhea or bowel disease was the prominent efficient cause of her death, and there is evidence which might authorize the conclusion that the injuries sustained by her as the result of the collision only slightly contributed to that result. In view of this testimony, we are of the opinion that a portion of the charge as last stated was erroneous. This, in effect, informs the jury that they could consider the injuries as the cause of

her death, if they in part, operating concurrently with the diarrhea or bowel disease, brought about such result. So much of the charge as is embraced within the criticism is as follows: "And that her death would not have resulted from such diarrhea or bowel disease alone, but was, in part, caused by such injuries, then you are instructed as a matter of law that in either of such events her death was the result of such injuries." The jury may have inferred from this charge, by the use of the expression, "in part caused by such injuries," that they were authorized to consider the injuries as one of the causes of death, although they were so slight that it could not be said that they were a proximate prominent efficient cause in producing that result. To attribute death to two or more concurrent causes, each must be a prominent efficient cause; for, if one of the alleged causes operates slightly with another, which is the prominent efficient cause, then the proximate cause of death should be traced to the latter. In *Insurance Co. v. Transportation Co.*, 12 Wall. 190, 20 L. Ed. 378, the Supreme Court of the United States states the rule in this language: "There is undoubtedly difficulty in many cases attending the application of the maxim, '*Proxima causa, non remota spectatur*,' but none when the causes succeed each other in order of time. In such cases the rule is plain. When one of several successive causes is sufficient to produce the effect, for example, to cause a loss, the law will never regard an antecedent cause of that cause, or the *causa causans*. In such a case there is no doubt which cause is the proximate one within the meaning of the maxim. But when there is no order of succession in time, when there are two concurrent causes of a loss, the predominating efficient one must be regarded as the proximate, when the damage done by each cannot be distinguished. Such is, in effect, Mr. Phillip's rule. And certainly that cause which set the other in motion and gave to it its efficiency for harm at the time of the disaster must rank as predominant." In *Freeman v. Mercantile Mut. Acc. Ass'n*, 15: Mass. 353, 30 N. E. 1013, 17 L. R. A. 733, the court says: "Where different forces and conditions concur in producing a result, it is often difficult to determine which is properly to be considered the cause; and in dealing with such cases the maxim, '*Causa proxima, non remota spectatur*,' is applied. But this does not mean that the cause or condition which is nearest in time or space to the result is necessarily to be deemed the proximate cause. It means that the law will not go farther back in the line of causation than to find the active, efficient, procuring cause of which the event under consideration is a natural and probable consequence in view of the existing circumstances and conditions. The law does not consider the cause of causes beyond seeking the efficient predominant cause, which, following it no farther than

those consequences that might have been anticipated as not unlikely to result from it, has produced the effect. An injury which might naturally produce death in a person of a certain temperament or state of health is the cause of his death if he dies by reason of it, even if he would not have died if his temperament or previous health had been different; and this is so as well when death comes through the medium of a disease directly induced by the injury as when the injury immediately interrupts the vital processes." The principle here outlined is further illustrated in applying the law that relates to contributory negligence. In the latter class of cases it is the concurring negligence of the plaintiff with the negligence of the defendant that excuses the latter from liability. The negligence of the plaintiff, to preclude him from recovery, must amount to want of ordinary care. If his concurring negligence is so slight that it did not amount to a want of ordinary care, then his conduct could not be said to be an efficient or proximate cause of his injuries. In *Cremer v. Portland*, 36 Wis. 92, it is said: "If the plaintiff was guilty of any want of ordinary care and prudence, however slight, which neglect contributed directly to produce the injuries, he cannot recover. It is not the law that slight negligence on the part of the plaintiff will defeat the action. Slight negligence is the want of extraordinary care and prudence, and the law does not require of a person injured by the carelessness of others to exercise that high degree of caution as a condition precedent to his right to recover damages for the injuries thus sustained." And, as said in *Strong v. Railway Co.*, 61 Cal. 326: "It is not any degree of negligence, however slight, that will preclude a recovery, but it must be such negligence as amounts to the absence or the want of ordinary care." This rule may be illustrated by a number of cases which it is unnecessary to cite. We are of the opinion that the court erred in the charge for the reasons stated, and for this error the judgment will have to be reversed.

The sixth subdivision of the charge, as quoted, is also complained of by the appellants on the ground that it limits the jury to a consideration of the effect of diarrhea and bowel disease after Mrs. Ellyson sustained her injuries. We do not make this objection ground of reversal, for, in our opinion, the error of the court in this respect was invited by the special instructions requested by the plaintiffs, which were refused; but, in view of another trial, we suggest that in submitting the question to the jury they be allowed to consider the effect of the bowel trouble before as well as after the injuries in operating to produce the death of Mrs. Ellyson.

There are some objections urged to those charges quoted as being on the weight of evidence. We do not think these objections well taken.

Reversed and remanded.

PATTON et al. v. COX et al.

(Court of Civil Appeals of Texas, May 20, 1903.)

JUDGMENT—SATISFACTION—RETAXATION OF COSTS.

1. Where there has been a final settlement and satisfaction of a judgment in the trial court, costs cannot be retaxed without a showing of equitable grounds for opening the case and setting aside the settlement.

Appeal from District Court, McLennan County; Marshall Surratt, Judge.

Suit by J. P. Cox and others against George M. Patton and others. From a decree for plaintiffs, defendants appeal. Affirmed.

Davis & Cocke, for appellants. D. A. Kelley, for appellees.

FISHER, C. J. This suit was an application on the part of the appellees John P. Cox and others for an injunction to restrain the appellant Geo. M. Patton, executor, from the enforcement of an execution for certain costs in the old case of No. 8,652, styled "Geo. M. Patton, Executor, v. John P. Cox et al.," in said district court of McLennan county, Texas. In said old case of Patton v. Cox, judgment had been rendered in Patton's favor against the defendants therein, John P. Cox and others, which judgment had been appealed to the Court of Civil Appeals, and had been affirmed, and such judgment, together with interest due thereon, and all the costs of court shown in the record on appeal, had been paid off, settled, and satisfied in full. After all of this had been done, Patton's attorney fished up some additional cost, which he claimed to have long previously paid, and had the district clerk to issue execution therefor. This present suit was for the purpose of enjoining the enforcement of that execution; also to restrain the issuance of any other execution upon said judgment, which had been satisfied and discharged. Upon a hearing of the case upon its merits, the preliminary injunction which had been previously granted was made perpetual and final. From this judgment the present appeal has been prosecuted.

The trial court filed the following conclusions of fact and law:

"(1) I find that the case formerly pending in this court, styled 'Geo. M. Patton, Ex'r v. Jno. P. Cox et al.,' and No. 8,652 in this court, was originally brought in the district court of Hill county in February, 1893, and was No. 2,634 in that court, and that at the fall term, 1896, of said court, an order was entered requiring the plaintiff, Patton, to pay all costs of court up to that time, and that he did so. That the case was tried three or four times in Hill county before it was transferred to the district court of McLennan county, which was on the 13th day of April, 1899. That in the transcript sent up on transfer of said cause from the district court of Hill county to the

Total clerk's costs.....

tate of M. D. Herring. The defendants in the case carried it to the Court of Civil Appeals, giving W. W. Seley and Meredith A. Sullivan as sureties on the appeal bond, and the judgment was affirmed by the Court of Civil Appeals on January 8, 1902 [66 S. W. 64], and judgment there entered, as shown by the mandate, that plaintiff Geo. M. Patton, executor, aforesaid, do recover of the said plaintiffs Cox, Matthews, Warren, Leary, Kelley, Herring (as executrix aforesaid), as principals, and their sureties, Seley and Sullivan, the amounts adjudged by the court below, and all costs in this behalf expended, and this decision be certified below for observance."

"(3) I further find that said Herring and Kelley, on the 7th of April, 1902, paid to the attorney of said Geo. M. Patton \$1,803.50 in full settlement as to principal and interest of said judgment.

"(4) I further find that said Herring and Kelley, on the 22d of April, 1902, paid to the clerk of the district court of McLennan county \$140.15, being the balance of costs due, as per the record in the Court of Civil Appeals in the case aforesaid of Geo. M. Patton, Ex'r, v. Jno. P. Cox et al., except as to the defendants' witnesses.

"(5) I further find that said Herring and Kelley paid the fees of the defendants' witnesses in said case of Patton v. Cox et al., during May, 1902, and that the said Herring and Kelley paid \$68.75 fee for transcript of the record in said case of Patton v. Cox et al., on said appeal.

"(6) I further find that the said Herring and Kelley paid all the costs incurred in said case in the Court of Civil Appeals on the 10th of April, 1902, \$31.20, and also all costs of the Supreme Court.

"(7) I further find that the execution complained of in plaintiffs' petition herein was issued by the clerk of the district court of McLennan county, Texas, on the 30th day of May, 1902, in said case No. 8,652, styled 'Geo. M. Patton, Ex'r, v. Jno. P. Cox et al.', and was issued against John P. Cox, D. M. Matthews, John D. Warren, H. M. Leary, D. A. Kelley, Alice G. Herring, as executrix of the estate of M. D. Herring, deceased, as principals, and W. W. Seley and Meredith A. Sullivan as sureties, for the sum of \$137.67 for costs due officers and witnesses of the district court of Hill and McLennan counties in said cause, as set forth in the following bill, to wit:

Issuing writ	\$ 1 00
Swearing witnesses	2 00
Oath without certificate	3 00
Swearing and impanelling jury	35
Filing papers	1 35
Entering each order of judgment	2 25
Issuing execution and return	1 50
One-half transcript to McLennan county	2 50
Total	\$13 95
Sheriff's fees summoning witnesses	1 80
Jury fee	5 00
Witness attendance	96 92
Stenographer's fees	20 00
Total	\$137 67

"—All of which were incurred in district court of Hill county, except stenographer's fees, \$20, which had been allowed by the district judge upon trial in McLennan county previous to the one appealed from, and \$1.50 charged for issuing and return of said execution. The witness fees which make up the charge of \$96.92 in the foregoing bill, is made up of the following items, to wit:

H. P. Harris	\$ 8 32
J. H. Williams	12 00
W. R. Henderson	15 20
B. N. Wills	14 00
D. B. Cauble	12 80
W. R. Jackson	12 80
J. R. Ballard	3 00
M. V. Rites	7 00
C. R. Hamm	6 40
R. M. Davis	4 40
Total	\$96 92

"All these fees accrued while the case was pending in the district court of Hill county.

"I further find that the costs contained in the execution complained of were not entered upon the feebook kept by the clerk of the district court of McLennan county until after the affirmance and settlement of the judgment and costs in the case of Patton v. Cox et al., as hereinbefore stated; and that the costs complained of in the said execution were not contained in the transcript of the said case on appeal as aforesaid; and that, after the judgment and costs had been paid by plaintiff herein as hereinbefore stated, that the clerk of this court, with the advice and assistance of the attorney of said Patton, made up the said costs complained of in said execution from data contained in the record and papers in the case sent by transfer as aforesaid from the district court of Hill county to the district court of McLennan county, and cost bill paid by Patton and in his possession, and that costs thus taxed were put upon blank fee bills, and pinned to the feebook, and upon this the execution for costs was issued. All of said costs except the witness fee of J. R. Ballard for \$3 and the \$1.50 for issuing and returning said execution were paid by defendant Patton, and have not been paid by plaintiff. The \$5 jury fee was incurred prior to the fall term, 1896, and was finally adjudged against Patton, and the remainder of the Hill county costs accrued after 1896, and were paid by Patton on and before October 16, 1899, and the stenographer fee of \$20 was paid by him more than two years before this suit was filed. Ballard's fee was not paid by Patton. After the judgment in No. 8,652 was entered in this court, and before the appeal was taken, defendants therein made a motion to retax costs, but none of the items here involved were included in said motion or in the judgment entered thereon. I find that all of said Hill county costs, except the witness fees of C. R. Hamm for \$6.40 and R. M. Davis for \$4.40, were taxed on the feebook in Hill county, and are shown in the bill of costs which accompanied the transcript

from that county to McLennan, and that they and the stenographer's fee of \$20, except the \$5 jury fee adjudged against Patton, could have been properly entered on the fee-book in McLennan county as part of the costs in said cause, and copied into the transcript on appeal of said cause No. 8,652, and that affidavits of said Hamm and Davis were sent down with the record from Hill county proving up their attendance as witnesses, and that their names and amounts as claimed were included in a bill of costs made out by the clerk of Hill county for Patton on May 6, 1899, and by him paid October 16, 1899.

"After the injunction was issued in this case the sheriff returned the execution enjoined indorsed, 'Returned this 10th day of June not executed by order of plaintiff.'

"Conclusions of Law.

"I am of opinion that when the case of Patton v. Cox et al. (No. 8,652 in this court) was affirmed on appeal, that this court had no further jurisdiction thereof to retax costs thereon, and that the clerk of this court had no power to retax the costs and issue the execution therefor, and that said execution should be enjoined, and defendant enjoined from taking out further execution thereon; and also that this court has no power in this case to retax the costs in that case, and to give defendant Patton a judgment therefor herein, or in any manner grant the relief prayed for by him in his cross-bill herein."

It is unnecessary for us to determine whether the trial court was correct or not in the conclusion that it had no jurisdiction to retax the costs, but we are of the opinion, in view of the facts as stated, that there was no error in the result reached in the disposition of the case. The facts, as stated, show that there was a final settlement and satisfaction of the judgment of the trial court as affirmed by this court, which included the costs. This being true, if the appellants desired to open up the case for the purpose of retaxing costs, they should have stated some equitable grounds for setting aside the settlement. The pleadings of the appellants were not sufficient for this purpose. *Gaines v. Mensing Stratton Co.*, 64 Tex. 326.

We find no error in the record, and the judgment is affirmed.

KEY, J., did not sit in this case.

HILL & MORRIS v. ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS.*

(Court of Civil Appeals of Texas. May 6, 1903.)

RAILROADS — DISCRIMINATION IN THE CARRIAGE OF GOODS — STATUTES — VALIDITY — CONSTRUCTION — PENALTY — JURISDICTION TO ENTER JUDGMENT FOR ACTUAL DAMAGES.

1. Rev. St. 1895, arts. 4537, 4539, providing that a railroad company giving a preference

to one shipper over another in the order or time of forwarding goods delivered for transportation shall be liable for all losses resulting from the delay, and also liable to a penalty for each act of discrimination, are valid.

2. Where the petition in an action against a railway company for unlawful discrimination stated a cause of action for the recovery of the penalty prescribed by Rev. St. 1895, art. 4539, but the evidence only established the fact that plaintiff sustained damages because of the company's delay in seasonably forwarding property delivered to it for carriage, the court had jurisdiction to render judgment for the actual damages.

On Rehearing.

3. Rev. St. 1895, art. 4537, directing railroads receiving goods for transportation into their "warehouses or depots" to forward them in the order in which they are received, and making them liable for losses occasioned by a failure so to do, requires a railroad to forward property received for shipment in the order in which it is received, though merely received on a platform used for handling that kind of property; the phrase "warehouses or depots" embracing the entire station of the road.

Appeal from District Court, Franklin County; J. M. Talbot, Judge.

Action by Hill & Morris against the St. Louis Southwestern Railway Company of Texas. From a judgment for defendant, plaintiffs appeal. Reversed.

Hill & Morris brought this suit against the Railway Company to recover \$150 actual damages and \$1,000 as a statutory penalty for failure to ship certain cotton and for unlawful discrimination. There was a non-jury trial, which resulted in a judgment for the defendant, and the plaintiffs have appealed.

The trial court filed the following findings of fact, which are conceded to be correct: "I find that the defendant, the St. Louis Southwestern Railway Company of Texas, operates its line of railway through Franklin county, Texas, and has a station and agent at Mt. Vernon, in said county, and that it has a depot and warehouse at said station for passengers and freight, and also a cotton platform, from which cotton was loaded on defendant's cars; and said cotton platform was disconnected from and about 100 feet from said depot and warehouse, and said platform had no cover over it, but was an ordinary platform. That on the 15th day of February, 1901, the plaintiffs, Hill & Morris, were merchants doing business in said town of Mt. Vernon, and on the market of said town purchased 18 bales of cotton, and on said date delivered said 18 bales of cotton onto the platform above mentioned, and the defendant then and there received it, and issued to plaintiffs its bill of lading showing that on said date it received from plaintiffs 18 bales of cotton consigned to W. L. Moody & Co., Galveston, Texas. That said cotton was to be sold at Galveston on its arrival by W. L. Moody & Co. on plaintiffs' account, and the freight charges were to be paid on delivery at Galveston. That when plaintiffs delivered said cotton to de

*Application for writ of error pending in Supreme Court.

defendant for shipment they wrote to W. L. Moody & Co. to sell the same on the market at Galveston as soon as it should be delivered to them. That said cotton was transported by defendant from Mt. Vernon about March 6, 1901, and when it reached consignees at Galveston, Texas, was by them sold on account for plaintiffs, and, on account of the falling market from the time said cotton would have reached Galveston if it had been shipped by defendant when received by it and the time when it was shipped and delivered to consignees, plaintiffs lost on said cotton the sum of \$86.60. That on the 17th day of February, 1901, the defendant received from H. L. Edwards & Co. on its said platform in Mt. Vernon, Texas, 75 bales of cotton consigned to H. L. Edwards & Co., Sulphur Springs, Texas, and forwarded same from Mt. Vernon, Texas, on the 18th day of February, 1901, to Sulphur Springs, Texas. That said H. L. Edwards & Co. were large cotton buyers, buying for export, and had a number of men stationed in the different towns and cities of Texas buying cotton for them, and all cotton bought in the towns near Sulphur Springs, a city on defendant's line of railroad, 22 miles from Mt. Vernon, was during February and March, 1901, concentrated at Sulphur Springs to be put in condition for shipment and export by being compressed. That there was a compress at Sulphur Springs which compressed all the cotton concentrated at said place for H. L. Edwards & Co., and there was no compress at Mt. Vernon, and never has been. That all cotton for export must be compressed. That said cotton loaded and forwarded from Mt. Vernon by defendant on the 18th day of February, 1901, consigned to H. L. Edwards & Co., Sulphur Springs, Texas, was purchased by one of their men at Mt. Vernon, and was not a regular shipment of said cotton, but was received and forwarded by said defendant for the purpose of concentrating the same at Sulphur Springs, to be put in condition for export and shipment by being compressed at said place; and that defendant handled and transported said cotton for H. L. Edwards & Co., and regulated and made its charges therefor under the rules and regulations of the Railroad Commission of Texas governing the concentration of cotton for the purpose of compressing the same. That the cotton crop of the year 1900 which was being handled and transported in February and March, 1901, was an unprecedented heavy crop, and at said time the largest portion of same was being concentrated for compressing, and the cars on which said cotton was loaded and forwarded from Mt. Vernon for H. L. Edwards & Co. were used exclusively for hauling cotton to said concentrating points to be compressed for shipment and for export, and were not used to haul regular shipments of cotton to points of final destination. That after defendant received said 18 bales of cotton from plaintiffs, up to the time it shipped

same from Mt. Vernon, it had no car, and was unable to get one, that could be sent to Galveston, or in that direction. That said 18 bales of cotton was less than a car load, and, if defendant had been able to get a car which could have been sent to Galveston, or in that direction, it could have loaded and forwarded said cotton; and that it did load and forward said cotton on the first car it could obtain on which the same could be forwarded in the direction of its destination after it received the same. That after the receipt of plaintiffs' cotton by defendant at Mt. Vernon, and before it transported same, it did not transport from Mt. Vernon to Galveston, or to any point near Galveston, any cotton or goods. That Sulphur Springs and Mt. Pleasant, the points on defendant's railroad where the compresses nearest to Mt. Vernon are situated, are over 100 miles from any Gulf port, and that defendant's railroad is the only one running through Mt. Vernon. That freight shipped from Mt. Vernon to Galveston can be shipped either through Sulphur Springs or Mt. Pleasant, and that at Sulphur Springs there are connecting lines of railroad leading in the direction of Galveston, and that at Mt. Pleasant defendant has a connecting railroad leading in the direction of Galveston." After hearing the testimony, the court below sustained the defendant's general demurrer to the plaintiffs' petition. Also, at the request of the plaintiffs, the court passed on the facts proved, and held, regardless of the question of pleading, that the facts established did not bring the case within the statute and entitle the plaintiffs to recover the penalty. It also held, as a matter of law, that, although the facts showed that the defendant was liable to the plaintiffs in the sum of \$86.60 actual damages, they were not entitled to recover the same in this suit, because the court was without jurisdiction to render judgment therefor.

J. F. Jones, for appellants. Glass, Estes & King and E. B. Perkins, for appellee.

KEY, J. (after stating the facts). It is provided by statute (Rev. St. 1895, art. 4537) that, where "railroads within this state receive goods for transportation into their ware-houses or depots, they shall forward them in the order in which they are received, the first received to be the first forwarded, without giving preference to one over another; and in case of failure to do so, they shall be liable for all loss occurring while the goods remain, and for all damage occasioned or in any wise resulting from delay." It is also provided by statute (Rev. St. 1895, art. 4539) that, "if any railway company doing business in this state * * * shall violate in any manner any other provisions of this and the four preceding articles, such railway company so offending shall be deemed guilty of discrimination within the meaning of this title, and shall forfeit and pay

to the person or corporation aggrieved thereby the sum of \$1,000 as penal damages for each and every act of discrimination or violation of this law." We think the plaintiffs' petition brought the case within the letter and spirit of the statute, and that the court erred in sustaining the general demurrer. Counsel for appellee assails the statute as being unconstitutional and void, but we cannot sanction the contention urged. However, we think the court ruled correctly in holding that the facts proved failed to bring the case within the statute. The rule is well settled in this state that, in order to recover a statutory penalty, the plaintiff must bring his case clearly within the terms of the statute. *Schloss v. Ry. Co.*, 85 Tex. 601, 22 S. W. 1014; *Ry. Co. v. Campbell*, 45 S. W. 2. In order to recover the penalty in this case, it devolved upon the plaintiffs to prove, among other things, not only that the defendant received the plaintiffs' cotton for shipment, but also that it received it in its warehouse or depot. This was not shown. On the contrary, the testimony shows that, while the railway company had a warehouse and depot, the cotton in question was not placed therein, but was received upon a platform wholly disconnected from the warehouse and depot. This variance between the statute and the proof is in this case material, and fatal to the plaintiffs' right to recover the penalty.

No good reason is perceived why the Legislature should have restricted the penalty to a failure to forward such goods only as were received by railroads in their warehouses or depots, but the Legislature had the power to impose that restriction, and to prescribe the very terms upon which the penalty should accrue; and, having done so, it is the duty of the courts to enforce the law as the Legislature made it, and not as the courts and others may believe it should have been made.

We sustain the assignment of error which complains of the action of the court in not rendering judgment for the plaintiffs for \$86.60 actual damages. As stated above, the plaintiffs' petition stated a cause of action for the penalty, which was \$1,000, and, although the proof failed to establish that claim, the court had jurisdiction to render judgment for the actual damages. *Willis v. Gordon*, 22 Tex. 241; *Stein v. Frieberg*, 64 Tex. 273; *Hale v. McComas*, 59 Tex. 486; *Seymour v. Hill*, 67 Tex. 385, 3 S. W. 313; *Hoffman v. Building & Loan Ass'n*, 85 Tex. 410, 22 S. W. 154; *Ablowich v. Greenville Nat. Bank*, 54 S. W. 794, 4 Tex. Ct. Rep. 763; *Cammack v. Prather* (recently decided by this court) 74 S. W. 354.

Although we hold that error was committed in sustaining the demurrer to the plaintiffs' petition, yet, as both parties fully developed the case by testimony, and as there is no dispute about the facts, we see no reason why the case should be sent back to

the court below. Therefore the judgment of the trial court is reversed, and judgment here rendered that plaintiffs take nothing as to their suit for penalty, and that they recover against the defendant \$86.60 as actual damages, and all costs of both courts.

Reversed and rendered.

On Rehearing.

(July 1, 1903.)

Upon further consideration, we have reached the conclusion that we fell into error in construing article 4537 of the Revised Statutes. We are now of opinion that it was the purpose of the Legislature, in enacting so much of that article as is quoted in our former opinion, to require railroads to forward property received for shipment in the due order in which it was received. The dictionaries give as one of the definitions of the word "depot," "a railroad station," and it seems to us, keeping in view the evil which it was the purpose of the Legislature to remedy, that the language "warehouses or depots," in the connection in which it is used in this statute, was intended to embrace the entire station of the railroad, including platforms used for handling cotton. This construction is supported by authority. 9 Am. & Eng. Ency. Law (2d Ed.) p. 66; *State v. Ry. Co.*, 37 Conn. 153; *Railway Co. v. Thornsberry* (Tex. Sup.) 17 S. W. 521; *Goyeau v. Ry. Co.*, 25 Grant. C. H. 64; *Humphreys v. McKissock*, 144 U. S. 313, 11 Sup. Ct. 779, 35 L. Ed. 473; *Ry. Co. v. Com.* (Ky.) 33 S. W. 939; *Ry. Co. v. Rose*, 24 Ohio St. 229.

The motion for rehearing will be granted, the judgment of the court below reversed, and judgment here rendered for appellants for \$86.60 damages and for \$1,000 statutory penalty.

McLENNAN COUNTY v. FROST et al.

(Court of Civil Appeals of Texas. June 10, 1903.)

COUNTY OFFICES—APPOINTMENT—ORDER FIXING SALARY—PROVISO.

1. Under Acts 25th Gen. Assem. p. 10, c. 5, § 12, providing that the county judge, on issuing his order granting authority to appoint deputy assessors, shall state in such order the number of deputies authorized, and the amount to be paid each, a proviso in such an order that the office shall yield revenue sufficient to pay the sums named, is mere surplusage, and does not vitiate the order.

Appeal from District Court, McLennan County; M. Surratt, Judge.

Action by McLennan county against J. W. Frost and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Clark & Bolinger, for appellant. Taylor & Gallagher, for appellees.

KEY, J. This is a suit by McLennan county against a former tax assessor for a debt, the principal of which is alleged to be

\$871.34; the county's contention being that the defendant had obtained that sum from the county in excess of the compensation allowed him by law. W. S. Frost, J. G. Fennell, and S. C. Brown intervened, and asserted that they, having acted as deputies under the defendant Frost, were entitled to the fund claimed by the county. There was a nonjury trial, resulting in a judgment against the county, and judgment for the interveners as prayed in their respective pleas.

The jurisdiction of this court being final, we are not required to file findings of fact. However, there is no dispute about the facts. The main contention of the county is that the county judge had not authorized the county assessor to employ the interveners as deputies, and allow them the compensation claimed in this case. The county judge made an order authorizing the county assessor to appoint nine deputies and three assistants; one deputy to receive a salary of \$100 per month, and each of the others \$75 per month, provided the office should yield revenue sufficient to pay the sums named. It is contended on behalf of appellant that this was not such fixing of the salaries to be paid to the deputies as is required by section 12 of the act of June 16, 1897 (Acts 25th Gen. Assem. p. 10, c. 5), regulating the fees of county officers. This contention is not believed to be sound. In our opinion, the proviso embodied in the county judge's order fixing the salaries was wholly immaterial, and may be treated as surplusage. If the proviso had not been made, and the fees and commissions allowed by law had been insufficient to pay the deputies the full amount of their salaries, the result would have been the same.

All of the questions presented in appellant's brief have received due consideration, and our conclusion is that the proper judgment was rendered, and it will be affirmed. Affirmed.

KELLY et al. v. SHORT et al.*

(Court of Civil Appeals of Texas. June 24, 1903.)

CONTRACTS — CONSTRUCTION — PROOF — EXECUTION — REPUDIATION — SPECIFIC PERFORMANCE.

1. A contract reciting that, whereas, the parties are jointly interested in certain land, and a suit is pending for part of it, and it may be necessary to bring or defend other suits in reference to it, it is agreed they will work in each other's interest in prosecuting and defending suits in reference to it, and, if successful, and the land is awarded to either of them, it shall be divided among them in a certain way, does not contemplate the division of an interest in the land subsequently acquired by one of the parties by purchase.

2. Though a suit be not strictly one for specific performance of a contract, but one to enforce an express trust based on a verbal contract, proof of the contract must be clear and satisfactory, and failure to prove that one of the alleged parties participated in the contract is fatal.

3. Evidence in a suit in the nature of specific performance held insufficient to show that one of the alleged parties, or one authorized to represent him, participated in the verbal contract.

4. Evidence in a suit in the nature of specific performance held insufficient to show that the contract was not repudiated and mutually abandoned by the parties, but conclusive that it was so abandoned and repudiated.

5. The parties to a contract having repudiated it, and recognized and each accepted the repudiation of the other, and conducted litigation on that basis, neither can afterwards claim it is in force.

Appeal from District Court, Camp County; J. M. Talbot, Judge.

Suit between William Kelly and others and U. F. Short and others. From the judgment, Kelly and others appeal. Affirmed.

Morris & Crow, Sheppard, Jones & Sheppard, and Prendergast & Armistead, for appellants. E. A. King, W. P. McLean, and Gano, Gano & Gano, for appellees.

STREETMAN, J. The original petition in this suit was filed January 2, 1894. It was an action of trespass to try title by H. S. Hepburn, as receiver of the Bankers' & Merchants' National Bank of Dallas, Tex., against U. F. Short, to recover a tract of land consisting of about 1,000 acres in Upshur county and about 5,000 acres in Camp county. In some manner, not clearly disclosed by the record, Wm. Kelly was also made a defendant, and on January 9, 1895, filed his first amended answer and cross-bill, containing, among other things, a pleading in the form of trespass to try title for all of the land in suit as against the plaintiff and his codefendant, Short. The plaintiff undertook to dismiss the suit, and was permitted to do so by the district court; but the Supreme Court, upon a certified question, held that the court could not dismiss as against the cross-bill of the defendant Kelly, and the cause was remanded for trial. *Short v. Hepburn*, 89 Tex. 622, 35 S. W. 1056.

The titles relied upon by the respective parties at this time were as follows:

James B. Simpson was the common source of title. On July 21, 1891, he executed a deed to Kennett Cayce, acknowledged on the same day before M. L. Robertson, notary public of Dallas county, conveying the land in controversy. This deed was filed for record in Camp county January 19, 1892. About this time Wm. Kelly had acquired certain Dallas city property, known as the "Skating Rink Property," and became liable for an indebtedness against it, secured by deeds of trust held by one Caven. Kelly negotiated a sale of this property with James B. Simpson; Simpson purporting to act for Kennett Cayce. The negotiations resulted in a conveyance from Kelly to Kennett Cayce of this skating rink property, and the assumption by Cayce of the incumbrances held by Caven. Subse-

*Hearing denied.

¶ 5. See Contracts, vol. 11, Cent. Dig. § 1151.

quently, the property was sold under the deeds of trust to pay these incumbrances, and lacked about \$6,000 of bringing enough to pay the indebtedness due. On March 4, 1892, Kelly brought suit in the district court of Dallas county against James B. Simpson and Kennett Cayce, setting out the foregoing transactions, and claiming that he had been compelled to pay off the balance of the incumbrance to Caven, which Cayce had assumed. Cayce was cited by publication, and an original attachment was issued and levied upon the lands in controversy; the levy being made in Camp county at 10 o'clock a. m., March 4, 1892, and in Upshur county at 9 o'clock a. m., March 5, 1892. In the petition and the affidavit for attachment Kelly states that he does not know whether in fact there is such a person as Kennett Cayce, but, whether there is or not, that James B. Simpson was the person really interested, and for whose benefit the purchase of the skating rink property was made, and that he is liable to Kelly for the balance which he was compelled to pay on said deeds of trust. The suit was subsequently dismissed as to Simpson, and judgment by default taken against Kennett Cayce, with a foreclosure of the attachment liens upon the lands in controversy. Orders of sale were issued under this judgment, the lands were regularly sold by the sheriffs of Camp and Upshur counties, Kelly became the purchaser of all the lands, and proper conveyances were executed to him. This was the origin of Wm. Kelly's title to the lands in controversy.

On March 2, 1892, a conveyance was executed by M. L. Robertson, as attorney in fact for Kennett Cayce, to U. F. Short, for a recited consideration of \$5,500, conveying the lands in controversy. This was filed for record in Camp county May 25, 1892. M. L. Robertson was a son-in-law of James B. Simpson. This was the only title shown by the records in U. F. Short when this suit was instituted. U. F. Short executed a deed conveying to W. D. Simpson, Jr., son of James B. Simpson, all his interest in the land in controversy, for a recited consideration of \$4,250 cash. This deed bore date May 24, 1892, but was not acknowledged until May 8, 1897, nor filed for record until May 17, 1897.

The title under which Hepburn, as receiver, claimed the land was as follows: Sam Thurman obtained judgment in the district court of Marion county, Tex., for \$924.26, with interest and costs, against Simpson, Perkins & Co., and the members of said firm, one of whom was James B. Simpson. An abstract of this judgment was properly filed, recorded, and indexed in Camp county on February 4, 1892, at 10 o'clock a. m. Execution was subsequently issued on this judgment to Camp county, the land in controversy was levied upon by the sheriff of Camp county as the property of James B. Simpson, and sold and conveyed to the Bankers' &

Merchants' National Bank of Dallas, Tex., on July 5, 1892. The Bankers' & Merchants' National Bank of Dallas also brought suit against Simpson, Perkins & Co. in the district court of Dallas county for an indebtedness of about \$5,000, and caused an attachment to be issued to Camp county, and levied upon that portion of the lands in controversy situated in that county as the property of James B. Simpson. This attachment was levied February 22, 1892, at 8 o'clock a. m. Judgment was subsequently rendered in said cause for plaintiff for \$2,154, and costs, with a foreclosure of the attachment lien. An order of sale was issued to Camp county, under which said land was regularly sold by the sheriff of that county to the Bankers' & Merchants' National Bank of Dallas. The Bankers' & Merchants' National Bank of Dallas became involved, and H. S. Hepburn was appointed receiver.

The foregoing statements show the respective titles at the institution of this suit: said bank, by its receiver, being plaintiff, and U. F. Short and Wm. Kelly defendants. On April 5, 1894, the following agreement was executed:

"The State of Texas, County of Dallas. This agreement, entered into between William Kelly, U. F. Short, and Wm. D. Simpson, Jr., witnesseth: That whereas, said parties are jointly interested in a certain tract of land as hereinafter described and in the proportion as hereinafter stated; and whereas, a suit is now pending in district court, Camp county, Texas, for part of said tract of land, and it may be necessary to bring or defend other suits in reference to said land described as follows: A tract of land situated in the counties of Camp and Upshur, known as the 'Dickson Lands,' containing 7,630.8 acres, as fully described in a deed of Amanda Dickson and others to James B. Simpson, dated 19th and 21st days of December, 1899, and recorded in Vol. G. pages 247, 248, 249, and 250 of the records of deeds of Camp county, Texas, to which reference is here made for a full and complete description of said tract of land: Therefore, it is agreed, by and between the parties hereto, that we will make common cause and work in each other's interest in prosecuting and defending suits in reference to said land, and, if successful, and said property is awarded to either of the parties hereto, then Wm. Kelly shall first have 2,000 acres, undivided, of said land; and, if over 2,000 acres is recovered, then U. F. Short shall have 200 acres, undivided, of said land; and after Wm. Kelly has received his 2,000, and U. F. Short his 200, all the balance of said land, supposed now to amount to about 3,000, shall belong to and be the property of Wm. D. Simpson, Jr., and an equitable partition and division of same shall be made between all the parties hereto in the proportion as herein before stated. It is further agreed that in all litigation in reference to said land each party shall fur-

nish his attorney at his own expense, but the court costs shall be shared pro rata in proportion to the interest in said land as herein indicated; that is, every dollar of costs U. F. Short shall pay, Wm. Kelly shall pay ten dollars, and Wm. D. Simpson, Jr., fifteen dollars.

"Signed and executed in triplicate.

"Witness our hands this the 5th day of April, A. D. 1894.

"[Signed] Wm. Kelly.

"[Signed] Wm. D. Simpson, Jr.

"[Signed] U. F. Short."

While this suit was still pending in the district court of Camp county, Hepburn, as receiver of said Bankers' & Merchants' National Bank, on December 28, 1894, brought suit in the United States Circuit Court at Jefferson, Tex., against Kelly and Short for the recovery of the land in controversy. The theory of the plaintiff, Hepburn, was that Kennett Cayce was a myth, and that there was really no such person in existence, that Jas. B. Simpson had executed the deeds purporting to convey this property to Cayce for the purpose of defrauding his creditors, and that these facts were known to Kelly and Short. A trial was had in the federal court, and resulted in a verdict for the plaintiff, Hepburn. Upon appeal this judgment was reversed by the Circuit Court of Appeals for errors in the charge of the court, and the cause remanded. *Short v. Hepburn*, 75 Fed. 113, 21 C. C. A. 252.

After the judgment reversing the cause was rendered, a material change occurred in the attitude of the parties. Up to this time there had been no apparent conflict between Short and Kelly. After this judgment there were some negotiations between Kelly and Short with a view to purchasing the title of the receiver. The evidence is conflicting as to the extent of these negotiations. Short claims that they went no further than mere conversation between him and Morris, the attorney representing Kelly. Morris testifies that there was a definite contract, binding, as far as he had authority to bind, the parties, that Short should buy out the title of the receiver for \$2,500, and hold the same in trust for the parties to the written agreement of April 5, 1894, above set out, in the same proportions provided by said instrument, and that each of said parties should pay their proportion of said \$2,500. It is unnecessary to determine which side of this contention is correct. We shall refer again, however, to the evidence concerning this contract. Whatever may have been the agreement, or whether there was an agreement or not, between Short and Morris, Short did in fact purchase the title of the receiver. H. C. Weaver had succeeded H. S. Hepburn as receiver of the Bankers' & Merchants' National Bank, and on December 8, 1896, under order of the Circuit Court of the United States at Waco, Tex., he conveyed the land in controversy to U. F. Short for a consid-

eration of \$2,500. On the same day U. F. Short, for a recited consideration of \$3,500, conveyed the lands in controversy to J. W. Bartlett. Both of these deeds were executed in Camp county, Tex., on December 12, 1896.

The suit in the federal court at Jefferson came to trial again on January 29, 1898, and the parties were the same as before; but the suit assumed the attitude of a contest between the defendant Kelly on the one hand, and Short and Bartlett, who had succeeded to the title of the receiver, on the other. The defendant Kelly first moved to dismiss the suit because the court had lost jurisdiction by the sale of the receiver's title. This motion was overruled, and upon trial a judgment was rendered for Kelly for all of the land. The plaintiff appealed, and the Circuit Court of Appeals held, in effect, that the evidence disclosed that the receiver no longer had any interest in the controversy, and, the jurisdiction of the federal court depending solely on the character of the original plaintiff, his sale of the property in litigation to one of the defendants deprived the court of jurisdiction, and reversed and remanded the cause, with directions to the Circuit Court to dismiss the case, which we presume was done. *Weaver v. Kelly*, 92 Fed. 417, 34 C. O. A. 423.

This suit in the district court of Camp county had been in abeyance while these proceedings were being had in the federal courts. After the termination of the suit at Jefferson, however, this case came on for trial, and the attitude of the parties was practically the same as at Jefferson. The receiver had been dismissed from the case, and the defendant Kelly, by his cross-bill, occupied the attitude of plaintiff, and Bartlett and Short the attitude of defendants. Kelly was seeking to recover, if he could, all of the land in suit; and, in the alternative, if he could not recover all the land, he sought to enforce the agreement of April 5, 1894. Short and Bartlett attacked the title of Kelly and those claiming under him as fraudulent, claiming that Kennett Cayce was a fictitious personage, and that the conveyances to him were made by James B. Simpson in fraud of his creditors. Upon a trial verdict was rendered for Kelly, and judgment accordingly, awarding him all of the land in suit. Short appealed, and the judgment was reversed by the Court of Civil Appeals of the Fourth district, because the verdict was contrary to the great preponderance of the evidence, and because of an error in the charge of the court. *Short v. Kelly et al.*, 2 Tex. Ct. Rep. 580, 62 S. W. 944. In the meanwhile, and before the last trial of this suit in the district court of Camp county, further litigation was being had in the Circuit Court of the United States at Dallas.

It will be noted that the attachments and executions under which the Bankers' & Merchants' National Bank acquired their title-

were directed only to the sheriff of Camp county. Acting, evidently, upon the hypothesis that these proceedings did not affect the title to that portion of the lands situated in Upshur county, other creditors of James B. Simpson undertook to subject the Upshur county lands to their debts. On January 14, 1892, T. L. Torrains obtained a judgment in the district court of Marion county, Tex., against J. B. Simpson for \$831.18. An abstract of this judgment was duly filed, recorded, and indexed in Upshur county on February 25, 1892. Execution was issued on the judgment within 12 months, and in October, 1895, an alias execution was issued to Upshur county, under which the portion of the land in that county was levied upon and regularly sold and conveyed to R. T. Torrains. February 12, 1896, R. T. Torrains conveyed said land in Upshur county to Thomas Kelly for a recited consideration of \$594, and on May 18, 1897, said Thomas Kelly for a recited consideration of \$594 conveyed said lands to Wm. Kelly.

Another title to the Upshur county lands originated as follows: Simpson & Cowan owed A. C. Petri three notes of about \$15,000 each, secured by lien on real estate. The National Park Bank of New York, having acquired these notes, brought suit in the district court of Dallas county on the same, foreclosed their lien on the property, which was sold, but left a balance of the judgment unsatisfied amounting to about \$35,000. The Ninth National Bank of Dallas became insolvent, and Geo. B. Morgan was appointed receiver. As such receiver, he held a claim for money collected by the National Park Bank of New York for the Ninth National Bank of Dallas, and in satisfaction of said claim said National Park Bank transferred to him the balance of the judgment against Simpson & Cowan. An execution was issued upon this judgment, and levied upon the Upshur county lands May 15, 1897; and on July 1, 1897, said lands were regularly sold under said execution, and conveyed to F. M. Hayes, who had succeeded Morgan as receiver of the Ninth National Bank of Dallas, Tex. Hayes thereupon brought suit in the Circuit Court of the United States, at Dallas, against James B. Simpson, W. D. Simpson, Jr., Wm. Kelly, M. L. Morris, W. M. Crow, and J. W. Bartlett, to set aside as fraudulent all the conveyances under which said parties claimed title to the Upshur county lands, and to recover said lands. Pending the suit a sale was made of this title of Hayes, as receiver, to one A. P. Morey, and on August 7, 1899, Morey filed a supplemental bill, in the nature of an original bill in equity, seeking a recovery of the Upshur county lands, alleging his purchase from the receiver, and that he was a resident of Missouri, and that the defendants were all residents of Texas, and setting out in detail and with great particularity every transaction by which any of the defendants

claimed to have acquired title to said lands, and that all of said acts constituted a part of a fraudulent scheme on the part of James B. Simpson, with the assistance of the other defendants, to dispose of said lands in fraud of his creditors.

It will be noted that Morris & Crow were the attorneys of Wm. Kelly, and had received conveyances from him for portions of the land. It was particularly charged in said bill that the purpose of the defendants in acquiring the several titles held by Bartlett and Kelly, and those claiming under Kelly, was to permit James B. Simpson to hold 3,000 acres of the lands in controversy and accomplish a fraud upon his creditors. The answer of Wm. Kelly and Morris & Crow denied in detail such allegations in the bill as charged them with any fraudulent purpose, and set out circumstantially the manner in which each claim of title was acquired by them. This answer contained the following paragraphs, with reference to the transactions between Short and Kelly:

"(15) That the facts stated in paragraph 15 of the amended bill are true, except that defendants say that after Kelly acquired his title against Kennett Cayce, and subsequent to the date of his sheriff's deed, dated January 2, 1894, H. S. Hepburn, receiver of the Bankers' & Merchants' National Bank of Dallas, about January, 1894, filed suit in the state court, the district court of Camp county, Texas, at Pittsburg, Texas, against Wm. Kelly and U. F. Short, to recover all said lands situated in Camp county and Upshur county; and as U. F. Short had acquired a title to said lands by deed from Kennett Cayce which antedated the title by attachment of William Kelly, and the latter, not knowing the nature of Short's said title, but being assured it was a valid title and found in good faith, Wm. Kelly entered into negotiation with U. F. Short to compromise their interests, which resulted in an agreement to the effect that Kelly was to have the first 2,000 acres of said land, and, if more than 2,000 acres was recovered, then Short was to have the balance, and Short and Kelly agreed to make common cause and work in each other's interest in the prosecution and defending of suits in reference to said land. After this agreement was made orally, Kelly suggested that it be reduced to writing, and when defendants came to prepare the written agreement they were informed Short had conveyed part of his interest in said land in good faith to W. D. Simpson, Jr., and the written agreement was then prepared and signed by Wm. Kelly, U. F. Short, and Wm. D. Simpson, Jr., dated April 5, 1894, with contents as stated above, and giving to Wm. Kelly the first 2,000 acres of said land recovered, and, if more than 2,000 acres were recovered, then Short was to have 200 acres, and the balance, supposed to amount to about 3,000 acres, was to go to William D. Simpson, Jr. That Wm. Kelly entered into said

agreement in good faith, defendants being assured and believing the title to said lands in Kennett Cayce was valid, and with no other motive than to collect the debt of Wm. Kelly against Kennett Cayce. That afterwards, on or about December 28, 1894, H. S. Hepburn, receiver of said Bankers' & Merchants' National Bank, of Dallas, Texas, filed suit against Wm. Kelly and U. F. Short, seeking to recover said lands in Camp and Upshur counties under his said pretended title against J. B. Simpson in the United States Circuit Court for the Eastern District of Texas, at Jefferson, Texas, and that Wm. Kelly and U. F. Short made common cause and worked together in the defense of said two suits, one in the state and one in the federal court, until in the summer of 1896 the said H. S. Hepburn, as receiver of said bank, offered to sell out to Wm. Kelly and U. F. Short, and compromise and terminate said litigation, and that Wm. Kelly and U. F. Short agreed orally between themselves to buy the said plaintiff's claim and pay him \$2,500 for same, but it was agreed the offer was to be made by U. F. Short, and the purchase and conveyance to be to him of said lands in trust for him and said Kelly, Kelly to pay his part of the \$2,500 based on his pro rata of the lands as determined by the former written agreement of date April 5, 1894, so that Kelly should have the first 2,000 acres of said land so recovered, and U. F. Short the balance, and acting under said agreement, U. F. Short made Hepburn an offer on said lands of \$2,500, which was accepted and approved by the Comptroller of the Currency, and by the United States Circuit Court for the Northern District of Texas, at Waco; but said Short, to wrong and defraud said Kelly, secretly secured said order of court approving the same [sale] to him, and procured deed fraudulently to be made to himself without the knowledge of defendants, and to accomplish his nefarious purpose and design to swindle these defendants out of any part of said land did not give them an opportunity to pay any part of said \$2,500, and secretly and fraudulently, and as soon as deed was made to him, by his deed in writing executed and delivered, he conveyed said lands to J. W. Bartlett, who was a party to and had knowledge of said fraudulent transactions of U. F. Short, whereby they conspired together to wrong and defraud these defendants. That all these matters are fully pleaded and set up by defendants in a cross-bill in said suit in state court, No. 1,293, at Pittsburg, Texas, which is still pending in said court; said cross-bill filed March 27, 1897, and amendment to it January 8, 1898, and to which the receiver of said bank, these defendants, U. F. Short, Wm. D. Simpson, Jr., and J. W. Bartlett, are all parties, wherein Wm. Kelly seeks on his cross-bill to recover all said lands, or, if denied this right, he prays that he be allowed to recover 2,000 acres of same, and partition

of same is prayed for, and this action is still pending in said court. That in said court, the federal court at Jefferson, Texas, on February 4, 1898, a trial was had in which all the matters herein alleged were considered, and judgment was rendered for Wm. Kelly for all said lands in Camp and Upshur counties, based on the fact that he had acted in good faith in all said matters, and that in entering into said agreement of April 5, 1894, he was imposed upon by the treachery and nefarious schemes of U. F. Short, of which defendants then had no knowledge, and that said judgment was still in full force and effect until set aside by appeal and cause dismissed.

"(16) The facts stated in paragraph 16 of the amended bill are true, except that on February 12, 1896, R. T. Torrans conveyed said lands in Upshur county to Thomas Kelly, and he, on May 18, 1897, by his deed in writing duly executed and delivered, and for a valuable consideration, sold and conveyed same to Wm. Kelly, who now owns all of said lands in Upshur county, Texas, but in purchasing same he did not do so in pursuance of any agreement with Jas. B. Simpson to enable him to place his property beyond the reach of his creditors, nor was said purchase made for the joint account of Simpson and Kelly, nor was it made to support the fraudulent title of said Kelly, derived from Cayce, because said title was not fraudulent, but acquired in good faith by Kelly to collect a bona fide debt due him by Cayce, nor was said purchase made with the intention of dividing the result of said lands with J. B. Simpson; that Wm. Kelly made said purchase of the Torrans title to the Upshur county lands in good faith, and paid for same with his own money, and without any agreement with any one to share any part of same, except such interest as his attorneys, Morris & Crow, might have by reason of their services to him, and that said purchase was made to remove cloud from the title to said land, and so as to perfect the title and save the expense of litigation over the same, of which he was fully advised by the pending litigation at that time; that said lands are held by him as his own property, and will be used for his own purposes, or to pay, first, his attorneys, Morris & Crow, a reasonable fee, then to reimburse himself said Torrans judgment, and pay the judgment against Kennett Cayce of \$7,005.60, dated October 10, 1893, interest at 10 per cent. per annum, and costs; and said land in Upshur county is not worth over \$1 to \$2 per acre, and there are only about 850 acres of same involved in this controversy."

This answer concluded with an averment to the effect that A. P. Morey, who filed said supplemental bill, did not in fact, but only nominally, make the purchase from F. M. Hayes, receiver, and that the real purchaser was U. F. Short, who frequently used the name of A. P. Morey, and that A. P. Morey

had no interest whatever in the property, and acquired none by said purchase, and that U. F. Short was acting as the attorney of F. M. Hayes, and, fraudulently pretending that the purchase was by Morey, concealed the real facts from the receiver, and for this reason asked for a dismissal of the bill. Upon a trial of this cause March 1, 1902, a decree was rendered in which it was found that the deed to the lands in question from Simpson to Kennett Cayce, and the titles under execution against Cayce, were fraudulent as against the creditors of Simpson; but it was further found that U. F. Short was the real complainant in this case, and that by reason of his participation in the agreement with Simpson and Kelly to hold the lands against Simpson's creditors he was precluded from obtaining relief in equity, and the bill was accordingly dismissed.

We have set out this much of these proceedings, in order that the attitude of the parties in this litigation may clearly appear; as we shall presently have occasion to refer to the testimony of appellants Morris and Kelly upon this trial. This proceeding having been thus terminated, there remained only this suit in the district court of Camp county to be disposed of; the judgment in favor of the defendants having been, as stated above, reversed by the Court of Civil Appeals at San Antonio. The suit went to trial upon the ninth amended answer and cross-bill of Wm. Kelly.

The fourth paragraph of said cross-bill contains substantially the following allegations: (a) The written agreement of April 5, 1894, between Wm. Kelly, Wm. D. Simpson, Jr., and U. F. Short is set out, followed by a description of the lands in controversy. (b) It is alleged that Kelly entered into said agreement in good faith, and, for the purpose of making certain the title to the Upshur county lands, with the acquiescence of U. F. Short and Wm. D. Simpson, Jr., purchased the Torrains title to said lands, and paid therefor \$594. (c) It is then alleged that Short, Wm. Kelly, and W. D. Simpson, Jr., on July 1, 1896, made a verbal agreement to buy out the title of H. S. Hepburn, receiver, for \$2,500, the purchase to be made by Short, but to be paid for by the parties in proportion to their interests under the written contract of April 5, 1894, and to be held in trust by Short for said parties. (d) That Short bought the lands from Hepburn, but on the same day, in order to defraud Kelly and W. D. Simpson, Jr., executed a conveyance to J. W. Bartlett, and that Bartlett then, in this suit and the suit in federal court at Jefferson, undertook to hold all of the lands. Bartlett is charged to have bought with notice of the agreements, and it is further charged that he has now conveyed back to Short; and, if Bartlett was an innocent purchaser, all of Short's transactions were fraudulent and void as against Kelly. (e) It is then alleged that the parties have tendered to Short their propor-

tionate amounts of the \$2,500 paid to Hepburn, and this tender is renewed. Kelly also tenders the title acquired under the Torrains purchase. (f) It is alleged that after the judgment was rendered at Jefferson, awarding all of said lands to Wm. Kelly, and before it was reversed, in accordance with said agreements, he adjusted the interest of W. D. Simpson in said lands by conveying to Sheppard & Jones, attorneys, 1,000 acres, and to W. T. Armistead, attorney, 200 acres, and the balance of the 3,000 acres coming to W. D. Simpson, Jr., he conveyed to M. L. Morris for the benefit of said Simpson, Jr., taking a vendor's lien executed by said Morris, binding only the land, and not Morris personally, which note was taken by W. D. Simpson, Jr., in full satisfaction of all his interest in the lands. (g) It is also alleged that the deed executed by U. F. Short to W. D. Simpson, Jr., dated May 24, 1892, was a special warranty deed, and was sufficient to pass the title subsequently acquired by Short in his purchase from Hepburn, receiver. (h) The interests of the several parties, arising out of all these transactions, are alleged to be as follows: Wm. Kelly, 1,000 acres; Morris & Crow, 1,000 acres; U. F. Short, 200 acres; Sheppard & Jones, 1,000 acres; W. T. Armistead, 200 acres; and the remaining 1,000 acres held by M. L. Morris subject to the vendor's lien note executed to Wm. Kelly for the benefit of W. D. Simpson, Jr., and now held by U. F. Short; and said parties are respectively subrogated to the rights of U. F. Short, Wm. Kelly, and W. D. Simpson, Jr., under said written and verbal agreements. (i) The prayer is for a judgment establishing the several interests as aforesaid, subject to payment of the proportionate amounts expended by Short in his purchase from Hepburn, and by Kelly in his purchase of the Torrains title, and for the appointment of commissioners and a partition of the lands.

The fifth paragraph of the cross-bill is in form of an action of trespass to try title by Kelly against Weaver, as receiver, U. F. Short, J. W. Bartlett, and W. D. Simpson, Jr., for all of the land in controversy. Morris & Crow, M. L. Morris, Sheppard & Jones, and W. T. Armistead in effect adopt the pleadings of Kelly, in so far as applicable. U. F. Short, in answer to these pleadings, filed his fourth amended answer, which consisted of (1) a plea of not guilty; (2) pleas of two and four year statutes of limitation to the fourth clause of Kelly's cross-bill; (3) a plea setting up the history of the litigation in this case, and in the federal court at Jefferson, and the conduct of Kelly with reference to said lands, which is alleged to amount to a repudiation and renunciation by Kelly of any rights he may have had under any agreement with Short; (4) a detailed account of the manner in which Kelly had acquired each title under which he claimed and allegations that all of said acts were

done for the fraudulent purpose of assisting Jas. B. Simpson to defraud his creditors, and for said reason were ineffectual to vest any title in Kelly or those claiming under him; and in this connection the proceedings in the case of *Hayes, Receiver, v. Kelly*, in the Circuit Court of the United States at Dallas, were fully set out, and it was alleged that in said suit the issue of fraud in all said transactions was adjudicated and settled as against Kelly, and that his claims of title had all in said suits been adjudged to be fraudulent, and he was precluded by said judgment from asserting said claims against Short in this suit.

When the cause was called for trial, and the exceptions had been disposed of, the judgment recites that "William Kelly and his coplaintiffs waived their suit in trespass to try title, as contained in the fifth clause of said cross-bill, and announced that they would try the case upon the cause of action set forth in the fourth clause of said cross-bill." After hearing the evidence, the court directed a verdict for the defendant U. F. Short, and verdict and judgment were accordingly rendered that Kelly, Morris, Crow, Sheppard, Jones, Armistead, and Simpson, Jr., take nothing by their suit against Short or Bartlett. From this judgment all of said defendants have appealed. The only question necessary for our decision is whether the evidence was in such condition as to warrant the peremptory instruction for defendant.

It is contended by appellee Short that said instruction was warranted upon each of several grounds, viz.: (1) That the pleadings of appellants were insufficient to entitle them to recover; (2) that the evidence failed to establish the verbal contract, which was the basis of appellants' right to recover; (3) that, if said contract was established, the evidence of plaintiff Kelly and his attorney, M. L. Morris, showed that the same had been repudiated and rescinded; (4) that the evidence showed conclusively that all of the titles of Kelly and those claiming under him and with him were fraudulent; and (5) that the fraud in said titles of Kelly and his coplaintiffs was res adjudicata by reason of the judgment rendered in the case of *Hayes, Receiver, v. Kelly*, in the federal court at Dallas. We conclude that the pleadings sufficiently alleged a contract, and, if we had reached a different conclusion as to this, if there were no other reason, it would hardly have justified us in affirming the judgment, as the effect of our decision would be to sustain an exception, and appellants should have an opportunity to amend.

From a careful examination of the record, we are convinced that the second and third grounds above mentioned are sustained, and afford sufficient reason for giving the instruction for defendant. It has been noted that upon the trial the count in trespass to try

title was abandoned, and appellants relied only upon the cause of action set out in the fourth paragraph of their cross-bill. This paragraph was based upon the written contract of April 5, 1894, and the verbal contract of July, 1894. An examination of the written contract of April 5, 1894, will clearly disclose that it does not contemplate the division of any interests subsequently to, be acquired by the parties, and it seems clear to us that, relying alone upon that contract, appellants were not entitled to recover any part of the interest subsequently acquired by any of the parties in any manner. The pleading recognizes the validity of the title acquired by Short in his purchase from Hepburn, and seeks a division of the title thus acquired. Whether this title vested in Short, or whether, as contended by appellant, it at once passed to W. D. Simpson, Jr., by reason of the deed previously executed by Short to W. D. Simpson, Jr., and which appellants claim is a special warranty deed, it is in either case obvious, from an examination of the written contract of April 5, 1894, that such subsequently acquired interest was not contemplated, and was not the subject of said contract. It therefore became necessary for appellants to prove, as alleged, that a verbal contract was made, to which Short, Kelly, and W. D. Simpson, Jr., were parties, for the purchase of the title held by Hepburn, by which Short was to purchase said title and hold the same in trust for himself, Kelly, and Simpson, Jr., in proportion to the interests agreed upon in the former written contract.

Appellees have presented the case upon the theory that the clause of the cross-bill relied upon was an action to enforce specific performance of the written and verbal contracts, and have cited authorities holding that, in such cases, there must be clear and unequivocal proof of the contract sought to be enforced. It is insisted by appellants that this is not a suit for specific performance, and that the authorities cited have no application. It is perhaps true that the cause of action is not, strictly speaking, for a specific performance of the contracts. *Stafford v. Stafford* (Tex. Sup.) 70 S. W. 75. It may perhaps be more correctly termed an action to enforce an express trust, based upon a contract. *Gardner v. Rundell*, 70 Tex. 453, 7 S. W. 781. This distinction, however, does not, in our opinion, render it any the less necessary to prove the contract as alleged. If there is any difference, it would seem that the evidence should be more clear to establish a trust than to enforce specific performance. *Mead v. Randolph*, 8 Tex. 199; *Miller v. Thatcher*, 9 Tex. 482, 60 Am. Dec. 172; *Grace v. Hanks*, 57 Tex. 14; *King v. Gilleland*, 60 Tex. 271. In the case last cited, it is said: "Perhaps there is no fact which in the trial of civil causes is required to be so satisfactorily proved as that which en-

grants a parol trust upon the legal title"—citing Perry on Trusts, § 136. Not only should the evidence be clear and satisfactory, but, if the proof fails to show that one of the alleged parties to the contract participated in making it, such failure would appear to be fatal to the action. In this case the parties alleged to have participated in making the verbal contract were Short, Kelly, and W. D. Simpson, Jr.

The only evidence that such contract was made is that of M. L. Morris, the attorney of Wm. Kelly, and upon this point he testified as follows: "After the reversal of that suit at New Orleans, Mr. Hepburn, the plaintiff in the case, came to me about closing out the matter. He said he was receiver of the national bank, and that he had been ordered to close out all assets of the bank; proposing to compromise this litigation. Said he was receiver, and was not in an attitude to make a proposition, but asked me to make him a proposition. On the same day defendant Short came to my office and suggested that Hepburn had been talking to him about closing out the affairs as receiver of the bank. He said that he owned the National Exchange Bank Building, said Hepburn rented an office from him, and that he was attorney for receiver for the Ninth National Bank, F. M. Hayes, and he was on very friendly terms with them, and suggested that W. D. Simpson, Jr., Kelly, and himself were all interested in this matter, and, inasmuch as the Court of Appeals at New Orleans had made some very harsh criticisms about the character of this litigation, that he wanted it stopped, and wanted to buy out Hepburn and stop the suit. He suggested to me that he could buy out the claim of Hepburn cheaper than I could, owing to his relation to him, being attorney for the receiver of the Ninth National Bank. He said, if they would permit him, he would make an offer, and Kelly and myself and Simpson would decline to make a purchase, and let him make an offer, and, on our declining to make a better offer, that Hepburn would accept the price he offered. We talked over the matter, and he was to make the purchase for the benefit of himself and for Wm. Kelly and W. D. Simpson, Jr., and agreed to offer \$2,500 to Hepburn for his interest in the lawsuit. This conversation occurred in the office of Morris & Crow at Dallas, Texas. We had several talks about the matter from time to time, and it was understood that the written agreement was in force, and that he would pay \$2,500, each party to pay his part of the money, and Short was to take the title in his name for the benefit of himself, Kelly, and Simpson. After the agreement was made, he went to Hepburn and made the proposition, and he accepted it, as he reported to me later, as we had declined to make Hepburn any offer. Mr. Short being a party to this suit and the suit at Jefferson, Wm. Kel-

ly being also a party, we thought it was of interest to all parties to close, and, as I understood it, the matter rested until Mr. Hepburn went back North to take his summer vacation, and nothing, it was understood, could be done until the federal court met in Dallas in January, 1897. So Mr. Short and I frequently met and discussed the matter, and it was understood that the trade was all fixed up, and we looked around to see where we might borrow the money. This title cleared up, and Hepburn bought out, would make a good title to the land. We agreed to place a mortgage on the land, and to borrow \$2,500, and pay Mr. Hepburn. We inquired around, and made some investigation to see if we could borrow the money, or make any arrangement whereby we could get it. Some time before January, 1897, about the 10th or 11th of December, I think it was, I was down here at Pittsburg, and happened to be in the clerk's office, and Mr. Davis, county clerk, showed me two deeds—one from Weaver, the receiver, who had taken the place of Hepburn, to Short, and another deed from Short to J. W. Bartlett—whereby Weaver had conveyed the land to Short, and Short had closed the trade with Weaver. Then on the same day Short had conveyed the property to Bartlett. It was my understanding that the trade was to be made in Dallas in January. I went home to Dallas in a few days, and went to see Mr. Short, and proposed to him that we put up our part of the money, and asked him to make Kelly a deed to his part of the land. I asked him what he was going to do about Simpson's part of the land. He declined to do anything, and said that the land belonged to Bartlett, and he declined to have anything to do with it. According to that agreement, the land was to be divided, 2,000 acres to Kelly, 200 acres to Short, and the other to go to Will Simpson. I went to Short, and proposed to pay our part of the consideration; asked him to make conveyance to our part of the land. He declined to accept my tender, or make any adjustment whatever about it. When I was talking to Short in these conversations, I was really representing Wm. Kelly. Some time during that summer, I mentioned to Short that he had received 200 acres of land from Simpson as a fee for his services, and that he ought to represent W. D. Simpson in this matter. In fact, I was getting a little suspicious of him, and told him that I wanted him to understand that I was representing Wm. Kelly, and that I wanted Kelly's interest in the land, and that after Kelly gets his part of the land I told him he should adjust with Simpson for his part of the land. I notified Wm. Kelly of the negotiations, and Kelly assented to the agreement to buy out Hepburn, and expressed a willingness to put up his part of the money when we got to that point. We have always been ready and will-

ing to comply with that agreement whenever we could get at it. It has always been my disposition. I never had an opportunity of paying my pro rata. Short has always declined to consider the matter, or make any deed of partition. Always said he did not own the land; that Bartlett owned it, and he had nothing to do with it further." Upon cross-examination, Morris testified: "This agreement was made in my office between U. F. Short and myself. Neither Simpson nor Kelly were present. I had no authority to represent Simpson in making the agreement. I do not know that Short had any such authority."

The statement of facts covers more than 200 pages of the record; but we have examined it as carefully as possible, and failed to discover any other evidence to show that W. D. Simpson, Jr., entered into the contract as alleged. Short denies the making of the contract, and directly contradicts the testimony of Morris upon this point. Crow, the partner of Morris, testifies in a general way to corroborate Morris as to the transactions between him and Short, but does not even go as far as Morris to show the particulars of the contract. Simpson, Jr., does not testify. We therefore conclude that there was an entire failure to show a participation by W. D. Simpson, Jr., or by any one authorized to represent him, in making the verbal contract; and, proof of this verbal contract being essential to the cause of action alleged, this failure of proof authorized the court to instruct a verdict for defendant.

If, however, it should be conceded that the verbal contract was made as alleged, we think the evidence is so conclusive that it was repudiated and mutually abandoned by the parties to it that the court was authorized to instruct the jury that it could no longer form the basis of a suit. As we have already shown, after the written agreement was made, the suit was instituted in the federal court at Jefferson, and after that suit was reversed upon the first appeal it is claimed the verbal agreement was made. This verbal agreement, while necessary, in addition to the written agreement, to entitle appellants to recover in this suit, was at the same time so based upon and connected with said written agreement as to become really a part of it. After it is claimed both agreements had been made, the second trial was had in the federal court at Jefferson, and the first trial of this suit in the district court of Camp county, and the trial of *Hayes v. Kelly* in the federal court at Dallas. In each of these trials, the contest was really between Short upon the one hand and Kelly on the other. In the *Jefferson* case, and the first trial in Camp county, Kelly recovered a judgment for all of the lands in suit. It is true that in his pleadings the agreement between him and Short was alleged, but it was only asserted as a cause of action in case he

should be denied a recovery of the entire land. We have set out the pleadings in the federal court at Dallas, in the suit by *Hayes, Receiver, v. Kelly et al.* It will be seen that the effort there was to show that Kelly's participation in all of the transactions with reference to the land was really in the interest of Jas. B. Simpson, and it was the purpose of Kelly to refute that idea. For this purpose Kelly and his attorney, M. L. Morris, testified in that suit.

Kelly there testified, among other things, as follows: "When you (Short) went to Jefferson last February, 1898, you repudiated that transaction—that contract. I didn't say I did. I said now I would make no promise until the case at Jefferson was decided, and, of course, if I win the appeal, I win it. I claimed the whole land at Jefferson. You repudiated the contract there, and didn't want to go into it; I claimed the land against everybody. Of course, under the ruling of the court, my understanding was we went to trial strictly on my title. If I recover in the upper court, it is my land. Simpson nor any one else will have any interest in it. That is my understanding. Sheppard & Jones helped in the case at Jefferson. Judge Morris employed them, and if the case was gained I was willing to give them some land. I said that before, and I still say so. I am willing to pay Judge Sheppard. Sheppard & Jones went down there to help win the case. I don't know who told them to go down there. I did not tell them. I didn't tell Judge Morris to tell them to go. I told Judge Morris to do just as he pleased, and, if they took them, that I would make them a deed to whatever he agreed. I did not know that Sheppard & Jones would be there until I saw them there. I supposed they would be there. They were down there before, early in the summer. I suppose they went there in the first place to represent Simpson. When the contract didn't come up, they represented me, I suppose. I did not ask them to represent me. I told Judge Morris, if he saw fit, he could employ any one he saw fit. I didn't make any contract with Sheppard & Jones myself. Judge Morris was down there a week ahead of me, and I told him, if he saw fit to employ extra counsel, I thought he had better do it. He spoke of hiring Armistead, and said Sheppard & Jones would help. After the trial came up between me and the bank, I told him, if I won, I would pay them. I suppose they were to get a thousand acres. I have since made them a deed. I didn't before. I have since I came back. As for my asserting my own title down there against any former agreement for dividing the land, I don't think the case was tried on that. You repudiated the contract, and forced me to try it on my own title against Hepburn, or Hepburn against me. I claimed the whole land. I claimed the whole land against Simpson and every one else—against the whole

world, as Game says. I told Judge Morris, if he could not go to trial on the contract, he had better employ counsel, and whatever agreement he made I would make good. I would deed the land. I did not hire Simpson's lawyers to help Judge Morris beat Simpson and you both, and give them a thousand acres of land to do it. It was not that way at all. You repudiated the contract, and forced us to go to trial strictly on my title against Hepburn. Sheppard & Jones helped to defeat the case. That cut you and Simpson both out. I haven't made any trade since then. I gave Armistead a deed down there. I don't remember how much. I think 500 acres. Judge Morris, 200 acres. All the rest was Judge Morris' and mine. I have not made any deed to the other 1,500 acres. I am not going to give any to Simpson; not unless I change my mind. These attorneys helped me to get the land; and, instead of getting 2,000 acres, I get 3,500 acres, and Simpson gets nothing. I didn't bring Simpson into it in the first place."

In this case, also, the following paragraph of the answer was sworn to by William Kelly, W. M. Crow, and M. L. Morris:

"(16) The facts stated in paragraph 16 of the amended bill are true, except that on February 12, 1896, R. T. Torrans conveyed said land in Upshur county to Thomas Kelly, and he, on May 18, 1897, by his deed in writing duly executed and delivered, and for a valuable consideration, sold and conveyed same to Wm. Kelly, who now owns all of said lands in Upshur county, Texas, but in purchasing same he did not do so in pursuance with any agreement with Jas. B. Simpson to enable him to place his property beyond the reach of his creditors, nor was said purchase made for the joint account of Simpson and Kelly, nor was it made to support a fraudulent title of said Kelly, derived from Cayce, because said title was not fraudulent, but acquired in good faith by Kelly to collect a bona fide debt due him by Cayce, nor was said purchase made with the intention of dividing the results of said lands with J. B. Simpson; that Wm. Kelly made said purchase of the Torrans title to the Upshur county lands in good faith, and paid for same with his own money, and without any agreement with any one to share any part of same, except such interest as his attorneys, Morris & Crow, might have by reason of their services to him, and that said purchase was made to remove cloud from the title to said lands, and so as to perfect the title and save the expense of litigation * * * at that time; that said lands are held by him as his own property, and will be used for his own purposes, or to pay, first, his attorneys, Morris & Crow, a reasonable fee, then to reimburse himself said Torrans judgment, and pay the judgment against Kenneth Cayce of \$7,005.60, dated October 10, 1893, interest at 10 per cent. per annum, and costs; and said

land in Upshur county is not worth over \$1 or \$2 per acre, and there are only about 850 acres involved in this controversy."

On the trial of that case, M. L. Morris testified as follows: "It is true that Sheppard & Jones, in the trial of the case of Jefferson in 1898, assisted me in behalf of Kelly. After the trial in May, 1897, when it became known to Kelly that W. D. Simpson, Jr., had no interest in the land through any former title, Kelly simply decided to repudiate the whole thing. He felt that he had been led into a trap, and at Jefferson he asserted title to the entire tract of land, which he had always asserted at Pittsburg, claiming that neither Simpson nor Short had any interest. On that issue he gained the suit, and got the whole tract of land lying in Camp and Upshur counties. This was on February 4, 1898, at Jefferson, Texas. * * * After Kelly found that he had been trapped into supposing that W. D. Simpson had an interest, he then repudiated the whole thing, and fought everybody for the land. * * * It is not true that Col. Simpson [or] W. D. Simpson, Jr., is to have an interest in this land, so far as I know; and Mr. Kelly has consulted me in every move. It was understood that neither one was to have any interest in this property. Wm. Kelly's prayer has always been for the entire land. I understood that Sheppard & Jones were to get 1,000 acres for representing W. D. Simpson, if he got any. They were representing him. Mr. Kelly agreed to give us half of what he recovered. He first agreed to give us half of the land recovered; but in 1895 Mr. Kelly was led into making a deal with U. F. Short with reference to this land, whereby Kelly was to get 2,000 acres. But that agreement has been repudiated, so we have never had any change in the matter. I made the agreement with Sheppard & Jones to give them 1,000 acres to represent Kelly in the litigation at Jefferson. They repudiated their agreement at Pittsburg with Simpson, because it developed that he had no interest in the land at all, and I made an independent agreement with them to represent Kelly. I did not have Simpson's consent. He was not a party; Col. Simpson was not a party. I had no communication with Jas. B. and W. D. Simpson about it. I did not make an agreement with them as to attorney's fees. I think Sheppard & Jones were at Pittsburg, their home, one term of court; but nothing was done. They were simply looking after W. D. Simpson's interest, as I understood it. Wm. Kelly made a deed to Sheppard & Jones and W. J. Armistead after the trial at Jefferson in February last; and the day I started home, after judgment was rendered in favor of Kelly, he gave Armistead a deed to 200 acres of the land. After coming home, I had him execute a deed to Sheppard & Jones to 1,000 acres. That agreement of April 5, 1894, was entered into in good faith,

and Kelly proposed to keep his part of it; but Short repudiated it. No, sir; he never made any tender of the Torrana purchase. He held the matter in statu quo. His brother bought in that property, and paid the money for it. No, sir; he never notified Simpson or Short that his brother held that property for him. Kelly bought it in without their knowledge or consent. They knew nothing about it. It was bought by Thomas Kelly, with this idea: that Wm. Kelly would pay him for it when he got the money. He didn't have the money to pay Torrana. It was bought for Wm. Kelly, if he could raise the money to pay for it. I understand that he did afterwards satisfy Thomas Kelly. He never did offer any part of it to Short or Simpson, except what was set up in the alternative plea at Pittsburg. If he could not hold all the land, then he wanted part of it. There never was any concession made. The matter was left open until the litigation terminated with Hepburn, receiver."

The force of these statements is sought to be overcome by the contention that Short was not nominally the antagonist of Kelly in these various branches of the litigation; that at Jefferson and Pittsburg he was using the name of J. W. Bartlett, and at Dallas he was suing in the name of A. P. Morey; and that Kelly had never, before the last trial, had an opportunity to present this cause of action. And this is true to a certain extent, and might have excused Kelly for not more actively prosecuting the cause of action based upon the agreements; but to our

minds these facts do not satisfactorily explain the strong and unequivocal statements, made under oath by both Kelly and his counsel, that these agreements had been repudiated, especially when their pleadings in the various suits, and their whole conduct with reference to the litigation, strongly indicate the same attitude with reference to these agreements. If we are to credit these statements, they show that if any verbal agreement was made, as claimed, by Kelly, he and Short had both repudiated that agreement, as well as the written agreement, and each recognized and accepted the repudiation on the part of the other, and conducted the litigation in its several branches on that basis. Having done so, we do not believe that either party can now be heard to say that the agreements are still in force. *Graves v. White*, 87 N. Y. 463; *Rochm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; *Ry. Co. v. Richards*, 152 Ill. 59, 38 N. E. 773, and note to same as reported in 30 L. R. A. 33.

These conclusions render it unnecessary for us to determine whether the evidence conclusively established that the transactions were fraudulent on the part of Kelly, or whether the judgment of the federal court at Dallas constituted *res adjudicata* as to the issue of fraud in this suit. They also render unnecessary a further consideration of the assignments of appellants. The judgment is accordingly affirmed.

Affirmed.

STATE ex inf. ATTORNEY GENERAL v. MISSOURI PAC. RY. CO. SAME v. CHICAGO, R. I. & P. R. CO. SAME v. CHICAGO, B. & Q. R. CO. et al.*

(Supreme Court of Missouri. June 15, 1903.)

In Banc. Separate proceedings in the nature of quo warranto, on the information of the Attorney General, against the Missouri Pacific Railway Company, the Chicago, Rock Island & Pacific Railroad Company, and the Chicago, Burlington & Quincy Railroad Company and others. Writs quashed in each case.

The Attorney General, Frank Hagerman, and Adiel Sherwood, for informant. O. M. Spencer, Warner, Dean, McLeod & Holden, M. A. Low, W. F. Evans, Frank P. Sebree, and Martin L. Clardy, for respondents.

BURGESS, J. These are all companion cases to the case of State of Missouri ex inf. Edward C. Crow, Atty. Gen., v. Atchison, Topeka & Santa Fé Railway Company (decided at the present term and not yet officially reported) 75 S. W. 776; and for reasons given in the opinion handed down in that case the pleas to the informations are sustained, and informations quashed.

All concur.

STATE ex inf. ATTORNEY GENERAL v. ST. LOUIS, K. C. & C. RY. CO. et al. (nine cases).*

(Supreme Court of Missouri. June 15, 1903.)

In Banc. Separate proceedings in the nature of quo warranto, on the information of the Attorney General, against the St. Louis, Kansas City & Colorado Railway Company, the Missouri Pacific Railway Company, the St. Louis, Iron Mountain & Southern Railway Company, the St. Louis & San Francisco Railway Company, the Wabash Railroad Company, the Chicago & Alton Railway Company, the Missouri, Kansas & Texas Railway Company, the St. Louis & Southwestern Railway Company, and the Chicago, Burlington & Quincy Railway Company. Writs in each case quashed.

The Attorney General, Frank Hagerman, and Adiel Sherwood, for informant. L. F. Parker, Geo. S. Grover, C. N. Travous, Wm. Brown, Geo. P. B. Jackson, O. M. Spencer, Warner, Dean, McLeod & Holden, Martin L. Clardy, Sam H. West, W. F. Evans, and Frank P. Sebree, for respondents.

BURGESS, J. These cases are all of the same character, being in quo warranto by the Attorney General to oust defendants of certain franchises charged to be unlawfully and without authority exercised by them. They will therefore be considered together. The questions involved are substantially the same as in State of Missouri ex inf. Attorney General v. Atchison, Topeka & Santa Fé Railway (decided at the present term and not yet officially reported) 75 S. W. 776; the only material difference being that in these cases there is no question of interstate transportation involved, while there was in that case. The matters complained of in these cases are the making by defendants of reconsignment charges at the city of St. Louis of \$2 per car; in discriminating in charges for switching facilities and against the city of St. Louis as a locality; in refusing to make deliveries without extra charge on any tracks of defendants or upon any track they can use; in making a discrimination against and between shippers, consignees, and the St. Louis market with respect to delivery of cars of grain, wares, and merchandise to connecting lines within the city of St. Louis; in creating

and maintaining a monopoly at St. Louis by refusing to afford to steamboat and barge line companies like facilities in the handling and transportation of grain and grain products which railroad companies furnished to each other on shipments through and out of St. Louis; in creating and maintaining a monopoly at St. Louis by refusing to furnish to shippers at St. Louis facilities in the transportation and handling of grain or grain products equal to the facilities afforded to persons, firms, or corporations who do ship out of St. Louis over some railroad an amount of grain or grain products and other commodities corresponding to that shipped to St. Louis; and in imposing said reconsignment charge and switching charge in the manner hereinbefore stated at St. Louis said railroad companies attempt to create and do create and maintain a monopoly at St. Louis in the handling and transportation of grain and grain products and other commodities shipped into St. Louis, by preventing shipment thereof on steamboat and barge lines from St. Louis, as above described at length.

For the views expressed in the case of the same informant against the Atchison, Topeka & Santa Fé Railway, supra, the pleas to the informations are sustained, and the writs quashed. All concur.

HARWELL v. SOUTHERN FURNITURE CO.

(Court of Civil Appeals of Texas. July 3, 1903.)

WRIT OF ERROR—AFFIDAVIT BY ATTORNEY—VALIDITY—PROOF BEFORE COURT.

1. Rev. St. 1895, art. 5, provides that whenever it is necessary for any party to a civil suit to make an affidavit it may be made by either the party or his agent or attorney. A writ of error was perfected by filing an affidavit of poverty in lieu of a cost bond. *Held*, that the party's attorney was authorized to make the affidavit.

2. It appeared that at the time the affidavit of poverty, which was sworn to before the judge trying the case, was made, the court was in session, but there was a temporary suspension of business. The judge was not actually sitting on the bench, but was in the courtroom where business of the court was dispatched. *Held*, that the making of the affidavit was making proof before the court trying the case.

Action by L. C. Harwell against the Southern Furniture Company. On motion to dismiss appeal. Motion overruled.

For former opinion, see 75 S. W. 52.

Chas. S. Todd, for the motion. Glass, Estes & King, opposed.

RAINEY, C. J. The defendant in error has presented a motion requesting conclusions of fact and law on its motion to dismiss writ of error, which was overruled April 11, 1903, with a view of applying to the Supreme Court for a writ of error, and same is complied with as follows:

The writ of error was perfected by the plaintiff in error filing an affidavit in lieu of a cost bond. Said affidavit speaks for itself as to the objections urged as to what appears on its face. It was sworn to before the judge trying the case, and the recitations in the judgment entered nunc pro tunc as to

*Rehearing denied July 3, 1903.

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 2074.

how the proof of inability to pay costs show the manner in which such proof was made, and we adopt the statements so made in said judgment as our conclusions of fact.

Conclusions of Law.

1. The affidavit being made by the plaintiff in error's attorney did not render the affidavit defective. He was authorized under the statute to make it. Rev. St. 1895, art. 5.

2. The making of the affidavit before the court trying the case is sufficient proof unless there is a contest. But it is insisted that the judge was not sitting as a court when the proof was made before him. At the time the affidavit was made, the evidence shows, in substance, that the court was in session, but there was a temporary suspension of business. The judge was not actually sitting on the bench, but was in the courtroom, where business of the court was dispatched. We are of the opinion that the making of the affidavit under those circumstances was making proof before the court trying the case.

The motion to dismiss appeal is overruled.

WITCHER v. WILES et al.*

(Court of Civil Appeals of Texas. June 13, 1903.)

SCHOOL LANDS—OCCUPANCY BY PURCHASER—ABANDONMENT.

1. Under Act Feb. 23, 1900, c. 11 (Gen. Laws 26th Leg. pp. 32, 33), and Amendatory Act April 15, 1901, c. 89 (Gen. Laws 27th Leg. p. 254), providing that, if any purchaser of school land fails to reside on it, he shall forfeit it to the state, a purchaser of land which is not detached must comply with the conditions of actual settlement.

2. Act April 15, 1901, c. 89 (Gen. Laws 27th Leg. p. 254), provides that, if any purchaser of school land fails to reside thereon and improve it, he shall forfeit it, and the land shall be again on the market. A purchaser executed a bond reciting a sale of the land and obligating himself to make title after acceptance of proof of three years' occupancy. Prior thereto the purchaser leased the land to the obligee, reserving the use of it, and continued in possession, residing on another part of the land. *Held*, that the execution of the instrument was not an abandonment of the land by the purchaser, so as to subject it to another sale.

Appeal from District Court, Childress County; G. A. Brown, Judge.

Trespass to try title by R. E. Witcher against J. A. Wiles and another. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

E. E. Diggs, for appellant. W. B. Howard and Q. S. Barrett, for appellees.

SPEER, J. The award of the land in controversy to appellee Bayless must be sustained. His applications for the survey and to purchase being regular, and all other requirements of the law having been fully complied with, he was entitled to the award, and his right was superior to that of Cawthon, under whom appellant claims, for the

reason that said Cawthon was never an actual settler upon the land. The land not being detached land, the purchaser, under the acts of 1900 and 1901, must be held to a compliance with the conditions of actual settlement. See Act Feb. 23, 1900, c. 11 (Gen. Laws 26th Leg. pp. 32, 33); Amendatory Act April 15, 1901, c. 89 (Gen. Laws 27th Leg. p. 254).

This, then, brings us to a consideration of the more important question in the case, of what effect, if any, is to be given to the following instrument, executed by Bayless to appellee Wiles, to wit:

"The State of Texas, County of Childress. Know all men by these presents, that I, W. H. Bayless of the County of Childress and State of Texas am held and firmly bound to J. A. Wiles of the County of Childress and State of Texas in the sum of Five Hundred (\$500.00) dollars to be paid to J. A. Wiles his executors administrators or assigns, to the payment whereof I bind myself my heirs executors and administrators firmly by these presents. Dated Feb. 24th, 1902. The condition of the above obligation is that whereas the above bound W. H. Bayless has this day sold to the said J. A. Wiles his heirs and assigns forever the following described real estate, lying and being in the County of Childress and State of Texas to wit: One hundred and twenty seven and one tenth acres off of the south part of survey 25 block T in Childress County Texas awarded to W. H. Bayless and containing 285.7 acres and more fully described in the County surveyor's records of Childress County as the survey of S. Cawthon as a homestead. The consideration paid for said land is as follows to wit: Two Hundred and Fifty Dollars (\$250.00) cash in hand the receipt of which is hereby acknowledged. Now if the said W. H. Bayless shall make or cause to be made to the said J. A. Wiles his heirs assigns or legal representatives two years and ten months from this date or after proof of three years occupancy has been made by said W. H. Bayless and accepted at the General Land Office, a good and valid School Land title to said premises, then this obligation shall be null and void, otherwise it shall remain in full force and effect.

"Witness our hands this 24th day of Feb. 1902.

W. H. Bayless.
"J. A. Wiles."

The application of Bayless to purchase and the award of the commissioner thereon, were made on November 21, 1901; and it is contended that, since Wiles has made no application to purchase the land, nor in any other way sought to have himself substituted as purchaser, the execution of the above instrument operated as a complete abandonment of the land upon the part of Bayless, and that the same was immediately again upon the market for sale under the act of April 19, 1901 (Gen. Laws 27th Leg. p. 294), and that it should have been award-

*Rehearing denied July 3, 1903.

ed to appellant upon his applications of date March 28, 1902, and April 26, 1902, he being at the time qualified in every respect to purchase, and his applications being in all respects sufficient. The testimony was to the effect that the instrument showed the real transaction between the parties, and that the consideration named was paid. It further showed that prior to the execution of the bond for title Bayless had leased the land to Wiles at 10 cents per acre per year, reserving the right to use the same for the pasturage of his own stock, and had never surrendered the possession of the land to Wiles under the bond for title, but was still receiving rent under the lease contract, and was still pasturing the land jointly with Wiles, and was still residing and making his home upon another part of the 285.7 acres awarded to him, of which the land in controversy is a part. The act of April 19, 1901, above cited, provides: "If any purchaser shall fail to reside upon and improve in good faith the land purchased by him as required by law, he shall forfeit said land and all payments made thereon to the state, to the same extent as for the non-payment of interest, and such land shall be again upon the market as if no such sale and forfeiture had occurred, and all forfeitures for non occupancy shall have the effect of placing the land upon the market without any action whatever on the part of the Commissioner of the General Land Office." It has been held that this act does not apply to sales under prior acts (*Bates v. Bratton* [Tex. Sup.] 72 S. W. 157); but, treating the purchase of Bayless as one under this act, still we do not think the facts show an abandonment of the land. The contract between himself and Wiles contemplates that Bayless will continue to occupy the land in compliance with law for the full period of three years, at the end of which time he will make a sufficient school-land deed conveying the property to Wiles. The Legislature has never seen fit to proscribe such contracts, and the courts cannot do so. Abandonment is a question of fact, to be determined from all the circumstances in evidence, and in this connection it is proper to consider such a contract, and to give to it such weight as it is entitled to in view of all the other facts in evidence. This was done in the trial court, and the question of abandonment resolved against appellant, and we cannot say that in this the court erred.

The judgment is affirmed.

MOORE v. ROBINSON et al. (BRANDT, Intervener).

(Court of Civil Appeals of Texas. June 10, 1903.)

FRAUDULENT CONVEYANCES — EVIDENCE — SUFFICIENCY — ADMISSIBILITY — DECLARATIONS OF GRANTOR—HEARSAY EVIDENCE—INTENT—INSOLVENCY.

1. In garnishment against a tenant of certain property, on the issue whether a transfer of

the rents accruing from the property during a certain year had been executed by the landlord to a third person in fraud of the landlord's creditors, the evidence examined, and held to make a case for the jury.

2. The creditor-attacking the transfer should have been permitted to testify that eight or ten years before it was made, and after he obtained his judgment, the landlord told him: "Inasmuch as you have sued me, I never intend to pay you; and, if you ever collect it, it will be settled by law. You have appealed to the law, and I will let the law settle it."

3. The testimony was not objectionable as hearsay.

4. Objection that the testimony was not binding on the transferee was untenable.

5. To warrant the admission in evidence of the declarations of the grantor, made after the sale, and tending to show that it was in fraud of his creditors, a prima facie case to defraud must first be established outside of the declarations.

6. A transfer of property from debtor to creditor is not invalidated by the mere fact that it is made in order to defeat another creditor in the collection of his claim.

7. The fact that the debtor is insolvent would not affect the validity of the transfer.

Appeal from Milam County Court; R. B. Pool, Judge.

Suit by James B. Moore against A. T. Robinson and others, including F. D. Brandt, intervener. Judgment in favor of intervenor. Plaintiff appeals. Reversed.

R. Lyles and Moore & Moore, for appellant. Henderson, Morrison & Freeman, for appellees.

RECTOR, Special Judge. This suit was instituted in the justice's court by James B. Moore against A. T. Robinson, as garnishee. Moore had recovered a judgment in the justice's court in 1889 against J. A. Pickens, which judgment was revived on January 8, 1900, and upon this judgment in October following a writ of garnishment was sued out and served on appellee A. T. Robinson. Robinson answered that he was a tenant on said Pickens' farm; that he had rented said premises from Pickens in the summer of 1899, for the year 1900, agreeing to pay him as rent one-fourth of the cotton and cotton seed raised, and \$3 per acre for each acre planted in corn and grain; that the rent due on the rent contract amounted, after deducting an account in his favor for expenses and repairs, to \$200.95, which amount he was ready to pay to the person to whom it was adjudged to be due. He further answered that in May or June, 1900, he had been notified that Pickens had transferred the rent due for that year to F. D. Brandt, and prayed that Brandt be made a party, and the matter adjudicated, so that he would be protected. F. D. Brandt, one of the appellees, intervened in said suit, and set up his title to the money due as rent, alleging that for a valuable consideration he had bought said rent from J. A. Pickens early in January, 1900, and that the same was trans-

¶ 6. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 373.

ferred to him by said Pickens, and that he had so notified said Robinson, and prayed judgment for the amount stated in Robinson's answer to be due as rent. The plaintiff, Moore, denied the allegations in intervenor's petition, and further specially alleged that, if said Pickens had transferred the rent on his place for 1900 to intervenor, the same was fraudulent and simulated, and was done under and by virtue of a conspiracy between him and intervenor, with intent to defraud plaintiff and Pickens' other creditors out of their debts; that said Pickens was insolvent, as the intervenor well knew, and, if he took a transfer of said rents from said Pickens, he took the same, and was then attempting to use the same, to protect said Pickens against the collection of plaintiff's debt, and for the purpose of defrauding plaintiff and other creditors.

The above is a sufficient statement of the pleadings of the parties. A trial in the justice's court resulted in a judgment for plaintiff, Moore; and on appeal to the county court, upon a trial *de novo*, Moore again obtained a judgment. From this judgment Brandt appealed to this court; and the judgment was reversed, and the cause remanded, upon issues not involved in this appeal. The trial in the county court, which resulted in a judgment from which this appeal was taken, was had before a jury. After the evidence was all in, the court instructed the jury to return a verdict for intervenor, Brandt, which it accordingly did, and judgment was accordingly entered for intervenor and against the plaintiff. By proper assignments appellant brings in review the action of the court below in peremptorily instructing a verdict for appellee Brandt.

The Constitution guaranties to litigants, when seasonably demanded, the right of a trial by jury; and it is the duty of the court to zealously guard against an invasion of this right. In this case, the burden was on appellee Brandt to show by a preponderance of the evidence his ownership of the rents owing by the tenant, Robinson, on the Pickens place during the year 1900. This burden he attempted to discharge by his own testimony, taken by deposition. His case, as thus made, was attacked by appellant by the proof of circumstances which he claims warranted the jury in disregarding the testimony of Brandt, and, the case standing thus, that he has been denied his constitutional right of a trial by jury. The following is a sufficient statement of the facts:

J. A. Pickens is insolvent, and has been for the last 10 or 12 years; there being several judgments against him during that time. The plaintiff lived in Milam county, and the Pickens farm is in Milam county. The said Pickens is a brother-in-law of appellee Brandt, and at the time of the trial, and for the last 2 years past, had lived in Wallace, in Austin county, where said Brandt resides, and has been engaged as a clerk in the store of Brandt & Harris (of which ap-

pellee Brandt is the senior member) on a salary of \$50 per month. The Pickens farm is about 100 miles distant from the town of Wallace. Brandt had never seen the Pickens farm, and was unacquainted with the tenant, A. T. Robinson. Pickens attended the trial in the justice's court, but never testified. Brandt attended the first trial in the county court, but did not testify. His depositions theretofore taken were used on the trial. Pickens came to Milam county a few days before the last trial, and remained up to the day when the case was set for trial. During this visit he went out into the country to see Robinson to get him to attend the trial as a witness. He never testified at any of the three trials. Brandt testified, by deposition taken in 1900, that about January 1, 1900, he bought the rent on the Pickens place in Milam county from J. A. Pickens for \$150; that he took an assignment of the rent for a debt due him by Pickens for money that he had furnished to Pickens over two years before that time. The exact amount of money that Pickens owed him is not distinctly stated; nor is it stated whether the debt existed in the shape of a note or was due on open account. He does not state whether the transfer was made by a writing or by parol. He states that J. A. Pickens is his brother-in-law, and was a clerk in the store of Brandt & Harris on a salary of \$50 per month. He states that he did not know that Pickens was indebted to Moore, nor did he know anything about Moore's suing Pickens. He also states that his claim is not fictitious, but that the transfer was made in payment of Pickens' debt to him, and not for the purpose of delaying and hindering the creditors of Pickens. He states that in January, 1900, he notified the tenant, Robinson, by letter in his own handwriting, that the rent had been assigned to him; says he was not acquainted with Robinson. The garnishee, Robinson, testified that he was not acquainted with F. D. Brandt, appellee; that in May or June, 1900, Joel Pickens, a brother of J. A. Pickens, delivered to him a note which stated that Brandt was the owner of the rent due on the Pickens place for that year; that he received no other notice from Brandt, and had never had any communication with him; that the notice in May or June was the first and only notice he ever had. It also appears in the record that in the fall of 1899 J. A. Pickens was in Milam county, and tried to collect the rent of that year, but Robinson was not then ready to pay, and that, at the request of Pickens, Robinson later on paid the rent to one Burnett, who, at request of Pickens, remitted it to appellee Brandt at Wallace, and that J. A. Pickens acknowledged the receipt of it.

To warrant a court in withdrawing a case from the jury, the facts ought to so clearly establish the issue as to exclude the idea that jurors' minds might reasonably differ in their conclusions. It rarely happens that in

cases of fraud the issues ought to be withdrawn from the jury. If fraud has been perpetrated, it need not be expected that the guilty party will admit it; and the party who attacks the transaction must necessarily resort to circumstances to uncover what is generally hidden and covered. The negative fact that appellee Brandt, though present at one trial, did not testify in person, resting, as he was, under a charge of fraud, and the further fact that at no trial did J. A. Pickens testify, either in person or by deposition, might be considered by the jury. The jury had the right to take into consideration the fact that, about the date appellant revived his old judgment against Pickens, appellee Brandt claims he obtained the transfer of rent on a place 100 miles away from his home, due on a farm he had never seen, by a tenant whom he did not know, and before the crop thereon was pitched. We do not wish to be understood as expressing any views by this court upon the facts; but the circumstances are stated only to emphasize the reasons why we think the court below committed error in instructing a verdict in this case. Appellee's case was wholly made by his own testimony. Being an interested witness, the jury might, if it saw fit, disregard his testimony. They were the exclusive judges of the credibility of the witnesses; and, where the witness is an interested party, the jury may discredit him. This rule is too well established to be any longer an open question. *I. & G. N. R. R. Co. v. Johnson* (Tex. Civ. App.) 55 S. W. 791; *Gonzales v. Adoue* (Tex. Civ. App.) 56 S. W. 548; *Sonnenhell v. Morlein Brew. Co.*, 172 U. S. 408, 19 Sup. Ct. 233, 43 L. Ed. 492. These cases discuss the question and cite cases supporting the doctrine. As the case must be reversed for the error pointed out, it will be necessary to consider other assignments complaining of the exclusion of evidence offered on the trial.

Appellant in his sixth assignment complains of the refusal of the court to permit him to testify to a conversation that occurred between him and J. A. Pickens eight or ten years ago, after he had obtained a judgment against Pickens, in which said Pickens stated: "Inasmuch as you have sued me, I never intend to pay you; and, if you ever collect it, it will be settled by law. You have appealed to the law, and I will let the law settle it." Pickens was charged with fraud in covering up his property, and his motives and intent were in issue, and any evidence that would explain his conduct was admissible. The objection that said conversation was hearsay, and not binding on intervenor, Brandt, ought to have been overruled, and the evidence admitted. *McKinnon v. Reliance Lumber Co.*, 63 Tex. 31.

In the seventh and eighth assignments appellant complains of the refusal of the court to permit him to prove a certain statement, alleged to have been made by J. A. Pick-

ens, in reference to the collection of the rent on the Pickens place for the year 1899. It occurs to us that all that was admissible with respect to that conversation is found in the record, and that the excluded portion was hearsay and was properly excluded.

By proper assignments appellant challenges the rulings of the trial court in excluding evidence offered to be shown by the garnishee, Robinson, relating to acts and declarations of J. A. Pickens on two occasions—one just after the trial in the justice's court, and the other just before the last trial in the county court. In the first conversation he sought to show that, immediately after the trial, Pickens went to the witness' house and requested him to pay over the rent to Brandt, stating that Brandt was financially able to protect him, if Moore finally won; that they were going to appeal, and that he (Pickens) had been kind to him (Robinson), and it would be a great accommodation to him (Pickens). On the other conversation with said witness, appellant offered to show that said Pickens stated to Robinson: "The case of Moore against you as garnishee on my place is set for to-morrow, and I am anxious for you to attend the trial, and have come out here to get you to do so." The general rule is well settled that the declarations of a grantor, after his sale, cannot be received to impeach his conveyance. *Hamburg v. Wood*, 66 Tex. 177, 18 S. W. 623; *Hinson v. Walker*, 65 Tex. 106; *Winchester Partridge Co. v. Creary*, 116 U. S. 165, 6 Sup. Ct. 369, 29 L. Ed. 591. There are exceptions to the rule, however, which are universally recognized: (1) Where there has been a prima facie case of fraud established, as where the thing granted has a corpus, and the possession of the thing after the sale remains with the seller; (2) where the declarations are made in the presence of the vendee, and he acquiesces in the statements, or asserts no rights where he ought to speak; and (3) where the evidence establishes a continuing conspiracy to defraud between the vendor and vendee.

It is insisted that, under the last exception, the testimony ought to have been admitted. It is also well recognized in the decisions that a prima facie case to defraud must first be established, outside of and independent of the said declarations, before the latter are admissible in evidence. It would be a dangerous practice to allow the testimony and attempt to limit its consideration by the jury, only in the event they found a prima facie case had first been established. Otherwise, the jury might find the conspiracy from the declarations alone. Under the facts in the record, we do not believe there was error in excluding said declarations. *Winchester Partridge Co. v. Creary*, 116 U. S. 166, 6 Sup. Ct. 369, 29 L. Ed. 591.

If Pickens owed Brandt a debt, he had the right to prefer him; and it would not invalidate his transfer of the rent to show

that he intended to defeat Moore in the collection of his judgment, provided he transferred no more property than was reasonably sufficient to pay his debt to Brandt. Nor would the insolvency of Pickens affect Brandt's title to the property transferred. *La Belle v. Tidball*, 69 Tex. 165, 6 S. W. 672. If Brandt's testimony was true, the assignment of the rent was for \$150, which paid the debt of Pickens to him, and the fact that the rent proved to be worth \$200 would constitute no ground for attacking his title to same, under the facts found in the record. Besides, appellant, on the stand as a witness in his own behalf, expressly stated that he did not attack the transfer, if there was one, on the ground that more property was conveyed than the alleged debt. This disposes of appellant's fifth assignment.

For the errors pointed out, the judgment is reversed and the cause remanded.

Reversed and remanded.

FORD v. BROWN.*

(Court of Civil Appeals of Texas. July 1, 1903.)

PUBLIC LANDS—ACTUAL SETTLEMENT—RIGHT TO QUESTION—PURCHASE—PREMATURE APPLICATION.

1. Plaintiff, in trespass to try title to land which defendant made application to purchase as additional land to his home section, is not precluded from questioning defendant's actual settlement on the home section at the time of the application, either by the original acceptance of the application, or by proof of occupancy before the land commissioner, after commencement of the action, and issuance of his certificate.

2. An application by an actual settler to purchase school land, though premature and rejected, because made before the appraisalment of the land was filed in the office of the county clerk, gives him a title against one who filed an application to purchase it as additional land to his home section, invalid because he was not an actual settler on his home land.

Appeal from District Court, Concho County; John W. Goodwin, Judge.

Trespass to try title by W. T. Brown against Henry Ford. Judgment for plaintiff. Defendant appeals. Affirmed.

John I. Guion, W. A. Wright, G. H. Garland, and J. W. Hill, for appellant. Jenkins & McCartney, for appellee.

STREETMAN, J. On a former day of this term we certified certain questions of law arising in this case to the Supreme Court. *Ford v. Brown*, 7 Tex. Ct. Rep. 522, 74 S. W. 535. The opinion of the Supreme Court is referred to for the facts there found by us. From the facts there stated it appears that on August 23, 1897, at 12:05 o'clock p. m., appellee, Brown, being an actual settler thereon, filed his application in proper form in the general land office, to purchase section 204, state school land, in Concho county, located under a certificate

to Beatty, Seale & Forwood. This application, however, under the decision of the Supreme Court, was premature, being made 40 minutes before the appraisalment of said section was filed in the office of the county clerk of Concho county. On the same day, at 4:29 p. m., after the land was on the market, appellant, Ford, filed his application to purchase said section 204, as additional land to his home section, which was section No. 2, H., T. & B. R. R. Co. lands. Ford, however, as found by the judgment, did not make his first payment on the land in controversy until November 2, 1897. Ford's application to purchase his home section was filed August 21, 1897, and was in compliance with law, except as to his settlement thereon and first payment, hereinafter mentioned.

The second question certified was as follows: "If said land was not subject to sale until said clerk had been so notified, could appellee acquire any interest or title in said land by virtue of his application, filed in the general land office, 40 minutes before such notice was received by the county clerk of Concho county; said application having afterwards been rejected by the commissioner of the land office?" Appellee, Brown, who filed the premature application, being the plaintiff in the case, and bound to recover, if at all, upon the strength of his own title, it did not occur to us that the validity of his application would be dependent upon facts which subsequently transpired with reference to the application of appellant, Ford. Being under this impression, we failed to include in our certificate a fact which now appears to be of vital importance.

The jury, in response to a special issue, found that appellant, Ford, was not an actual settler on his home section at the time he applied to purchase it. Appellant complains of this finding as against the evidence; but, after a careful examination of the statement of facts, we conclude that the evidence is sufficient to sustain the finding of the jury upon this issue. From this it follows, in our opinion, that the application of appellant to purchase the section in controversy was invalid. In reaching this conclusion, we have not failed to consider the fact that after the institution of this suit, appellant, in accordance with Rev. St. 1895, art. 4218j, made proof of his three years' occupancy of his home section, and obtained the certificate of the land commissioner, which was introduced in evidence. We do not think that the question of actual settlement upon the home section would be concluded, either by the original acceptance of the application to purchase, or by the proof of occupancy before the land commissioner, and the issuance of his certificate after this had become a material issue pending in this suit. *Franklin v. Kirlin* (Tex. Civ. App.) 74 S. W. 592; *May v. Hollingsworth* (Tex. Civ. App.) 74 S. W. 592; *Lamkin v. Mastler* (Tex. Civ. App.) 73 S. W. 970.

*Writ of error pending in Supreme Court.

While we did not, in our certificate, allude to any defect in the application of appellant, Ford, yet the Supreme Court, in answering the question, indicate the importance and the effect of this fact. They answer: "*As against one who applied to purchase the land after the notice had been received by the clerk, the appellee did not acquire any right or title in the land by his application which was prematurely made.*" (Italics are ours.) It may be true that the Supreme Court has not committed itself to the converse of this proposition; that is, that in the absence of a valid application, made after the land was on the market, appellee would acquire title by his rejected premature application, which he could enforce as plaintiff in an action of trespass to try title. The establishment of this rule gives rise to some interesting speculations, as illustrated by the facts of this case.

There is no evidence in the record, aside from the continued occupancy of appellee, and the fact that the application and obligation and money were not withdrawn, to indicate a renewal of the application by appellee, or an insistence on it after the land came onto the market; and, if these facts are sufficient to show that appellee was insisting upon his application, would they not become operative so instantly when the land came on the market, so as to preclude any subsequent applicant from acquiring title? If not, what time must elapse before they would be given that effect? We can conceive that facts might possibly arise which would be tantamount to a renewal of the premature application, without actually refileing it after the land came on the market; but we do not think that we have such facts in this record. Again, as we have stated, the first payment was not made by appellant on the land in controversy until November 2, 1897; appellee's application having been filed August 23, 1897. Suppose appellant had been an actual settler, but had failed to make his payment as stated, appellee would then have had a title which he could have maintained until November 2d; but could he have maintained it after that time? If not, how long will the title under a premature rejected application be held in suspense to await the filing of a valid application after the land is placed on the market? These and other difficulties suggest themselves to the writer as likely to arise in applying the doctrine which makes the validity of a premature application dependent upon the filing of a valid application after the land is on the market. We do not deem it necessary or proper to express any opinion, but simply suggest them as being possibly helpful in the final determination of the case.

Appellee has filed a motion requesting us to find the additional facts above stated with reference to the time of first payment by appellant on the land in controversy, and with reference to appellant's settlement on his home section, and to certify additional

questions to the Supreme Court predicated on said findings. We have found the facts as requested, but we regard the intimation of the Supreme Court upon the question discussed as so strong, under the circumstances, that we are constrained to follow it in the disposition of the case, and overrule the motion to certify. We are impelled to this action upon the motion, not so much because we are free from doubt on the questions discussed, as because the decision of the case is such as to give the Supreme Court jurisdiction upon application for writ of error, and this course will probably effect a speedier disposition of the suit than to grant the motion to certify.

We have carefully examined the remaining assignments of error, and some of them are in effect disposed of in our findings of fact stated herein and in the certificate above referred to. We find no error in the judgment, and it is accordingly affirmed.

Affirmed.

WREN et al. v. HOWLAND et al.
(Court of Civil Appeals of Texas. June 17, 1903.)

TRESPASS TO TRY TITLE—EVIDENCE—PEIN-GREE—DEEDS—RECORDS—DESCRIPTION—POWER OF ATTORNEY—UNAUTHORIZED RECORD—LAND OFFICE—ARCHIVES.

1. Where defendants in trespass to try title went into possession and continued in such possession during the coverture of the owner of the land, limitations did not begin to run in favor of defendants until termination of the coverture.

2. A curatrix, acting under authority of a probate court of Louisiana, could not make a valid conveyance of land belonging to the ward and situated in Texas.

3. Under Act May 12, 1846, p. 237 (Hart. Dig. art. 2791), providing that the proof of any instrument of writing, for the purpose of being recorded, shall be by the subscribing witnesses appearing before some authorized officer and stating that they saw the grantor subscribe the same, or that the grantor acknowledged in their presence that he subscribed the same, and that they signed as witnesses at the request of the grantor, and that the officer taking such proof shall make his certificate under his official seal, it is not necessary that the officer's certificate should state that the subscribing witnesses were known to him.

4. Where the execution and delivery of a deed were established by evidence not objected to, the alleged erroneous admission of a certificate of acknowledgment was harmless.

5. Where objection is made to the introduction of a statement in a deed as a whole, such objection is not sufficient to raise the question of the admissibility of a specific part of the statement, and it was not error to admit the entire statement, if any part thereof was proper evidence.

6. In trespass to try title, where it was in issue whether plaintiff's remote grantor was the son of the original patentee of the land, a deed wherein such remote grantor stated that he was the son of the original patentee, and the only heir, with the exception of his mother, was properly admitted.

7. In trespass to try title, a void deed under which defendants claim may be put in evidence by plaintiff to show common source of title.

* 1. See Limitation of Actions, vol. 23, Cent. Dig. § 402.

8. In trespass to try title, defendants could not be regarded as innocent purchasers of the land in controversy, where one deed forming a part of their chain of title was absolutely void.

9. In trespass to try title, certified copies of the record in proceedings in a foreign state, over which the court in which the proceedings were had had no jurisdiction, were not admissible in evidence.

10. Where certified copies of the record in a proceeding in a foreign state were not admissible in evidence, because the court in which such proceedings were had was without jurisdiction, partial contents of such copies were not admissible to prove statements therein contained.

11. Under the express provisions of Rev. St. 1895, art. 2806, certified copies of the record of proceedings in courts of this state, made under a seal of the custodian of such record, are admissible in evidence.

12. In trespass to try title, in which defendants denied that plaintiff's remote grantor was the son of the original patentee of the land, the pleadings in a suit for divorce by the wife of such original patentee, in which she prayed for the custody of a minor child, who was afterward plaintiff's remote grantor, were admissible in evidence.

13. In trespass to try title, where plaintiff claimed under a deed from a married woman, her testimony that her husband always recognized the land as her separate property, and that, at the time the land was conveyed to her, her husband, herself, and the grantor understood that the title was to vest in her as her individual property, was admissible to prove that the land was her separate property, and that she therefore had the right to convey.

14. A power of attorney with reference to the sale of land is not entitled to record in a county in which none of the land is situated.

15. Where a power of attorney with reference to the sale of lands was recorded in a county in which none of the land was situated, a copy of the record filed in the land office did not become an archive of that office.

16. In trespass to try title, in which it was in issue whether plaintiff's remote grantor was the son of the original patentee of the land, evidence that the wife of the original patentee on one occasion went to see the grave of this remote grantor, saying that it was that of her son, etc., was admissible as tending to show that plaintiff's remote grantor was the son of the wife of the original patentee.

17. This evidence was also admissible as showing that plaintiff's remote grantor was dead, as a predicate for the introduction of a deed containing a declaration by him that he was the son of the original patentee.

18. In trespass to try title, where it was in issue whether plaintiff's remote grantor was the son of the original patentee of the land, the Family Bible of plaintiff's remote grantor, identified by his son, was admissible to show that such remote grantor was the son of the original patentee.

19. In trespass to try title, in which it was in issue whether plaintiff's remote grantor was the son of the original patentee, in which a witness had testified for defendant that a person of the same surname as plaintiff's remote grantor, but of a different given name from the original patentee, was the husband of the woman who was admitted to be the mother of plaintiff's remote grantor, testimony by witnesses who knew this witness, to show that his mental capacity and faculties of recollection were much impaired, was admissible.

20. In trespass to try title, where it was in issue whether plaintiff's remote grantor was the son and heir of the original patentee, evidence of declarations made by a woman who was admitted to be the mother of plaintiff's remote grantor as to his pedigree and her relationship with the original patentee, made long prior to

any controversy about the ownership of the land, was admissible.

21. Where the record on appeal does not contain any requested instruction in writing, signed by the appellants or their attorneys, no error in refusal to give charges requested by appellants is shown.

22. An assignment of error embracing more than one distinct question will not be considered on appeal.

Appeal from District Court, Caldwell County; L. W. Moore, Judge.

Action by Amelia M. Howland and husband against James A. Wren and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

A. B. Storey, Jas. L. Storey, S. B. McBride, and Walton & Walton, for appellants. Will G. Barber and E. B. Coopwood, for appellees.

FISHER, C. J. This is an action of trespass to try title, and was originally brought by Amelia M. Howland and her husband, James A. Howland, to recover an undivided one-half interest in a league and labor of land situated in Hays county, patented to the heirs of David Wilson. In 1896 Mrs. Howland died, when her husband, Thomas A. Howland, and her son, Henry Howland, made themselves parties plaintiff, and sought to recover as the heirs of Mrs. Amelia Howland. The defendants, who were James A., John, and Mack Wren, O. G. Parke, S. M. Heard, and B. F. Herndon, for answer filed certain demurrers, pleaded not guilty, and pleaded the statutes of limitations of three, five, and ten years, and improvements in good faith. In reply to the pleas of limitation, the plaintiffs pleaded the coverture of Mrs. Amelia M. Howland from 1853 to the time of her death in 1896. The questions arising on the evidence and pleadings in the trial court were submitted to the jury by special issues, and, upon the answers returned by the verdict of the jury in response to the special issues submitted, the trial court rendered judgment in favor of plaintiffs for the land sued for, and rendered judgment adjusting the value of improvements erected by the defendants and the rents due plaintiffs from the defendants.

There are no assignments of errors by any of the defendants, who are appealing from the judgment of the trial court, complaining of so much of the judgment as relates to the subject of improvements and rents. Appellants in their brief make this statement: "There are four main issues in the case: (1) As to the heirship of plaintiffs' remote vendor, James M. Wilson, as the heir of David Wilson, the grantee of the land; (2) whether the land in controversy was the separate property of Amelia M. Howland, the plaintiff, under coverture when the suit was brought, who died pending the litigation; (3) whether defendants were purchasers of the land bona fide, for value, and without notice in the meaning of the law; (4) as to whether defendants have acquired the land sued for

by the statutes of limitations of five years, under all the facts. And, incidentally, the subject of valuable improvements in good faith was involved." This statement of the issues involved is substantially correct, and is apparently acquiesced in by the appellees, in that it is not denied or controverted in their brief. As said before, we do not find where any objection is raised to that portion of the judgment of the trial court that relates to the subject of improvements in good faith.

We find the facts material to the disposition of this case to be as stated in the following condensation of the many facts established by the special verdict of the jury, and some additional facts, as shown by the evidence in the record:

The league and labor of land, a part of which is in controversy, and which is situated in Hays county, Tex., was granted to the heirs of David Wilson by patent of date July 3, 1847. This patent is based upon a land certificate issued to David Wilson by the board of land commissioners of Harrisburg county, Tex., on February 2, 1838, for one league and labor of land. The certificate recites that on the day of its date David Wilson appeared in person before said land board, and proved according to law that he had arrived in the Republic of Texas in the year 1835, and that he was a married man. On October 9, 1830, in Indiana, David Wilson, the grantee mentioned in the two above instruments, married Ophelia P. Morrell. About 1831 or 1832, there was born of this marriage a male child that was subsequently named James M.; and the evidence authorizes the conclusion that this was the only child born of that marriage. David Wilson, the grantee, is shown to be dead, and the evidence warrants the conclusion that he died at some period of time between the years 1841 and 1847; and upon his death the land descended, one-half to his son James M. Wilson, and one-half to his wife, Mrs. Ophelia P. Wilson, as her community interest. It is the interest of James M. Wilson only which is in controversy in this suit. May 30, 1854, James M. Wilson by deed conveyed his undivided one-half interest in the land in controversy to Abram M. Gentry. This deed was recorded in 1854. December 16, 1858, by a deed duly executed and delivered, Abram M. Gentry conveyed the land in controversy to Amelia M. Howland, which deed was duly recorded November 12, 1860. At the time this deed was executed it was the purpose and intention of Gentry, Amelia M. Howland, and her husband, Thomas A. Howland, that the land therein conveyed should become and be the separate property of the grantee, Amelia M. Howland; and we find as a fact that the evidence shows that the land in controversy became the separate property of Amelia M. Howland by virtue of this conveyance, and continued to be her separate property from

that time to her death, which occurred in 1896, and that during all that time she was under coverture as the wife of Thomas A. Howland, to whom she was married in 1853, and that the defendants went into possession and continued in possession during such coverture. Therefore we find that the right and title asserted by the plaintiffs was not, up to the time of filing this suit, affected by the statutes of limitation which were pleaded by the defendants. September 11, 1896, Thomas A. Howland executed and delivered to Henry A. Howland a deed conveying an undivided one-half interest in the league and labor of land in question, and all claim of the former against all persons for the use and occupation thereof, as alleged by the plaintiffs in their petition.

The several defendants herein deraign their title or claim of title to the land in controversy through a deed executed by Ophelia P. Talbot, which attempts to convey her interest in the David Wilson league, and the interest of her minor son, James Wilson. This latter interest is the same interest conveyed by James Wilson in the deed to Abram M. Gentry. The deed here mentioned was executed by Ophelia P. Talbot to Francis Brichta, dated March 31, 1852, and recorded in 1852. The effect of this conveyance is to establish the fact that the defendants and the plaintiffs claim under James Wilson as common source of title. The James Wilson here mentioned is the same James M. Wilson, the son of David Wilson, the original grantee of the land in question, and of his wife, Ophelia P. Wilson. The grantor in this deed, Ophelia P. Talbot, was formerly Ophelia P. Wilson; and there is some evidence in the record tending to show that after the death of her former husband, David Wilson, she married a man by the name of Talbot. In 1852, Francis Brichta conveyed the land in controversy to D. C. Osborn, which conveyance was recorded in 1852. All of the defendants, except Mack Wren, bought their respective interests in the land in question in good faith under the above two last-mentioned deeds, and they have had actual possession of the land, using, cultivating, and enjoying the same, and paying taxes thereon, under deeds duly executed and registered, for more than five years prior to July 31, 1893; and according to the findings of the verdict of the jury the defendants claim the land in controversy by a consecutive chain of title, from and under the deed heretofore stated as executed by Ophelia P. Talbot and her husband, wherein she attempts, as curatrix for her minor son, James Wilson, to convey the land in controversy to Brichta. We find that this deed was simply admitted by the court for the purpose of establishing common source of title in James M. Wilson. Other than for the purpose of serving as a basis of common source of title, we find that this deed was not sufficient to convey the title and interest of James M. Wilson in the land

in controversy, for the reason that he was not a party to the conveyance, but it was executed by his mother, Ophelia Talbot, as curatrix, acting under authority and by virtue of orders of a probate court of the state of Louisiana; that court having no jurisdiction over lands situated here in Texas.

There being no question raised on the issue of improvements in good faith, or the subject of rents, it is unnecessary to make any findings of fact upon these questions.

Appellants' first assignment of error complains of the admission in evidence of the deed executed by A. M. Gentry to Mrs. Amelia M. Howland, for the following reasons: (1) Because the officer taking the acknowledgment does not state in his certificate that the officiating witness, Louis B. Reed, was known to him; (2) because the subscribing witness did not state under oath that he saw the grantor subscribe the same, and did not swear that the grantor acknowledged in his presence that he had subscribed and executed the deed for the purposes and consideration therein stated; and (3) that the officer who took the acknowledgment had no authority to take acknowledgments of deeds to land located in Texas.

The acknowledgment is as follows:

"State of New York, City and County of New York. I, Gordon L. Ford, a commissioner in said state, appointed by the Governor of the state of Texas to take and administer oaths and affirmations, and to take the acknowledgment and proof of deeds to be used and recorded in said state of Texas, do hereby certify that this day Louis B. Reed, Jr., personally appeared before me, and, being duly sworn, saith that Abram M. Gentry, whose signature appears to the annexed instrument of writing, acknowledged same to be his act and deed, for the considerations and purposes therein expressed, and that he, with John Sessions, the other witness, subscribed their names as witnesses thereto at the request of the same Abram M. Gentry.

"In testimony whereof, I hereunto set my hand and official seal, this 17th day of December, 1858.

"[Signed] Gordon L. Ford,

"Commissioner for Texas in and for the State of New York."

The eighth section of the act of May 12, 1846 (Laws 1846, p. 237; Hart. Dig. art. 2791), under which this acknowledgment is taken, reads as follows: "That the proof of any instrument of writing, for the purpose of being recorded, shall be by one or more of the subscribing witnesses personally appearing before some officer authorized to take such proof, and stating on oath that he or they saw the grantor or person who executed such instrument, subscribe the same, or that the grantor or person who executed such instrument of writing acknowledged in his or their presence that he had subscribed and executed the same for the purposes and consideration therein stated, and that he or they had sign-

ed the same as witnesses, at the request of the grantor or person who executed such instrument, and the officer taking such proof shall make his certificate thereon, sign and seal the same with his official seal." The effect of the certificate is to state that the grantor, Gentry, acknowledged and admitted to the subscribing and officiating witness, Louis B. Reed, that he (the grantor) had subscribed and executed the deed for the purposes and consideration therein stated. This brings it within the terms of the statute as quoted. It was not required by the act in question that the certificate should state that the subscribing witness was known to the officer taking the acknowledgment. *Sowers v. Peterson*, 59 Tex. 216; *Watkins v. Hall*, 57 Tex. 1; *Cook v. Cook* (Tex. Civ. App.) 23 S. W. 927.

In the last objection it is contended that there was no law authorizing a commissioner of deeds to take the acknowledgment of conveyances to land situated in Texas. The contention is that the act of May 8, 1846 (Laws 1846, p. 187) conferring such authority, was repealed by a subsequent law passed during the same month at the same session of the Legislature. This question was discussed by the court in *Monroe v. Arledge*, 23 Tex. 481, and the point was ruled contrary to the contention of appellants. But, however, if this certificate could be held defective, it would not constitute reversible error, because the execution and delivery of the deed was established by other evidence, found in the record, which was not objected to.

The deed from James M. Wilson to A. M. Gentry contained this recital: "I declare that I am the son of David Wilson, deceased, and, except my mother, Ophelia P. Wilson (or Talbot), I am the only heir." The defendants objected to this recitation, because they were strangers to the deed, and that it was not admissible to prove the material issue in the case, whether James M. Wilson was the son of David Wilson, the grantee of the land in controversy, and insisted that the jury be instructed to disregard the recitation. James M. Wilson had been dead many years at the time of the trial of this case, and it was a disputed question in the court below whether he was the son of David Wilson, the grantee. The appellants contended, and offered much evidence to the effect, that his father's name was James Wilson, and not David Wilson, the grantee of the land in controversy. At the time this deed was executed, the controversy suggested in this case had not arisen. The statement, "I am the only heir," might not be admissible; but the objection was not urged to that, but embraced the entire statement. The court was asked to exclude all of the statement, and not a part of it. This being the case, if a part was admissible, it was the duty of the court to admit it, and to either control (if asked, which was not done), the objectionable portion by a charge, or exclude

it. The portion of the statement to the effect, "I declare that I am the son of David Wilson, deceased," and that his mother was Ophelia P. Wilson (or Talbot), was admissible. A declaration or statement contained in an instrument executed by one who has since deceased is admissible on the subject of his pedigree. *Summerhill v. Darrow*, 94 Tex. 71, 57 S. W. 942; *Chamblee v. Tarbox*, 27 Tex. 145, 84 Am. Dec. 614. In the latter case it is said: "Recitals in deeds are ordinarily said to be evidence only against parties and privies; but when the recital is of a matter of pedigree, which includes the facts of birth, marriage, and death, it may be used as original evidence, even against strangers."

It is contended by appellants, in their third assignment of error, that the trial court erred in admitting the deed of date March 31, 1852, executed by Ophelia Talbot and her husband, to Brichta, in order to establish common source of title in James Wilson. They urge the fact that, this deed being void, common source of title could not be established by such a conveyance. In *Burns v. Goff*, 79 Tex. 236, 14 S. W. 1009, it is in effect held that a void deed, under which the defendants claim, may be offered as evidence establishing common source of title.

Appellants' fourth assignment of error complains of the refusal of the court to admit in evidence the deed above referred to, when offered by defendants as evidence of title. As before stated, the court admitted this deed, when offered by the plaintiffs, for the purpose of establishing common source of title, but declined to recognize its validity as establishing title in the defendants, and refused to admit it for that purpose. The plaintiffs objected to the deed, because the certificate of acknowledgment of Mrs. Talbot was not sufficient under the statute that related to the subject of conveyance of property by married women, and for the further reason that the probate court of Louisiana had no authority or jurisdiction over the estate or the lands of the minor, James M. Wilson, situated in Texas. It appears from the face of the deed that, so far as the minor is concerned, Mrs. Talbot attempts to act as curatrix by virtue of authority of the Louisiana court. We are of the opinion that both of these objections are sound. The acknowledgment was not in accordance with the terms of the statute. There was no authority shown in Mrs. Talbot to convey the interest of James M. Wilson. *Mills v. Herndon*, 60 Tex. 353; *Moseby v. Burrow*, 52 Tex. 404.

And in this connection it may be well to dispose of the contention of the appellants to the effect that the evidence tends to show that they were innocent purchasers of the land in controversy. The deed just discussed would be an essential link in the chain of their title to connect them with the sovereignty of the soil; and, this deed being eliminated on the ground that it is void, of course,

there is no foundation for the claim that they occupy the attitude of innocent purchasers.

The defendants offered in evidence certified copies under the act of Congress of proceedings of the probate court of Louisiana, for the purpose of showing statements of Mrs. Ophelia Talbot, contained in these instruments, to the effect that James M. Wilson was the son of her husband, James Wilson. These statements appear in some of the proceedings and court papers filed in the Louisiana court concerning the guardianship of James M. Wilson. A copy of one of these papers, which appeared to be an inventory of the estate of James M. Wilson, is signed by Mrs. Ophelia Talbot. The others are not signed by her, but they were all offered as copies under the act of Congress, which authorized the admission in evidence of the records and judicial proceedings of other states. The purpose of this evidence was to establish the fact that Mrs. Ophelia Talbot, formerly Mrs. Ophelia Wilson, the mother of James M. Wilson, admitted that her former husband's name was James, and not David. Mrs. Wilson (or Talbot) died several years prior to the trial. The records offered were a part of a supposed judicial proceeding; and we are of the opinion that, if the court in which these proceedings were created did not have jurisdiction, they would not be admissible. The full faith and credit, exacted by the act of Congress, that should be given to the judicial proceedings of a sister state, applies only to those of a court exercising jurisdiction, and would not extend to a recognition of one that had no jurisdiction over the subject-matter with which it is attempting to deal. *Norwood v. Cobb*, 24 Tex. 556; *Easley v. McClinton*, 33 Tex. 288; *League v. Henecke* (Tex. Civ. App.) 26 S. W. 729; *Lindley v. O'Reilly*, 50 N. J. Law, 636, 15 Atl. 379, 1 L. R. A. 79, 7 Am. St. Rep. 802. At the time these proceedings occurred, James M. Wilson, the minor, was a young man recently captured as a member of the Lopez Expedition to Cuba, and was from there sent and confined in one of the prisons of Spain.

It is apparent, from the face of these proceedings, in which the Louisiana court appointed Mrs. Talbot curatrix of the minor, James M. Wilson, that the only purpose and object was to sell and dispose of the interest of James M. Wilson in the lands situated and located in Texas, which is the land in controversy, a part of the David Wilson league and labor; and that court could not, for any purpose, exercise its probate jurisdiction over lands situated here in Texas. *Moseby v. Burrow*, 52 Tex. 404. There was no attempt to prove these documents, except in the way just stated. If the documents could not be admitted in evidence, by reason of the fact that the court from which they are taken did not have jurisdiction, partial contents of them would not be admissible for the purpose of proving statements therein contained.

where the only manner of proof consists in certified copies under the law permitting judicial proceedings occurring in other states to be admitted in evidence.

For the purpose of tending to prove that Ophelia Wilson was the wife of David Wilson, the grantee of the land in controversy, and that James Wilson was his son, the plaintiffs offered in evidence, and the same was admitted by the court, a certified copy of a petition for divorce, from the district court of Harris county, Tex., of Ophelia P. Wilson against David Wilson, filed on the 27th of November, 1840, sworn to and signed by Ophelia Wilson; also a certified copy of a petition in the probate court of Harris county, filed on September 12, 1840, signed by Ophelia Wilson, for the guardianship of her minor son, James Wilson. To the introduction of this evidence the defendants objected, for the reasons that there was no evidence showing the identity of the person making the application, that the original papers were not produced, that there was no evidence that the applicant in person signed the papers, or authorized the signing thereof in her name or at her request. These documents were pleadings pending in the courts of this state, from which they came; and, by virtue of article 2306 of the Revised Statutes, certified copies, under the hand and seal of the custodian of such records, were admissible in evidence. It was the contention of the appellants in the trial court that Ophelia P. Wilson was not the wife of David Wilson, the grantee of the land in controversy, and that James Wilson, although her son, was not the son of this David Wilson. As stated before, Mrs. Ophelia Wilson died several years before the trial of this case, and at the time these pleadings were filed in the courts of Harris county the controversy as to the heirship of James Wilson, or the fact of Mrs. Wilson's being the wife of David Wilson, had not arisen. The recitals of these documents, which were executed by Mrs. Wilson, stating who was her husband at that time, and who was the father of James Wilson, were admissible.

The evidence complained of in appellants' eighth assignment of error was admissible as a fact and circumstance bearing on the question as to the ownership of the property in controversy after it was conveyed to Mrs. Howland. It was proper to admit her testimony to the effect that her husband always recognized that the land was her separate property, and that he never claimed any interest in it, and also as to what was the understanding between her and her husband and Gentry, at the time that the conveyance was executed and delivered to her, as to whom the property belonged. She testified that it was the understanding of herself, her husband, and Gentry that the title was to vest in her as her individual property. The deed to the property was taken in her name; but there were no recitals contained in the

face of the instrument that in express terms declared that the purpose and intention was that it should be her separate estate. This is not a case in which the creditors of Thomas A. Howland, the husband of Mrs. Howland, are seeking to subject the property to the payment of the husband's debts; nor is it a case in which any one is claiming under a conveyance from the husband in opposition to a right asserted by Mrs. Howland in her separate interest. The defendants are not connected with the Howland title. Where the deed to the wife is silent as to whom it is intended that the title to the property shall vest, an inquiry is permissible into the understanding, agreement, and intention of the husband and wife and vendor, in order to ascertain if the wife has a real separate interest in the property. The testimony objected to was not merely an opinion of the witness upon this subject, but was the statement of a fact which she seemed to be familiar with.

What has just been said also disposes of the question raised in the ninth assignment of error.

The appellants offered in evidence a certified copy from the records of Travis county of a power of attorney, executed by Mrs. Ophelia Henning and Albert Henning, on the 17th day of May, 1861, and recorded in Travis county on the 27th of January, 1862, and a certified copy of a copy of this power of attorney from the general land office, which contained the following statement: "Ophelia Henning, formerly Ophelia Wilson, the wife of David Wilson, deceased, joined by her husband, Albert Henning, only heirs at law of David Wilson, deceased, who lost his life in the Texas War of Independence at the Alamo, in the year 1836, constitute and appoint James Y. Eggleston and Matthew M. Young to demand from the government of the state of Texas any and all lands, patents, land certificates, land warrants, money, or pay due to the said Ophelia as only heir at law of the said David Wilson, deceased, for services in the Texas War of Independence as aforesaid, and to sell and convey one-half of said lands," etc., "due the said Ophelia Henning and Albert Henning." This was acknowledged and signed by Ophelia Henning and Albert Henning. It is here important to state that Mrs. Ophelia Talbot, who was formerly Ophelia Wilson, afterwards married Albert Henning; and the evidence in the record tends to identify this Ophelia Henning as the same person as Ophelia Wilson, the mother of James Wilson. The purpose of this evidence was to introduce the admission of Mrs. Wilson that she was the wife of a David Wilson who fell at the Alamo, and not the wife of the David Wilson the grantee of the land in controversy.

The objections which were sustained to the admission of this testimony were that it was not an archive of the land office, and that the paper from that office was a copy of

a copy (the latter was not produced), and that the original was not properly recorded in the records of Travis county, as none of the land in controversy, or that was called for in the power of attorney, was shown to be in Travis county. None of the land in controversy is situated in Travis county, nor does it appear from the evidence that any of the land or property called for in the power of attorney was ever situated or located in Travis county. To entitle the power of attorney to be recorded, it must be in a county where some of the land or property covered by it was situated. *French v. Groesbeck* (Tex. Civ. App.) 27 S. W. 43; *Broxson v. McDougal*, 63 Tex. 197; *Burck v. Taylor*, 152 U. S. 635, 14 Sup. Ct. 696, 38 L. Ed. 578. A copy of the unauthorized deed records of Travis county of the power of attorney filed in the land office would acquire no higher standing than the record from which it is taken; and, if the latter was unauthorized, the mere filing of a copy of it in the land office would not give to such copy so filed any validity. An unauthorized paper filed in the land office does not become an archive. *Rogers v. Pettus*, 80 Tex. 427, 15 S. W. 1093; *Patrick v. Nance*, 26 Tex. 299.

The old bill of sale, which is objected to by appellants' eleventh assignment of error, in connection with the testimony of Miss Alice Henning, the daughter of Mrs. Ophelia Henning (formerly Ophelia Talbot and Ophelia Wilson), was admissible on the issue of common source of title, which was sought to be established by the plaintiffs to be in James Wilson. It was proper to establish the fact that the mother of James, who pretended as curatrix to convey the property by deeds under which the defendants claim, was the Mrs. Talbot who was the mother of James Wilson. The evidence offered had some bearing upon this subject. If it was not admissible for this purpose, it was harmless, and would not be reversible error.

It is difficult to perceive the materiality of the evidence complained of in appellants' twelfth assignment of error; but its admission, in our opinion, was not harmful error.

The evidence complained of in appellants' thirteenth assignment of error was objected to on the ground that it was irrelevant, immaterial, and calculated to mislead the jury and prejudice the defendants. These objections were overruled, and the testimony admitted. The evidence is to the effect that in 1885 Mrs. Ophelia Wilson went to Texas, saying that she wanted to see her son James Wilson's grave before she died. She brought back with her a few leaves off the grave, which she wanted buried with her when she died. "In 1885, while on a visit to her grandchildren, and while going to Houston on her return, Mrs. Henning, formerly Mrs. Wilson, was thrown from the wagon and broke her arm. Receiving a telegram her daughter Alice and myself went to Houston from New Orleans and brought her home on her re-

covery." The objection was to the whole of the evidence. Some of it might not be admissible, but a part of it was properly admitted. Objections should have been urged to the objectionable portion, or a request should have been made that its effect be controlled by a charge; but this was not done. The objection went to the entire testimony. A part of it was admissible as tending to show that James Wilson was the son of Ophelia P. Wilson, who is identified by much of the evidence in the record as being the wife of David Wilson, the grantee; and it was also admissible as tending to establish that James Wilson was dead. It was material that the plaintiffs should establish the death of James Wilson as a predicate to the introduction of the declarations of James Wilson contained in his deed to Gentry that his father was David.

The plaintiffs offered in evidence, in connection with the testimony of Charles Wilson, the son of James M. Wilson, the entries in the Family Bible of James M. Wilson. These entries were objected to as irrelevant and immaterial, and not sufficiently proven, and calculated to mislead the jury and prejudice the defendants. Charles Wilson testified: He was the son of James M. Wilson. His grandmother was Ophelia Henning (or Wilson). "I have with me my father's Family Bible. The entries therein shown me are in the handwriting of my father. I do not remember to have seen him write, but have seen his writing, and my mother told me that it is his handwriting. There are some entries there in the handwriting of my mother, and yet some others which I do not recognize. This Bible has been in the family since I can first remember." The following entries were admitted: "James Morrell Wilson and Nancy Artemesia Wilson were married November 3, 1853. James Morrell Wilson was born February 9, 1832." Then follows other entries showing the birth of Mrs. Artemesia Wilson, and of the children of her and James Wilson. It was important to prove the date of the birth of James M. Wilson, which appears by this entry in the Family Bible to be February 9, 1832. This shows that he was born after the marriage of David and Ophelia Wilson. If the balance of the entries were immaterial, they were harmless.

We do not think there was any error in admitting the photograph of James M. Wilson, which evidence is complained of in the fifteenth assignment of error. We agree with what the appellees say upon this subject on pages 37 and 38 of their brief.

We are of the opinion that the evidence of S. G. Selkirk, Mrs. S. G. Selkirk, H. L. Labatte, and J. A. Labatte, as complained of in appellants' sixteenth, seventeenth, and eighteenth assignments of error, was admissible. They stated facts bearing upon the question of the mental capacity or competency of the witness A. C. Smith, who had by deposition testified, favorably to the defend-

ants, to the effect that one James Wilson was the husband of Ophelia and the father of James M. Wilson. The testimony was not for the purpose of establishing the insanity of the witness Smith; but the evidence of these witnesses was to establish facts tending to show that the mental capacity and the faculty of recollection of the witness Smith was much impaired. This testimony came from witnesses who knew him and were well acquainted with his condition.

The court admitted in evidence, on behalf of the plaintiffs, the testimony of Mrs. Rayne and Miss Henning, to the effect that they had heard conversations between Mrs. Henning, who was formerly Mrs. Wilson, and Mr. Smith, in which they spoke of James Wilson being the son of Mrs. Henning, formerly Mrs. Wilson, and her husband, David Wilson. Miss Alice Henning testified, further, that they also spoke of David Wilson as the former husband of her mother, who was Mrs. Ophelia Henning, formerly Mrs. Ophelia Wilson, and that David Wilson was the father of James Wilson. What occurred in these conversations when Mrs. Henning, formerly Mrs. Wilson, was present, was admissible. The declarations made by her, or to which she assented, establishing the pedigree of James, or her relationship with David Wilson, were admissible as original testimony. As stated before, she had been dead many years, and these conversations occurred long prior to any controversy about the subject to which the testimony relates.

It is asserted in appellants' twentieth and twenty-second assignments of error that the court refused to give certain charges requested by appellants. It does appear in bills of exception that the defendants requested certain instructions; but the record does not contain any requested instruction in writing signed by the appellants or their attorneys. *Moore v. Brown* (Tex. Civ. App.) 64 S. W. 947; *Belcher v. Ry. Co.*, 92 Tex. 599, 50 S. W. 559. Therefore no error is shown in this respect.

There is no merit in appellants' twenty-first assignment of error. The special issues submitted by the court which are complained of in this assignment were proper questions to be submitted to the jury, or, at least, in view of the fact that the evidence clearly demonstrates that the land in question was the separate property of Mrs. Amelia Howland, the findings complained of would not be harmful; but we are of the opinion that the court had the right, if it saw fit to do so, to permit the jury to find the facts upon which they predicated the conclusion that the land was intended to be of the separate estate of Mrs. Howland. The findings of the jury as submitted in this assignment, and as complained of, had a tendency to find facts establishing this issue.

Our findings of fact in effect dispose of the twenty-third, twenty-fifth, and twenty-sixth assignments of error. Further than this state-

ment, we do not feel called upon to pass on the questions presented in the twenty-third assignment of error, as we do not think that that assignment is in accord with the rules. It embraces more than one separate and distinct question. *Cammack v. Rogers* (recently decided by this court) 74 S. W. 945.

The so-called two fundamental errors urged in appellants' brief do not go to the merits of the plaintiffs' title or the judgment of the court. We find no error in the record, and the judgment is affirmed.

Affirmed.

SUPREME COUNCIL, AMERICAN LEGION OF HONOR, v. STOREY et al.

(Court of Civil Appeals of Texas. May 27, 1903.)

BENEFICIAL ASSOCIATION—BY-LAWS—CONSTRUCTION—PART PAYMENT OF CERTIFICATE—RELEASE—CONSIDERATION—PLEADING AND PROOF—DAMAGES AND ATTORNEY'S FEES.

1. Findings of fact, not complained of by assignments of error as unsupported by evidence, will be considered, on appeal, as correct.

2. The words "face value," in a by-law of a beneficial association, providing that \$2,000 shall be the highest amount paid on a benefit certificate, provided that the amount paid shall not exceed the amount of a full assessment on each of the members, and provided "that the face value of the benefit certificate shall be paid, so long as the emergency fund * * * has not been exhausted," means the amount stated in the body of the certificate, so that, the emergency fund not being exhausted at the death of a member whose certificate, issued before passage of the by-law, provided for payment of \$5,000, all of it is payable.

3. A receipt or release in full, given on payment by a beneficial association of \$2,000 of the \$5,000 which a certificate provided should be paid, is without consideration as to the \$3,000; liability for the \$2,000 not being denied, but conceded.

4. Defendant, in an action against a beneficial association on a certificate, may not prove a by-law, passed after issuance of the certificate, changing the contract, to defeat recovery; not having pleaded it.

5. If not being shown that defendant fraternal beneficiary society is a fraternal beneficiary association, as defined by Act May 12, 1899 (Acts 1899, p. 195, c. 115) § 1, it is, like an insurance company, liable for 12 per cent. damages and attorney's fees; having failed to pay in full its certificate at maturity, and after demand, according to its liability.

Appeal from District Court, Milam County. J. C. Scott, Judge.

Action by James F. Storey and another against the Supreme Council, American Legion of Honor. Judgment for plaintiffs. Defendant appeals. Affirmed.

John L. Terrell and Monta J. Moore, for appellant. Hefley, McBride & Watson, for appellees.

KEY, J. This is a suit to recover \$3,000, a balance claimed by the plaintiffs upon a benefit certificate issued by the defendant, and for 12 per cent. damages and reasonable

¶ 5. See Insurance, vol. 23, Cent. Dig. §§ 1932, 1990.

attorney's fee, as prescribed by statute. From a judgment in favor of the plaintiffs the defendant has appealed.

The trial court filed the following conclusions of fact:

"(1) The defendant, the Supreme Council, American Legion of Honor, is a corporation incorporated under the laws of the state of Massachusetts. It is, and has been continuously since the year 1879, a life insurance company, issuing life insurance policies upon the lives of persons, being a fraternal beneficiary society. In this connection, see conclusion of fact No. 18, filed separately.

"(2) That the defendant has, and has had since the year 1879, a subsidiary branch at Cameron, Tex., known as 'Hercules Council, No. 265.' On October 19, 1880, D. M. Storey made written application for membership in said Hercules Council, No. 265, and was accepted and became a member. In her application, which was on a form furnished her for the purpose, was the language:

"I agree to make punctual payment of all dues and assessments for which I may become liable, and to conform in all respects to the laws, rules, and usages of the order, now in force or which may hereafter be adopted by the same."

"On March 30, 1881, the defendant issued and delivered to the said D. M. Storey its policy of insurance, or benefit certificate, No. 16,366, for like amount and in all respects exactly like the one now sued upon, except that the beneficiaries in same were William Storey, husband, and Lou Atkinson, Cella, Frank, and Andrew Storey, children of the said D. M. Storey; the said Frank and Andrew Storey being the plaintiffs James F. and William A. Storey, respectively. On March 20, 1891, the defendant issued to the said D. M. Storey, in lieu of said benefit certificate No. 16,366, another benefit certificate or policy of insurance, for like amount and in all respects exactly like the one now sued upon, the beneficiaries therein being the present plaintiffs. On March 6, 1897, the defendant, in lieu of said certificate of date March 20, 1891, issued to said D. M. Storey the benefit certificate or policy of insurance No. 195,265, now sued upon, and which is in substance as follows:

"No. 195,265. \$5,000.00. Benefit Certificate Issued by Supreme Council, American Legion of Honor. This is to certify that D. M. Storey is a companion of the American Legion of Honor--said companion having made application for membership to Hercules Council, No. 265, A. L. of H., instituted and located at Cameron, in the state of Texas, and passed the requisite medical examination, and has been duly initiated into said council; and this certificate is issued to said companion as an evidence of the facts in it contained, and as a statement of the contract existing between said companion and the Supreme Council, American Legion of Honor. In consideration of the full compliance with

all the by-laws of the Supreme Council, A. L. of H., now existing or hereafter adopted, and the conditions herein contained, the Supreme Council, A. L. of H., hereby agrees to pay Jas. F. Storey and Wm. A. Storey, children, one-half each of five thousand dollars, upon satisfactory proof of the death while in good standing upon the books of the Supreme Council of the companion herein named, and a full receipt and surrender of this certificate, subject, however, to the conditions, restrictions, and limitations following:

"First. That all statements made by the companion in application for membership, and all answers to the questions contained in the medical examination, are in all respects true, and shall be deemed and taken to be express warranties.

"Second. That said companion shall have paid all assessments called within the time and in the manner required by the by-laws of the Supreme Council, in force at the time of the issuance of this certificate, or as the same may be hereafter amended.

"Third. That, in case the companion shall die by his own hand within three years after admission to membership, whether sane or insane, this certificate shall be void, and no liability shall exist thereon, and, if his death shall be by his own hand after three years, recovery shall only be had for such fractional part of this certificate as the number of years the companion has been a member of the order bears to the whole number of years he would have been, had he lived to be 70 years of age, plus 50 per centum of the unpaid balance. If death shall occur, either as the immediate or consequent cause of the excessive use of spirituous liquors, the same fractional rule shall apply.

"Fourth. That this benefit certificate is issued by the Supreme Council, and accepted by the companion herein named for himself and his beneficiary, upon the express agreement and condition that, in case of any false or fraudulent statement or misrepresentation, or violation of any of the covenants herein contained, the same shall be void.

"In witness whereof, the Supreme Council, American Legion of Honor, has hereunto affixed its corporate seal, and caused this certificate to be signed by its Supreme Commander, and attested by its Supreme Secretary, at Boston, Massachusetts, this the 6th day of March, A. D. 1897."

"Said certificate is signed by the Supreme Commander and the Supreme Secretary of the defendant, and has the seal of the defendant affixed.

"(3) James F. Storey and William A. Storey, named as beneficiaries in said benefit certificate, are the plaintiffs in this suit.

"(4) The said D. M. Storey died on December 6, 1901, and on May 8, 1902, the plaintiffs made out and furnished to the defendant, in accordance with the rules of the defendant, satisfactory evidence of the death of

the said D. M. Storey. The said D. M. Storey, up to and at the time of her death, was in good standing with the defendant order. The certificate or policy sued upon, and which is numbered 195,265, was never surrendered by the said D. M. Storey, and another policy or certificate issued in lieu of it.

"(5) The Supreme Council of the defendant met in the state of New Jersey on August 21 and 22 of the year 1900, and passed the following by-law:

"(55) Two thousand dollars shall be the highest amount paid by the order on the death of a member upon any benefit certificate heretofore or hereafter issued. This sum shall be paid on the death of every member holding a benefit certificate of two thousand dollars or over, and one thousand dollars on the death of every member holding a benefit certificate for that amount, and five hundred dollars on the death of every member holding a benefit certificate for that amount: provided that, if at the death of said member one full assessment upon each of the members of the order will not amount to the full sum of two thousand dollars, then the amount to be paid to the beneficiaries of said deceased member shall not exceed the amount collected by said assessments, if said member's benefit certificate is for two thousand dollars; one-half of the amount if the benefit certificate is for one thousand dollars, and one-quarter of the amount if the benefit certificate is for \$500; and provided that the face value of the benefit certificate shall be paid, so long as the emergency fund of the order has not been exhausted; and provided that the said member shall at the time of the death be a member of the order in good standing, and shall have complied with all the laws, rules, and regulations of the order, as they now are, or as they may hereafter from time to time be altered or amended."

"Said by-law went into effect October 1, 1900.

"(6) Neither D. M. Storey nor either of the plaintiffs ever expressly or impliedly consented to the passage of by-law 55, and there is no evidence to indicate that either the said D. M. Storey or the plaintiffs, prior to the passage of said by-law, knew that the passage of same was contemplated. Shortly after the said by-law was passed, both of the plaintiffs learned of its passage; also the said D. M. Storey learned of the passage of the said by-law shortly after it had been passed.

"(7) Just prior to the time said by-law 55 went into effect the assessments levied by the defendant against the said D. M. Storey amounted at each assessment to \$4.80 for each \$1,000 of her \$5,000 policy; that is, \$24 for each assessment. After said by-law went into effect, the assessments levied by the defendant against the said D. M. Storey amounted at each assessment to \$4.80 for but \$2,000; that is, each assessment there-

after amounted to \$9.60. Such assessments, as so reduced, were paid to the defendant upon the certificate or policy of the said D. M. Storey, continuously thereafter up to her death as they became due. I find that continuously after the said D. M. Storey first became a member of the defendant order, up to the date of her death, all assessments which she was called upon to pay to the defendant, or for which she was liable, were punctually paid to the defendant. The assessments called for by the defendant against the said D. M. Storey, after October 1, 1900, up to and including the date of her death, were twenty-two (22) assessments, for \$9.60 each. I find that immediately after said by-law 55 was passed, and as soon as the said D. M. Storey and the plaintiffs learned of the passage of the same, James F. Storey, in behalf of himself and of his mother, D. M. Storey, and of his brother, William A. Storey, protested to the defendant against any attempt upon the part of the defendant to scale the amount to be paid upon the benefit certificate now sued upon to less than its face value, and insisted with the defendant that the said D. M. Storey, or the said James F. Storey in her behalf, be permitted to pay assessments in the amounts levied and required prior to the passage of said by-law 55, and prior to the time same went into effect, and that the said James F. Storey then notified the defendant it was the desire of his mother and himself and of his said brother to pay all assessments and do all things necessary to entitle the plaintiffs to the full \$5,000, as called for in said benefit certificate, upon the death of the said D. M. Storey; but the defendant declined to permit the said D. M. Storey or the plaintiffs to pay any other or further assessments than as called for by the defendant, which assessments, as above stated, amounted to \$9.60 at each assessment since October 1, 1900, and were twenty-two (22) in number since said time. D. M. Storey paid all dues for which she was liable up to her death.

"(8) Said benefit certificate issued by the defendant to the said D. M. Storey on March 20, 1891, as also the benefit certificate sued upon, were taken out by the said D. M. Storey with the agreement between her and the plaintiffs, James F. and William A. Storey, that the said plaintiffs should pay to the defendant all of the assessments due or to become due to the defendant from the said D. M. Storey, after the issuance of said certificate, and said plaintiffs have in fact paid all assessments since March 20, 1891, up to the date of the death of the said D. M. Storey.

"(9) At the same session of the Supreme Council of the defendant in New Jersey, in the year 1900, at which by-law 55 was passed, the said Supreme Council also passed by-law 72, reading as follows:

"(2) An emergency fund of five per centum of the aggregate face value of all out-

standing benefit certificates as recognized by the by-laws of the order is hereby established, to be created, collected, maintained, and disbursed in conformity with the laws of the state of Massachusetts; and that for the establishment of said fund there be charged against the certificate of each member of the order five per centum of the by-law value (reduced or otherwise) thereof: provided, however, that if, upon the decease of any member, any part of said charge shall remain unpaid by said member to said fund, the same shall be deducted from the amount payable to the beneficiary. This by-law shall take effect September 1, 1900.'

"There is no evidence that D. M. Storey, or either of the plaintiffs, ever impliedly or expressly consented to the passage of said by-law 72, or that either of them ever knew of its having been passed.

"(10) Some time during the year 1902, and prior to the 8th of May, said year, the plaintiffs William A. Storey and James F. Storey made out and delivered to the defendant a written statement, addressed to Adam Warnock, Supreme Secretary of the defendant, in which statement plaintiffs notified the defendant of the death of D. M. Storey and claimed \$5,000 upon the benefit certificate now sued upon.

"(11) On August 27, 1902, the defendant paid to the plaintiffs, Wm. A. Storey and James F. Storey, \$2,000 upon the benefit certificate sued upon, and said plaintiffs then turned said benefit certificate to the defendant, and signed the receipt upon said certificate reading as follows:

"Undersigned, beneficiaries named in the within benefit certificate, hereby acknowledge having received the amount herein agreed to be paid, and this certificate is hereby surrendered to the Supreme Council, American Legion of Honor, for cancellation.'

"And said plaintiffs also, at the time said \$2,000 was paid to them, signed and delivered to the defendant a receipt as follows:

"Release. Know all men by these presents, that I, James F. Storey and William A. Storey, beneficiaries of the late Dollie M. Storey, do hereby remise, release, and forever discharge the Supreme Council, American Legion of Honor, its successors and assigns, of and from all and all manner of actions and causes of actions, suits, debts, dues, accounts, bonds, covenants, contracts and agreements, judgments, claims, and demands whatsoever, in law or in equity, which against the said Supreme Council, American Legion of Honor, I ever had, now have, or which my heirs, executors, administrators, or assigns, or any of them, hereafter can, shall, or may have, for or by reason of any cause, matter, or thing whatsoever, from the beginning of the world to the date of these presents.'

"(12) I find that the sole and only consideration for the execution and delivery of the said aforesaid receipt and release by

the plaintiffs, and the sole and only consideration for the surrender to the defendant of the benefit certificate sued on, and the sole and only consideration which ever passed from the defendant to the plaintiffs, or either of them, upon any occasion whatsoever, was the said \$2,000 so paid to them by the defendant upon the occasion of the execution of the said receipt and release and surrender of the said benefit certificate.

"(13) I find that the defendant never, either upon the occasion of the payment by it to the plaintiffs of the \$2,000, or at any other time, made or urged any dispute as to its being liable to the said plaintiffs for the full \$5,000 upon the benefit certificate sued upon. The defendant, at the time of said settlement, in which it paid to the plaintiffs the said \$2,000, did not believe that it was not liable to the plaintiffs for the full \$5,000 upon said benefit certificate sued on, nor was there any reasonable grounds for its so believing.

"(14) Neither D. M. Storey, nor the plaintiffs, nor either of them, have paid to the defendant the 5 per cent. of the benefit certificate sued upon, as provided for in the aforesaid by-law 72; nor have they, or either of them, ever been called upon to pay the same, or any part of it.

"(15) I find that the defendant has failed and refused to pay to the plaintiffs any further sum than the said \$2,000 upon the benefit certificate sued upon, notwithstanding the plaintiffs did both of them, prior to the filing of this suit, make written demands of the defendant for the payment of the entire amount of \$5,000, as called for in said certificate or policy.

"(16) I find that the plaintiffs have incurred necessarily, in the matter of the prosecution and collection of their claim herein sued for, the sum of \$400 attorney's fees, and I find that said sum is a reasonable attorney's fee. I find that the plaintiffs are the holders of the benefit certificate or insurance policy sued upon.

"(17) I find that the emergency fund of the defendant order on October 1, 1900, was \$413,217.31; and at the date of the death of the said Dollie M. Storey, and also at the date of the proof of her death, said fund was \$406,334.31.

"I file my additional finding of fact, No. 18, as follows:

"(18) I find, as already stated in my former conclusions of fact, that the defendant is a fraternal beneficiary society; but the evidence fails to show as to whether it is an association having no capital stock, or as to whether it is conducted by lodges, a quorum of whose members meet in their respective lodge rooms at least once a month, or whether it has made to the insurance department of this state a report or statement such as the laws of this state require, or as to whether it has designated the insurance commissioner of this state as its agent, upon whom service may be

had; and the evidence shows that it is not such a fraternal beneficiary association as is defined by section 1 of the Acts of this state of 1899, p. 195, c. 115, relating to fraternal beneficiary associations, and fails to show that it is such a beneficiary association as is relieved from the provisions of the insurance laws of this state; and hence the evidence does not show that the defendant is entitled to be relieved from the provisions of the insurance laws of this state providing for 12 per cent. penalty and reasonable attorney's fees; and hence I hold defendant liable for both the said penalty and attorney's fees."

Opinion.

1. There is no assignment of error complaining of the foregoing findings of fact as unsupported by testimony; and therefore appellant must be regarded as acquiescing in the correctness of the findings, and the appeal must be disposed of upon the same theory.

2. One of the defenses relied on is by-law 55; appellant's contention being that it was binding upon the assured and the beneficiaries in the policy, and resulted in scaling the policy from \$5,000 to \$2,000, the amount paid by appellant before suit was brought. Appellees contend that as the by-law referred to was enacted after the policy or certificate was issued, and was not consented to by them or the assured, it cannot affect their rights, and they cite decisions from other jurisdictions which support their contention. They also contend that under the facts presented in this case, if the by-law be considered valid, the policy should not be scaled. This contention is founded upon the proviso embodied in the by-law to the effect that the face value of benefit certificates shall be paid, so long as the emergency fund of the order has not been exhausted, and the fact that at the time of the death of the assured, and at the date of the proof of her death, the fund referred to had not been exhausted, but was then over \$400,000. While the writer believes that appellees are correct in both contentions, the decision of this court is rested upon the correctness of the latter contention. The proviso in by-law 55 states in clear and unambiguous language "that the face value of the benefit certificate shall be paid, so long as the emergency fund of the order has not been exhausted, if the member shall at the time of death be a member of the order in good standing, and shall have complied with all the laws, rules, and regulations of the order." The words "face value" undoubtedly mean the amount stated in the body of the certificate as payable upon the death of the assured, which in this case was \$5,000. Therefore, the emergency fund not being exhausted, according to the very terms of the by-law itself the entire \$5,000 was owing and due.

3. The release executed by the appellees was without consideration, except as to the \$2,000 then paid on the debt, which is not involved in this suit. Appellant never denied liability in toto, but always conceded its liability for \$2,000, the amount which it paid; and therefore, having paid nothing more than its conceded liability, the receipt or release was without consideration as to the remainder of the debt. *Franklin Insurance Co. v. Villeneuve* (Tex. Civ. App.) 60 S. W. 1014, 68 S. W. 203.

4. The trial court properly excluded the amended by-law of 1901, because the same had not been pleaded. The plaintiffs sued upon a written contract, which, if the facts alleged in their petition were true, entitled them to recover; and, if the defendant sought to defeat such recovery on account of a subsequent change in the contract (and such seems to have been the purpose for which the excluded by-law was offered), then it devolved upon the defendant to specially plead such change.

5. Having failed to pay the full amount of the policy or certificate at maturity and after demand, the defendant became liable, under the statute regulating insurance, for 12 per cent. damages and reasonable attorney's fees, unless it was made to appear that it was a fraternal beneficiary association, as defined by the act of May 12, 1899. According to the findings of the court, this was not shown, and therefore appellees were entitled to recover damages and attorney's fees. *Mutual Reserve Fund Life Ass'n v. Payne* (Tex. Civ. App.) 32 S. W. 1065.

6. There are some other minor questions, which we deem it unnecessary to discuss in this opinion. They have been duly considered, and our conclusion is that no reversible error has been shown.

Judgment affirmed.

HENNING et al. v. WREN et al.

(Court of Civil Appeals of Texas. May 27, 1903.)

ADVERSE POSSESSION—JOINT AND SEVERAL
PLEA—DEEDS—DESCRIPTION—RECORD—
SUFFICIENCY—PAYMENT OF TAXES.

1. In trespass to try title against several defendants, the answer set up that, if plaintiffs ever had any cause of action against defendants, it was barred by limitations, because defendants and those under whom they claimed had had adverse possession of the land for more than five years, and that "each of the defendants say that, if plaintiffs ever had any cause of action, such action is barred by the statute of limitations, which they and each of defendants plead in bar of this action." *Held* to plead the statute jointly and severally for each of defendants, so as to allow them to prove limitations separately as to the particular portions of the entire tract sued for.

2. Where a deed described land "as my undivided one-half interest in the David Wilson league and labor of land," but the deed as recorded described it as the Daniel Wilson survey," the record was insufficient to support the five-year statute of limitations.

3. In the absence of a statement of facts, it will be presumed that there was sufficient evidence to warrant findings of the trial court.

4. Where the grantee in a recorded deed pays taxes on the number of acres called for in his deed, actually believing he is paying for the full quantity in his possession, he is not deprived of the benefit of the five-year statute of limitations, merely because his tract is larger than he supposed.

On Rehearing.

5. Where the record of a deed to an undivided interest in a survey of land was defective for failure to describe the land as it was described in the deed, the defect could not be cured by parol.

Appeal from District Court, Caldwell County; L. W. Moore, Judge.

Action by Alice V. Henning and others against James A. Wren and others. From a judgment for defendants, plaintiffs appeal. Reversed as to defendant Parke alone.

W. G. Barber, E. B. Coopwood, and P. N. Springer, for appellants. A. B. Storey, S. B. McBride, and Walton & Walton, for appellees.

STREETMAN, J. Appellants, as heirs of Mrs. Ophelia P. Wilson (who was afterwards Mrs. Talbot, and finally Mrs. Henning), sought in this action to recover an undivided half interest in the Daniel Wilson league and labor of land in Hays county, Tex. Upon change of venue to Caldwell county, a trial was had without a jury, and the court found the following facts:

"(1) On the 9th day of October, 1830, David Wilson and Ophelia P. Morrell were married at Vincennes, in the state of Indiana, and emigrated together to the state of Texas and county of Harrisburg, where they arrived in 1835.

"(2) That on February 2, 1838, said David Wilson appeared before the board of land commissioners of said Harrisburg county and made the proper proof, upon which said board issued to him, as a married man, a written certificate for one league and labor of land, which certificate is the basis for the patent to the land in controversy.

"(3) That prior to the 3d day of July, 1847, said David Wilson died, leaving surviving him only one child, named James M. Wilson, and his widow, Ophelia P. Wilson.

"(4) That on July 3, 1847, the state of Texas, by patent No. 433, vol. 15, granted to the heirs of said David Wilson, deceased, the league and labor of land described in the petition of plaintiffs in this cause, and in controversy in this suit; it being survey No. 83 and abstract No. 476.

"(5) That said Ophelia P. Wilson was the wife of the original grantee, David Wilson, at the date of the issuance of said certificate and at the date of the accrual of his right thereto, and as such she owned an undivided half interest in said land in her community right.

"(6) Prior to the 31st day of March, 1852, O. P. Wilson intermarried with one James Talbot, and was the wife of said Talbot on said date and prior and subsequent thereto.

"(7) That on said 31st day of March, 1852, said Ophelia P. Talbot, joined by her husband, James Talbot, executed and delivered to Francis Brichta a deed, attempting or purporting to convey all said land. In said deed it is recited that she, as the widow of David Wilson, owned an undivided one-half interest in said land, and that James M. Wilson, as the son, owned the other undivided one-half interest. She attempts to convey the whole survey of the land by this deed, reciting that her son, James, is a minor, and that she has been authorized to convey his interest by certain orders from the First district court of the city of New Orleans, state of Louisiana. This deed is properly acknowledged by the husband, James Talbot; but the purported acknowledgment thereof by the wife, Ophelia P. Talbot, was and is defective, and not in compliance with the requirements of the law. Said certificate of acknowledgment of the wife wholly fails to show that the instrument was explained to her in any way by the officer, and further fails to show in any way that she acknowledged to the officer that she did not wish to retract same.

"(8) On May 15, 1855, said Ophelia P. Talbot married Albert Henning, and continuously thereafter was the wife of and lived with the said Albert Henning until the 25th day of November, 1892, when said Albert Henning died.

"(9) That said Ophelia herself died on the 12th day of August, 1897, intestate, and there has been no administration upon her estate, and no necessity has ever existed therefor.

"(10) That said Ophelia was the mother of only two children; that is, the plaintiff Alice V. Henning, who was born in 1857, being the daughter of said Ophelia and her last husband, Henning, and the other child being the said James M. Wilson, by her first husband, David Wilson.

"(11) That said James M. Wilson died in Harris county, Tex., intestate, and no administration was ever had upon his estate.

"(12) That James M. Wilson was married in 1858 to Artimisia Habermacher, by whom he had three children; that is, the plaintiffs Charles A. Wilson, Ophelia Black (whose husband is Peter Black), and Jas. M. Wilson.

"(13) That said Artimisia also died prior to the institution of this suit, and in the early part of 1897, and that said three children were the only children of the said Artimisia and the said James M. Wilson.

"(14) That the said Ophelia P. Wilson never sold or conveyed her interest in the said land, and never attempted to do so, except by the said deed executed to said Brichta, as shown above.

"(15) That plaintiffs each claim the undivided one-half interest in said land involved in this suit through the said Ophelia P. Wilson, who is common source of title as to such undivided one-half interest.

"(16) That the title to said land, as conveyed by the said deed from said Ophelia Talbot and her husband, attempting to convey all

of the survey, one-half for herself and one-half for her son, to said Brichta, passed by successive conveyances, duly executed, acknowledged, and recorded, to Mrs. Emma Burleson, John T. Allen, and D. C. Osborn; the said Mrs. Emma Burleson owning an undivided one-half thereof, and the said Allen and Osborn owning the other one-half thereof. That on the 21st day of April, 1871, the said Mrs. Burleson, joined by her husband, on the one hand, and Allen and Osborn, on the other, executed partition deeds, by which they conveyed in severalty to said Osborn and Allen all the land lying north and east and northeast of the partition line, and by which they conveyed to said Mrs. Burleson in severalty all the land lying west and south and southwest of said partition line; the said partition line being set out in said partition deeds, the same as set out in the amended original answer of defendants in this cause.

"(17) That on the 16th day of February, 1880, said Allen and Osborn conveyed to the defendant Jas. A. Wren, by deed of that date, all the land lying northeast of said partition line, describing it as containing 2,302½ acres, more or less. This deed was regularly acknowledged for record by the grantors, and properly recorded in the deed records of Hays county, Tex., on March 3, 1880.

"(18) On June 30, 1871, said Emma Burleson and her husband, Ed. Burleson, by deed, properly acknowledged, and duly recorded immediately thereafter, conveyed to Joseph D. Sayers that portion of said survey lying south of said division line; and on March 11, 1878, by deed of that date, properly acknowledged, and immediately thereafter recorded, said Sayers conveyed to W. O. Hutchison the land so conveyed to him by same description.

"(19) On September 12, 1882, W. O. Hutchison, by deed of that date, duly recorded on September 26, 1882, in the deed records of Hays county, conveyed to D. A. Nance and S. N. Heard nine different tracts of land in Hays county, Tex.; one of them being described as 2,304 acres, the west half of the David Wilson league and labor of land, and all thereof lying southwest of said division line.

"(20) On April 8, 1884, D. A. Nance and wife, by deed of that date, duly acknowledged, and recorded on April 19, 1884, in the deed records of said Hays county, conveyed to the defendant O. G. Parke an undivided one-half interest in the same lands conveyed by the said deed from W. O. Hutchison to Nance and Heard by a like description.

"(21) On the 25th day of January, 1887, said S. M. Heard executed, properly acknowledged for record, and delivered to the defendant O. G. Parke a deed in writing of which the following is an exact copy:

"State of Texas, County of Hays. Know all men by these presents, that I, S. M. Heard, of said state and county, for and in consideration of the sum of twenty-five

hundred and twenty-five dollars, cash to me in hand paid by O. G. Parke, of said state and county, the receipt whereof I do hereby acknowledge, have bargained, sold, aliened, transferred, and conveyed to the said Parke, to have and to hold to him and his heirs, forever, all of my interest, which is an undivided one-half interest, in the following tracts and parts of tracts of land situated in Hays county and state of Texas, to wit: My undivided one-half interest in the David Wilson survey, containing 1,664½ acres; my one-half undivided interest in the R. J. Smith 640-acre survey; my undivided one-half interest in the 1,006 acres out of the Martha Andrews 1,280-acre survey—the aforesaid tracts of land being owned by myself and the said Parke in equal undivided interest, and hereby convey to him my undivided one-half interest in each of said tracts. The 1,006-acre Martha Andrews survey is all of said survey except 274 acres. The said Parke has conveyed to me his undivided one-half by deed of this date, and said 274 is described in said deed; and for the better description and identification of the aforesaid tracts and parts of tracts of land, reference is here made to all of the title papers, and to the record of the same, and to plat and map made by Otto Groos, the county surveyor of Hays county, Mark A. And the said Heard, for myself, my heirs, and legal representatives, do warrant the title to the undivided one-half interest in said tracts of land herein conveyed, and will defend the same against the claims of all persons claiming or to claim same by lawful title.

"Witness my hand this 25th day of January, A. D. 1887. S. M. Heard."

"The plat referred to in said deed was not introduced in evidence and was not of record. That said deed was filed for record on its day of execution, and was recorded on the 29th day of January, 1887, in Book V, pages 40, 41, of the deed records of Hays county, Tex. That the clerk of the county court of Hays county, in recording said deed, did accurately transcribe same upon the records, except, where there is written in the deed 'David Wilson,' it is written upon the record of said deed 'Daniel Wilson'; the result being that the deed shows upon the record exactly as originally written, except 'Daniel Wilson' is substituted for David Wilson."

"(22) On the 10th day of October, 1887, the state of Texas granted to the defendants O. G. Parke and S. M. Heard, as assignees of Martha E. Andrews, a patent, No. 517, vol. 16, for 1,280 acres of land, which land was and is in fact part of the same land covered by the grant heretofore made to the heirs of David Wilson. That said patent was duly filed and recorded in the deed records of Hays county, Tex., on March 8, 1888.

"(23) By deed dated January 25, 1887, and at once thereafter recorded in said deed records, O. G. Parke conveyed to S. M. Heard the former's undivided one-half interest in

274 acres of land covered by the said Andrews patent, describing said 274 acres as being all thereof lying south and west of a certain line identified and described in said deed.

"(24) By deed dated March 5, 1888, and recorded in said deed records on March 12, 1888, said S. M. Heard and wife conveyed an undivided one-half interest in a number of tracts of land, including the said 274 acres, to John W. Herndon; and by deed dated May 11, 1889, said John W. Herndon conveyed to the defendant B. F. Herndon an undivided one-half interest in a number of tracts of land, one being described as containing '274 acres out of the Martha E. Darden survey of 1,280 acres.' This deed refers for further description to the deed to John W. Herndon, shown in next preceding finding of fact; and the word 'Darden' was written therein by the mutual mistake of the parties, instead of the word 'Andrews.'

"(25) The defendant James A. Wren inclosed all of the land claimed by him, and lying north, northeast, and east of the said partition line fixed in the partition deed between Burleson, Allen, and Osborn, in the latter part of 1886 and the first of 1887; the inclosure being completed by the 1st day of May, 1887. Since that date said James A. Wren has used, occupied, and enjoyed the land so claimed by him, holding the same peacefully and adversely to all persons, and claiming same as his own under deeds duly registered, and paying taxes thereon, as herein shown. Prior to his inclosure of said land, and subsequent to his purchase thereof, his wife died intestate, leaving only two heirs at law; that is, the defendants John Wren and Mack Wren. The community one-half interest of their mother vested by inheritance in these two children, and the occupancy and claiming of the land by the father has been for himself and his said two children; they living with him.

"(26) Since, for and before the said year 1887, Wren has rendered, as appears from the assessor's rolls, collector's rolls, and the original tax receipts, for taxes, 2,032 acres of land, showing the original grantee as David Wilson. Such rendition has also shown the abstract number of the survey as No. 476, except for the years 1896 and 1897, for each of which years the rendition so made by the said James A. Wren shows the abstract number as 475. None of the renditions made by the said Wren show the certificate number, nor the survey number of the said land, nor the number of the patent, nor do they in any way describe the particular land so rendered by him, except only to show, as the name of the grantee and the owner, 'James A. Wren'; as the abstract number, '476,' for the various years except 1896 and 1897, when it is shown as '475'; as the name of the original grantee, 'David Wilson'; and as the number of acres rendered, '2,302.' The receipts for the taxes issued to the defendant Wren correspond with

the renditions so made by him, and do not further describe the land.

"(27) The defendants John Wren and Mack Wren made no rendition for taxes, and paid no taxes upon said land, or any part thereof; but in paying same their father, James A. Wren, did so in recognition of their rights therein and for their benefit.

"(28) The defendant O. G. Parke, in the latter part of 1886, inclosed and took possession of all that portion of the David Wilson survey lying south, southwest, and west of the said partition line, and has since then occupied same continuously and adversely to all other persons, claiming same as his own; except only the 274 acres above described. The said Parke, prior to the year 1892, and for that year, and for each succeeding year, has rendered for taxes 1,664 acres of the David Wilson survey, and paid the taxes thereon under such rendition. The rendition did not otherwise describe the particular land paid upon, except by showing, as the name of the owner, 'O. G. Parke'; as the abstract number, '476'; as the original grantee, 'David Wilson'; and as the number of acres rendered, '1,664.' No survey number, nor certificate number, nor patent number are shown by such rendition, and the taxes paid by the defendant Parke were paid under such renditions, only from 1884 to 1887 said Parke paid on 2,303½ acres of the Wilson league, and from 1887 to 1901 he paid on 1,664 acres of the Wilson and 1,006 acres in the name of Andrews 1,280-acre survey, that had been patented over the Wilson in 1887. Said Parke also rendered, as stated, prior to and for the year 1892, and for each succeeding year, 1,006 acres of the land upon the M. E. Andrews survey, which rendition does not show the survey number, the certificate number, nor abstract number. It does not otherwise describe the particular lands rendered, except only by showing as the name of the owner, 'O. G. Parke'; as the abstract number, '659'; as the original grantee, 'M. E. Andrews'; and as the number of acres rendered, '1,006.' The payment of taxes by the said Parke was made under such rendition only.

"(29) Defendants Heard and Herndon, in the latter part of 1886, inclosed and took actual possession of the 274 acres of land, and have since then had and held actual peaceable possession thereof, claiming same adversely to all persons and as their own. For the year 1892, prior thereto, and continuously since then, said Heard and Herndon have rendered and paid taxes upon 274 acres of the said M. E. Andrews survey. The renditions made by them as basis for the payment of such taxes did not show survey number nor the patent number of said land, nor otherwise describe the particular land paid upon, except only to show as the name of the owner, 'Heard and Herndon'; as the abstract number, '659'; as the

certificate number, '1,284'; as the original grantee, 'M. E. Andrews'; and as the number of acres, '274.'

"(30) On March 6, 1891, the state of Texas patented to A. Wyschetski, as assignee of the Texas Central Railroad Company, 314½ acres of land, known as 'Survey No. 3.' This 314½ acres of land is in fact part of the said David Wilson survey; it being placed upon land which was not vacant, but which was already covered by the David Wilson survey. Since and including the year 1892 taxes have been each year regularly assessed upon said survey in the name of A. Wyschetski, and taxes so assessed have been paid by said A. Wyschetski, and none of the defendants have paid the taxes upon said land, unless same was paid by the defendant James A. Wren, under said rendition of 2,302 acres, shown as being upon the David Wilson survey.

"(31) For the year 1892, and each year since then and prior thereto, there was regularly assessed in the name of 'Unknown Owner' 639 acres of the David Wilson survey, abstract No. 476, and the taxes so assessed against said 639 acres in the name of 'Unknown Owner' have not been paid by any of the defendants, unless same were paid under their several renditions herein above shown.

"(32) The testimony tends to show that the said David Wilson survey is considerably in excess in acres of the amount called for by the patent. The testimony tends to show, and the plaintiffs ask the court to find, that there is as much as 314½ acres of said Wilson survey over and above the 2,302 acres as rendered for taxes by defendants Wren, and lying on the north, northeast, and east side of said partition line; and the evidence further tends to show, and the plaintiffs ask the court to find, that there is lying on the other side of said line as much as 639 acres of said Wilson survey over and above the 1,664 acres thereof as rendered for taxes by defendant O. G. Parke, and over and above all of portions of said Wilson survey covered by the Andrews patent. But the court, although so requested by plaintiffs, declines to find in any way on the question of excess in acreage or the amount thereof, because the court holds same to be wholly immaterial, as, defendants having paid on as many acres as their title papers call for, and as many acres as they thought they had, any excess in acreage cannot defeat their title by limitation to all the land. The M. E. Andrews survey all lies upon the south, southwest, and west side of said partition line, and the said Texas Central Railroad Company's survey lies upon the north, northeast, and east side of said partition line.

"(33) In making his said rendition of 2,302 acres upon said Wilson survey, said Wren intended thereby to render and pay taxes

on all the Wilson survey which he had, including the land covered by said Texas Central Railroad Company's survey, which he has all the time claimed, and yet claims, and has possession of as part of said Wilson survey.

"(34) Said Parke has during these several years supposed that said renditions of the 1,664 acres of land of the said Wilson survey and 1,006 acres upon the said Andrews survey covered all the land which he had within the limits of the Wilson survey, and in paying taxes under such renditions his purpose has been to pay upon all the Wilson survey owned or claimed by him.

"(35) At the time the said Andrews survey was located by the said Parke and Heard, they then thought the land thereby covered was part of the Wilson survey, and part of the land claimed by them upon the Wilson survey; but on account of the excess in acreage of the said Wilson survey, and as a precaution, and upon the advice of the county surveyor of Hays county, they filed upon said land and caused same to be patented to them as assignees of M. E. Andrews."

There is no statement of facts in the record. The court concluded that the defendants had established their defense under the five-year statute of limitation, and rendered judgment accordingly.

The third and four assignments of error complain of the admission of evidence to support the plea of limitation, and of the judgment based thereon, because it is claimed to be at variance with the pleadings on that issue. Appellants insist that the answer of the defendants is a joint plea of limitation as to the whole tract, and that under this plea they should not have been permitted to prove limitation separately as to particular portions of the tract. We do not deem it necessary to determine what the result would be if the pleading was as claimed. The portion of the answer setting up the five-year statute on which the judgment was based is as follows:

"(2) And, further answering, defendants say that, if plaintiffs ever had any cause of action against the defendants for the land sued for, the same has long been barred by the statute of limitation of five years, because they say that they (defendants) and those under whom they claim have had the actual, peaceable, adverse, and quiet possession of said land sued for, using, enjoying, possessing, and cultivating the same, and paying the taxes thereon, and claiming the same under a deed or deeds duly registered for more than five years next before the institution of this suit, and they and each of defendants say that if plaintiffs, or either of them, ever had any cause of action against them for said land, said action is barred by the statute of limitations of five years, which they and each of defendants here plead in bar of this said action."

It is evident that this answer pleads the statute jointly and severally for each of the

defendants. Had only one of the defendants been sued and pleaded limitation as to the whole tract, we do not doubt that he could have recovered any portion of the tract which the evidence might have shown him entitled to under the statute, although he might not have sustained his defense as to the whole. So, each of the defendants having pleaded limitation as to the whole tract, we see no reason why they should not have been permitted to hold the portions, respectively, to which they established their defense of limitation.

The fifth assignment of error attacks the deed from S. M. Heard to O. G. Parke, and the record of said conveyance, as insufficient to support the five-year statute of limitation. We are of opinion that this assignment should be sustained. The description in the deed as recorded is as follows: "My undivided one-half interest in the Daniel Wilson survey, containing 1,664½ acres." Had the deed been recorded as it is written, it would probably have been sufficient; but almost the only feature of the description which would serve to identify the land conveyed was the name of the survey, and this was so changed in recording the instrument that this means of identification was not only destroyed, but rendered positively misleading. The object of the statute in making registry of the deed, necessary to enable the possessor to avail himself of the five-year limitation, is to give notice to the owner that the defendant in possession is claiming under the deed; and, if there is such falsity or uncertainty of description as that it will not answer the purpose intended, it cannot be considered a deed duly recorded under the statute. *Flanagan v. Boggess*, 46 Tex. 335; *Kilpatrick v. Sisneros*, 23 Tex. 136. While it may not be necessary to literally transcribe an instrument, in order to say that it is duly registered, yet there should certainly not be such an error in recording it as to destroy the effect of the descriptive part of the instrument. We cannot believe that a record purporting to show a conveyance of an "undivided one-half interest in the 'Daniel Wilson survey,' containing 1,664½ acres," would impart notice that the grantee was claiming an undivided half interest of 1,664½ acres in the "David Wilson league and labor."

The remaining assignments complain of the insufficiency of the evidence to show payment of taxes for the time required to complete the bar of the statute. It will be observed that during the years 1896 and 1897 the defendant James A. Wren rendered his land under abstract No. 475; the correct abstract number being 476. For these years, however, the name of the survey was correctly given, as well as the name of the owner. There being no statement of facts, we cannot tell what other evidence the court may have acted upon in finding, as it must have found, that the payment was made upon the lands in controversy. It is not shown, as it was in *Dutton v. Thompson*, 85 Tex. 116, 19 S. W. 1026, that there

was another survey in the county to which the description would apply, and that the land rendered was really different from that claimed by the defendant. We will presume, in the absence of a statement of facts, that there was evidence sufficient to warrant the court in finding that the land rendered, and upon which payment was made, was the land in suit, and that the abstract number, as shown on the tax rolls, was an error, but not sufficient to destroy the identity of the land on which taxes were paid.

It is insisted, because there was evidence tending to show that the lands held by defendants actually contained a larger number of acres than rendered by them, that this would defeat the operation of the statute, at least as to the excess. The court found that the defendants rendered as many acres as their deeds called for, and as many acres as they thought they had. We do not hold that such a disparity might not exist between the quantity of land held in possession and that rendered for taxes as to prevent the statute from running, nor do we hold that the number of acres called for in the deed is conclusive; but we do not believe, where a grantee in a recorded deed pays on the number of acres called for in his conveyance, actually believing that he is paying for the full quantity in his possession, that he should be deprived of the benefit of the statute, because it may subsequently be ascertained that his tract is somewhat larger than he believed it to be.

We have carefully considered all of the assignments, and find no error, except as shown in the fifth assignment. This error affects only the portion of the lands claimed by the defendant O. G. Parke. As to all the other defendants, the judgment will therefore be affirmed. We are unable to determine definitely to what extent and what portions of his tract the defendant Parke may be able to hold under the three-year statute of limitations; and, in addition, the findings of fact are not sufficiently full and definite to enable us to settle the questions of rents and improvements between him and plaintiff. The judgment in favor of the defendant Parke will therefore be reversed, and as to him alone the cause remanded.

Affirmed in part, and reversed and remanded in part.

On Rehearing.

(July 1, 1903.)

Appellants and appellee have filed motions for rehearing of so much of the former judgment as is adverse to them, and appellants have also filed a motion requesting that judgment be rendered in their favor against appellee Parke for so much of the land as they would be entitled to recover under the decision herein rendered. Appellees contend that the description in the deed from S. M. Heard to O. G. Parke is either sufficient in itself, or that it might be made sufficient by parol evidence, and conclude by saying that "if the

ambiguity in the deed cannot be removed by testimony, * * * there would seem to be no reason for a reversal of the case." We do not think the defect in the record of the deed could be cured by parol evidence, and, in this situation, we understand that appellees would prefer that the case be not reversed.

Some question has arisen as to the extent to which appellants are entitled to recover against appellee Parke; said Parke having established title by limitation to an undivided half interest in the tract in question, and appellants having sued for an undivided half interest in the land, including said tract. The question has not been argued by counsel, but we have concluded that the recovery should be for an undivided half only of the portion to which Parke failed to establish title; that is, for an undivided one-fourth of the Parke tract, after deducting the portions which said Parke can hold under the three-year statute of limitations. On account of the absence of field notes from the record, and the general nature of the description contained in the findings of fact, we deem it best not to undertake to render judgment; and, as the case must be remanded for a partition and adjustment of the questions of rents and improvements, we will modify our former judgment reversing and remanding the case as to the appellee O. G. Parke, and reverse and remand the case as to said defendant, with directions to the lower court to render judgment for appellants against said Parke for an undivided one-fourth interest in all the land in suit lying on the west and southwest side of the partition line established between Mrs. Emma Burleson on the one part and John T. Allen and D. C. Osborn on the other part, by deed dated April 21, 1871, except so much thereof as is covered by the Martha E. Andrews 1,280-acre survey—this direction being conclusive only upon the question of title, and not as to the rights of any of the parties concerning partition, rents, or improvements.

The motions for rehearing will be overruled.

CASEY-SWASEY CO. et al. v. VIRGINIA STATE INS. CO.

(Court of Civil Appeals of Texas. June 13, 1903.)

WITNESSES—IMPEACHMENT—CROSS-EXAMINATION—DISCREDITING PARTY'S OWN WITNESS.

1. A witness cannot be impeached by showing indictments of perjury pending against him, except on cross-examination.

2. A party offering a witness may not impeach his character.

Appeal from District Court, Comanche County; J. C. Randolph, Special Judge.

Action by the Casey-Swasey Company and others against the Virginia State Insurance Company. From a judgment in favor of defendant, plaintiffs appeal. Reversed.

Geo. E. Smith and Orrick & Terrell, for appellants. G. H. Goodson, for appellee.

STEPHENS, J. Appellee was permitted, against the objections of appellant, to prove by witness Z. P. West that two indictments for perjury were pending against him (West) in the district court of Comanche county, Tex.; and by witness J. T. Maroney that he, too, had been indicted in the same court for the same offense. That it is incompetent to thus impeach a witness, except on cross-examination, is well settled. *Texas Brewing Company v. Dickey* (Tex. Civ. App.) 43 S. W. 577. True, it has been held by this court and several others that a witness may be thus discredited on cross-examination, but there are numerous authorities, including some from our Courts of Civil Appeals, to the contrary. See cases cited by us in *Texas Brewing Company v. Dickey*, supra, and the following, cited by appellants: *Hill v. Dons* (Tex. Civ. App.) 37 S. W. 638; *Freedman v. Bonner* (Tex. Civ. App.) 40 S. W. 49; *Kruger v. Spachek* (Tex. Civ. App.) 54 S. W. 295; *Van Bokkelen v. Berdell*, 130 N. Y. 141, 29 N. E. 254; *Stanley v. Insurance Co.* (Ark.) 66 S. W. 432; *Hendrickson v. Com.* (Ky.) 64 S. W. 954; *Lewis v. Com.* (Ky.) 42 S. W. 1127; *Miller v. Curtis*, 158 Mass. 127, 32 N. E. 1039, 35 Am. St. Rep. 469. The rulings in this instance are not brought within the exception to the general rule, since the record refutes the idea that this testimony was drawn out on cross-examination. It was not until after West, who was an important witness for appellant, had been examined in chief and cross-examined, and not until after appellant had rested, and appellee had offered him as a witness, as appears from the statement of facts, that the fact of his having been indicted was proven. Maroney was not offered as a witness by appellant at all, though his testimony in the main was favorable to appellant, agreeing substantially with that of West; and the fact of his having been indicted appears to have been drawn out on his direct examination by appellee. The bills of exception, besides showing that the testimony was introduced on the trial over objection, only show the questions, answers, and objections, and do not, therefore, of themselves show how it was introduced; but, read in connection with the agreed statement of facts, leave no room for the inference that it was drawn out on cross-examination, particularly as to witness Maroney. The objections stated in the bills of exception were prima facie good, and the record, as a whole, so far from bringing the case within the exception to the general rule, which exception at best rests upon conflicting authority, affirmatively excludes that view, at least as to Maroney.

Another well-settled rule of evidence was violated in the admission of this testimony of Maroney—that which forbids the impeachment of the character of a witness by the

party offering him. That the evidence objected to was prejudicial will not be disputed, and its admission necessitates a reversal of the judgment. In view of a retrial, we venture to suggest that if, in the pending indictments, perjury was assigned upon statements made after this controversy arose, and about the matters out of which it arose, we very much doubt the admissibility of such testimony, even when drawn out on cross-examination.

Reversed and remanded.

MOSELEY v. HOUSTON & T. C. R. CO.

(Court of Civil Appeals of Texas. June 20, 1903.)

CARRIERS OF GOODS—RAILROADS—LIVE STOCK—DAMAGES—TRIAL—VERDICT—EVIDENCE.

1. In an action for damages to horses shipped on defendant's railroad the plaintiff claimed that one horse killed was worth \$100, that the damage to another was \$65, and that to another was \$25. There was some evidence that the one horse was not dead, but had been badly injured, and left at an intermediate station. The consignee of the horses testified that the damage was as alleged, and this was the extent of evidence relating to value or damages. Held, that there was no basis for a verdict for \$104.50, but plaintiff, if he was entitled to recover at all, was entitled to the whole amount testified to.

Error from Ellis County Court; Lee Hawkins, Judge.

Action by M. M. Moseley against the Houston & Texas Central Railroad Company. There was judgment awarding plaintiff less damages than the amount claimed, and he brings error. Reversed.

Tom P. Whipple, for plaintiff in error.

TEMPLETON, J. Moseley sued the railroad company to recover the value of a large sorrel horse, and damages for injuries to a roan mare and a small sorrel horse. It was alleged that the large horse was killed and the other horses injured while being transported from Waxahachie to Beaumont over the line of the company, and that the loss was due to the company's negligence. The large horse was valued by the plaintiff at \$100. The damage to the mare was estimated at \$65, and the damage to the small horse at \$25. The plaintiff obtained judgment in the justice's court for \$190, the total amount claimed by him, and the company appealed. A jury trial in the county court resulted in a judgment for the plaintiff for \$104.50. He was not satisfied with the amount of his recovery, and has appealed to this court by writ of error.

Joe Harding testified that he was in the employ of the plaintiff, and accompanied the shipment; that "between Ennis and Houston, at a station called 'Benchly,' the stock were in such a condition that the conductor had them side-tracked and unloaded. The big sorrel horse was dead; the little sorrel horse

was so badly used up that he could hardly stand, and the roan mare was down, and was badly cut and bruised." Henry Forbes testified as follows: "The stock was consigned to me at Beaumont, Texas, and I was there when they came in. As soon as they were unloaded, I made a close examination of them all, and found some of them badly damaged. The large sorrel horse said to have been left at Benchly was worth a hundred dollars. The roan mare was a very fine animal, and was worth one hundred and fifty dollars. She was all bruised up, and had a bad cut on her leg. The small sorrel horse was bruised and badly cut about his foretop. The sorrel horse was worth a \$100. I sold him for \$50. I kept these two animals for two weeks or more after they arrived, so as to get them in some sort of condition for market. I sold the roan mare for \$85. The damage to the roan mare was \$65 and to the small sorrel horse \$25. I saw the stock when they were loaded on the cars at Waxahachie, and they were all in good condition." The conductor of the train testified that: "When we reached Benchly. I was informed that some of the stock was down, and I ordered the cars unloaded. We side-tracked and unloaded them. The large sorrel horse was not dead, but when we got ready to start we did not take him, but left him in charge of the agent at Benchly. I do not know what became of him." The plaintiff testified that: "I have no personal knowledge of any damage to any of the stock. I was informed that two sorrel horses and a roan mare had been killed or damaged. The large sorrel horse was worth a hundred dollars. If the large sorrel horse is not dead, the railroad company have never informed me that he was alive." There was no other evidence relating to the value of the horses or to the extent of the damages.

There is no basis in the evidence for the verdict which was returned. If the plaintiff was entitled to recover at all, he was entitled, under the evidence adduced, to recover more than the amount awarded him by the jury. The judgment will therefore be reversed, and the cause remanded.

Reversed and remanded.

SECURITY MUT. LIFE INS. CO. v. CALVERT.

(Court of Civil Appeals of Texas. June 20, 1903.)

CONTINUANCE—DUE DILIGENCE—COUNTER AFFIDAVITS.

1. On an application for a continuance, controverting affidavits to the effect that plaintiff's counsel, on the day before the suit was instituted, informed an adjuster of defendant that suit would be brought on the next day, and that it was so brought, should not be considered on the question of diligence, as defendant was not required to prepare for trial until the service of citation upon it.

2. A continuance should be granted, or a postponement had to a future day in the term,

where the application therefor shows on its face a legal defense, and where defendant acted promptly, and exercised due diligence after service of citation in presenting the same.

Appeal from District Court, Rains County; H. C. Connor, Judge.

Action by Jeff. B. Calvert against the Security Mutual Life Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed.

Coke & Coke, for appellant. B. M. McMahon and Looney & Clark, for appellee.

RAINEY, C. J. The court erred in overruling defendant's application for a continuance. The application, on its face, stated sufficient grounds entitling defendant to a continuance, and the controverting affidavits filed by plaintiff, to the effect that plaintiff's counsel on the day before the suit was instituted informed an adjuster of defendant that the suit would be brought on the next day and that it was so brought, should not be considered on the question of diligence, as defendant was not required to exert any diligence to prepare for trial until citation was served upon it. After the service of citation the application shows that defendant acted promptly, and exercised due diligence to present its defense. A legal defense being shown on the face of the application, and proper diligence having been exercised, the motion should have been granted, or a postponement had till a future day during the term.

The judgment is reversed, and the cause remanded.

DUCKWORTH et al. v. FT. WORTH & R. G. RY. CO.*

(Court of Civil Appeals of Texas. June 13, 1903.)

RAILROADS—FIRES—INSTRUCTIONS—NEW TRIAL—APPEAL—WAIVER OF ASSIGNMENT.

1. Where, in an action against a railroad for causing a fire, it was shown that the property was located 156 feet from the right of way, that the fire was not discovered until more than two hours after the engine had passed, and the evidence was conflicting as to the direction of the wind, and defendant's testimony was that the locomotive did not emit sparks, while plaintiff's testimony was that on other occasions defendant's engines had emitted sparks, the court properly refused to instruct that defendant had the burden of showing freedom from negligence, as the real issue was whether the fire was caused by sparks from the locomotive.

2. Where the newly discovered evidence for which a new trial was sought was inconclusive and uncertain, and one of the witnesses testified at the trial, the court's action in refusing a new trial would not be disturbed on appeal.

3. An assignment of error not followed by any proposition or statement will be deemed waived.

Appeal from District Court, Hood County; W. J. Oxford, Judge.

*Rehearing denied July 3, 1903.

†2. See New Trial, vol. 37, Cent. Dig. §§ 203, 208, 224, 226.

Action by W. J. Duckworth against the Ft. Worth & Rio Grande Railway Company, in which the Fire Association of Philadelphia intervened, and asked to be subrogated to certain rights of plaintiff against defendant. Judgment for defendant, and plaintiff and intervener appeal. Affirmed.

Reeder & Cooper and Crane, Greer & Wharton, for appellants. West, Chapman & West, for appellee.

CONNER, C. J. Appellant Duckworth sued appellee to recover damages for the loss of his gin property, alleged to have been burned by reason of escaping sparks from one of appellee's passing engines, and the appellant Fire Association of Philadelphia intervened, alleging the payment of certain insurance on the property burned, and praying to be subrogated to the extent thereof to the right of appellant Duckworth. It was alleged that the engine which set out the fire was at the time negligently operated, and unprovided with proper and sufficient appliances to prevent the escape of sparks. Appellee pleaded the general denial, and the trial resulted in its favor.

The principal assignment of error relates to the refusal of the court to give the following special charge, viz.: "Counsel for the plaintiff and intervener ask the following charge: 'Gentlemen of the jury, you are instructed that, if the plaintiff's gin was set on fire by sparks emitted from the engine of the defendant railway company, as charged in their petitions, and if the emission of said sparks which set fire to said gin was the result of the negligence of the said defendant company's agents and servants in operating their said engine so emitting same, or if you believe from the evidence that the emission of said sparks was due to the fact that the said engine being then and there operated by the agents and servants of said defendant company was unskillfully, improperly, and negligently constructed and that it was not sufficiently and properly equipped with spark-arresting devices, and that by reason of these conditions that said engine was out of order in regard to its appliances for the prevention of the escape of sparks, and that but for such negligence the sparks emitted from said engine would not have set fire to plaintiff's property, you will find for the plaintiff and intervener. In this connection you are charged that the burden of proof devolves upon the defendant company to prove that its locomotive was not negligently constructed, as charged by the plaintiff and the said intervener, and that it was properly equipped with the best approved appliances in general use for preventing the escape of fire; and also to prove that its locomotive was being carefully operated at the time when said sparks were emitted that set fire to said building.' " We think the charge

was properly refused. The gin, with machinery, burned was situated about 150 feet south of appellee's right of way in the town of Granbury. There was no direct evidence as to the origin of the fire, and the sharply contested issue in the evidence was whether the fire originated from a passing engine at all, as alleged. The real issue was not whether the engine indicated by the testimony as the only one which could probably have set out the fire was provided with a proper spark arrester, or was improperly handled at the time. This engine was shown to have been attached to a light train, which passed at 3:47 a. m. on the morning of November 13, 1901, and the testimony of appellee's witnesses that it was properly operated and equipped with approved spark arresters was not disputed save by the testimony of some of appellant's witnesses to the effect that on other occasions, and from engines not identified as the one under consideration, sparks had been emitted and set out fire at as great a distance. The fire in question was not discovered until about 6 a. m. of the morning stated, and the evidence conflicts as to the direction of the wind. Duckworth testified to the effect that some openings in the gin-house towards the right of way were unclosed, and that the fire had apparently originated from a point on the inside near one of these openings, and burned thence along the hard pine floor to the gin stands on the south side of the building, where the fire, at the time of observation, had gained great headway. There was much testimony as to the direction of the wind, and the night agent of appellee testified that at the time involved he stood on the platform, watched the outgoing train, and observed no sparks, but did notice heavy black smoke issuing from the engine, but that such smoke rolled to the north. Other circumstances might be adverted to, but we think this sufficient to indicate the real issue, and to illustrate our conclusion that a charge in effect indicating when the burden of proof shifted to appellee would have been inappropriate and confusing. *Ry. Co. v. Syfan* (Tex. Civ. App.) 43 S. W. 551; *Ry. Co. v. Dotson* (Tex. Civ. App.) 38 S. W. 644. Besides, the requested charge would have devolved a greater burden on appellee than the law imposes. The law does not require of railway companies the equipment of their engines with absolutely the "best approved appliances in general use for preventing the escape of fire," but that degree of care only in this respect that would be exercised by a person of ordinary prudence under the same or similar circumstances. *Ry. Co. v. Carter* (Tex. Sup.) 68 S. W. 150.

Assignments of error not involved in the foregoing conclusions need but brief notice. Of the two witnesses on account of whose newly discovered testimony a new trial was sought, one had testified on the trial in

behalf of appellants, and the slightest diligence in examination must, at the proper time, have disclosed the alleged newly discovered fact. The testimony of the other witness, as well as that of the first, was, we think, altogether too inconclusive and uncertain in the light of the testimony to have justified a new trial. At least we cannot say that the court abused his discretion in overruling the motion therefor on this ground. The assignment questioning the sufficiency of the evidence to sustain the verdict and judgment is not followed by any proposition or statement, and is evidently not relied upon.

Finding no error as assigned, the judgment is affirmed.

STATE ex rel. WYANDOTTE LODGE, NO.
35, I. O. O. F., et al. v. EVANS,
Judge, et al.

(Supreme Court of Missouri, June 30, 1903.)

MORTGAGES—ACTION TO FORECLOSE—EQUITY OR LAW—DECREE—VALIDITY—SALE—CONFIRMATION—NECESSITY—WRITS OF ASSISTANCE.

1. The distinction between law and equity is as clearly observed in Missouri as it is in those states in which separate courts are held for the disposal of equity causes.

2. Whether a cause arising in the circuit court is to be judged to be an action at law or a suit in equity must depend on the facts of the case, and, though the form of the pleadings and of the judgment or decree may have some influence, yet the substance of the controversy must control.

3. Where the pleadings, etc., in an action to foreclose a mortgage, showed that the questions involved were of such a nature as could not be settled in a tribunal proceeding within the limits that circumscribe a court in the trial of an ordinary lawsuit, the action was in equity and not at law.

4. If the pleadings presented to the court a suit in equity, its character would not be changed because the decree, erroneously, it may be, in one respect, took the form of a judgment at law.

5. If, under the pleadings in an action to foreclose a mortgage, the court had no jurisdiction to enter a personal judgment, that much of the decree would be void, but the rest of it would not be affected.

6. A decree, in a suit in equity to foreclose a mortgage, which ordered the sheriff to sell the property as in case of ordinary sales of land under execution, to execute a deed to the purchaser, receive from him the purchase money, and pay it out in a certain way, and which also declared that title to the property should pass to and rest in the purchaser, and that he, on conditions named therein, would be let into possession, instead of following the ancient chancery practice of having the officer report the sale to the court and having it confirmed, etc., even if erroneous, was not void.

7. After the sale by the sheriff and the delivery by him of the deed to the purchaser, the latter went with his deed to the parties in possession and demanded to be let into possession, as the decree required, but they refused, and then the purchaser applied to the court for a writ of assistance. After a full hearing, in which all parties interested participated, the court ordered the writ to issue. Held that, if confirmation of the sale was necessary, the judgment of the court ordering the writ was a confirmation.

8. Courts of equity, in the foreclosure of mortgages, have power to issue writs to put the purchasers into possession of the property sold. Burgess, J., dissenting.

In Banc. Application by the state, on the relation of the Wyandotte Lodge, No. 35, I. O. O. F., and others, for a writ of prohibition directed to Andrew F. Evans, judge, etc., and others. Writ denied.

H. F. Wieman, B. F. Pursel, and Porterfield, Sawyer & Conrad, for relator. Warner, Dean, McLeod & Holden, for respondent.

VALLIANT, J. This is an original proceeding by which the relator seeks a writ to prohibit a judge of the circuit court in Jackson county issuing a writ of assistance to put the purchaser into possession of certain real estate which was sold under a decree of that court in a suit to foreclose a deed of trust.

The application for the writ of prohibition is based on two propositions: First. That the suit in which the foreclosure judgment was rendered was an action at law, in which relator says no writ of assistance can issue. Second. If relator is mistaken in the nature of that suit, and it is to be adjudged a suit in equity, then it says the court has exceeded its jurisdiction in ordering the writ of assistance, because there had been no confirmation of the sale, which was essential to the passing of the title.

1. We have a statutory proceeding to foreclose a mortgage, which has been adjudged to be an action at law. Section 4342, Rev. St. 1899, provides that a mortgagee may file his petition in the circuit court against the mortgagor and those in possession of the property, "setting forth the substance of the mortgage deed, and praying that judgment may be rendered for the debt and damage, and that the equity of redemption may be foreclosed, and the mortgaged property sold to satisfy the amount." In that brief quotation is defined the entire scope of the petition contemplated in the proceeding there authorized. The judgment to be entered in such a suit, if plaintiff is successful, is prescribed in sections 4350 and 4351 following, which is, if the mortgagor has not been summoned or does not appear, that the plaintiff "recover the debt and damages, or damages, found to be due, and costs, to be levied of the mortgaged property," and, if the mortgagor has been summoned or appears, the judgment, in addition to the above, is to be "that if the mortgaged property is not sufficient to satisfy said debt and damages, or damages and costs, then the residue to be levied of other goods and chattels, lands and tenements of said mortgagor." That is the statutory proceeding which this court from the beginning has decided to be an action at law, as distinguished from a suit in equity. *Thayer v. Campbell*, 9 Mo. 281; *Riley's Adm'r v. McCord's Adm'r*, 24 Mo. 265; *Fithian v. Monks*, 48 Mo. 502; *Pemberton v. Johnson*, 46 Mo. 342. The proceeding there contemplated

deals with no uncertain parties and no equivocal titles. The parties are the mortgagee on the one side, and the mortgagor and the man in possession on the other; the one holding the legal title with a defeasance, the other holding the equity of redemption and the possession. The only duties of the court are to ascertain the amount due on the mortgage debt and pass judgment that the property be sold for the amount so ascertained, and that execution issue for the balance, if any, against the mortgagor's other property. When that is all there is of substance in a case, it is a suit at law, even though the petition denominate it a suit in equity, and states the case in language more appropriate to bills in equity. *Riley's Adm'r v. McCord's Adm'r*, 24 Mo. 265. But the remedy given by that statute is not exclusive. Courts of equity retain their original jurisdiction, and mortgages are still foreclosed through equity jurisprudence. *McClurg v. Phillips*, 49 Mo. 515; *Hannah v. Davis*, 112 Mo. 599, 20 S. W. 689; *Brim v. Fleming*, 135 Mo. 597, 37 S. W. 501. If a case which involves, among other things, the foreclosure of a mortgage, must for that reason be limited to the proceeding given in the statute, that proceeding would often be found to be inadequate, because, while under its forms the amount of the debt can be ascertained and the equity of redemption be ordered to be sold to pay it and execution against the mortgagor awarded for the balance, if any, yet there may be other complications involved which only a court of equity can adjust. *Wolff v. Ward*, 104 Mo. 127, 16 S. W. 161. In our Code of Civil Procedure we start out by saying that there shall be but one form of action for the enforcement or protection of private rights, which is to be called a civil action (section 539, Rev. St. 1899); yet we do not say, and it would be futile to say, that we no longer observe the fundamental distinctions that exist between causes that are to be adjudged according to principles of equity and those that are to be measured by the rules of law. And whilst we submit all causes to the judgment of one court of the highest original jurisdiction, yet, in order to render that court competent to fulfill its duty, we have been compelled to clothe its presiding officer not only with the attributes of a law judge, but also with those of a chancellor. Under our judicial system the distinction between law and equity is as clearly observed as it is under the systems in vogue in those states in which separate courts are held for the disposal of equity causes. Whether a cause arising in the circuit court is to be judged to be an action at law or a suit in equity must depend on the facts of the case, and, although the form of the pleadings and of the judgment or decree may have some influence, yet the substance of the controversy must control the decision of the question. If the pleader in his petition, or the court in its decree, has, through misconception of the nature of the cause, added

¶ 8. See *Mortgages*, vol. 35, Cent. Dig. § 1568.

something inconsistent with its true nature, such may, or may not, according to its bearing on the case, render the proceeding erroneous, but it will not change its character in respect to the question as to its being an action at law or a suit in equity.

To determine, therefore, whether the foreclosure suit with which we have now to deal was a suit in equity or a proceeding under the statute, let us first look at the pleadings. According to the petition, the facts of the case are as follows: The plaintiff is the holder of past-due notes and a deed of trust to secure them, which were executed in 1892 by the Wyandotte Hall Joint-Stock Company (which will hereinafter be called the stock company), which was chartered by a special act of the General Assembly in 1857. Wyandotte Lodge, No. 35, of the Independent Order of Odd Fellows (which will hereinafter be called the lodge), is, and was in 1857, and had been long prior to that date, a voluntary association for charitable and benevolent purposes. The lodge consisted of about 125 members, and, under its constitution and by-laws, James O. McKeehan, L. B. Austin, and Samuel M. Taylor, who are defendants in the suit, are the trustees to own, hold, and manage all the property of the lodge. In 1857 the lodge, being desirous of acquiring real estate and erecting a house or hall in which to hold its meetings, and being unable in itself to raise the required capital, in order to obtain outside financial assistance promoted and obtained the incorporation of the stock company. It was provided in the charter that the trustees of the lodge were to have the privilege of purchasing the stock of the stock company, and, acting on that right, they did purchase, and have since held, and now hold, all the stock of the corporation for the use of the lodge. In 1892 the lodge, being desirous of erecting a new building for its use, by resolution authorized the stock company to borrow \$25,000 for that purpose, and to secure the same by deed of trust on the land described in the petition, the title to which was then held by the corporation for the use of the lodge. In accordance with that direction the corporation borrowed that amount of money from one Snyder, and, to secure the same, executed its notes and the deed of trust in question. The plaintiff, before the maturity of the notes, purchased the same for value. The money so borrowed was used in erecting a building on the land, and the same has ever since been in the possession and use of the lodge and the trustees thereof. The terms of the deed of trust, which include a power of sale, are set out in the petition, but it is unnecessary to repeat them here.

At the date of filing the suit, the principal note and some of the interest notes were due and unpaid, and other breaches of the conditions of the deed had occurred. The insolvency of the corporation, the depreciation of the property in value, its insufficiency to pay

the debt, its mismanagement, and misappropriation of the rents by the defendants, are alleged in the petition as reasons why the court should appoint a receiver. It is also alleged that the individual defendants, the trustees, and the officers of the corporation have denied the validity of the plaintiff's security, on the ground that the alleged corporation which was chartered in 1857 had expired by limitation in 1877, under the provision of the general statute limiting the life of corporations to twenty years, and was not in legal existence in 1892, when the notes and deed of trust were executed. But the petition says that in fact, whatever the law on the point may be, the stockholders and officers of the corporation kept up the organization by annual election of officers and transaction of business, treating it as a live concern, holding it out as such, and, on the faith of such display of life, borrowed the money and erected the building on the lot, and that they are now estopped to deny the validity of the act. The stock company, McKeehan, Austin, and Taylor, as trustees of the lodge, and Mr. Dean, the trustee in the deed of trust, are made parties defendant. The prayer of the petition is that the amount of the plaintiff's debt be ascertained; that it may have judgment for the amount against the defendants other than the trustee in the deed of trust; that the deed be declared a valid and first lien on the real estate; that the property be so sold to satisfy the debt; that the defendants' equity of redemption therein be thereby foreclosed; that in the meantime a receiver be appointed to take possession of the property, to collect the rents and preserve the same, to the end that they be used to protect the property from taxes, etc., and finally applied towards payment of the debt; and for general relief.

The return of the sheriff on the summons is not in the record before us, but we infer from what does appear that the service as to the stock company was on Mr. Porterfield as its president. Mr. Porterfield in his own name was allowed to file what in the proceedings is called a plea, which was to the effect that the stock company, having been incorporated in 1857, ceased to exist as a corporation in 1877 by force of the 20-year limitation; that at the date of the deed of trust in question it had no corporate existence and its alleged acts were null and void.

The individual defendants who are sued as trustees of the lodge filed an elaborate answer, in which they made a specific denial of each material allegation in the petition, including that of their own alleged title in the property, and averred that the stock company had ceased to be a corporation in 1877, having expired by limitation; that of the last board of directors two were yet living; that the title to the property owned by the corporation at the date of the expiration of the charter passed to the individuals composing the then board of direct-

ors, as trustees, and is now held by the two surviving members, whose names, however, the answer does not state, nor does it state that they are unknown to the defendants answering. The plaintiff came back with a reply, which was to the effect that, under the circumstances already stated, the defendants were estopped to deny the corporate existence of the stock company or the validity of the deed of trust.

In the foregoing summary we have not given the full statements that are set forth in the pleadings, as might be necessary if the record in that case were now before us for review on appeal, but only sufficient to show the nature of the suit and the character of the issues of law and of fact that the court had for trial. The cause was tried by the court upon the pleadings and proofs adduced, and there was a finding of all the issues for the plaintiff. On the question of the corporate existence of the stock company at the date of the deed of trust, the court makes a special finding to the effect that, from the date of the act of incorporation down to and including that of the execution of the notes and deed of trust, the concern continued to act as a corporation, holding regular elections, and in all respects behaving as if it were a legal entity; that the defendants the trustees of the lodge owned all the stock for the use of the lodge, that the lodge had, by a resolution, directed its trustees, as such stockholders, to obtain the loan in question through means of the corporation; that the money was obtained by this means, and used for the erection of the building in the name of the stock company, and had been ever since its erection in the use of the defendants; and that, therefore, they were estopped to deny the corporate existence of the stock company. The court found that there was due on the notes \$38,085.26, for which sum and interest it rendered judgment against the stock company, and decreed that the deed of trust to secure that debt was a first lien on the real estate in question; that the same be sold by the sheriff of the county "in the same manner as lands are sold under the laws of this state under ordinary executions for the sale of real estate, and that upon such sale, and the payment to the sheriff of the purchase price thereof, the said sheriff shall execute and deliver to the purchaser a good and sufficient deed of conveyance of said land and improvements, which shall vest in said purchaser the title thereto, free and clear of all claims, rights or demands of the defendants, and each of them, and all persons in privity with or claiming by, through, or under them, or any of them, and that the title of such purchaser to said land and improvements be, and the same is hereby, quieted, confirmed, and established against all of said defendants, and all persons claiming or to claim by, through, or under

them or any of them; and it is further ordered, adjudged, and decreed that the defendants and all such persons above referred to be, and they are hereby, barred and foreclosed of all equity of redemption or claim in and to said land and improvements and any and every part thereof. It is further ordered, adjudged, and decreed by the court that the purchaser of said land and improvements at said sale be let into possession thereof, and to every part thereof, and that defendants and each of them who may be in possession thereof, or any part thereof, and any and all persons who, since the commencement of this suit, have come into possession thereof, or any part thereof, deliver possession to such purchaser upon the production to them of the sheriff's deed therefor, and in default thereof that a writ of possession issue out of this court to put such purchaser into possession according to law." Then follows direction to the sheriff as to the appropriation of the proceeds of the sale, first to the costs, then to the debt, and the surplus to the stock company. The decree concluded with a judgment for costs against the stock company, and an award of execution to enforce the decree in all its parts.

There was an appeal taken by the defendants, which is now pending, but, as there was no supersedeas, execution issued, a sale occurred, at which the respondent Alsop became the purchaser, received the sheriff's deed, which he exhibited to the defendants and their tenants, and demanded possession, which they refused; then he applied to the court, which rendered the judgment for a writ of assistance to put him in possession. Notice of this application was duly given to the defendants and their tenants, and also to the lodge, which entered a special appearance, and filed an answer in which it claimed to be a corporation and the sole owner in possession of the property, and contested the right of Alsop to the writ asked for and the jurisdiction of the court to issue it. The trustees Austin and Taylor answered, as did also some of the tenants, all contesting the right of the purchaser to the writ, and the authority of the court to issue it. The application came on for hearing upon the petition by the purchaser, the answers or returns of the parties, and the proofs adduced on the issues of fact raised. There was a finding for the petitioner on the facts, and the court awarded a writ to put him in possession. There is no necessity, for the purpose of our present inquiry, to set out here the details of the order, its conditions, limitations, etc. The general purport of the order was that, as against the lodge, the trustees, and their tenants, the purchaser at the sheriff's sale was to have possession of the property. Upon the entering of that order, the lodge filed its petition for the writ of prohibition we are now asked to issue.

The foregoing epitome is sufficient to show that there were questions in the case of such a nature as could not be settled in a tribunal proceeding within the limits that circumscribe a court in the trial of an ordinary lawsuit; questions of a character certainly different from those which were in the minds of the lawmakers when they enacted our statute, above quoted, providing for the foreclosure of a mortgage; questions of the very character which rendered the establishment of courts of equity jurisdiction a necessity in the administration of justice.

If the relator's idea in reference to the expiration of the life of the corporation is correct, then the court had to deal with a title in the cloud, with no one tangible by the process of the court except those having only the equitable interest—those for whose use the property was acquired. If the statements in the petition are true, the stock company acquired and held the title to the property for the sole use and benefit of the lodge; the stock company was the trustee, and the lodge the cestui que trust; the stock company held the legal, and the lodge the equitable, title. This relation was rendered the more intimate by the lodge owning, through its trustees, all the stock in the stock company, so that, as to the stock, the legal title was in the trustees, while the equitable title was in the lodge. It is said in the answer of the trustees that two of the members of the board of directors, who were such in 1877, when the life of the corporation expired, are still alive; that the legal title to the property passed to them on the demise of the corporation, and is now held by them. The issue on that point is not sufficiently tendered, because the names of the alleged surviving directors are not given. The court could not find for the defendants on that issue unless it could locate the title, and that it could not do unless it was informed of the individuals who held it. If, therefore, it is true that the corporation at the date of the deed of trust was dead, we have a case (if the statements in the petition are true) in which the trustee is dead, but the cestui que trust has assumed management of the property, has put forward certain persons professing to represent the trustee, has induced confidence to be placed in them as such, has obtained a large amount of money through that means, and now denies the validity of their act and deed on the ground that they had no legal authority to do as they did. In a court which deals with strict rules of law alone, the position could perhaps be sustained; but a court of equity can adjust the rights of the parties on broader principles. In such case, if the legal title has dissolved or become intangible, a court of equity alone can reconstruct it out of the equitable interests that remain.

We have not intended by anything that is here said to express or intimate any opinion on the merits of the controversy, but only to indicate the nature of the controversy, so that

we can judge whether it is a suit in equity or an action at law. It is a suit in equity.

2. On one point the decree takes the form of a judgment in personam against the stock company, and this is considered by relator as showing conclusively that the proceeding is an action at law. If the pleadings presented to the court a suit in equity, its character would not be changed because the decree, erroneously it may be, in one respect took the form of a judgment at law. If the court, under the pleadings, had no jurisdiction to enter a personal judgment, that much of the decree would be void, but the rest of it is not dependent on it. And if there was in this case in that particular an excess of jurisdiction, it was on a point that in no manner affected the relator. If what the relator now says about the stock company is true, a judgment against it amounts to nothing, and, at all events, relator has no cause to complain of it.

3. Relator's next proposition is that, if it is a suit in equity, then title to the property did not pass by the sale and sheriff's deed, but is held in suspense until the sale shall be confirmed by the court. The usual course of procedure in courts of chancery in such case was for the officer or special commissioner, who was ordered by the decree to make the sale, to report his act to the court and await its further order; then, if the act was confirmed, he would make the deed; and then the court, if it deemed it right to do so, would order a writ to issue to put the purchaser into possession. In the case at bar the court, by its decree, ordered the sheriff to sell the property as in case of ordinary sales of land under executions, to execute a deed to the purchaser, receive from him the purchase money, and pay it out in a certain way. The decree also declared that the title to the property should pass to and vest in the purchaser, and that he, on conditions therein named, should be let into possession. In these particulars the decree did not follow the ancient chancery practice, but passed judgment on points that under that practice would not have been adjudged until the coming in of the report of the officer or commissioner. Upon the part of respondent it is argued that, whilst equity jurisdiction is preserved in our courts, yet as to procedure our Code of Procedure applies, where it can apply, as well to equity as to law cases. We will not decide that question now, nor intimate any opinion on it, because it is not necessary for the purpose of this application to do so, and because to decide it now might be to anticipate the decision on that point when the case comes before us for review on appeal. If the decree ought to have followed, in the respect complained of, more closely the ancient chancery procedure, the most that can be said against it is that in that respect it was erroneous, but that would not be the same as saying that the court exceeded its jurisdiction. The court has said in its decree that the sale and sheriff's deed

should pass the title to the purchaser, and that he should be let into possession. The court was dealing with a subject over which it had jurisdiction, and the decree is valid and binding until, if ever, it is reversed on appeal.

It appears that after the sale by the sheriff, and the delivery by him of the deed to the purchaser, the latter went with his deed to the parties in possession and demanded to be let into possession as the decree required, but they refused, and then the purchaser applied to the court for the writ of assistance. In the hearing of that application the relator, with others interested, was present and participated. All the facts necessary to show that the purchaser was entitled to have that provision of the decree relating to putting him in possession were shown to the court, and all that the relator and others desired to show to the contrary was shown, and after a full hearing the court decided that the purchaser was entitled to the writ, and so ordered. If a confirmation of the sale was necessary, the judgment of the court on that application was a confirmation. *Jones v. Manley*, 58 Mo. 559; *Grayson v. Weddle*, 63 Mo. 538.

That courts of equity, in the exercise of their jurisdiction in the foreclosure of mortgages, have the power to issue writs to put the purchasers into possession of the property sold, is a proposition well established. *Jones on Mort.* (4th Ed.) § 1663; 2 *Ency. Pl. & Pr.* 975, 978; *Wiltse on Mort. For.* § 593; *Root v. Woolworth*, 150 U. S. 411, 14 Sup. Ct. 136, 37 L. Ed. 1123; *Kershaw v. Thompson*, 4 Johns. Ch. 610; *Woodsworth v. Tanner*, 94 Mo. 124, loc. cit. 128, 7 S. W. 104. Under the ancient chancery proceeding it is called a writ of assistance, and there is no objection to that name in our practice. Our statute gives to our courts express authority to issue all writs necessary in the exercise of their jurisdictions. Section 1598, Rev. St. 1899.

Nothing we have said in this opinion is intended as passing judgment on any points in the decree, or the proceedings, which the parties appealing therefrom conceive to be error, but we have viewed the case only from the standpoint of relator, who has challenged the validity of the action of the court in awarding a writ of assistance, upon the ground that the court, in awarding the writ, exceeded its jurisdiction. We hold that the court had jurisdiction to issue the writ, and that it was in duty bound to do so if, in its own judgment, the right and justice of the case demanded it.

The writ of prohibition is denied. All concur, except *BURGESS, J.*, who dissents.

WHITEHEAD v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Missouri, Division No. 2,
June 30, 1903.)

APPEAL—ABSTRACT—DISMISSAL.

1. Supreme Court Rule 12 (73 S. W. vi) provides that, in all cases where a complete tran-

script is brought to that court in the first instance, appellant shall deliver to respondent a copy of his abstract of the record, and file 10 copies thereof with the clerk of the court. Rule 13 (73 S. W. vi) requires that the abstract be printed, and that it set out so much of the record as is necessary to a full understanding of the questions presented. *Held*, that where no abstract has been filed on an appeal where a verdict was directed for defendant, and the statement mentions the evidence of only 3 out of 14 witnesses, the appeal must be dismissed.

Appeal from Circuit Court, Butler County; J. L. Fort, Judge.

Action by King Whitehead against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for defendant, and plaintiff appeals. Dismissed.

Murray & Renfro, for appellant. Martin L. Clardy and Louis F. Dinning, for respondent.

GANTT, J. This is an appeal from the Butler circuit court. When the cause was reached on the docket, counsel for respondent insisted that the appeal should be dismissed for failure to comply with the rules of this court, particularly rules 12 and 13. (73 S. W. vi). It is obvious that counsel for appellant have failed to comply with either the spirit or the letter of those rules. They were designed to aid this court in grasping a full and complete understanding of the questions presented in the circuit court, and it is therefore provided in rule 12 that, "In all cases where a complete transcript is brought to this court in the first instance, the appellant shall deliver to respondent a copy of his abstract of the record at least thirty days before the day on which the cause is set for hearing and file ten copies thereof with the clerk of this court not later than the day preceding the one on which the cause is set for hearing." In *Johnson v. Carrington*, 120 Mo. 315, 25 S. W. 200, this court ruled that a statement by the plaintiff in error, merely giving an abstract of the evidence offered at the trial, is not a compliance with rules 12 and 13, and the writ will be dismissed on motion of the respondent. In this case it does not even appear, except by the designation of plaintiff, that this case was brought here by appeal. There is no effort to abstract the evidence at all, and that only of three witnesses is mentioned, whereas eleven other witnesses testified. The pertinency of this observation will be seen when we note that plaintiff says the circuit court directed a verdict for the defendant and the jury returned a verdict. Now it is evident that, if we are to review the action of the circuit court on the demurrer to the evidence, we are entitled to an abstract of all, not merely of three, witnesses.

Moreover, it often happens that a fragment of testimony, standing alone, appears to be incompetent or was erroneously excluded, but, when viewed in the light of all the testimony and the rulings of the court, it is entirely proper, or at least harmless. We have

been very conservative in the enforcement of these rules, but a number of cases will show that when the appellant disregards the rules to such an extent that his so-called abstract will necessitate the preparation of one by this court, or the burden and cost of so doing will be entailed on the respondent, we have enforced them by dismissing the appeal. *Brand v. Cannon*, 118 Mo. 598, 24 S. W. 434; *Craig v. Scudder*, 98 Mo. 665, 12 S. W. 341; *Garrett v. Coal Mining Co.*, 111 Mo. 281, 20 S. W. 25; *Halstead v. Stone*, 147 Mo. 649, 49 S. W. 850; *Bobb v. Wolff*, 148 Mo. 335, 49 S. W. 996; *Clements v. Turner*, 162 Mo. 467, 63 S. W. 84.

As there is not even an effort to file an abstract in this case, and the statement is so utterly insufficient to enable us to pass at all on the demurrer to the evidence, this appeal must be, and is, dismissed. All concur.

PHILLIPS et al. v. JONES et al.

(Supreme Court of Missouri, Division No. 2.
June 30, 1903.)

APPEAL—QUESTIONS REVIEWABLE—MOTION FOR NEW TRIAL—RECORD—BILL OF EXCEPTIONS.

1. Alleged error in the admission and rejection of evidence cannot be reviewed on appeal, where no motion for a new trial is made below.

2. The fact that a motion for a new trial was made can only be shown by bill of exceptions, and is not made to appear by copying the motion into the record proper.

Appeal from Circuit Court, Lawrence County; H. C. Pepper, Judge.

Action by Jesse H. Phillips and others against Lucy A. Jones and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

J. W. Farris and R. S. Phillips, for appellants. J. L. Newhouse, for respondents.

GANTT, J. This is an appeal from the circuit court of Lawrence county. The action is ejectment for certain lands in Laclede county, and was originally brought in Laclede county, and a change of venue awarded to Lawrence county. The judgment was for defendants, and plaintiffs appeal.

A jury was waived, and the cause was tried to the court. No errors are assigned on the record proper. The only points assigned in brief and argument of counsel are the insufficiency of the evidence to sustain the judgment, and the admission of evidence. There is no motion for a new trial incorporated in the bill of exceptions, and as error in the admission and rejection of evidence can only be made to appear in a bill of exceptions, and as such errors can only be reviewed in this court after the attention of the circuit court has been called to them in a motion for new trial, it is

plain that there is nothing before us for review. It is true that in the transcript a motion for new trial is copied into the record proper by the clerk, but the preservation of these motions is the special and exclusive office of the bill of exceptions. They can be preserved nowhere else. No recital in the record proper will have any such effect.

In *Nichols v. Stevens*, 123 Mo., loc. cit. 119, 25 S. W. 578, 27 S. W. 613, 45 Am. St. Rep. 514, it was ruled that "a recitation in the record of matters not properly belonging thereto cannot be noticed in an appellate court. Matters which are not in fact a part of the record cannot be made such by the mere recital of the clerk." Citing *Parkinson v. People (Ill.)* 24 N. E. 772; *Gould v. Howe*, 127 Ill. 251, 19 N. E. 714; *Ryan v. Gowney*, 125 Mo. 474, 28 S. W. 189; *State v. Revely*, 145 Mo. 660, 47 S. W. 787; *State v. Burdett*, 145 Mo. 674, 47 S. W. 796; *State v. Gilmore*, 110 Mo. 1, 19 S. W. 218.

This court, in a long line of decisions, has held that it will not consider objections to the action of the circuit courts which were not brought to the attention of the circuit court by a motion for a new trial. *Ross v. Railroad*, 141 Mo. 390, 38 S. W. 926, 42 S. W. 957; *Mattock v. Williams*, 59 Mo. 105; *State v. Harvey*, 105 Mo. 316, 16 S. W. 886. We have then before us nothing but a copy of the evidence taken on the trial. The alleged errors on which the appellant relies were not called to the attention of the circuit court, so far as the bill of exceptions discloses, and hence, so far as this record shows to the contrary, no exceptions were saved to the action of the circuit court. It is most unfortunate that counsel overlooked these essential prerequisites to a review by this court, and thus incurred the cost and delay of this appeal, but the practice has been too long settled to justify us in making an exception of this appeal.

It results that we must affirm the judgment, and it is accordingly so ordered. All concur.

Ex parte HANDLER.

(Supreme Court of Missouri, Division No. 2.
June 30, 1903.)

INTOXICATING LIQUORS—LOCAL OPTION LAW—CONSTITUTIONALITY.

1. The local option law (Rev. St. 1899, p. 765, art. 3, c. 22) is not in violation of the constitutional provision that all laws of a general nature shall have uniform operation throughout the state, on the ground that a penalty is thereby imposed, for selling and giving away intoxicating liquors, different from that inflicted for the illegal sale or giving away of such liquors in portions of the state where the law is not in operation.

2. The local option law (Rev. St. 1899, p. 765, art. 3, c. 22), authorizing cities having a population of 2,500 inhabitants to prohibit the

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 1691.

sale of intoxicating liquors therein, is not in contravention of Const. art. 9, § 7, in that it makes a new class of cities of the fourth class, to wit, those having a population of 2,500 inhabitants.

Application for writ of habeas corpus by Bone Handler, alias Joel Smith, to secure applicant's release from custody. Application denied.

L. D. Ramsey, T. M. Bailey, and Porter & Groves, for petitioner. Edward C. Crow, Atty. Gen., and L. J. Miles, for respondent.

GANTT, J. The petitioner is confined in the jail of Atchison county for failure to pay a fine of \$300 assessed by a jury in the circuit court of Atchison county, Mo., in the cause of the State of Missouri against said Bone Handler, for a violation of the local option law of this state by unlawfully and willfully selling and giving away intoxicating liquors in said county of Atchison on the 28th day of May, 1902, after the act of the General Assembly of this state approved April 5, 1887, and known as the "Local Option Law," had been adopted by said county and was in force.

From the judgment and sentence in that case the defendant therein, the petitioner herein, took his appeal to this court, and the same is now lodged in the clerk's office of this court; nevertheless he seeks to be discharged by virtue of a writ of habeas corpus, on the ground that the act of the General Assembly approved April 5, 1887, and now known as article 3 of chapter 22, page 765, of the Revised Statutes of 1899 of this state, is unconstitutional.

1. The constitutionality of this law was assailed in *State ex rel. Maggard v. Pond*, 93 Mo. 606, 6 S. W. 469 (1887), and after the most exhaustive argument, in which every proposition now advanced by petitioner and his counsel, save two, was considered and weighed by the court, it was held constitutional in an opinion by Chief Justice Norton, Judge Sherwood alone dissenting. That decision was rendered 18 years ago. The next year after that decision was promulgated, the law was again attacked in *Ex parte Swann*, 96 Mo. 44, 9 S. W. 10 (1888), and its constitutionality reaffirmed after reargument. Those decisions were followed and accepted as settling the validity of this law in *State v. Mitchell*, 104 Mo. 121, 16 S. W. 118, 24 Am. St. Rep. 324. In *State v. Dillard Moore*, 107 Mo. 78, 16 S. W. 937 (1891), this court was asked to overrule *State ex rel. Maggard v. Pond*, 93 Mo. 606, 6 S. W. 469, but the Supreme Court in Banc said: "No reason has been suggested, and none can be seen by us, for receding from the conclusion reached in the cases of *State ex rel. Maggard v. Pond*, 93 Mo. 617, 6 S. W. 469, and *Ex parte Swann*, 96 Mo. 44, 9 S. W. 10. These cases were considered with great care, and the conclusion reached therein meets with our continued approval, and we reaffirm the constitutionality

of said law." In *State v. Searcy*, 111 Mo. 236, 20 S. W. 186 (1892), the question being again mooted, the constitutionality of the law was reaffirmed. In *State v. Watts*, 111 Mo. 554, 20 S. W. 237, this Division again unanimously expressed its satisfaction with the decisions in *State ex rel. Maggard v. Pond* and *Ex parte Swann*, supra. In *State v. Wingfield*, 115 Mo. 428, 22 S. W. 363, 37 Am. St. Rep. 406 (1893), the constitutionality of the act was once more brought in question, but Judge Burgess, while believing the law unconstitutional, expressly deferred to the previous adjudications sustaining it, and Judge Sherwood, who had dissented up to that time, concurred in the opinion. Afterwards, in *City of Warrensburg v. McHugh*, 122 Mo. 649, 27 S. W. 523, the constitutionality of this law was again raised, and, because of that contention alone, this court had jurisdiction to hear and determine the appeal therein. Judge Sherwood wrote the opinion, and, in answer to the insistence that the local option law was unconstitutional, said, "We will not enter in any discussion of the constitutionality of the local option law," and thereby sustained its constitutionality, because it is perfectly obvious that, if it was unconstitutional, the ordinance of the city imposing the fine, from which the appeal in that case was taken, was clearly invalid, and the judgment must have been reversed, whereas it was affirmed with the concurrence of every member of this Division.

Thus this law, on eight distinct occasions, has been solemnly adjudged by this court to be a valid and constitutional enactment. It is true that afterwards, in *State v. Buchardt*, 144 Mo. 83, 46 S. W. 150, an appeal from a conviction in a petit larceny case, Judge Sherwood, arguendo, referred to the decision in *State ex rel. Maggard v. Pond*, 93 Mo. 606, 6 S. W. 469, and said it was incorrectly decided and would not be followed, but in that statement the writer did not concur, as in his opinion, then and now, the correctness of the Maggard-Pond decision was not involved in the Buchardt Case. A reading of the last-mentioned case will show, we think, that the remark of the learned author of it, in reference to the Maggard-Pond Case, was obiter, and in no manner affected the judgment in that case, which was affirmed. Subsequently, in *Owen v. Baer*, 154 Mo. 538, 55 S. W. 644, the Maggard-Pond decision was discussed arguendo by Judges Marshall, Sherwood, and the writer hereof, and an examination of those opinions will demonstrate that Judges Brace, Marshall, Valliant, and Robinson and the writer all adhered to and approved the decisions in *State ex rel. Maggard v. Pond*, 93 Mo. 606, 6 S. W. 469, and *Ex parte Swann*, and the cases above cited which followed those decisions, and Judges Sherwood and Burgess dissented from that view, so that those decisions are still controlling authority on this question as to this law now under consideration. Surely, if any-

thing is ever to be held settled by judicial opinion, and if the doctrine of stare decisis is not to be entirely discarded, it should obtain and govern as to the constitutionality of the local option law, and especially so when every objection now urged, except two, was ably and exhaustively considered by both court and counsel in those cases, and particularly so when the only dissenting judge in those cases has subsequently given his adherence to the conclusion reached by the majority, in opposition to his views, in *State v. Wingfield*, 115 Mo. 439, 22 S. W. 363, 37 Am. St. Rep. 406, and *Warrensburg v. McHugh*, 122 Mo. 649, 27 S. W. 523.

Addressing ourselves now to the two propositions which counsel now urge in addition to those decided in the *Maggard-Pond Case*, the first is that it violates the constitutional provision that all laws of a general nature shall have uniform operation throughout the state, and, inasmuch as a different penalty is imposed by the local option law for selling and giving away intoxicating liquors from that inflicted for the sale or giving away such liquors in other portions of the state, it necessarily offends the principle of uniformity. That a local option law like our statute on that subject was not a general law was one of the chief contentions in *Maggard v. Pond*, and was ruled adversely to that contention. The decision of this court on that point is abundantly fortified by many of the courts of last resort in the various states of the Union, and the decision of this court is expressly approved by name in several well-considered decisions. *Mathis v. Jones*, 84 Ga., loc. cit. 807, 11 S. E. 1018; *Paul v. Gloucester Co.*, 50 N. J. Law, 594, 15 Atl. 272, 1 L. R. A. 86. "This objection has generally been held untenable. To render such laws constitutional, it is necessary only that they shall operate generally upon all persons or classes of persons intended to come within their provisions. The fact that they have been accepted in one locality, and not in another, is immaterial if, by complying with the necessary formalities, they are capable of adoption in all localities alike." 19 Amer. & Eng. Ency. p. 493. and cases. The very words "local option" imply the grant of the right to one locality to adopt, and another to decline to avail itself of, the law. Moreover, it is no objection to a law that it does not operate upon every citizen alike; it is sufficient if it operates equally upon all who in all parts of the state come under the same circumstances and conditions. *Gordon v. The State*, 46 Ohio St. 607, 23 N. E. 63, 6 L. R. A. 749; *Santoro v. The State*, 46 Ohio St. 607, 23 N. E. 63, 6 L. R. A. 749.

It seems hardly necessary to argue that, when the people of a given county or city elect to avail themselves of the local option law to prohibit the sale of intoxicating liquors in such county or city, a different condition is at once created from that which obtains in counties where it has not been

adopted. In the one, regulation only is the object of the law; in the other, prohibition; and, the circumstances being different, obviously it is entirely within the power and discretion of the Legislature to impose different penalties in the one from those provided for the violation of the law for the other. As said by Judge Black in *Ex parte Swann*, 96 Mo. 44, 9 S. W. 10: "It is plain that the two laws cannot be in force in the same locality at the same time." Both are general laws within the meaning of the Constitution of this state, though the adoption of the local option act suspends the operation of the general law governing the sale of intoxicating liquors in the counties and localities where adopted. And, as further said by that able and eminent jurist: "There is no discrimination whatever in favor of or against persons or classes of persons within such territory. They are all treated alike. It is true, the penalties for violating this law are not the same as those for violating the dram-shop law. They are, indeed, not the same offenses. In the one case the offense is the violation of a law which allows and regulates traffic in intoxicating liquors as a beverage, and in the other case the offense is for selling such liquors where the sale is wholly prohibited by law." A different policy is indicated by the two systems, and it is entirely competent for the Legislature to adopt more stringent and drastic methods to prevent the sale or giving away of intoxicating liquors in those counties in which the people have voted they do not want it under any regulations, than in those where the sale is allowed under regulations. Indeed, Judge Sherwood, in his able and strong dissent in *Maggard v. Pond*, says, "I do not deny but that a local option law could be passed, one that would repeal existing laws and denounce heavier penalties than they do against the sale of intoxicating liquors." While counsel deem this is a new question, it was fully and clearly disposed of in *Ex parte Swann*, and we think unanswerably.

As to the other proposition, that it offends against section 7 of article 9 of the Constitution of this state, in that it makes a new class of cities of the fourth class, to wit, those having a population of 2,500 inhabitants, to enlarge the corporate powers of said cities, so as to enable them to prohibit the sale of intoxicating liquors altogether, while those having 500 and under 2,500 can merely regulate the sale by levying and collecting a license tax thereon, this contention is based on the opinion of three of the judges in *Owen v. Baer*, 154 Mo. 438, 53 S. W. 644. An examination of that case will show, however, that, while the writer took that view of the statute under consideration in that case, his views were not adopted by the court, and hence did not become the opinion of the court, and, while it is true that Judge Marshall thought that the views of myself and those agreeing with me were inconsistent

with the Maggard-Pond decision, he fully maintained the last-named decision in a most able and elaborate review of all the authorities on the questions involved in the Maggard-Pond Case. The writer and Judges Valliant and Robinson agreed that Maggard v. Pond was correctly decided, and were of opinion that the local option act could not properly be construed as changing the municipal charters of cities of the fourth class. The right to issue dramshop licenses had not been conferred on such cities, and the grant to the citizens of such cities having 2,500 and more inhabitants to vote that they were opposed to the sale of liquors in such cities was simply a prohibition on the county courts in counties containing such cities to issue licenses to sell intoxicating liquors therein. On its face it did not purport to amend the charters of such cities in any way, nor to change their statutory power. It was a police regulation by a general law of the state, and, if adopted by a vote of the people, the law prohibited, not the city council, but the county courts, from legalizing the sale of intoxicating liquors therein, and in no manner enlarged their charters. But, whatever the opinion of the writer as to the effect of the law in amending the charter of Westport in *Owen v. Baer*, the writer concurred with Judge Marshall in holding that the local option law was entirely constitutional, and, as has already been said, inasmuch as the constitutionality of that act has been solemnly sustained on eight different occasions, it should be regarded as the settled law of this state.

The petition for a discharge is denied, and the petitioner remanded to the custody of the sheriff to abide the judgment and sentence of the circuit court until it is reversed or set aside for some error other than the unconstitutionality of the law of 1887, known as the "Local Option Act."

BURGESS and FOX, JJ., are of the opinion that the local option law is unconstitutional, but, as it has so often been held otherwise by this court, concur in the result.

SYLVESTER v. JOHNSON.

(Supreme Court of Tennessee. May 21, 1903.)

REAL ESTATE AGENTS—SALE BY ANOTHER—COMMISSION—TERMINATION OF AGENCY.

1. Defendant's daughter, who generally conducted defendant's affairs, gave complainant the sole agency for the sale of a lot, and he placed his sign as such sole agent thereon, removing all other signs. This was done with defendant's knowledge, and without objection. The daughter referred a prospective purchaser to plaintiff, with the statement that the matter was entirely out of her hands, and there was no denial of the existence of an agency. *Held* to show that complainant was defendant's sole agent.

2. Where a person who had the sole agency for the sale of a lot commenced the negotia-

tions with the purchaser, he is entitled to his commission, though the sale was consummated through the agency of another.

3. While an agency for the sale of a certain lot was terminated by the sale of the property to one with whom the agent had commenced negotiations, this did not defeat the agent's right to his commission.

Appeal from Chancery Court, Shelby County; F. H. Heiskell, Chancellor.

Action by J. A. Sylvester against Elizabeth Johnson. Decree dismissing the bill, and complainant appeals. Reversed.

Rhea P. Cary, for complainant. Thos. M. Scruggs and M. G. Evans, for defendant.

WILKES, J. This is an action by a real estate broker to recover commission upon a sale of certain real estate in Memphis for the defendant. The decision of the case turns upon the questions whether the complainant had the exclusive agency for the sale of the lot at the time it was sold, and whether he was instrumental in procuring the purchaser. The chancellor found against complainant, denied him any relief, and dismissed his bill, and complainant has appealed and assigned errors.

Defendant contends that complainant was not sole agent, and that he was not the efficient cause in negotiating the sale. Her contention, in detail, is that the complainant was never given the sole agency, but, if he was, it was without defendant's authority, and that the agency was revoked by a sale of the lot. We have examined the record with much care, and feel constrained to differ with the chancellor, and reverse his decree. We think that complainant was given the sole agency. While this was done by the daughter of defendant, it was known to defendant, and consented to by her. Complainant placed his sign upon the lot, on which was painted the words "Sole Agent," and this was known and seen by both mother and daughter. In her answer, defendant admits that she made no objection to this. He removed all other signs of other agents from the lot, and this was seen by and known to defendant. The defendant was old, and her daughter generally attended to her business. When Mr. Lake approached the daughter with a view of buying the lot, she referred him to the statement on the sign, and said, "The matter is entirely out of my hands." There is no question or controversy but that he was an agent, and we think complainant has made out his contention that he was sole agent.

The lot was sold to a man named Godwin by another real estate agent, named McNeill. Godwin says that his first negotiations were with complainant, and the daughter corroborates this, and knew of the fact that complainant was negotiating with Godwin. We think that the evidence shows that the first negotiations were had between complainant and Godwin while complainant

had the sole agency, and that McNeill came in, pending the negotiations, and effected the sale. Under this state of facts, complainant is entitled to his commission.

It is said that his sole agency was terminated by a sale of the property, and, of course, this is true, but does not affect complainant's right to his compensation. If so, every agent who is instrumental in bringing property to sale may be defeated of his compensation if the principal sell, even if the sale be to a party with whom the agent is negotiating.

We are of opinion that, under the record, complainant is entitled to his compensation, and the decree of the court below is reversed, and judgment is rendered here for the commission and interest, and all costs, in favor of complainant.

MEMPHIS ST. RY. CO. v. RIDDICK et al. (Supreme Court of Tennessee. June 9, 1903.)

STREET RAILWAY—INJURY TO PERSON ON STREET—FAILURE TO LOOK AND LISTEN.

1. It is not negligence as a matter of law for a person driving on a street in a vehicle in the daytime, under ordinary circumstances, to fail to look and listen for the approach of street cars.

Error to Circuit Court, Shelby County; J. P. Young, Judge.

Separate actions by T. K. Riddick, Harriett Riddick, and William Holloway against the Memphis Street Railway Company. The actions were tried together, and, from judgments for plaintiff in each case, defendant brings error. Reversed.

Wright, Peters & Wright, for plaintiff in error. M. C. Ketchum and W. A. Percy, for defendants in error.

NEIL, J. Shortly before the present suit was brought, the phaeton of the defendant in error was run down, by a car of the plaintiff in error, on Beal street, in the city of Memphis, by reason of which occurrence the phaeton was broken, and Mr. Riddick's daughter, Miss Harriett, and his colored driver, William Holloway, were injured. Mr. Riddick brought suit for the breaking of his vehicle, and also for the expense of medical attention to his daughter, necessitated by the collision. Miss Harriett also brought suit for the injury she sustained. The colored driver also brought suit, and these three actions were tried together as one case in the court below and in this court. Verdicts were rendered in favor of each of the three plaintiffs in the court below, and judgments were entered thereon. No question was made here as to the amount of these judgments, the errors assigned being directed alone to the charge of the circuit judge.

Numerous objections were made to the charge, and all have been disposed of in a written memorandum filed with the record.

In the present opinion, designed for publication, we need notice only one of these objections, and we do this in order to correct a misconception of one of the opinions of this court, which has been several times manifested during the present term. The objection referred to is as follows: During the course of his honor's charge, he used the following language: "While it is ordinarily the duty of a person traveling on the street in a vehicle to look and listen for the approach of cars, yet this is not an absolute rule of law; but it is for the jury to say, in view of all the proof, whether the plaintiff was guilty of contributory negligence in failing to look and listen." It is insisted that the circuit judge erred in giving this instruction, because it is said to be in conflict with our latest case upon the subject. *Nashville, etc., Ry. Co. v. Norman*, 108 Tenn. 324, 67 S. W. 479. The instruction was in accord with *Wilson v. Street Railway Co.*, 105 Tenn. 74, 83-85, 58 S. W. 334, and the cases therein cited, and with *Citizens' Rapid Transit Co. v. Seigrist*, 96 Tenn. 119, 33 S. W. 920, and *Saunders v. City & Suburban Railroad Co.*, 90 Tenn. 130, 41 S. W. 1031. It is insisted by counsel that a different rule is laid down in the *Norman Case*, but this is a mistaken view. It was not intended in that case to overrule any of the cases referred to, or to in any wise depart from or modify them. In the *Norman Case* there was evidence tending to show that Norman drove his wagon, at 11 o'clock at night, along Church street, in Nashville, into the crossing made by the intersection of Church street and Front street, at the foot of a heavy grade running northward from that point to the public square, and that at this point he was struck by a car, upon Front street, coming downgrade from the direction of the public square, and that before going upon this crossing he neither looked nor listened. In view of these facts, counsel for the railway company requested the circuit judge to give the following instruction to the jury, viz.: "It was the duty of the plaintiff to look and listen for the approach of the car before he attempted to pass over the track, and if you believe from the evidence that he failed to look and listen, and that such failure was the direct and proximate cause of the accident, or directly contributed to it as its approximate cause, your verdict should be for the defendant." The circuit judge declined to give this instruction to the jury, and this action of his was assigned as error in this court. In respect of this matter, this court, speaking through McAllister, J., said: "We are constrained to hold that the objection thus urged to the charge is well founded, and the court was in error in refusing this supplemental request to the effect that, if the plaintiff's negligence contributed proximately to the accident, this fact would defeat the right of recovery." In that case the court regarded the act of the plaintiff in driving at night

with his wagon into a crossing at such a place as negligence per se—that is, under the special facts just stated—and held, in effect, that, if that negligence was the proximate cause of the plaintiff's injury, he could not recover. But this holding in no wise impeaches the rule announced in the case of *Wilson v. Street Railway Co.*, supra, and other cases referred to. It results that the foregoing assignment of error must be overruled.

For other errors, however, pointed out in the memorandum opinion, the judgment must be reversed, and the cause remanded for a new trial.

GORDON v. COX et al.

(Supreme Court of Tennessee. May 9, 1903.)

JUDGMENT — LIEN — PROPERTY AFFECTED — FRAUDULENT CONVEYANCE BY JUDGMENT DEBTOR—BONA FIDE PURCHASER.

1. Several months before the recovery of judgment against him, a judgment debtor transferred all his property to a third person. After recovery of the judgment, complainant, without notice of any fraud in the conveyance, offered to buy land included therein. The third person declined to convey direct, but offered to make a conveyance back to the judgment debtor, who could convey to complainant. This was done, both deeds being simultaneously delivered to complainant. *Held*, that the judgment debtor was merely a conduit for the transmission of the title, and the lien of the judgment did not attach to the land.

2. It was immaterial whether the conveyance by the judgment debtor to the third person was fraudulent or not, complainant having had no notice of the fraud.

Appeal from Chancery Court, Shelby County; F. H. Helskell, Chancellor.

Bill to annul an execution sale brought by G. W. Gordon against A. G. Cox and others. Decree for complainant, and defendant's appeal. Affirmed.

H. D. Minor, for appellants. McFarland & Neblett, for appellee.

BRANTLY, C. J. On December 6, 1898, A. G. Cox recovered a judgment against J. O. Cox in a court of record in the county of Shelby, where the defendant then resided. Several months before the rendition of this judgment, the defendant debtor transferred all of his real estate in that county to one Mrs. McGuoy, the deed to her being at once put of record in the register's office. In 1900 the complainant, Gordon, opened negotiations with a real estate company in Memphis, which, as an agent, had for sale some of the lots covered by this deed, for a purchase of the same. These negotiations ended with an agreement on the part of Gordon to buy. After this agreement, but before the com-

pletion of the contract of purchase, the complainant was informed that Mrs. McGuoy declined to make a deed direct to him, but was willing to make it to the original vendor, J. O. Cox, who would convey to the complainant. The complainant accepted in good faith this modified arrangement, and without any suspicion that there was any fraud in the original transaction between J. O. Cox and Mrs. McGuoy. Thereupon a deed was made by Mrs. McGuoy to J. O. Cox, and he and his wife executed a conveyance to complainant, Gordon, and the two deeds were withheld by the respective grantors, and were simultaneously delivered to the complainant, Gordon, who at the same moment delivered them to the proper officer in Shelby county for registration. At the time of the delivery of these deeds to complainant, he paid the purchase money, and so much as was left, after settling the taxes on the property and certain expenses, was divided between Mrs. McGuoy and the wife of J. O. Cox. Soon thereafter, an execution was issued upon the judgment before referred to, and levied upon the property purchased by Gordon. To enjoin a sale under this levy, the present bill was filed.

We think this case clearly falls within the authority of *Huffaker v. Bowman*, 4 Sneed, 94. J. O. Cox was merely a conduit for the transmission of the title from Mrs. McGuoy to the purchaser, and there was no such seisin in him as would afford a point of time for the lien of this judgment to attach. We think it immaterial whether the original transaction between Mrs. McGuoy and the judgment debtor was fraudulent or not. If it was not fraudulent, then the judgment creditor had no more right to levy upon this property than if Cox had been a stranger to the title, and yet had been selected by the vendor as a channel through which she saw proper to convey to her vendee. On the other hand, if it was fraudulent, Gordon in no way participated in this fraud, nor was he advised of any wrong that might have been perpetrated by the parties. In either event, he was entitled to the benefit of the rule as announced in *Huffaker v. Bowman*, supra.

It is insisted, however, that the case of *Gregg v. Jones*, 5 Helsk. 459, is authority for the contention of the judgment creditor. We do not think so. That case was rested alone upon the construction of section 2399 of the Code of 1858 (Shannon's Code, § 4139), which gave a widow dower in all the estate, both real and equitable, of which her husband died seised and possessed. This case has never been understood to shake in the slightest degree the authority of *Huffaker v. Bowman*, supra.

The decree of the chancellor is affirmed.

**SLATTON v. TENNESSEE COAL, IRON
& R. CO.**

**TENNESSEE COAL, IRON & R. CO. v. J. J.
DYKES & CO. et al.**

(Supreme Court of Tennessee. Nov. 20, 1902.)*

**ADVERSE POSSESSION—COLOR OF TITLE—EX-
TENSION OF POSSESSION—BOUNDARIES
—CHAMPERTOUS DEEDS.**

1. Possession of land not within the boundaries recited in a deed is not under color of title which may be invoked to perfect an adverse possession, since the claim must be based on a written instrument purporting to convey the fee.

2. Where land not in the boundaries described in a deed is occupied by the vendee, and the deed is subsequently corrected so as to include the land, adverse possession cannot be perfected by relation to the subsequently acquired title, as there must be actual possession at the time under color of title.

3. Where land is occupied outside the boundaries described in a deed, the vendee cannot sustain adverse possession by asserting that, being a tenant at will of his vendor, his possession was his vendor's possession, and the latter's deed was color of title, which inured to him, as a vendee under parol contract holds for himself, and not as tenant of the vendor.

4. Where a vendee is not in actual possession of land outside the boundaries as recited in his deed, a deed to the lands of which he has no possession is not champertous.

Appeal from Chancery Court, Marion County; T. M. McConnell, Chancellor.

Consolidated actions by John Slatton against the Tennessee Coal, Iron & Railroad Company, and by such company against J. J. Dykes & Co. and others. From the decree the aforesaid company appeals. Reversed.

Spears & Hall, for appellant. A. L. Robertson, for appellees.

McALISTER, J. The Tennessee Coal, Iron & Railroad Company has appealed from the decree pronounced against it in these consolidated cases. The action is in ejectment, and involves the title and right of possession of a tract of land in Marion county. The facts found by the Court of Chancery Appeals, speaking through Judge Wilson, are as follows: Slatton claims title under a deed from David Melton, dated March 11, 1875, and possession thereunder for over 20 years. Melton purchased the land by deed from M. M. Kilgore and R. Lane, February 24, 1874. Shortly after his purchase in March, 1875, from Melton, Slatton went into possession by his son, as he supposed, of the lands embraced in the boundaries of his deed, and made improvements thereon, such as clearing 10 or 12 acres, building a house thereon, planting out an orchard, and has occupied the improvements ever since. As a matter of fact, the deed of Melton to Slatton in its terms and boundaries did not include the land upon which Slatton afterwards erected

his improvements. The land, it appears, is in the shape of an irregular parallelogram. The description of the land in the deed from Melton to Slatton calls for a certain corner, thence to the second corner, thence to the third corner and thence to the beginning, omitting the fourth call. The result was that the description included only about one-half of the land purchased. Slatton, under the impression that his deed covered the whole tract, went into possession, erected a dwelling house, and inclosed several acres around his improvements, but located them outside the boundaries of his deed. He held possession of the land openly, adversely, and continuously for 18 or 20 years. The omission in the deed to include the lands on which the improvements were erected was not discovered by Slatton until May 23, 1896, when he had his land surveyed. Thereafter, to wit, November 5, 1897, Slatton filed a bill in the chancery court of Marion county against Melton to correct the errors and mistakes in the deed, and make its terms and boundaries conform to and embrace the land he had bought. He specially set out in his bill the boundaries his deed ought to have contained, and exhibited with the bill a plat showing what should be the boundaries in his deed, and the boundaries in the deed delivered to him. The insistence of the bill was that the deed as made was incorrect and erroneous in the particulars pointed out as the result of mistake, inadvertence, or oversight. The deed was corrected by the chancery court, and on appeal the decree was affirmed by the Court of Chancery Appeals. There was no appeal to this court. The deed of Melton to Slatton, as corrected by the decree mentioned, embraces the improvements made by Slatton or his son, and which the father or the son has possessed and occupied since shortly after the purchase of the former from Melton. It further appears that prior to the correction of the deed from Melton to Slatton, and on September 3, 1895, Slatton sold and conveyed by deed to Dykes & Brown about $3\frac{3}{4}$ or 4 acres of the land he bought from Melton. Dykes & Brown, after their purchase from Slatton, erected four houses on it, and have had control or possession, either in person or by tenants, ever since, until their tenant Northcutt attorned to the Tennessee Coal, Iron & Railroad Company, as alleged in its bill. Northcutt, it appears, rented from Dykes & Brown, and went into possession of the three or four acres purchased by them from Slatton, and paid them the rents until notified by the Tennessee Coal, Iron & Railroad Company not to do so any longer, when Northcutt attorned to said company.

The foregoing statement embraces the finding of the Court of Chancery Appeals in respect to the title of Slatton to the land in controversy. The title of the Tennessee Coal, Iron & Railroad Company is found by that court to be as follows: First, an entry (No.

*Opinion filed in clerk's office July, 1903.

1. See Adverse Possession, vol. 1, Cent. Dig. § 463.

1,521) for 5,000 acres in the name of Violet Hendricks, dated December 1, 1836, and survey of this entry May 11, 1837; second, a grant issued on said entry March 15, 1839, to Burgess Matthews; third, the heirs of Burgess Matthews, who died intestate, conveyed their interest in said land by several deeds, in 1882, to E. O. Nathurst and E. F. Colyar; fourth, Nathurst and Colyar, by deed, conveyed the land to the Tennessee Coal, Iron & Railroad Company. The land embraced in these various conveyances is the land included in the said grant, and is the land claimed by the Tennessee Coal, Iron and Railroad Company in its bill. The grant and conveyances recited cover the land in dispute. "In other words," continues that court, "they cover and embrace all the land bought by Slatton from Melton, both that contained in the defective deed and the deed as corrected. So it is clear and undisputed that, if the company has deraigned its title back to grant No. 6,765, aforesaid, it has the older paper title. It is equally clear from the proof that the Tennessee Coal, Iron & Railroad Company has never had any actual possession, either by itself, or by agent, or by tenant of the land in dispute, until Northcut, as the original tenant of Dykes & Brown, attorned to it a short while before this litigation arose, with respect to the land he had rented from Dykes & Brown." The Court of Chancery Appeals in a supplemental opinion find as a fact that the Tennessee Coal, Iron & Railroad Company was in the open, peaceable, notorious, exclusive, and adverse possession of the land embraced in the Violet Hendricks entry, No. 1,521, upon which grant No. 6,765 to Burgess Matthews was issued, for more than seven years before the institution of either of these suits; that is to say, it was in the open and adverse possession by its employes or tenants of lands embraced within the boundaries of said entry and grant for more than seven years before these suits were brought. Its possession was evidenced by houses and inclosures, but none of its possessions and inclosures were on the land conveyed by the deed of Lane and Kilgore to Melton, and not on the land conveyed in the deed of Melton to Slatton, original or corrected. The Court of Chancery Appeals then summarizes the respective contentions as follows: Slatton rests his title on the deed of Melton, dated March 11, 1875, and open, notorious, continuous, adverse possession thereunder since that date. Slatton went into actual possession in person, or by his son, of the land he supposed he bought from Melton, and made improvements and inclosures thereon; and the land, he supposed, was covered by the deed of Melton to him, until he discovered the defect in such deed in May, 1895. But, as before stated, his improvements and inclosures were not within the boundaries of the defective deed, but were within the boundaries of the corrected deed.

The Court of Chancery Appeals also found as a fact that the Tennessee Coal, Iron & Railroad Company or its agents or employes knew, after Slatton bought from Melton, the land he claimed under his purchase, and all parties supposed his lines were as he claimed, and as they were established under his bill against Melton, until the defect in the boundaries was discovered when he had his land surveyed in 1895, and the agents of the company in cutting timber respected the lines as claimed by him, and all parties believed they existed under his deed as first made and delivered.

The contention of the company, under this state of facts, is, of course, that Slatton's possession, not being within the boundaries of his deed as made and delivered, was not under color of title until the deed was judicially corrected in 1897, and hence that the statute of limitations does not operate to give him title or to perfect his title. At most, it is contended, all that his possession could effect is to give him a defensive possessory title that will enable him to retain his possession within his actual inclosure.

A further defense of Slatton is that the deed of Matthews to Nathurst and Colyar and from the latter to the Tennessee Coal, Iron & Railroad Company were executed while he was in open and notorious possession of the land, claiming in his own right, and hence said deeds are champertous. Shannon's Code, § 8171 et seq.

With this statement of the facts, taken from the opinion of the Court of Chancery Appeals, we proceed to state our opinion of the law which governs its determination.

It is plain the Tennessee Coal, Iron & Railroad Company has established a superior paper title to the land in controversy. It is also true that the adverse possession of Slatton has not been made out, for the reason that it was not held under an assurance or color of title purporting to convey the fee. The possession of Slatton by his son, George Slatton, was prior to the reformation of the deed from David Melton to John Slatton, and the fiction of relation cannot be invoked to perfect John Slatton's possession. The possession of John Slatton of 8 or 10 acres of this land prior to the reformation of his deed was under a parol sale. It is well settled that possession without a deed defining the land is only notice to the boundaries actually inclosed. It is also held that a disseisor holds constructive possession of the whole tract only when his entry was under color of title by specific boundaries to the whole tract. The first requisite of such color of title as will give constructive possession to the claimant is, therefore, some definite description showing the extent of the claim, which, as to the part constructively possessed, may be said to perform the same office as acts of ownership upon the parts in actual possession. Without the paper title, the possession is limited by the pedis

possessio, and it is immaterial whether the deed conveys a good title or not. If no lands are described in it, nothing can pass, the deed is a nullity, and lays no foundation for a claim beyond the actual possession. *Sedgewick and Watt on Trial of Title of Land*, §§ 767, 768. In section 769 the same authors say: "There can be no constructive adverse possession which is not based upon a claim under some written instrument, constituting in form a paper title." The idea of a parol sale being color of title so as to make out an adverse possession under the statute, as has been suggested in argument, is, of course, out of the question.

These principles, we take it, are so well settled as to be axiomatic in the law of ejectment. Moreover, a color or assurance of title by relation cannot be invoked to perfect an adverse possession. Our statute contemplates that the title should be made out by the concurrence, first, of an adverse possession of seven years, and, second, an assurance or color of title purporting to convey the fee. Unless there is actual possession at the time under an assurance or color of title, that adverse possession cannot be perfected, under the doctrine of relation, by a title subsequently acquired. It was also insisted on behalf of Slatton that, inasmuch as he held the land outside of the boundaries of the Melton deed under a parol sale from Melton, he was therefore, a tenant at will of Melton and that his possession was Melton's possession, and perfected Melton's title; the deed from Kilgore to Melton being an assurance of title purporting to convey a fee, and that this title now inures to his benefit—citing *Valentine v. Cooley*, Meigs, 613, 33 Am. Dec. 166; *Napier's Lessee v. Simpson*, 1 Tenn. 452, and *Winnard v. Robbins*, 3 Humph. 614. It suffices to say that when those decisions were made a verbal contract for the sale of land, under the decisions of this court, was absolutely void. *Crippen v. Bearden*, 5 Humph. 129; *Hurst v. Means*, 2 Swan, 599. This rule has since been changed, and the law now is that a parol sale of land is not void, but voidable merely. There may be a specific performance enforced against either party if he falls or refuses to rely on the statute of frauds. *Brakefield v.*

Anderson, 87 Tenn. 211, 10 S. W. 360; 4 *Pickle* 335.

Moreover, under the uniform holding of this court, during the currency of the parol contract and until it is repudiated, the vendee in possession holds for himself, and not as tenant of the vendor. *Railroad Co. v. Gammon*, 5 Sneed, 567; *Sullivan v. Ivey*, 2 Sneed, 487; *Beard v. Bricker*, 2 Swan, 50; *James v. Patterson's Lessee*, 1 Swan, 309, 55 Am. Dec. 737; *Fain v. Headerick*, 4 Cold. 334. In some of our cases the vendee has been likened to a quasi tenant of the vendor, but in those cases the parol sale had been repudiated. It appears, however, in the case now being adjudged, that the sale from Melton to Slatton, so far from being repudiated, has been affirmed, Slatton always claiming the land under his purchase, and relying on the statute of limitation of seven years. He has never at any time claimed to be a tenant of Melton.

In *Ellege v. Cooke*, 5 Lea, 627, Judge McFarland, entered into a thorough review and discussion of the cases, and the conclusion was reached that a purchaser in possession under a parol contract is not holding the possession for his vendor, so as to make out the latter's title, by the first section of the act of 1819, against a superior title in a third party.

We are further of opinion the Court of Chancery Appeals was in error in holding that the deeds from Nathurst and Colyar to the Tennessee Coal, Iron & Railroad Company were champertous. This holding was correct as to the land whereof Slatton was in actual possession, but under the findings of the Court of Chancery Appeals Slatton was only in possession of 8 or 10 acres outside of the land described in his deed, and the conveyances of Nathurst and Colyar to the Tennessee Coal, Iron & Railroad Company were only champertous to that extent. They were certainly not champertous as to the land outside of the description of Slatton's deed, and as to lands of which he had no possession.

It results that the decree of the Court of Chancery Appeals must be reversed, and complainant's bill dismissed, and relief will be decreed the Tennessee Coal, Iron & Railroad Company under its bill. The costs will be divided.

HALLIBURTON v. STATE.

(Supreme Court of Arkansas. July 6, 1903.)

INDICTMENT—SABBATH BREAKING—NEGATIVE EXCEPTIONS IN STATUTE.

1. A statute enacted that "every person who shall, on the Sabbath or Sunday, be found laboring, or shall compel his apprentice or servant to labor or to perform other services than customary household duties, of daily necessity, comfort or charity, on conviction thereof shall be fined." Sand. & H. Dig. § 1887. An indictment charged that defendant "did unlawfully make sale of a bill of drugs and take and make orders for same" on the Sabbath day. *Held* bad, as not negating the exception in the statute.

Appeal from Circuit Court, Clark County; Joel D. Conway, Judge.

W. H. Halliburton was convicted of Sabbath breaking, and appeals. *Reversed*.

Jno. E. Bradley, for appellant. Geo. W. Murphy, Atty. Gen., for the State.

HUGHES, J. This is an indictment for Sabbath breaking, heard and determined in the Clark circuit court, August term, 1902. Verdict of guilty, and judgment accordingly, from which the defendant appealed to this court duly and in due time.

The indictment is as follows, to wit: "The grand jurors of the state of Arkansas, duly selected, empaneled, sworn and charged, to inquire in and for the body of the county of Clark, in the state of Arkansas, on oath present that one W. H. Halliburton, late of said county, on the 31st day of August, 1902, said day being the Sunday or Christian Sabbath, did unlawfully make sale of a bill of drugs, and take and make orders for same, contrary to the form of the statute, and against the peace and dignity of the state of Arkansas." The statute upon which the foregoing indictment was founded, is as follows, to wit: "Every person who shall, on the Sabbath or Sunday, be found laboring, or shall compel his apprentice or servant to labor or to perform other services than customary household duties, of daily necessity, comfort or charity, on conviction thereof shall be fined one dollar for each separate offense." Sand. & H. Dig. § 1887. A controlling question in this case is, does the indictment negative the exceptions named in the statutes? and this question is raised by the general demurrer. That exceptions named in the clause of the statute creating the offense must be negatived in the indictment is well settled. *Britin v. State*, 10 Ark. 299; *Matthews v. State*, 24 Ark. 484; *Wilson v. State*, 33 Ark. 537, 34 Am. Rep. 52; *Id.*, 35 Ark. 414; *State v. Bailey*, 43 Ark. 150; *State v. Railroad*, 54 Ark. 546, 16 S. W. 567; *State v. Scarlett*, 38 Ark. 563; *Thompson v. State*, *Id.* 408; *Bone v. State*, 18 Ark. 109. The particular question, then, is, does the allegation in the indictment, "did unlawfully make sale of a bill of drugs and take and make orders for same" on the Sabbath day, necessarily imply a denial of the charge that the sale was made

through necessity, charity, or for comfort? A majority of the court are of the opinion that it does not, and that, therefore, the indictment is fatally defective.

Reversed and remanded.

JETER v. STATE.

(Supreme Court of Arkansas. June 27, 1903.)

TRESPASS—EVIDENCE—SUFFICIENCY—OWNERSHIP OF LAND.

1. A trespass was charged to have been committed on land "belonging to the Little Rock & Ft. Smith Railway." The proof showed that the land at one time belonged to the Little Rock & Ft. Smith "Railroad," being part of the land granted it by Congress. A deed was introduced, conveying all the land granted by Congress to this latter road to the Little Rock & Ft. Smith Railway, "except such portions thereof as the Little Rock & Ft. Smith Railroad Company had heretofore sold." There was no proof that the tract named in the indictment had not thus been sold. *Held*, that a conviction was not sustained.

Appeal from Circuit Court, Franklin County; Jephtha H. Evans, Judge.

M. E. Jeter was convicted of a trespass, and appeals. *Reversed*.

Chew & Fitzhugh and J. J. Walker, for appellant. Geo. W. Murphy, Atty. Gen., for the State.

RIDDICK, J. This is an appeal from a judgment convicting the defendant of a trespass, which the indictment alleges that he committed by wilfully, knowingly, and without lawful authority cutting trees on land "belonging to the Little Rock & Ft. Smith Railway, a corporation." We are of the opinion that the appeal must be sustained, and the judgment reversed, for the reason that there is in the transcript no evidence to show that the lands from which the timber was cut belonged to the Little Rock & Ft. Smith Railway, or that the railway was a corporation, as alleged in the indictment. On the question of the title the record evidence introduced at the trial seems to show that land from which the timber in question was cut was at one time owned by the old Little Rock & Ft. Smith Railroad Company, being a part of the land granted by Congress to aid in the construction of a railroad from Little Rock to Ft. Smith. To show that the land is now owned by the "Little Rock & Ft. Smith Railway," as alleged in the indictment, the state introduced the deed of a special commissioner and master of the United States Circuit Court for the Eastern District of Arkansas. The recitals in that deed show that all the lands granted by Congress for the purpose of constructing the Little Rock & Ft. Smith Railroad, and which became the property of the Little Rock & Ft. Smith Railroad Company, were sold under decree of the court, and purchased by the Little Rock & Ft. Smith Railway, "except such portions thereof as the Little Rock & Ft. Smith Railroad Company

had heretofore sold." In other words, the deed shows that not all the land granted by Congress for the purpose mentioned was sold to the Little Rock & Ft. Smith Railway, but only such of that land as had not previous to the decree been sold by the railroad company. There is no testimony to show that this tract had not been thus sold, and therefore nothing to show that it passed by the decree and deed introduced in evidence, and nothing to show that it was at the time of the alleged trespass owned by the Little Rock & Ft. Smith Railway, as alleged.

As the judgment must be reversed on account of the failure of the evidence in respect to the ownership of the land, we need not discuss the question as to whether the evidence was sufficient to show that the trespass was committed within one year before the finding of the indictment, or notice the other questions raised.

Judgment reversed, and cause remanded for new trial.

CHICAGO, R. I. & T. RY. CO. v. JAMES.
(Court of Civil Appeals of Texas. July 2, 1903.)

RAILROADS—CROSSING ACCIDENT—CARE REQUIRED OF COMPANY—INSTRUCTIONS—ORDINARY CARE.

1. An instruction, in an action for collision of a train with a team at a public crossing, that the company would be liable if those in charge of the engine, in approaching the crossing, failed to use that degree of care which an ordinarily prudent person "could" have used to avoid the injury, places too high a degree of care on the company.

2. The words "or ought to" should be omitted from the instruction "ordinary care * * * means that degree of care which an ordinarily prudent person would or ought to use in regard to a similar matter under like circumstances."

Appeal from District Court, Tarrant County; M. E. Smith, Judge.

Action by C. W. James against the Chicago, Rock Island & Texas Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

N. H. Lassiter and Robert Harrison, for appellant. R. C. Armstrong, Jr., O. S. Lattimore, and Theodore Mack, for appellee.

STEPHENS, J. Appellee was traveling east in a wagon on Twelfth street, in Ft. Worth, when an engine and tender of appellant, going south, struck the wagon and knocked him out, producing injuries for which he recovered damages in this case.

One of the alleged grounds of recovery was the reckless running of the train at a great rate of speed across said street while appellee was in the act of crossing the railway track therein. In submitting this issue, the court instructed the jury that appellant would be liable for the consequences of the collision, if "those in charge of said engine, in approaching said crossing in the manner and

under the circumstances they did, failed to use that degree of care which an ordinarily prudent person could have used under the same circumstances to avoid injury to the plaintiff." This was tantamount to an instruction to find against appellant, for undoubtedly an ordinarily prudent person could have used that degree of care which would have prevented the collision. In other words, those in charge of the engine could have approached said crossing in such manner and under such circumstances as to have avoided the possibility of collision. This is a higher degree of care than is required of those operating railway trains even across public streets, and for this error the judgment must be reversed.

In defining ordinary care, the court used this language: "Ordinary care, as used in this and other sections of this charge, means that degree of care which an ordinarily prudent person would or ought to use in regard to a similar matter under like circumstances." Without condemning this definition, in view of a retrial, we deem it advisable to suggest the propriety of eliminating the clause, "or ought to," since without it the definition is complete, and has been too often approved to warrant the experiment of new phrasing.

We doubt, also, whether the evidence raised the issue of negligence on the part of appellant after appellee's peril was discovered, but have not sufficiently considered the evidence bearing on it to warrant us in sustaining the assignment complaining of the submission of that issue to the jury.

For the error first noticed, the judgment is reversed, and the cause remanded for retrial.

MISSOURI, K. & T. RY. CO. OF TEXAS v. DYER.

(Court of Civil Appeals of Texas. June 27, 1903.)

MASTER AND SERVANT—PERSONAL INJURIES—EVIDENCE—SUFFICIENCY.

1. In an action by a section hand for injuries received, while "spiking down track," owing to the alleged defective condition of maul and spike, the evidence examined, and held to show that the defects, if any existed, were obvious, and a verdict for plaintiff was not sustained.

Appeal from Clay County Court; Jas. F. Carter, Judge.

Action by G. A. Dyer against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff. Defendant appeals. Reversed.

H. E. Eldridge and W. P. Midkiff, for appellant.

STEPHENS, J. This appeal is from a verdict and judgment in favor of appellee for \$400 as damages for personal injuries. The accident is claimed to have occurred on appellant's road near Henrietta, Tex., while appellee was at work for appellant as a section

hand. He was engaged in "spiking down track," using a steel and iron maul, which, as described by him, was "kinder flared out on the edges, and was rounded in the center," and "was of an oval shape instead of being flat," a spike maul when in good condition being, as testified by him, "perfectly smooth around the edges and square across the face." He had been using the maul for several months when the accident occurred. The spike and accident were thus described by him: "The spike that I used on that occasion was old and dull and battered. I set it with my hand and struck it, and the spike hit me on the leg. The head of the spike was greasy. When I struck it, it flew back and hit me on the leg. The lick did not break the spike, it bent it back; and I put it in my pocket, and in stooping over it broke into [in two]." Appellee continued to work, for a week after the accident, as usual, without any of the other section hands knowing that he had ever been hurt, and then only lost about 30 days from work, during which time both he and his wife had erysipelas, an infectious disease, the wife claiming that he had it first, and the attending physician being of opinion that she had it first. His earning capacity was \$1.15 per day, and the expense of his illness was small, making a total loss, besides physical suffering, of less than \$100.

It seems clear to us that the evidence did not warrant the verdict, and, consequently, that the court should have granted appellant's motion for a new trial. In the first place, we doubt if the evidence as a whole warranted the inference that the maul was not in a reasonably safe condition, or at least that a person of ordinary prudence would not have furnished it as it was, since the evidence fails to show that any such result as that complained of was at all likely to attend the use of such a maul. The master, in furnishing the servant with tools to work with, is not required to guard against every possible accident, but is only required to take such care as a person of ordinary prudence would take to furnish reasonably safe tools. But if it be conceded that the maul, by reason of its worn and battered condition, had become unsafe, it is perfectly clear from the evidence that this condition was obvious, and that appellee could not reasonably have been ignorant of it, since he had been using the maul constantly for several months. He admitted on cross-examination that if he had looked at the maul he could have seen its condition; further stating, "It was no trouble to see it. It was plainly and easily to be seen after I got hurt." If, then, he did not see it before, it was because he did not look. While not required to search for defects in the tools furnished him, the servant cannot shut his eyes and refuse or neglect to see what is open and patent to common observation.

What is said above of the maul may be said of the spike, except that appellee had not been handling it so long. He did, however,

pick it up and place it in position to be driven, and if he did not see that it was "old and dull and battered," and that it was "greasy" and "broken," it was because he did not look. It had too many defects, and was in too bad a condition generally, according to his testimony, for him to have overlooked everything, accustomed as he was to handling and driving spikes. He admitted that he could have seen that the spike was greasy and broken if he had noticed it. The only excuse offered for not noticing the unusual condition of the spike he was thus handling and driving was that the section foreman was hurrying him so that he did not have time to look at it; but this is far from being satisfactory.

The judgment is therefore reversed, and the cause remanded for a new trial.

FT. WORTH & D. C. RY. CO. v. CARLOCK & GILLESPIE

(Court of Civil Appeals of Texas. July 3, 1903.)

ATTORNEY AND CLIENT—CONTRACT—VALIDITY—INTEREST IN CAUSE OF ACTION—FAILURE TO PAY OCCUPATION TAX.

1. The promise of an attorney at law to defray all the expenses incident to the collection of his client's claim for damages is a promise to give or grant "a valuable thing" to his client, within Acts 1901, p. 125, which made it a misdemeanor for an attorney at law to "promise to give, loan, or otherwise grant money or other valuable thing to the person from whom such employment is sought before such employment in order to induce such employment."

2. Whether the promise of attorneys to pay the expenses incident to the collection of their client's claim was made to induce their employment by him, *held*, under the evidence, to be for the jury.

3. A contract with an attorney, whereby he is given a part interest in a claim as compensation for his services in collecting the same, is not void as against public policy, though it prohibits the client from settling the claim without the attorney's consent.

4. The failure of a lawyer to pay the occupation tax imposed by Rev. St. 1895, arts. 5049, 5054, will not bar his right to recover on a cause of action assigned to him by his client as compensation for his services.

Appeal from Tarrant County Court; R. F. Milam, Judge.

Action by Carlock & Gillespie against the Ft. Worth & Denver City Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Stanley, Spoons & Thompson and Marshall Spoons, for appellant. Carlock & Gillespie, in pro. per.

STEPHENS, J. E. J. Wynn, who had sustained personal injuries through the negligence of appellant, employed appellees, a firm of lawyers, to collect his claim for damages, the contract of employment reading:

"Ft. Worth, Texas, Feb. 8th, 1902.

"This agreement between E. J. Wynn and Carlock & Gillespie, witnesses that the said

Wynn has this day employed said Carlock & Gillespie, to collect, by suit or otherwise, a claim against the Fort Worth & Denver City Railway Company for personal injuries to said Wynn, sustained on the 16th day of January, 1902, at Sanborn, Texas, said injury consisting of a crushed knee-cap. In consideration of said services of Carlock & Gillespie in and about said claim the said Wynn hereby agrees to give to said Carlock & Gillespie one half of what may be recovered from said Railway Company, either by suit or otherwise; provided, that if said claim is compromised before suit that said Carlock & Gillespie shall have for their services one fourth of the amount collected.

"To secure said Carlock & Gillespie, I hereby transfer a one half interest in and to said cause of action. It is further agreed and understood that said Wynn is to be at no expense in and about said matter, and that if nothing is recovered on said claim said Carlock & Gillespie are to get nothing for their services, and said claim is not to be compromised without the consent of all parties hereto."

Appellees gave appellant notice of the claim and of their interest in it, and brought suit for Wynn to collect it. Pending this suit appellant paid Wynn \$300 in full satisfaction of the claim, and refused to pay appellees anything. This suit was consequently brought by them, and resulted in a verdict and judgment in their favor for \$150, the court instructing the jury to so find.

Complaint is made of the peremptory instruction upon the ground that the agreement that Wynn was to be "at no expense in and about said matter" made the contract of employment obnoxious to that clause of the act of 1901 which made it a misdemeanor for an attorney at law, in seeking or obtaining employment, to "promise to give, loan or otherwise grant money or other valuable thing to the person from whom such employment is sought before such employment in order to induce such employment." Acts 1901, p. 125. We are inclined to agree with counsel for appellant that the promise of an attorney at law to defray all the expenses incident to the collection of his client's claim for damages, if not a literal promise to pay him money, is at least a promise to give or grant a valuable thing to his client; and such is the construction a statute very similar to our own has recently received in New York in the case of *Stedwell v. Hartmann* (Sup.) 77 N. Y. Supp. 498; the New York Code (section 74) reading: "An attorney or counselor shall not * * * promise or give or procure to be promised or given a valuable consideration to any person, as an inducement to placing * * * a demand of any kind for the purpose of bringing an action thereon." There can be no substantial difference between a promise to give or grant money or other valuable thing, as denounced in our statute, and a promise to give a valuable

consideration, as denounced in the New York Code. In the case above cited arising under the New York Code the question was thus stated and decided: "But the question still remains as to the validity of a contract by which an attorney, in consideration of having a claim placed in his hands for suit, gives the valuable consideration as an inducement that the attorney will himself pay all the expenses, or, in other words, that he himself will maintain the suit. * * * In the case at bar the agreement was not only to advance money, but to carry on the suits or actions at the expense of the attorney himself, under the agreement that he should receive a certain compensation; and thus he was promoting the suit, and defraying for the plaintiff the expense thereof."

We have yet to determine whether the promise to give a valuable consideration in this instance—that is, to defray the expenses of collecting the claim—was made in order to induce the employment, or, rather, whether the evidence raised that issue; and we have reached the conclusion that it did. The fact that the contract of employment contained such a promise was itself some evidence that the promise was made to induce the employment. On the other hand, the circumstances under which the contract was made tended to raise the inference that the promise complained of may not have been made as any inducement whatever to the employment, but was a mere incident of it, affecting rather the terms than the fact of employment. This phase of the issue does not seem to have been fully developed on the trial.

The contract in question is further assailed by the proposition, but without assignment of error, for being against public policy because of the clause prohibiting Wynn from settling the claim without the consent of appellees, in support of which *Davis v. Webber*, 66 Ark. 190, 49 S. W. 822, 45 L. R. A. 196, 74 Am. St. Rep. 81, is cited. That decision is placed upon the ground that such contracts "foster and encourage litigation," and are, therefore, against that public policy which favors the settlement of disputes "without hindrance from disinterested parties." To the same effect is *Davis v. Chase* (Ind. Sup.) 64 N. E. 88. It seems to us, however, that the reason for such holding is wanting in this instance, since appellees acquired by valid assignment a one-half interest in the cause of action itself. *Railway v. Miller* (Tex. Civ. App.) 53 S. W. 709; *Railway v. Andrews* (Tex. Civ. App.) 67 S. W. 924. That assignment placed it in their power to prevent a settlement of the controversy, and it would hardly be against public policy, therefore, to merely add a stipulation which could do no more than that. In other words, where the law, as it does in this state, permits a transfer in part of a claim for damages to the attorney as compensation for his services, thus placing it in his power to prevent a compromise of the en-

tire claim with the client, there seems little room for the contention that public policy is violated by a clause in the contract which can add nothing to this power.

It remains to determine whether the failure of a lawyer in Texas to pay his occupation tax will bar his right to recover on a cause of action assigned to him by his client as compensation for his professional services. It seems clear from our Civil Statutes on the subject that, however it may be with some other occupations therein mentioned, it was not the intention of the Legislature to make an occupation tax license a condition precedent to the right to practice law. Rev. St. 1895, arts. 5049, 5054, and pages 1014, 1015, and 1022. It seems equally clear from articles 112, 113, and 114 of our Penal Code that the only object of imposing a penalty for pursuing an occupation without paying the tax and obtaining a license was the collection of the tax. The case of *Singer Mfg. Co. v. Draper* (Tenn. Sup.) 52 S. W. 879, so much relied upon, arose under article 604, Mill. & V. Code Tenn. (1884), which made the occupations therein enumerated privileges, and, besides taxing them, expressly declared that they should not be pursued without license. In *Amato v. Dreyfus* (Tex. Civ. App.) 34 S. W. 450, it was held that the failure of a land agent to pay his occupation tax did not bar his right to recover his commissions on a land sale.

Because the court instructed a verdict for appellees, the judgment is reversed, and the cause remanded for a new trial.

BRITT et ux. v. SWEENEY et al.

(Court of Civil Appeals of Texas. June 27, 1903.)

APPEAL—FINAL JUDGMENT.

1. Where a judgment in trespass to try title does not dispose of all the parties, it is not final, and no appeal lies therefrom.

Error from District Court, Dallas County; Rich'd Morgan, Judge.

Action by William H. Male against Eugene Sweeney and others. From a judgment for plaintiff, defendants Britt and wife bring error. Dismissed.

Plowman & Baker, for plaintiffs in error. Thomas Shearon, for defendants in error.

BOOKHOUT, J. William H. Male brought suit in trespass to try title against Eugene Sweeney, W. J. Britt, and his wife, Susan E. Britt. Answers were filed for each of the defendants. Pleas of intervention were filed by H. H. Hayden, William Halls, Jr., and Benjamin Graham, who adopted the pleadings of plaintiff. The cause went to trial, and upon the conclusion of the evidence the court instructed a verdict for plaintiff against all of the defendants. Upon a verdict returned

in accordance with this instruction judgment was rendered in favor of plaintiff, W. H. Male, against W. J. Britt and his wife, Susan E. Britt, for the land sued for, and for costs, and awarding execution. The judgment makes no disposition of the defendant Sweeney or of the said interveners. The defendants Britt and wife prosecuted an appeal by writ of error, and suggest that there was no final judgment in the cause.

The judgment is not final in that it does not dispose of the parties, and hence, for this reason, we have not jurisdiction to pass upon the questions presented. *Mignon v. Brinson*, 74 Tex. 18, 11 S. W. 903; *Whitaker v. Gee*, 61 Tex. 218.

The appeal is dismissed.

ROACH v. SPRINGER et al.

(Court of Civil Appeals of Texas. July 3, 1903.)

INTOXICATING LIQUORS—SALE TO MINORS—CIVIL ACTION—ESTOPPEL—STATEMENT OF MINOR.

1. One is not estopped by his conduct to sue for sale of liquor to his minor son by a liquor dealer, where the dealer did not rely on his conduct, but on his alleged consent to the sale.

2. It is no defense to an action against a liquor dealer for selling liquor to plaintiff's minor son that plaintiff did not object to others selling liquor to him, though this may be admissible to corroborate the dealer's testimony that the father consented to his sale.

3. What a minor, when purchasing liquor, said as to his father's consent to such sale to him, is not admissible in an action by the father against the liquor dealer for making the sale.

Appeal from Cooke County Court; J. M. Wright, Judge.

Action by R. W. Roach against Frank Springer and others. Judgment for defendants. Plaintiff appeals. Reversed.

Robt. E. Cofer, for appellant. Culp & Giddings, for appellees.

STEPHENS, J. Suit on liquor dealer's bond, in which recovery was denied.

The court erred in giving the following charge: "If the plaintiff, prior to the time of the sale as alleged, or prior to the time that Frank Roach is alleged to have entered the house and place of business of defendant, had permitted his son, Frank Roach, to frequent saloons, and if, by his course of conduct towards his son, plaintiff acted in such manner as to leave [lead] defendant to believe that he did not object to others selling his son beer, you will find for the defendant." This issue was raised by the answer, but not by the evidence, for appellee Springer, the saloon keeper, admitted on cross-examination that in selling beer to appellant's minor son he did not rely upon such conduct of appellant, testifying: "This is not my defense in this case. I rely on the consent of Mr. Roach, as I have stated," as to which the evidence

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 484.

¶ 1. See Estoppel, vol. 19, Cent. Dig. § 128.

was conflicting. Misleading conduct which does not mislead works no estoppel.

We are also of opinion that the plea itself was bad, and that the exception to it should have been sustained. That appellant may have been culpable for infractions of similar bonds given by other liquor dealers was no defense to the action on this bond. The evidence offered under the plea may have been admissible as tending to corroborate the testimony of appellee Springer, which was in conflict with that of appellant, to the effect that the latter had prior thereto consented to the sale in question. Such testimony has been held to be competent by two of our Courts of Civil Appeals, though perhaps not upon precisely the same ground. *Edgett v. Finn* (Tex. Civ. App.) 36 S. W. 832; *Kruger v. Spachek* (Tex. Civ. App.) 54 S. W. 295, and cases there cited.

We hardly think, however, that what the minor said about his father's consent when he obtained the beer should have been admitted.

We think, also, that the evidence set out under the seventh assignment was irrelevant.

The objections to the form of the charge presented in the ninth and eleventh assignments of error should be obviated on another trial, and also that presented in the twelfth assignment.

Reversed and remanded.

McCARTY v. HARTFORD FIRE INS. CO. (Court of Civil Appeals of Texas. June 20, 1903.)

FIRE INSURANCE—IDENTITY OF INSURED—OWNERSHIP OF PROPERTY—MISTAKE—NEGLECT—PLEA—VERIFICATION—CROSS-EXAMINATION—CREDIBILITY OF WITNESS—AGENCY—DECLARATIONS OF AGENT—ADMISSIBILITY—CONSPIRACY TO DEFRAUD COMPANY—DECLARATIONS OF CONSPIRATORS.

1. In an action on a fire policy the evidence examined, and *held* to sustain the finding of the trial judge that the property insured was in fact owned by the woman with whom the plaintiff, at the time the policy was issued, was living in adultery, and that plaintiff had no interest therein.

2. Evidence examined, and *held* to show that the alleged mistake of the company in supposing that the property belonged to the woman with whom plaintiff was living when it was insured, and not to plaintiff, was not due to negligence on its part.

3. A plea admitting the issuance of an insurance policy, but denying that plaintiff was the person insured, was not required to be verified.

4. A woman having testified for plaintiff, defendant was properly permitted to question her as to her relations with him, and as to her reasons for going under an assumed name, the cross-examination tending to impeach her credibility.

5. It was proper to permit defendant to question plaintiff on the same subject.

6. It appeared that the woman first approached the agent of the company relative to obtaining the insurance, and that he offered to go at once and inspect the property, but she told him it was not ready for inspection. A day or two later she sent her daughter to request the agent to make the inspection. Another agent was sent for that purpose. He was met by plaintiff, who told him the woman would be in shortly.

She came in and showed the agent the property, plaintiff being present. *Held*, that the statements made by her to the first agent relating to insurance were admissible in evidence.

7. A week after the policy was issued the property was burned. The fire commenced early in the morning. Plaintiff and the woman were alone in the house, the latter's little daughter having gone to spend the night with a neighbor. Both were fully dressed when observed shortly after the fire was discovered. The woman even had on her corset. *Held* to make such a prima facie case of conspiracy to collect the insurance that the acts and declarations of either plaintiff or the woman relating to the purpose of the conspiracy, and during its pendency, were admissible.

8. The woman having stated that plaintiff was exclusive owner of the property, it was proper to show that shortly after the fire she told a third person that if the company would not prosecute her for arson she would give up the policy, and that plaintiff had nothing to do with it, as everything belonged to her.

Appeal from District Court, Johnson County; W. Poindexter, Judge.

Action by E. C. McCarty against the Hartford Fire Insurance Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Brown & Bledsoe, for appellant. Crane, Greer & Wharton, for appellee.

TEMPLETON, J. On May 14, 1901, the Hartford Fire Insurance Company issued a policy of insurance in the sum of \$1,500, whereby it insured E. C. McCarty, for the term of one year, against loss or damage by fire to a lot of household furniture and medical instruments situated in a dwelling house in Cleburne, Tex. On May 21, 1901, the insured property was destroyed by fire. A man who claimed that his name was E. C. McCarty, that the policy was issued to him, and that he was the owner of the insured property, made out and presented proofs of loss. Payment was refused by the company, and the said claimant thereupon brought this suit to recover the sum for which the policy was issued. In addition to the general issue, the defendant pleaded: (1) That the insured property did not belong to the plaintiff, but was the property of a woman named Ellen C. Battles, who falsely claimed that her name was Ellen C. McCarty and that she was the wife of the plaintiff; (2) that the policy was not issued to the plaintiff, but was issued to the said woman under her alleged name; (3) that the plaintiff's name was not E. C. McCarty, but was A. C. McCarty; that, at the time the policy was issued, the plaintiff and the said woman were not husband and wife, as they claimed to be, but were living together in adultery, and that in order to effect the said insurance the plaintiff and the said woman fraudulently concealed from the company their true names and relationship, and thereby induced the company to issue the policy, which it otherwise would not have done; (4) that the plaintiff falsely and knowingly represented and stated in the proofs of loss that the insured property belonged to him, when it, in fact, belonged to

the said woman; and (5) that the plaintiff and the said woman willfully burned the insured property, or caused it to be burned. It was also alleged that the policy contained the usual stipulations respecting the ownership of the insured property, the fraudulent concealment of facts material to the risk, and the willful making of false representations relating to the subject of insurance. The cause was tried before the court without a jury, and judgment was rendered for the defendant.

In 1898 one Charles Battles, together with his wife and their little daughter, resided at Jerseyville, Ill. The wife's name was Ellen C. Battles. She was 35 or 40 years old, and conducted a sort of hospital. A man named Alonzo C. McCarty, or Elmonzo C. McCarty, came to her hospital for treatment. He was about 21 years old, his education was very limited, and he had little means. He was a day laborer by occupation. About this time Battles and his wife separated. He returned to Missouri, whence he came, and she and their daughter remained at Jerseyville. After McCarty recovered, he became an assistant about the hospital. A year or two thereafter the parties left Jerseyville, and appear to have gone to St. Louis. They remained there several months, when McCarty came to Texas. He was followed in a few weeks by Mrs. Battles and her daughter. McCarty met them at Dallas, and they all went to Cleburne, reaching there early in 1901. They boarded together a short time at a hotel, and then at a boarding house. Finally, about the middle of February, Mrs. Battles rented a dwelling house, and they moved into it. They had an X-ray machine, a few medical instruments and books, some household and kitchen furniture, wearing apparel, etc. The man and the woman held themselves out as husband and wife. They had never been married. Battles was still living, and had not been divorced from his wife. McCarty appears to have worked in the railroad shops. Mrs. Battles professed to be a physician and surgeon, and to treat diseases of women. She had cards printed which gave her name as "Ella McCarty" and which stated her business. Her name was given in the sign on her door as "Dr. E. C. McCarty." Shortly before the policy was issued she applied to the agent of appellee for insurance on the property covered by the policy. In her conversation with the agent she spoke of the property as being her own. The agent offered to go at once and inspect the property, but she told him it was not ready just then for inspection. She returned home, and a day or two later sent her little daughter to the agent with a note requesting the agent to come and make the inspection. Another agent of the company was sent out for that purpose. He was met by McCarty, who, on being informed of the agent's business, told him that the doctor would be in directly. Mrs. Battles soon came in, and showed the

agent what property she wanted insured. McCarty was present, and showed how the X-ray machine was operated. The agent returned to the office, and two or three days thereafter the premium was paid and the policy was issued and delivered. A week later the property was burned. The fire occurred between 4 and 5 o'clock in the morning. McCarty and Mrs. Battles were alone in the house that night, the little daughter of the latter having gone to spend the night at a neighbor's. McCarty and Mrs. Battles were fully dressed when they were observed shortly after the fire was discovered. The woman even had on her corset. With regard to the ownership of the property, both of them testified that it belonged exclusively to McCarty. He testified that when he left Illinois his father gave him \$1,500; that he got to Texas with about \$1,400; that he bought the X-ray machine, and paid therefor the sum of \$1,000 in cash; that he bought the other property, and paid therefor the sum of \$800 in cash. His father testified by deposition in his behalf that his son had some money when he left Illinois, but denied having given him any considerable amount. McCarty was never licensed to practice medicine, and did not treat any patients while at Cleburne. He stated that he bought the machine and the medical instruments and books after he reached Texas, in the expectation of establishing a hospital at Cleburne. He had never been at Cleburne at that time. He and his father testified that his name was Elmonzo C. McCarty. Several persons testified by deposition for the defendant that they had known him many years, and that he always went by the name of Alonzo C. McCarty. The agents of the company at Cleburne knew nothing of the facts at the time the policy was issued, except what appeared on the surface. They supposed that the parties were husband and wife, and that the property belonged to the woman. Had they known the facts they would not have issued the policy. In October, 1901, McCarty and Mrs. Battles were married, Battles having theretofore obtained a divorce.

Conclusions of fact and law were not requested or filed, but it appears, from an explanation to a bill of exceptions, that the trial judge found "that the property was in fact owned by Mrs. Battles at the time the policy was issued, and that the plaintiff had no interest in it, and that the agents thought the policy was issued to the woman, and that she was the E. C. McCarty, and that the policy would not have been issued had it been known that the man was E. C. McCarty and the name of the woman Ellen C. Battles." There can be no doubt, as a matter of law, that the plaintiff was not entitled to recover it, as a matter of fact, the insured property belonged to Mrs. Battles. The trial judge having so found, and the evidence being sufficient in our opinion to justify the finding, the other issues in the case are not

material. We will say, however, that we think the evidence was sufficient to warrant the other findings of the trial judge.

Appellant insists that, notwithstanding the said findings, the defendant was not entitled to judgment on the issue of mistake in the identity of the assured. It is true, as contended by appellant, that if the property belonged to McCarty, and the policy was taken out for his benefit, the supposition of the agents of the company that the property belonged to the woman, and that the policy was being issued to her, would not prevent a recovery by the plaintiff, provided the mistake was due to the negligence of the company, and not to any fraud practiced by the assured. We think the evidence shows that it is not a case of negligence on the part of the company. Its agents assumed that the parties were what they held themselves out to be, and it cannot be held that they were guilty of negligence in doing so. The woman procured the insurance, and represented herself as the owner of the property. The agents of the company were therefore justified in supposing that they were issuing a policy to the woman on her property. The suppositions were induced by the misconduct and misrepresentations of McCarty and Mrs. Battles, who were evidently acting together in the accomplishment of a common purpose in all that was done. The facts not known to the company were material to the risk, and we think the defendant was entitled to judgment on the issue of mistake and fraud in procuring the insurance.

Appellant further insists that the company cannot avail itself of the defense of mistake in the identity of the assured, because it did not plead *non est factum* under oath. The plaintiff sued on a policy issued by the defendant to E. C. McCarty. The defendant admitted the issuance of the policy as alleged, but denied that the plaintiff was E. C. McCarty, or, if he was, that he was the E. C. McCarty to whom the policy was issued. It was not necessary for this plea to be verified. The instrument sued on was not disputed, but was admitted. The facts put in issue by the plea were outside the instrument. Such plea does not come within the statute requiring the verification of certain pleadings.

Mrs. McCarty was used as a witness by the plaintiff, and the defendant was permitted, over objections urged by the plaintiff, to question her concerning her relations with the plaintiff, and her reasons for going under an assumed name. The objections were properly overruled. The cross-examination of Mrs. McCarty tended to impeach her credibility as a witness. The facts sought to be elicited tended to establish the defense of the company that facts material to the risk were fraudulently concealed by the assured. For the reasons stated, the trial court did not err in permitting the defendant to question the plaintiff himself on the same subjects.

The plaintiff objected to the agent of the

company, who was first approached by Mrs. Battles, being permitted to testify as to statements made to him by her relating to the insurance. There can be no doubt as to the admissibility of this evidence. Even according to the plaintiff's theory of the case, she was his agent to procure the insurance, and, as the statements were made in the course of the transaction in which he had engaged her, he cannot complain of the statements being used against him. According to the defendant's theory, McCarty and Mrs. Battles were acting together in procuring the insurance, their purpose being to fire the property, collect the insurance, and appropriate the same to their common use. We think the evidence makes such a *prima facie* case of conspiracy between them as to render the acts and declarations of either relating to the purpose of the conspiracy, and occurring during the pendency thereof, admissible against the other.

Mrs. McCarty testified, at the instance of the plaintiff, that he was the exclusive owner of the insured property, and that she had no interest in it. She was asked on cross-examination if she did not state to one McClain, shortly after the fire, that if the company would not prosecute her for arson she would give up the policy, and that McCarty had nothing to do with it, and that everything belonged to her. She denied having made such statement, and was contradicted by McClain. The plaintiff complains of the action of the court in permitting the defendant to go into an investigation of the matters aforesaid, proper bills of exception being reserved. The evidence tended strongly to impeach the credibility of the plaintiff's witness, Mrs. McCarty, and was therefore admissible. And we are not sure that the evidence was not admissible on another theory. It appears that McCarty and Mrs. Battles were being jointly prosecuted for adultery and arson. It seems that from first to last they have acted in perfect concert in regard to all matters relating to the said prosecutions and the said insurance, the woman being the manager for both parties. If there was a conspiracy between them to swindle the insurance company, it was not completed when the policy was issued or when the property was destroyed. If such conspiracy existed, it continued while the policy remained outstanding and uncollected. The evidence complained of was certainly admissible for impeachment purposes, and we are not prepared to say that it was not admissible as original evidence. What is said above is sufficient to dispose of the plaintiff's objections to the testimony of the defendant's witness Yeakum concerning statements made to him by Mrs. Battles.

The defendant was permitted, over objections urged by the plaintiff, to prove that, under the rules of the insurance company, policies were not written on property of persons living in adultery. We are inclined to the opinion that the evidence was admissible.

but, as it appears from an explanation to the bill of exception that the evidence was not considered by the court, it is unnecessary to decide the question.

On the whole case, we are satisfied that the trial court entered the only proper judgment that could have been rendered, and the said judgment will therefore be affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS v. TARWATER.

(Court of Civil Appeals of Texas. June 20, 1903.)

CARRIERS—EJECTION OF PASSENGERS—MENTAL SUFFERING—LIABILITY—EVIDENCE—CUSTOM—RES GESTÆ.

1. An action lies against a common carrier for mental suffering occasioned by being ejected from a train, though the mental suffering is not accompanied with physical injury.

2. In an action against a carrier by an ejected passenger, it was improper to admit evidence of a custom among defendant's conductors to permit old trackmen to ride free on its trains.

3. A statement made by one ejected from a train after the train had gone, and he had walked back some 50 yards, and when some 5 or 10 minutes had elapsed, that "the conductor had put him off after he had offered to pay his fare," was not *res gestæ*.

Appeal from Montague County Court; W. W. Cook, Judge.

Action by T. J. Tarwater against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Reversed.

H. W. Hunt, for appellant. A. L. Scott and Smith & Walker, for appellee.

SPEER, J. This appeal is prosecuted from a verdict and judgment in the county court in favor of appellee for the sum of \$150 for mental suffering occasioned him by being ejected from one of appellant's trains after he had tendered to the conductor the necessary fare for transportation.

We think the complaint states a cause of action, although the mental suffering was not accompanied with any physical injury. The case is not analogous to *Gulf, C. & S. F. Ry. Co. v. Trott* (Tex. Sup.) 25 S. W. 419, 40 Am. St. Rep. 868, and that line of authorities, but is ruled by the principles announced in *Missouri P. Ry. Co. v. Kaiser*, 82 Tex. 144, 18 S. W. 305; *Texas & P. Ry. Co. v. Armstrong* (Tex. Sup.) 51 S. W. 835; *Same v. Jones* (Tex. Civ. App.) 39 S. W. 124; *Same v. Gott* (Tex. Civ. App.) 50 S. W. 193; *Leach v. Leach* (Tex. Civ. App.) 33 S. W. 703; *I. & G. N. Ry. Co. v. Anchonda*, 68 S. W. 743, 5 Tex. Ct. Rep. 289; *Tex. & P. Ry. Co. v. Dennis*, 4 Tex. Civ. App. 90, 23 S. W. 400; and the many other cases to the same effect that might be cited. We think the court erred, however, in admitting, over the objection of

appellant, the testimony of appellee that it was the custom of appellant's conductors to permit old trackmen to ride on its trains without paying fare. The custom of appellant's conductors in this respect could not alter the legal rights of the parties in the matter at issue, and the question was an improper one for the consideration of the jury. It can easily be seen how the consideration of such an apparently unjustifiable discrimination against appellee, who was an "old trackman," might unduly affect the verdict of the jury in giving damages. See *Missouri P. Ry. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. Rep. 776. The admission in evidence of the conversation between appellee and the witness Fitch was also error. It was not *res gestæ*. The statement of appellee, in response to Fitch's query if they had put him off the train, that "the conductor had put him off of the train after he had offered to pay his fare at 4 cents per mile," was but a narrative of a past and completed transaction. The appellee had alighted from the train, the train had gone, and he had walked back some 50 yards, and some 5 or 10 minutes had elapsed. The circumstances do not exclude the idea that his statement was an afterthought, or indicate that it was a spontaneous expression occurring so nearly contemporaneous with the transaction as to be descriptive of it. The error is accentuated when it is remembered that the vital issue in the case was whether or not appellee had tendered his fare to the conductor. See *Pilkinton v. Railway*, 70 Tex. 226, 7 S. W. 805; *Texas & P. Ry. v. Barron* (Tex. Sup.) 14 S. W. 698; *Texas & N. O. Ry. v. Crowder* (Tex. Sup.) 7 S. W. 709; *Gulf, C. & S. F. Ry. v. Moore*, 69 Tex. 157, 6 S. W. 631; *Leahy v. Ry.* (Mo. Sup.) 10 S. W. 58, 10 Am. St. Rep. 300; *Louisville & N. R. Co. v. Pearson* (Ala.) 12 South. 176; *Richmond & D. R. Co. v. Hammond* (Ala.) 9 South. 577.

The other assignments are without merit, and are overruled.

Reversed and remanded.

KATZENBERGER et al. v. WEAVER.

(Supreme Court of Tennessee. May 18, 1903.)

WILLS—CONSTRUCTION—CROSS-BILLS—PARTIES—RES ADJUDICATA—SPECIFIC PERFORMANCE—APPEAL AND ERROR.

1. Testator left half of his estate to his children. By a subsequent clause of his will he provided that if any of his children died, leaving a child surviving, the property thereby devised to a child so dying should go to the surviving grandchild. *Held*, that testator's grandchildren took an interest only in the event of their respective parents dying before the death of testator.

2. One of testator's married daughters acquired the interest of testator's widow and of his other children in certain of his property, and sued for specific performance of a contract for the sale thereof against the vendee in such contract, who objected to the title on the ground that testator's other children and complainant's children took an interest in the property under

¶ 1. See *Carriers*, vol. 9, Cent. Dig. §§ 1453, 1486, 1487.

the will. *Held*, that complainant's children were proper parties defendant to a cross-bill and answer filed by defendant.

3. Testator's other grandchildren were not proper parties defendant to the cross-bill.

4. While the question of construction could have been settled with no one before the court except the original complainants and the defendant, the decree would not have been binding, as *res judicata*, on complainant's children.

5. A cross-bill was filed by defendant to a bill to enforce specific performance of a contract to convey real estate, and a demurrer thereto by the original complainants was improperly sustained. *Held*, on appeal, that no decree granting a specific performance could be entered in the Supreme Court, the cause being remanded for issue on the cross-bill.

Appeal from Chancery Court, Shelby County; F. H. Heiskell, Chancellor.

Bill by William Katzenberger and others against Dudley S. Weaver to enforce specific performance of a warrant to convey real estate. A demurrer to a cross-bill was sustained, and the same dismissed, and specific performance decreed. Defendant appeals, and assigns errors. Decree construing a will involved, and remanding the cause for issue on the cross-bill.

Cooper, Hirsch & Cooper and Geo. Hays, for complainants. Hunsdon Cary, for defendant.

NEIL, J. On the 20th day of March, 1900, Jacob Gans died, leaving a will in which he disposed of his property as follows:

In the first paragraph of his will he gave to his wife, Bluma Gans, one-half of all of his real and personal property, absolutely.

The second paragraph reads as follows: "I will that the rest and residue of my estate, real and personal, shall be divided equally, share and share alike, between my said children, Gus M. Gans, Solomon Gans, and Elizabeth M. Katzenberger, and I desire in making said division among them an account may be taken of any and all advances that I may have made to each up to the time of my death."

The third paragraph, after stating that the two sons of the testator were in the mercantile business in the city of Little Rock, Ark., and that his daughter, Elizabeth, lived in a house in the city of Memphis that belonged to him, expressed the testator's desire that in the division of the estate the sons should take the mercantile property, and the daughter the house and lot in Memphis.

The fourth paragraph of the will reads as follows: "In case any of my children herein named, shall die leaving a child or children at the time of his or her death, then my will is that the property hereby devised and bequeathed to such child or children so dying shall go to the surviving child or children of such child or children so dying, and that the rents, issues, and profits of said property hereby devised and bequeathed shall be applied to the support, maintenance and education of such surviving child or chil-

dren until they become of full age, at which time said property shall go to them equally and in fee simple, provided that if either of my said sons shall die leaving a widow, then my will is that such widow shall receive the income of the property devised and bequeathed to said sons during the time of her widowhood, the title to said property remaining in the children of such sons dying as aforesaid, and upon the death or marriage of such widow the rents, issues and profits of the property shall go to the said child or children of any such son of mine dying as aforesaid."

The fifth paragraph designated the widow as sole executrix, and the sixth and last paragraph revoked other wills.

Such negotiations and settlements were had between the widow and her children as that she and the two sons released to Mrs. Elizabeth Katzenberger all of their interests in the house and lot in Memphis. After Mrs. Katzenberger thus acquired the sole interest in the house and lot, she and her husband, the complainant William Katzenberger, contracted to sell this property to the defendant, Dudley S. Weaver, the consideration expressed in the contract being \$11,000, but \$1,500 of this was really for the furniture in the house, which had already been delivered and paid for. After the contract was entered into, Mr. Weaver declined to receive a deed to the property, upon the ground that he could not get a good title. His objection to the title was that under the fourth paragraph of the will, quoted above, the children of Mrs. Katzenberger and also of her two brothers took an interest in the property. Upon the foregoing objection being made, Katzenberger and wife filed a bill, the original bill in the present case, for the purpose of obtaining a specific performance of the contract, tendering with the bill a deed duly executed by themselves. No one was made a defendant to this bill but Mr. Weaver. He, however, filed an answer and cross-bill, bringing in as defendants to the cross-bill Bernice Gans, the daughter of Sol Gans, Leah, Rosalyn, and Jacob Gans, the children of Gus M. Gans, and Irene De Young Hyman and William M. Katzenberger, children of the complainant Elizabeth M. Katzenberger; also Edward Hyman, the husband of the said Irene. He also made defendants to the cross-bill the original complainants, William Katzenberger and his wife, the said Elizabeth. All of the aforesaid children were minors and nonresidents of the state, and were duly brought before the court by publication. A guardian ad litem was appointed to represent the interests of each, and he answered for each of them. There was an order pro confesso taken against Edward Hyman, who had been legally brought before the court. The original complainants, Katzenberger and wife, demurred to the cross-bill, on the ground, among other things, that the above-mentioned children were not proper parties. The

chancellor sustained the demurrer, and dismissed the cross-bill on the ground that the minor defendants above mentioned had no interest in the property, and were improperly made defendants. He thereupon heard the case upon the original bill and answer, adjudged that the title was good, and decreed a specific performance as prayed in said original bill. The defendant Weaver has appealed, and assigned errors. The minors have also assigned errors.

The chief question to be determined arises upon the construction of the will. For the appellant it is insisted that, under a true construction of the fourth paragraph of the above-mentioned will, the minor defendants to the cross-bill took some kind of interest in the property. Complainants in the original bill deny that this is the true construction, and insist, under the authority of *Vaughn v. Cator*, 85 Tenn. 302, 2 S. W. 202, and *Meacham v. Graham*, 98 Tenn. 190, 39 S. W. 12, that under a true construction of the said fourth paragraph the aforesaid minors, grandchildren of Jacob Gans, could take no interest except in the event of their respective parents dying before the death of the testator, and that, inasmuch as all of Jacob Gans' children survived him, their estates became absolute.

In *Vaughn v. Cator*, the codicil construed read as follows: "For the purpose of making a change in the bequest to Basil Smith; in the event Basil Smith dies without lawful issue, then the property herein bequeathed shall revert to my estate and be equally divided among the other named heirs in said will, of which this is a codicil." The words "dies without lawful issue" were construed to mean death during the lifetime of the testator. Basil Smith survived the testator, and died several years after, without issue, his mother surviving him. It was held that upon the death of the testator, leaving Basil Smith surviving, the estate of the latter became absolute, and upon his death without issue his mother took the estate as his heir at law.

In the case of *Meacham v. Graham*, so much of the will as is pertinent to the present inquiry was as follows: After giving an estate to the testator's daughter, Thomasella, the will proceeded, "In the event of her death without living children, her share of the estate to go to my sons, John M. and Harry H., equally; and, in case either of them shall be dead, leaving living children, then to their child or children." The words "in the event of her death without living children" were held to mean in the event of her death without living children, before the death of the testator; and it was further held that, having survived the testator, she took the absolute estate. 98 Tenn. 195, 207, 39 S. W. 13.

It is observed that in both of these cases the event provided against was the dying without child or children; and in these cases,

and the numerous authorities cited in the latter opinion, it is indicated as a general rule that, where there is a limitation over upon the dying of one without children or issue, without more, and an estate is given such one, the words shall be held to import a death in the lifetime of the testator. As thus stated, the present case does not fall within the scope of the two cases referred to, inasmuch as the will involved in the present controversy involves the contingency of the devisees and legatees of the testator, his children, dying leaving children. This apparent divergence has induced the citation on the part of counsel for defendant Weaver, and also on the part of the guardian ad litem, of several of our reported cases, which, when cursorily examined, seem to support their contention. These cases will be presently considered.

The rule announced in *Meacham v. Graham*, and indicated in *Vaughn v. Cator*, is but a particular expression of a much wider rule of construction applicable to wills.

In 3 Jarman on Wills (Randolph & Talcott's Ed.) 605, it is said that, where a bequest is made to a person, with a gift over in case of his death, a question arises whether the testator uses the words "in case of" in the sense of "at" or "from," and thereby as restrictive of the prior bequest to a life interest—that is, as reducing a gift to take effect on the decease of the prior legatee under all circumstances—or with the view to create a bequest, in defeasance of or in substitution for the prior one, in the event of the death of the legatee in some contingency. "The difficulty in such cases," continues the author, "arises from the testator having applied terms of contingency to an event of all others the most certain and inevitable, and to satisfy which terms it is necessary to connect with death some circumstance in association with which it is contingent. That circumstance is naturally the time of its happening; and such time, where the bequest is immediate (i. e., in possession), necessarily is the death of the testator, there being no other period to which the words can be referred. Hence it has become an established rule that where the bequest is simply to A., and in case of his death, or if he die, to B., A., surviving the testator, takes absolutely." The following cases are cited in support of the rule: *Lowfield v. Stoneham*, 2 Stra. 1261; *Northey v. Burbage*, Pre. Ch. 471; *Hinckley v. Simmons*, 4 Ves. 160; *King v. Taylor*, 5 Ves. 806; *Turner v. Moor*, 6 Ves. 556; *Cambridge v. Rous*, 8 Ves. 12; *Webster v. Hale*, Id. 410; *Ommaney v. Bevan*, 18 Ves. 291; *Wright v. Stevens*, 4 B. & Ald. 574.

In *Theobald on Wills*, p. 336, the following rules are laid down for the construction of such clauses: "If there is an immediate gift to A., and a gift over in case of his death, or any similar expression implying the death to be a contingent event, the gift over will take effect only in the event of A.'s death be-

fore the testator"—citing *Lord Bindon v. Earl of Suffolk*, 1 P. Williams, 96; *Crigan v. Baines*, 7 Sim. 40; *Taylor v. Stainton*, 2 Jur. (N. S.) 634. "So, too, a gift to several, and in case of the death of either in the lifetime of the others, or other, was confined to the death before the testator, the death of one before the other being a certain and not a contingent event"—citing *Howard v. Howard*, 21 B. 550. "It makes no difference that the gift in case of A.'s death is to his children." *Slade v. Milner*, 4 Mad. 144; *Schenck v. Agnew*, 4 K. & J. 405. And the rule applies in devises of realty, as well as in bequests of personalty. *Rogers v. Rogers*, 7 W. R. 541.

Speaking further of the rule, Mr. Jarman says: "The case of *Trotter v. Williams* (Pre. Ch. 78; 2 Eq. Cases, Al. 344) appears to have carried this construction to a great extent. J. S. bequeathed to A. 500 pounds, to B. 500 pounds, and in a like manner gave 500 pounds apiece to five others, and, if any died, then her legacy, and also the residue of his personal estate, to go to such of them as should be then living, equally to be divided betwixt them all. The court held that these words referred to her dying before the testator, so that the death of any of the legatees after would not carry it to the survivors. The word 'then' seemed to present some difficulty in the way of the construction adopted in this case. It followed immediately after the reference to the death of the legatee, and might with great plausibility have been held to refer to that event whenever it should happen, for a testator could hardly intend to make existence at a period anterior to his own death a necessary qualification of a legatee. This case exhibits the extreme point to which the construction in that direction has been carried."

Numerous other illustrations might be given from the cases referred to in the text of Jarman, and in the notes of the edition referred to, but the foregoing will suffice. It is clear, on comparing the fourth paragraph of the will of Jacob Gans with the rule above announced, that the former falls within the terms of the latter, and is controlled by it. But, before leaving the subject, we shall say a few words in explanation of the cases in our own Reports referred to by counsel as being in contravention of the rule. Before referring to these cases, however, it is necessary that we should note the following qualifications of the rule: Mr. Jarman says: "But although, in the case of an immediate gift, it is generally true that a bequest over, in the event of the death of the preceding legatee, refers to that event occurring in the lifetime of the testator, yet this construction is only made, ex necessitate rei, from the absence of any other period to which the words can be referred, as a testator is not supposed to contemplate the event of himself surviving the object of his bounty; and consequently, where there is

another point of time to which such dying may be referred (as obviously is the case where the bequest is to take effect in possession at a period subsequent to the testator's decease), the words in question are considered as extending to the event of the legatee dying in the interval of the testator's decease and the period of vesting in possession." It is elsewhere shown in the text that qualifying expressions used in the will, or attendant circumstances proven, may suffice to make the words under consideration refer to death at any period. Sundry illustrations are given in the text, but we need not incur this opinion with them. With the principle in view, we shall now examine the cases referred to.

Alston v. Davis, 2 Head, 268, could in no event apply. The clause of the will there referred to contains directions to the executors, and hence, of necessity, referred to a date after the testator's death, when the executors would be in the discharge of their duties.

In *Cowan, McClung & Co. v. Wells*, 5 Lea, 682, the clause under examination read as follows: "I direct that should my son Luther F. Wells die without heirs, then and in that case, the property that I have hereby given to him shall be equally divided between my three daughters, Linda Lane, Louisa Nash, and Lavena Miller." Construing this clause, the court said: "If the contingency happens, the limitation over in favor of the sisters takes effect; if it does not happen, the absolute gift to the first taker remains undisturbed; and in neither event do the children of Luther F. take any interest under the will."

The will in the case referred to came up for construction after the death of the testator, and the court and counsel seem to have tacitly regarded the matter from the standpoint of the then existing status, and to have assumed, without stating the point, that the death referred to was death after the death of the testator. There may have been, and we must infer that there were, other parts of the will, not stated in the opinion, which made the point clear, only a small portion of the will being set out. The rule of construction which we have under consideration in the present case was not referred to in any way, and does not seem to have been in the mind of the court, or of the judge delivering the opinion, at the time. If there was nothing in other parts of the will explaining the language used, or no circumstances shown indicating that the testator had in mind a death subsequent to his own, it would seem that this case should have been decided differently, according to the principle recognized and enforced in the later cases of *Vaughn v. Cator*, supra, and *Meacham v. Graham*, supra; yet, on the assumption that a death after the testator's death was indicated by other expressions in the will, the proper legal consequences were deduced, and the case

was correctly decided. However, as the rule of construction under examination in the present case was not considered in *Cowan, McClung & Co. v. Wells*, that case cannot, as pointed out below, be taken as an authority against the rule.

In *Hottell v. Browder*, 18 Lea, 676, it appears that the will was executed when the testator was very low, was unable to sit up, never expected to recover, and in fact was upon his deathbed; and his daughters were strong and healthy. These facts were sufficient to negative the construction that the testator referred to his daughters dying before his death, and to give to the expression "in case of the death of either of my daughters" (the clause being, "and in case of the death of either of my said daughters above named, then my will is that all the part of my estate which I hereby give to her shall go and descend to her children") the general meaning of death at any time. And it was so held in that case.

In *Stovall v. Austin*, 16 Lea, 700, 704, 705 it appeared that the codicil was made two days before the death of the testator; also that the language used in the codicil, which was the portion of the will under construction, was that, in the event of the death of testator's daughter or daughters leaving a child or children, "such child or children shall succeed to and take all the rights of its or their mother," etc. The words "succeed to and take" indicated that the testator was looking to a time beyond his death, and that the words "In the event of the death of either of my said daughters" should bear the general meaning of death at any time.

In *Armstrong v. Douglass*, 89 Tenn. 219, 14 S. W. 604, 10 L. R. A. 85, no reference to the rule under consideration was made. The court was considering another rule altogether—the rule against perpetuities. However, it seems to have been assumed in that case that the language was broad enough to cover death at any time, either before or after the testator's death. And manifestly this assumption was correct, as will be seen from reading the fourteenth and fifteenth clauses together of the will there copied. When so taken together, they show beyond controversy that the testator was referring to a period beyond his death.

As already intimated, in none of the cases, except in *Hottell v. Browder*, was the rule referred to in the present case considered, or apparently at all in the mind of the court at the time. We shall add the observation that, although a case should be found presenting a state of facts to which the rule might have been applied, yet if the court did not have the rule in mind, and, upon some other ground than an intentional disregard of it, reached a conclusion, in the solution of the case, the same as that which would have been reached upon a purposed disregard of it, such case would not be authority for the

proposition that the court had abrogated or declined to enforce the rule.

Recurring now to the case in hand, we have already indicated the construction which we think the will should bear. It remains to state that we are of the opinion that the children of Mrs. Katzenberger were proper parties, and the demurrer to the cross-bill should not have been sustained on the ground that they were not proper parties. The cross-complainant had the right to bring them before the court for the purpose of settling their claims, and thereby removing any doubt that might be cast upon his title. Of course, the question of construction could have been settled with no one before the court except the original complainants and the defendant, Weaver; but the decree would not have been binding, as res adjudicata, on the children. We do not think that the children of the two brothers of Mrs. Katzenberger were proper parties, as under a true construction of the will they could in no event take thereunder the property devised to Mrs. Katzenberger; but, as there was no demurrer directed specially to their status before the court, they will have to remain in the cause until the final decree.

No final decree granting a specific performance can be entered in this court, owing to the fact that the cross-bill is before the court on the demurrer of the original complainants. All that can be done here is to enter a decree construing the will in the manner above directed, and remand the cause for issue on the cross-bill, and other proceedings looking to a final decree settling the rights of the parties.

MEMPHIS NEWS PUB. CO. v. SOUTHERN RY. CO. et al.

(Supreme Court of Tennessee. June 30, 1903.)
CARRIERS—CARRIAGE OF FREIGHT—DUTY TO CARRY—UNLAWFUL DISCRIMINATION—SPECIAL CONTRACTS—ACTIONS BY SHIPPERS—DEFENSES—EQUITABLE RELIEF—CONDITIONS—ASSUMPTION OF BURDEN.

1. A railroad company contracted with a newspaper publisher, agreeing to run a special early morning train carrying only the newspapers of the publisher, in consideration of the publishing company guarantying to it a certain revenue from the operation of the train. This train became one of its scheduled trains, and was advertised as such. It was controlled exclusively by the company, and all the revenue derived from its operation in the carrying of passengers and freight was its property. Held, that the railroad could not, relying on its contract, refuse to carry on such train newspapers tendered it by a rival publishing house, which offered to comply with all the conditions as to guaranty, indemnity, etc., complied with by the house making the contract, and such refusal constituted an illegal discrimination between persons of the same class.

2. The fact that the publishing company solicited the institution of the train service and supported it by a large outlay of money during its early days did not change the rule, nor make the train a special one, chartered for a special purpose.

3. It was the duty of the railroad company to forward the papers tendered it, without discrimination in time or order of shipment; and it could not refuse to carry papers of the rival house on the early morning train, on the ground that it had other trains going out later in the day.

4. The early morning train being in operation, the railroad company could not refuse to accommodate the rival publishing house, and defend, when sued for such refusal, on the ground that such house could make a special contract similar to that made by the first house.

5. In a suit by a publishing house against a railroad company for refusal to carry its papers on an early morning train, which was put in service by the railroad under a contract with another publishing house which stipulated that the railroad company should not forward the papers of any other house than the contractor, the contracting house could not, when made a party to the suit by its rival, file a cross-bill, and thereby work out any equities that it might have against it on account of expenses incurred through the establishment and early maintenance of the train service.

6. The granting of such relief would be impracticable, as an account could not be stated which would do equal justice to the parties, since it would be impossible to ascertain the kind or value of the advantages which should be taken into account, derived by the contractor from the enterprise.

7. If bound to contribute to such expenses at all, the rival house could only be required to contribute to the extent of its proportional part of the service; other shippers, who had availed themselves thereof, being equally liable to contribution.

8. Since the railroad company was bound, under its duty as a common carrier, to carry any freight properly tendered to it, neither the railroad nor the house contracting for the service could impose, as a condition of acceptance and delivery of goods tendered, an obligation to share the burden of establishing the service voluntarily assumed by the contracting house.

Appeal from Chancery Court, Shelby County; F. H. Heiskell, Chancellor.

Bill for an injunction by the Memphis News Publishing Company against the Southern Railway Company and the Commercial Publishing Company. From a decree for plaintiff, defendants appeal. Affirmed.

F. P. Poston and Wright, Peters & Wright, for appellants. G. T. Fitzhugh, for appellee.

BEARD, C. J. This is an injunction bill, filed by the complainant, a corporation organized under the laws of Tennessee, against the Southern Railway Company, a corporation chartered by the state of Virginia, engaged in operating a line of railroad running between the cities of Memphis and Chattanooga, and the Commercial Publishing Company, a corporation with a charter issued under the authority of the state of Tennessee. The first and third of these corporations are engaged in the publication and circulation of two daily newspapers, and have their situs in the city of Memphis, and the Southern Railway Company is a common carrier of freight and passengers between the termini mentioned. The controversy arises out of a refusal upon the part of the railway company to receive and carry upon its train No. 6, scheduled to leave Memphis for Huntsville, Ala., each morning

at 4:30 o'clock, packages containing newspapers published by the complainant company and put up for delivery at certain stations along the line of said railroad; the refusal being based upon the ground, alleged by the railway company, that by the terms of a contract already existing between it and the Commercial Publishing Company it was prohibited from carrying any other newspaper than such as was published by that company. The facts, conceded in the pleadings or found in the agreed stipulation of counsel in the record, are:

The defendant the Commercial Publishing Company was on the 29th of November, 1901, and had been for years prior thereto, engaged in the publication daily of a newspaper called the "Commercial-Appeal," of wide circulation, and especially with many subscribers living along the line of the railroad. At that time there was no early train service out of Memphis by which newspapers could be carried to points between that place and Huntsville, a point on the road situated in the state of Alabama. Conceiving the idea that the value of its newspaper would be largely enhanced by the establishment of such train, it entered into a contract with the Southern Railway Company, the terms of which, so far as it is necessary to state them, may be summarized as follows: (1) The railway company agreed to operate a passenger train, consisting of an engine, a combination passenger and baggage car, and at least one passenger coach, between Memphis and Huntsville, leaving Memphis about 4 a. m. daily, and reaching Huntsville at or about 10:40 a. m., and on its return trip departing from the latter place about 7:20 a. m. and arriving at Memphis about 2:00 p. m. (2) It agreed to forward upon said train all newspapers which the Commercial Publishing Company might desire to distribute between Memphis and Huntsville, and to transport upon such train daily also such employees of the Commercial Publishing Company as might be necessary to handle the same, and also to forward daily on a freight train such newspapers to points east of Huntsville; also to operate its own hand car or velocipede, at its own risk and expense, over its branch line to Somerville, Tenn., from the town of Moscow. (3) It further agreed to refuse, so far as it might lawfully do so without violating the postal laws, rules, and regulations of the United States, to carry upon said train the newspaper or publication of any other publishing company; but other newspapers or publications were to be transported upon any other train or trains of the railway company except the one in question. (4) The contract further provided that the railway company might carry on said train all such passengers and their baggage, express matter, and other business usually accommodated upon passenger trains, as might be offered, upon such rates or terms as it might prescribe, and should retain all earnings and revenue derived from the operation of these trains. (5) It

was also provided that the employes of the Commercial Publishing Company were to be under the exclusive control of the railway company, and amenable to the orders and instructions of its conductor, and to the reasonable rules and regulations of the carrier company. In consideration of these undertakings on the part of the railway company, on its part the Commercial Publishing Company in this contract guaranteed to the railway company a revenue from the operation of this train of \$125 for each one of the round trips contemplated by the contract, and agreed to pay the railway company the difference between the gross earnings of each of these trips and this sum. The Commercial Publishing Company further agreed to indemnify the railway company against all demands, suits, judgments, or sums of money accruing to the publishing company or any one or more of its employes and to protect it against any claims of the employes of the publishing company and the cost of defending them, if suits were brought against it. In other words, the publishing company agreed to be responsible for all costs, demands, and claims growing out of the operation of the train and incurred in handling papers by and transporting employes of the publishing company. It also undertook to publish daily a schedule time-card of the railway company in the Commercial-Appeal, as the same might be promulgated from time to time, with all desired changes and corrections therein as might from time to time be made, and also to publish 500 inches of any advertising matter desired by the railway company, all of which should be done at the expense of the Commercial Publishing Company. The railway company, however, agreed to grant a reasonable amount of free transportation over its lines to the publishing company. This contract took effect December 1, 1901, and was to continue until December 31, 1902, with the right of renewal for a further period of one year. The train thus provided for was soon thereafter put in operation by the Southern Railway Company, and it is agreed in the cause that it was one of its scheduled trains, and was advertised to the public as such. It is also agreed that it was controlled exclusively by that company, that all of the revenue derived from its operation was its property, and that it carried passengers and their baggage, the United States mail, express matter, newspapers of the Commercial Publishing Company, and all such other freight as is usually transported on passenger trains of a commercial railroad.

On the 4th of May, 1902, the complainant began in the city of Memphis the publication and issuance of a daily morning paper called the "Memphis Morning News," and immediately secured several thousand subscribers in the territory reached by this line of railroad. Desirous of reaching these subscribers at as early hour as possible, the complainant demanded the right to ship as

freight its packages of newspapers, properly directed to its several agents at the various stations along the line of the railroad where the train was scheduled to stop, and tendered the usual charges on the same. This demand, however, was refused by the railway company, upon the ground that it was restrained from such carriage by the terms of its contract with the Commercial Publishing Company. Upon this refusal the complainant then tendered to the railroad company a bond, with proper security, in consideration of being allowed to ship its packages of newspapers as freight on this train, by which it undertook to indemnify it against all loss resulting from the operation of the train up to \$125 for each round trip thereof; complainant thereby seeking, so far as the railway was concerned, to place itself in the same condition of liability as was the Commercial Publishing Company. This tender was also declined. Thereupon the complainant offered for transportation, with charges prepaid, its packages of newspapers to the Southern Express Company, which was shipping express matter on this train; but it also declined to receive or transport these packages, assigning as a reason for the refusal that the railway company had reserved to itself exclusively this right. The record discloses that, in order to avoid complications which possibly might result from this refusal, the express company temporarily withdrew its service from these particular trains. Thus thwarted in all its efforts to avail itself of the advantage of this daily train, and there being none other by which it could reach its subscribers in the territory tributary to this railway, so as favorably to compete with the Commercial Appeal newspaper, the present bill was filed.

The theory of the bill is found in the ninth clause thereof, which is in these words: "Complainant avers that in receiving and transporting the papers of the aforesaid Commercial Publishing Company on said train, thus enabling it to deliver its papers to its subscribers in that particular territory a short time after the publication thereof, and in refusing to receive and transport on the same terms the papers of complainant, and thus depriving it of an opportunity to deliver its papers to its subscribers with equal promptness, the defendant railway company has been, and still is, granting daily to said Commercial Publishing Company an undue, unreasonable, and unlawful preference or advantage over complainant, and has been, and still is, guilty of an unjust and illegal discrimination against complainant and in favor of the said Commercial Publishing Company. * * * Complainant is advised, and so charges, that the said contract so entered into by and between defendant and the said Commercial Publishing Company, in so far as it attempts to give to the said Commercial Publishing Company a monopoly of transportation of a certain kind of traffic, to

wit, newspapers, causes the defendant Southern Railway Company to violate its duty as a common carrier by refusing to receive and transport on said trains the newspapers or publications published by any other publisher than said Commercial Publishing Company, is absolutely prohibited, and unlawful." It is also alleged that the contract was violative of the seventeenth section of an act of the General Assembly of the state of Tennessee, passed March 24, 1897, and approved April 7, 1897, which is in these words: "Be it enacted, that it shall be unlawful for any corporation to make or give any undue or unreasonable preference or advantage to any particular description of traffic, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage." Acts 1897, p. 120, c. 10. The prayer of the bill was, in effect, that the rights of the complainant in this regard be ascertained and established, that an injunction be awarded restraining the defendant the Southern Railway Company as a common carrier from discriminating in favor of the Commercial Publishing Company and against the complainant in the transportation of packages of their respective newspapers upon this train, and for a mandatory injunction requiring the railway company to accord to it the same privileges as was granted the publishing company in the matter of transportation, upon the tender of freight charges and guaranties against loss such as had been executed by the Commercial Publishing Company; and upon final hearing it was asked that the injunction be made perpetual and general relief be granted.

To this bill answers were filed by the two defendants, in which it was insisted that under the conditions existing at the time of the making this contract it was legal; that there was at that time no early train service out of Memphis on which newspapers could be carried; that the railway company did not believe this train would be self-supporting, and it was only at the solicitation of the Commercial Publishing Company, and upon its guaranty that it should earn at least \$125 for each round trip, that the train was put on; that in the early history of its operation it was not self-sustaining, but entailed a loss on the Commercial Publishing Company under its guaranty of about \$7,000 in money paid by it to the railway company. Under these facts it was insisted that this train was a chartered train, on which alone the Commercial Publishing Company was entitled to carry its newspapers, and that the railway company, in complying with this contract hereinbefore set out, was not a common carrier, and was not guilty of any unjust, unlawful, or discriminating conduct against the complainant.

With its answer the Commercial Publishing Company filed a cross-bill, in which, after re-

peating many of the allegations of its answer, it insists, among other things, that, if the Memphis News Publishing Company should, by decree of the court, be let into an equal enjoyment of this train service, for the carriage of its packages of newspapers, then it should only be on the conditions that it reimburse the cross-complainant to the extent of one-half the money paid out by costs expended by it in the establishment of this service, and, in addition, one-half the value of the advertisements which, under the contract, it had done for the railway company. To this end the chancellor was asked that, if it should be held the News Publishing Company was entitled to an equal advantage in this service, then it should be decreed to pay to cross-complainant one-half of all such sums. This cross-bill was dismissed on demurrer.

Upon the hearing of the issue made by the original bill and answers thereto, a decree was entered adjudicating all the questions involved in favor of the Morning News Publishing Company. From the decree dismissing its cross-bill, and from the final decree, the Commercial Publishing Company has appealed, and now makes the following assignment of errors, to wit:

"(1) The court erred in holding that the contract with the Commercial Publishing Company was made by the Southern Railway Company as a common carrier, and that it was invalid and illegal, in that it undertook to grant exclusive rights and privileges to the Commercial Publishing Company, and in holding that the Memphis News Publishing Company was entitled to the same rights as were conferred upon the Commercial Publishing Company by the said contract in transporting its newspapers and employes on this train.

"(2) The court erred in holding that the contract between the Southern Railway Company and the Commercial Publishing Company was not valid.

"(3) The court erred in holding that the contract between the Southern Railway Company and the Commercial Publishing Company created a monopoly, that it unjustly and illegally discriminated against the Memphis News Publishing Company, and was invalid as against said company.

"(4) The court erred in holding that the Memphis News Publishing Company was entitled to transport its papers and employes on this train, and to enjoy equal privileges and rights with the Commercial Publishing Company thereon, without paying to it anything therefor.

"(5) The court erred in not holding that, before the Memphis News Publishing Company could conduct its business and transport its newspapers and agents on this train, and avail itself of all the rights and privileges accorded to the Commercial Publishing Company on said train under its contract with the Southern Railway Company, the said Memphis News Publishing Company should be required to pay to the Commercial Publishing

Company one-half of all the sums of money expended by it in inaugurating and maintaining the operation of the said train, and in advertisements and other expenditures, which amounted to a very large sum of money."

The first three of these assignments may well be treated together, as raising the question whether the Southern Railway Company, in the matter of the transportation of the newspapers of the Commercial Publishing Company, is a common carrier; for, if so, then it cannot, at common law or under the statute, discriminate against any other person who in like condition, with a tender of all reasonable charges, offers its newspapers to be transported as freight over its line of road. The criterion by which it is ordinarily determined whether one is a common carrier is that "he has held himself out, or has advertised himself in his dealings or course of business with the public, as being ready and willing for hire to carry particular classes of goods for all those who may desire the transportation of such goods between the places between which he professes in this manner his readiness and willingness to carry. If he has done so, he is, of course, to be regarded as a common carrier; but, if not, he will be treated as a private carrier for hire." *Hutchinson on Carr.* § 48. This, however, it has been held, is not a universal test. There are cases, exceptional, it is true, where a party has had imposed upon him the character of a common carrier, though it be he has not given the public to understand that this was his profession, but has carried only in occasional or particular instances, but in this has received hire for his service. In *Gordon v. Hutchinson*, 1 *Watts & S.* 285, 37 *Am. Dec.* 472, and *Moss v. Bettis*, 51 *Tenn.* 661, 13 *Am. Rep.* 1, it was ruled that such a party pro hac vice assumed the responsibilities of a common carrier.

Whatever doubt may have been thrown by text writers on the wisdom of extending the common-law definition or rule so as to embrace such exceptional cases, there can be none that commercial railroad companies are by their very nature and organic character common carriers. Recognizing them as public utilities, as well as private enterprises, there has been conferred upon them extensive rights and franchises, among these being that of the right to invoke the power of eminent domain; but at the same time, whether by statute or upon the principles of the common law, they have had imposed upon them duties they cannot avoid, one of which is that they shall serve the public without unjust discrimination. Not only have they been fostered by the government, but, by reason of aggregation of capital and the great facilities which they possess for the transportation of all the commodities of commerce, they have practically monopolized the land carriage of the country. This being so, it is just and proper that they should be held to the strict discharge of their common law and statutory duties. *Hutchin-*

son on Carr. § 67. One of the duties imposed upon a railroad as a common carrier is that it shall deal fairly and impartially with all who seek, as passengers or shippers of freight, to avail themselves of its service. Impressed, as it is, by its grant of franchises, with a trust to the public, this trust can only be discharged by extending equal facilities to each member constituting the public. It fails of its duty, therefore, when, discriminating between individuals in like condition, it gives one an advantage in the carriage of his person or property which it refuses to another, and it follows that any contract made by it, by which one or more members of a class are fostered at the expense of or to the detriment of others of the same class, who demand like service, is unenforceable. Granting that goods not dangerous in their nature and not unfit for shipment are offered at a proper place and time, and that the cost of carriage is tendered, and the railroad has facilities for shipment, then it must accept and transport them. In doing this it "can show no favor, nor make distinctions which will give one employer an advantage over another, either in the time or order of shipment, or in the distance of the carriage, or in the convenience or accommodations which may be afforded." *Hutchinson on Carr.* § 297; *New Eng. Ex. Co. v. Maine Cent. R. R.*, 57 *Me.* 188, 2 *Am. Rep.* 31; *Messenger v. Penn. R. R.*, 36 *N. J. Law*, 407, 13 *Am. Rep.* 457; *Union Pac. Ry. Co. v. Goodridge*, 149 *U. S.* 680, 13 *Sup. Ct.* 970, 37 *L. Ed.* 986.

These general principles are conceded by the defendants to be sound, but it is insisted they do not control the present case. It is admitted—or it is true, whether admitted or not—that the railway company, as to the train in question, was a common carrier of passengers and of mail and express; but it is contended that it was, by reason of its contract with the Commercial Publishing Company, a private carrier of newspapers, and therefore was under no obligations to admit the newspapers of the complainant on its train. It is true "a common carrier may become a private carrier or bailee for hire, when as a matter of accommodation or special agreement he undertakes to carry something which it is not his business to carry." *Hutchinson on Carr.* § 44. For example, "if a carrier of produce, running a truck boat, should be requested to carry a keg of silver or a load of furniture, * * * he might justly refuse to receive such freight, except by such an agreement as he might choose to make. * * * But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character." *N. Y. C. R. R. Co. v. Lockwood*, 17

Wall. 357, 21 L. Ed. 627. If the contract complained of in this case was one which granted an exclusive right and privilege to the Commercial Publishing Company to sell its newspapers on this train, and the complainant was here seeking to interfere with this contract and to force the railroad to grant it an equal privilege, then there would be presented a special agreement which the courts would not intermeddle with; and this upon the ground that as a common carrier it owed no duty to furnish newspapers to the traveling public, and was not bound to permit another to do so. If it chose, however, to grant this privilege, another to whom it was refused would not be heard to complain.

But this is not the case at bar. Under the contract the railway company is carrying the newspapers of the Commercial Publishing Company as property, and the complainant is insisting that, having the means of doing so, it should equally and impartially carry its packages of papers upon the same terms as merchandise. It would hardly be contended that a railroad by making a special and exclusive contract to transport shoes manufactured by one party in a community, could strip itself of its common-law character, and decline, without any reason save the existence of said contract, to transport boxes of shoes for another manufacturer in the same community. If this be so, where is the controlling difference between such a case and the one now before us? Packages of newspapers are as much property as shoes, and the principle which controls in the one case, it seems to us, must equally apply to the other. If this be not so, by parceling out its means of transportation to the full extent of its carrying capacity, it would be possible for a railroad to build up a few in a community to the destruction of the many who equally seek shipment. This the law will not tolerate in one who holds himself out as a common carrier. As has been already said, he must accord equal privileges to all who are in like condition. He cannot foster monopolies. He will not, by making special preferential agreements, be permitted to build up one set of shippers at the expense of another. He must carry for all alike.

These general principles being established, what is there to prevent their application in this case? We see nothing. A railroad by its very nature, as has been seen, is a common carrier. The train in question is a scheduled one, advertised to the world as such. An invitation is given to the public to take passage and ship freight upon it. Its own employes, managers, and the railway company appropriate all its revenues. So far as the record shows, it receives on this train merchandise from every other member of the community, and refuses carriage alone to that of this complainant; and this refusal is based, not upon a lack of carrying capacity, but exclu-

sively upon the ground that it has contracted away its duty, in respect to such property as the complainant has tendered, to another party. Such an excuse cannot relieve the railway company from its obligations to complainant as one of the public, unless it be that this contract in question brings this within the lines of certain exceptional cases on which the defendants rely as authority for their contention. Some of these cases, which may be taken as representatives of their respective classes, will be now referred to.

It has been held that a common carrier of passengers may establish in his car or vessel an agency for the delivery of passengers' baggage, and may exclude all other persons from entering upon it for the purpose of soliciting or receiving orders therefor. *Barney v. Oyster Bay, etc., Steamboat Co.*, 67 N. Y. 301, 23 Am. Rep. 115. It has been also held that a railroad corporation may exclude from its right of way one party who comes to sell lunches to its passengers and admit another to this privilege, if it pleases (*Fluker v. Ga. R. R., etc., Co.*, 81 Ga. 461, 8 S. E. 529, 2 L. R. A. 843, 12 Am. St. Rep. 328), and that a steamship corporation and a railroad may equally give preferential privilege to certain hackmen to solicit passengers on their property and exclude others (*Smith v. New York R. R. Co.*, 149 Pa. 249, 24 Atl. 304; *Norfolk & W. R. R. v. Old Dominion Bag. Co.*, 99 Va. 111, 37 S. E. 784, 50 L. R. A. 722.) These cases and others like them rest, however, on the ground that, save as to duties which he owes to the public, a common carrier has as complete dominion over its property, whatever it may be, as does every other owner, and may therefore exclude from or admit to it, at its will, particular persons. In other words, an inhibition upon preferential indulgences extends only to those services which inhere in or pertain to the office of a common carrier, and beyond these he is entitled to the absolute control of his own, and that in none of these matters covered by these cases does he owe anything to the public.

In *Audenried v. Philadelphia & Read. R. R.*, 68 Pa. 370, 8 Am. Rep. 195, the question was as to the right of the defendant company to so parcel or divide its wharf among other coal dealers as to exclude the complainant therefrom. After expressing great doubt as to whether the defendant, under its charter, was bound to provide wharf accommodations to any of the coal dealers in question, or was a trustee to any extent for them, the court adds: "But, concede both of these points; what then? As trustee there is a discretion reposed in them in the use of the property with which a chancellor cannot interfere. It is agreed that they have not room enough for all. They must select some and reject others. Can a chancellor inquire into their motives and, not approving of them, assume the selection himself?" The court in this opinion by necessary implication de-

clared that its holding could not be authority for such a contention as is now made by these defendants; for it adds: "Transportation by a common carrier is necessarily open to the public upon equal and reasonable terms. An exclusive right granted to one is inconsistent with the rights of all others. This was not transportation, but wharfage, the nature of which requires exclusive possession temporarily."

In *Hoover v. Penn. R. R.*, 156 Pa. 220, 27 Atl. 282, 22 L. R. A. 263, 36 Am. St. Rep. 43, the court held that an agreement made in 1881 to charge a uniform rate on shipment of coal to the Bellefonte Nail Works for consumption in operating its machinery could not be complained of as unjust discrimination against a mere dealer, who received his coal over the same road and was charged a higher rate. This was held not to be unjust discrimination, because the business of the coal dealer paid but one freight to the carrier, while that of the nail company paid two freights, to wit, one for handling the coal to the nail works, and the other for carrying all the products manufactured by the nail company. "This," said the court, "was a most important and vital difference in the conditions and circumstances of the two shipments. The authorities are very clear and strong that, where an additional freight is obtained by means of the lesser charge, the discrimination is justified, both at common law and under the statute." To save such an arrangement from condemnation, however, it must appear that "the same advantages" were "extended to all persons under the like circumstances. This latter incident," adds the court, "would, of course, be essential where all the favored class were in the same business." The case was distinguished from *Messenger v. R. R. Co.*, 37 N. J. Law, 531, 18 Am. Rep. 754, where it was held that there was a clearly unlawful preference by the common carrier in favor of one party over all others in the same business in "giving him a specified drawback upon freight on hogs carried from the same points." "This drawback," said the Pennsylvania court, "as of course, was giving one a direct preference over all others, and was in violation of the law."

We think, as the discrimination of the case at bar is one in favor of and against another of the same class, it falls under the condemnation of the *Messenger Case*, rather than being within the saving authority of that of *Hoover*, supra. Nor can we see how the fact that the solicitation or the money of the Commercial Publishing Company, however able was its exhibition of public or private enterprise, contributed to the institution of this train service and its support in its early days, is to affect this question. From the beginning the railway company had itself recognized that it was operating this train as a part of its common carrier service. It was in no sense a special train, char-

tered for a special purpose, with the carriage of freight and passengers as simply incidental. The contract itself gives notice that it is a public enterprise, and the contemporaneous conduct of the parties has so construed it. The railway company has controlled it by its own employés, and has advertised its readiness to serve the public with it; and the Commercial Publishing Company, according to this record, has continually published it as one of the schedule trains of the railway company.

It is said, however, that the railway company has other trains going out every day, though later in the day, on which the complainant may ship his papers. But it was the duty, upon the record, of the company to receive the packages for shipment. Having done this, it could make no "discrimination, either in the time or order of shipment," between these two publishing companies. *Hutchinson on Carr.* § 297. It was bound to use due diligence in the delivery of the goods. *N. & O. R. R. v. Jackson*, 53 Tenn. 271.

It is also said that, if complainant wishes a train to use in carrying its goods, it should make a special contract, as is relied on in this case by the defendant. This would be a good answer for the railway company, if complainant wanted an early service and there was no train on which could render the service. But it is not for either defendant, with the present train on, amply able to take complainant's goods, to decline only upon the ground of the special agreement.

After a careful consideration of the assignments of error raising the question as to legal effect of this agreement upon the carrier duty of the railway company, we hold that they are not well taken, and they are overruled.

There remains open now only the assignment of error upon the action of the chancellor in sustaining the demurrer to the cross-bill. In arguing this assignment, the cross-complainant overlooks the fact that the real controversy in this cause is between the Memphis News Publishing Company and the railway company. It was a proper, but by no means a necessary, party to this suit. No relief was asked against the Commercial Publishing Company. Complainant sought a remedy alone against the railway company, and this remedy would have been applied as effectually without, as with, the former company a party defendant; and the defense of the railway company, if sound in law, was maintainable even if it stood alone. This company has been paid all it is entitled to, and is claiming nothing for past service. This being so, we know of no principle upon which the cross-complainant can in this suit work out any equity against complainant, if it has any; for on this cross-bill it is in the attitude it would be in if, not a party to this suit, it had filed an independent bill, and asked the court to grant it relief before giv-

ing a decree in favor of the Morning News Publishing Company against the railway company. It would hardly be insisted that such a bill could be maintained. Nor do we think the contention of cross-complainant that the original complainant shall be compelled to account to it for one-half of the sums expended in placing this train service on a self-sustaining basis before being let into its enjoyment can be maintained on other grounds.

First. We think it would be impracticable to state an account that would do equal justice to the parties. While it would be easy to ascertain the amount of money expended and the value of the service rendered in fostering this train by cross-complainant, yet it would be impossible to ascertain the kind or the value of the advantages derived by it from this enterprise. Certainly the worth of this advantage should be taken into account.

Second. If bound to contribute at all, we think the Morning News Publishing Company could only be required to do so to the extent of its proportional part of the same; all other shippers who have availed themselves of this service being equally liable to contribution.

Third. Having held, however, that the duty of a common carrier attached from the establishment of this train service, it follows that every shipper who made a timely and proper tender of freight was entitled to its benefit, as long as there was accommodation for his freight, without regard to the connection between the railway company and other shippers. All other things being equal, the company was bound to accept and make prompt delivery of the goods so tendered. Neither the company nor a third party could impose as a condition for acceptance and delivery that complainant should agree to share a burden voluntarily assumed by this third party. No more can either demand at this day that this burden shall now be divided as a condition precedent to the railway company's discharging its duty.

However meritorious this claim of cross-complainant, we can see no legal or equitable ground on which it can be vested. The assignment is therefore overruled.

The decree of the chancellor is in all things affirmed.

STATE ex rel. WELLFORD v. WILLIAMS, Mayor.

(Supreme Court of Tennessee. June 29, 1903.)
MUNICIPAL CORPORATIONS — TAXPAYERS — RIGHT TO EXAMINE BOOKS — MANDAMUS — ANSWER — SUFFICIENCY — PURPOSE OF EXAMINATION — CUSTODIAN OF BOOKS.

1. In mandamus proceedings, where the cause is set down for hearing on petition and answer, every fact properly averred in the answer must be treated as true.

2. A provision of a city charter that every officer and agent of the city shall at all times, when requested, submit his books and official papers to the inspection of the mayor, or any

member of the legislative council, or to any person or committee appointed or authorized by said legislative council to examine the same, is not exclusive, so as to preclude an examination of such books by any person not specifically designated.

3. The right of a grand jury to examine the books of a municipality is not exclusive, so as to prevent such an examination by a private individual.

4. The fact that a person making application for examination of the books of a municipality is politically hostile to the administration is no excuse for refusing to permit such examination.

5. That an examination of the books and records of a municipality would produce worry and inconvenience, and that the transactions recorded are numerous, involving large sums of money, is not a sufficient reason for denying a citizen the right to examine such books.

6. In mandamus to compel the mayor of a city to allow relator to examine the books of the city, the answer stated that prior to the time application was made for examination of the books the city was much indebted and without funds, and that a committee of citizens had been called together by the mayor for the purpose of devising means to raise revenue, and that relator's application was denied, because respondent believed that the proposition to examine the books was made rather to impede and thwart the object had in view by calling the committee than to forward such object. *Held*, not sufficient to show that relator was actuated by a fraudulent and dishonest purpose, so as to justify the denial of a writ.

7. Where a city had become deeply indebted, and the tax rates were so heavy and burdensome that an application had been made to the Legislature for an increase of the means of raising taxes, and subsequently the mayor called a meeting of the citizens to devise ways and means for repaying and improving the streets, etc., a taxpaying citizen was entitled to an examination of the books of the city, for the purpose of learning its financial condition and ascertaining the true facts relative to the expenditure of its resources.

8. Where, after the commencement of mandamus proceedings to compel the mayor of the city to allow a taxpayer to examine the books, the mayor appointed a committee to make such an examination, and offered to allow the taxpayer to name a part thereof, such action did not affect relator's right to the writ.

9. Under Watkins' Dig. 1902, pp. 19, 20, § 6; Id. p. 22, §§ 1, 2; and Id. p. 107, art. 5—the mayor is custodian of the books and records of the city to a sufficient extent to make it proper that a writ of mandamus to enforce a taxpayer's right to examine the books should be directed to the mayor.

Appeal from Chancery Court, Shelby County; F. H. Heiskell, Chancellor.

Mandamus by the state, on relation of W. L. Wellford, against J. J. Williams, as mayor of the city of Memphis. From a decree denying the writ, relator appeals. Reversed.

Carroll, McKellar & Bullington and Caruthers Ewing, for appellant. W. B. Henderson, for appellee.

NEIL, J. This was a proceeding instituted in the chancery court of Shelby county for a mandamus upon the defendant, as mayor of the city of Memphis, to compel him to allow the relator to examine the corporation books of the said city of Memphis with an expert accountant. An alternative writ was issued by the chancellor, to which the defendant re-

sponded. Thereupon the relator demanded the peremptory writ on the pleadings as they then stood. The chancellor denied the relief sought, and complainant has appealed and assigned errors.

In order to fully understand the scope of the litigation, it will be necessary to set out the substance of the bill or petition, and of the defendant's response or answer to the alternative writ. Before doing this, in order to properly understand the legal effect of the allegations and averments in the pleadings referred to, it is necessary to state certain rules applicable thereto. In *Harris v. State ex rel.*, 96 Tenn. 496-513, 34 S. W. 1017, it is said: "The power to issue mandamus, and the practice under it, is to some extent regulated in this state by statute. Code 1858, § 3567 et seq.; *State v. Marks*, 6 Lea, 12. By these provisions the return to the writ is made traversable, and the averments of the petition may be put in issue by a denial in the return or answer, in which event the case will be determined by the court, or tried by the jury on evidence. With these exceptions, the proceeding is one largely controlled by the rules of pleading established by the common law. Among these rules, we think the following are well established: (1) Whenever it appears that the return fails to answer the important facts alleged in the petition, every intendment will be made against it. *High on Ex. Leg. Rem.* § 461. (2) The allegations not denied, nor confessed and avoided, are taken to be true. *Merrill on Mandamus*, § 274. (3) If the relator moves for a peremptory writ upon the pleadings, this motion is equivalent to a demurrer to the return for not stating facts sufficient to constitute a defense. *High on Ex. Leg. Rem.* §§ 521, 523; *State v. Marks*, supra. With these principles in view, we shall now endeavor to ascertain the facts, as contained in the pleadings.

The petition contains the following allegations: That the relator is a resident citizen and taxpayer of the city of Memphis, and as such one of the incorporators of the city, which is a municipal corporation under and by virtue of chapter 11 of the Acts of 1879 and the acts amendatory thereof; that the defendant is the mayor and chief executive of the said municipality; that as such mayor and chief executive he has the custody of the books of the said city, on which are kept the receipts and expenditures of the funds of the said city; that in the said receipts and expenditures the relator, as a taxpayer and citizen, has a direct interest; that some time before the petition was filed the relator, uninvited, attended a meeting of 200 invited citizens, called by the mayor, for the purpose of devising ways and means to assist the city administration to pave, repair, and "round up," more or less, the streets of the city, and, being interested in the material prosperity of the city, he afterwards attended the meeting of a committee of 15 appointed at the aforesaid meeting of citizens; that the relator,

having the interest of a corporator and taxpayer (the financial condition of the city showing the necessity for the providing of additional means for the purposes aforesaid and the tax rate being already very high and very burdensome), thought that business men, in the conduct of their own affairs, ought to know the sources of the revenue of the city and the items of expenditure of that revenue. and thereupon the relator proposed to the said committee to provide for an examination of the books of the city, for the sole purpose of ascertaining the exact financial condition of the city, the sources from which it was received, and for what it had been paid out; that afterwards a subcommittee of 5 was appointed from the said committee of 15; that this subcommittee undertook to make such investigation as was practicable of a superficial character, and, having called upon the defendant for such information as would enable the members thereof to have a conception of the amount of revenue received, the sources from which it had been received, and the accounts to which it had been appropriated, the defendant, as mayor, furnished the committee with certain figures, which are exhibited with the bill and marked "A"; that the proposition of the relator for the examination of the city books by experts resulted in a declination by the chairman of the committee of 200 before referred to; and that thereupon the relator demanded of defendant the right to make an examination of the books, records, papers, and vouchers in his possession, claiming, as a corporator and taxpayer in and of the city, the right to make a general inspection of the public records of the city, and to make copies of its public documents and records, under such rules and regulations as would insure their safety—the relator stating at the time that the books would be examined with the least possible inconvenience to the mayor and to the other officers of the city government, and that he trusted that the examination might be made without any hard feelings between any officers of the city government and himself, but that this demand was ignored and refused, and treated with contempt and derision.

The petition then proceeds: "The relator is advised by counsel that the books of the city of Memphis are public records, and that as a corporator and taxpayer of said city of Memphis he has the right to inspect them, to make copies of them under such rules and restrictions as will preserve their safety; and he is entitled, to this end, to the benefit of agents and employes, and to the right of a general inspection. That the relator is informed and believes, and upon information of a public character avers the fact to be, that the refusal to grant him the right he claims by the defendant is not based upon any abuse or inconvenience likely to arise by inspection, examination, and making note of the records, or any damage or loss that is likely to ensue by reason of such ex-

amination of the records, but is predicated wholly upon the assumed and unwarranted claim of the defendant that the examination sought by the relator and demanded as of right is predicated of political animosity, which the relator says is ill-founded in fact; he claiming the right purely because of his interest as a corporator and taxpayer, and making the demands to the end that he may know that which he has the right to know—the exact status financially of the corporation of which he is a member, and what has become of its funds.”

The prayer of the bill was for an alternative mandamus and for ultimate relief in accord with the substance thereof. An alternative writ was issued in accordance with the prayer of the petition or bill, and thereupon the defendant filed his answer.

The answer does not deny that the relator was, at the time the petition was filed, a resident citizen and taxpayer of the city of Memphis; that he attended the meeting of citizens mentioned in the petition; that this meeting was called for the purpose stated; that the relator also attended the meeting of the subcommittee of 15, and that he proposed to the committee to provide for an examination of the books; that the subcommittee of 5 was appointed as stated, and that the defendant furnished to that committee the figures mentioned in the petition; that the relator's request for an examination of the city's books by experts was declined by the chairman of the committee of 200; and that thereupon he demanded of the defendant the right to make an examination of the books, records, papers, and vouchers of the city, claiming as a corporator and taxpayer the right to make a general inspection of the public records of the city, and to make copies of its public documents, under such rules and regulations as would insure their safety, and that this demand was refused by him. These facts, therefore, must be treated as established.

In response to the allegation that he was the custodian of the books and papers referred to, the answer contains the following: “He denies that he is the custodian of the city's books as set forth in complainant's bill of complaint. His connection with or power over said books is controlled by ordinance, which provides as follows: ‘The mayor shall have power to inspect such of the books, papers, and records of the officers of the city as may, in his opinion, be necessary to enable him to discharge the duties imposed upon him, and may call upon all of the officers of the city to furnish him in writing with any information connected with the respective offices.’” Respondent states that under the legislative enactment creating the city of Memphis, and the acts amendatory thereof, the government of the said city is vested in a board of fire and police commissioners, a board of public works, and a legislative council. “The entire government of the city

of Memphis, under and by virtue of the charter of the taxing district of Shelby county and the amendments thereto, is lodged in said two boards and legislative council and such agents as they and the mayor may appoint. The custody and the control of all of the property of the city, its books, and cash funds are under the control and supervision of said boards and legislative council, and county trustee of Shelby county; he being the tax collector of the city. Respondent further states that, under the legislative enactments creating the city of Memphis and the ordinances thereof, the custody of all the city books is vested in the secretary and bookkeepers of the various city departments, the county trustee, and a general secretary of the city government, who do not hold them for, or subject to, the orders of the mayor, but as the officers and representatives of the board of fire and police commissioners and the board of public works and the legislative council of the city of Memphis, and subject to such duties with regard to the same as are imposed upon them by law. Respondent has not the right, under and by virtue of the laws and ordinances of the city of Memphis, to grant the inspection of the books demanded by complainant in his bill.”

In an amended answer he adds concerning the custody of the books as follows: “Respondent does not have the charge or control of the books of the city, as he has already explained; they being in the possession and control of W. B. Armour, the secretary of the city, and other secretaries and bookkeepers, who are under heavy bond for the correct and honest keeping of the books, their custody, preservation of papers, etc.” The matters here referred to are partly matters of law and partly matters of fact, and the question as to the defendant's right of custody to the papers and records referred to will have to be determined later by the language of the charter, taken in connection with the ordinance above referred to and the facts above stated.

As to the refusal on his part to allow the relator to make the extended examination he demanded the opportunity of making, while not denying that he had so refused, he answered, further, that he had never refused to relator, as a citizen of Memphis, “the right personally to inspect the books of the city in any reasonable manner, which this respondent has never denied to any citizen, but has at all times been ready to concede and accord [this] to all.” We construe this to mean that he has not denied the right to make an examination for any special or particular matter. But, taking this in connection with other parts of the answer, we infer that the defendant did not consider as reasonable the demand made by the relator for a general examination, such as is claimed in the petition, and that the demand for such examination he did refuse.

Upon the subject of the motive and animus

of the relator, after referring to the proposition for an examination made by the relator to the committee called by defendant, the answer proceeds: "Respondent states that the complainant is very hostile politically to him, and to the present city administration, and he believes that the design of the said proposition, made at the time it was, or the effect of it, was, or would be, not to promote and aid, but rather to impede and thwart, the objects and purposes had in view when said citizens were invited to meet to consider the subject of streets. Respondent, under the circumstances, regarded the proposition of complainant as an intended obstacle to what he was desiring to accomplish for the good of the city of Memphis, and did not accede to the demand."

After setting out the fact that he had addressed a letter to certain well-known gentlemen in Memphis, asking them to consent to act as a committee to examine the books of the city, and that, upon their expressing a willingness to act, they had been appointed for that purpose and to perform that duty by the legislative council of the city of Memphis, the answer set forth the following correspondence that passed between the chairman of that committee, Mr. A. S. Caldwell, and the solicitors of the relator, as indicating and throwing light upon the motive and purposes of the relator in demanding the examination. The first letter is as follows:

"Memphis, Tenn., Feb. 11, 1903.

"Carroll, McKellar & Bullington and Caruthers Ewing, Attorneys for W. L. Wellford—Dear Sirs: I am instructed by the committee who have accepted Mayor Williams' invitation to supervise the examination of the city's books to address this communication to you and to make the same public. We call your attention to the letter of the mayor, dated February 10, 1903, published in the daily papers, which conferred upon us full authority to make this examination without any limitations whatever, and with the power to increase our membership. We accepted the mayor's invitation because we believed this work was a public duty we should not shirk. We desire the investigation to be made in a thorough and comprehensive manner, and under such supervision that the report, when made, will command the respect and confidence of the whole community. We believe that this can best be accomplished with the co-operation of your client, and therefore suggest that all legal proceedings be dismissed, and that you select five prominent citizens, irrespective of their business occupations, and we will appoint them members of our committee. If desirable to further increase the committee, the new committee of ten may do so. If this proposal is accepted by you, it will not be necessary for Mr. Wellford, or those interested with him, to contribute any money toward the examination. Our sole object in making this proposal is a sincere desire to obtain your co-operation, to the end that only

one examination shall be made, and that by a committee representing all of the citizens of Memphis. Will you kindly let me hear from you by 11 o'clock tomorrow?

"By order of committee.

"Albert S. Caldwell, Chairman."

The reply to this is set forth in the answer as follows:

"Memphis, Tenn., Feb. 11, 1903.

"Mr. A. S. Caldwell, City—Dear Sir: Referring to your call on yesterday, when you requested that Mr. Wellford select five more members to be added to your committee, and let the increased committee of ten select accountants and examine the books of the city, we wish to make the following suggestion in lieu thereof: Mr. Wellford has put up his money and can close his contract at any time with accountants to examine the books. We suppose that your committee has the funds and can do likewise. Why not, then, simply let the accountants employed by your committee and those employed by Mr. Wellford get to work on the books and examine them? In this way there will certainly be an examination of the books, concerning which no one can complain, and in which examination no one can be injured. We submitted the matter to our client, Mr. Wellford, who directs us to say that, the mayor having assumed such a hostile attitude toward him, he is now, in justice and fairness to himself, unwilling to take part in any examination of the city books unless he has the legal right to do so. Mr. Wellford directs us to say to your committee that we shall be glad to meet you in conference at any time.

"Very truly yours,

"Carroll, McKellar & Bullington.

"Caruthers Ewing."

The answer further avers that, prior to the reception of this letter from the attorneys of Mr. Wellford, the aforesaid Mr. Albert S. Caldwell, as chairman of the committee of five, had addressed another communication to the said attorneys, and in reply thereto received the following:

"Memphis, Tenn., Feby. 12th, 1903.

"Mr. A. S. Caldwell, Chairman, City—Dear Sir: After conferring with our client, Mr. Walker L. Wellford, we have concluded to accept for him your proposition that we select five prominent citizens, who, with the five gentlemen selected by the mayor, shall constitute a committee of investigation of the city's books and affairs, subject, however, to the following express conditions: The scope of the investigation to be conducted shall embrace the following:

"(1) A thorough and complete examination of all books, contracts, vouchers, and other documents in any way bearing on the conduct of the city's affairs during Mayor Williams' administration. The committee to be aided by such reputable expert accountants and other agents and employes as may be necessary, who shall be named by the five citizens selected by us,

"(2) A searching and exhaustive investigation, with a view of being able to report definitely as to: (1) The disposition of all taxes and revenues collected by the city. (2) The amount collected, and the methods employed in collecting money, from gamblers and other violators of the law, and the disposition made of same. (3) Whether all persons appearing on the city's pay rolls rendered services to the city. (4) Whether improper influences have been brought to bear on any member of the city council for the purpose of securing franchises or other concessions; if so, specify same. (5) Whether relations between members of the city council and corporations granted franchises or concessions have been entirely proper and legitimate. (6) Whether money has been borrowed, or direct or indirect benefits of any kind have been received by members of the city council, from such corporations or individuals granted franchises or privileges. (7) Whether any city official has been or is interested, directly or indirectly, in contracts awarded by the city for paving or other purposes. (8) Whether mayor or other member of the city council has used his position for personal profit. (9) The relation of the mayor or any member of the city council, directly or indirectly, to gamblers, those selling liquors without license, and those who are permitted to carry on their business, though under the ban of the law. (10) Whether the city has received adequate compensation for its franchises, and whether it has received materials, services, etc., on reasonably fair terms, or whether considerations other than those of the best interests of the city have entered into such matters. (11) Whether the affairs of the city during Mayor Williams' administration have been conducted in an honest, economical, and businesslike manner, or otherwise. (12) Whether the contracts, purchases, or sales made by the city during the present administration have been made in accordance with the law, after proper advertising, or whether any of such contracts, purchases, or sales have been made privately, or in any other way in violation of the law.

"(8) That every member of the committee shall bind himself to adopt such means and to employ such agencies as may be necessary to conduct a thorough and earnest investigation in accordance with this agreement, and to this end that any witnesses whose names may be suggested by three or more of the committee shall be summoned, and every member of the committee shall demand that said witness shall answer any and all questions that may be propounded by the committee bearing on the subjects of inquiry herein set forth, and a refusal to answer shall call forth the censure of the entire committee. That the money provided for the examination shall be used by the committee for the above purposes. That the chairman of the organized committee of ten

shall be named by the five gentlemen selected by us.

"Having stated that you desire the investigation to be made in a thorough and comprehensive manner, and under such supervision that the report, when made, will command the respect and confidence of the whole community, we feel assured that you will accept the above conditions, by which alone, in our opinion, this much desired result can be achieved. On receiving the unanimous approval of these terms, we will at once select the five gentlemen whom we wish to co-operate with the five appointed by the mayor, all of whom can then meet, organize, and proceed to business.

"Very truly yours,

"[Signed] Carroll, McKellar & Bullington.

"Caruthers Ewing."

To this letter the committee replied as follows:

"Memphis, Tenn. Feby. 12th, 1903.

"Messrs. Carroll, McKellar & Bullington and Caruthers Ewing, Attorneys for Walker L. Wellford—Dear Sirs: Your letter of Feby. 12th has been referred to my committee, and I am instructed to reply as follows: Your proposals that we shall have no voice in the selection of accountants and other agents and employes connected with the investigation, and that the chairman of the reorganized committee shall be selected by you, reflects such want of confidence in us that we can see but little hope for useful and harmonious action along the lines you suggest. We are still of the opinion that the investigation should be impartial, and, as far as possible, free from public criticism; and to evidence our entire disinterestedness we now propose that you and we jointly request Chancellor Heiskell to select a committee of five or ten, as his judgment may seem best, to conduct this investigation. If you agree in this, we will join you in an immediate request to the chancellor to name this new committee, and upon its appointment we will tender to the city council our resignation, with a request that they appoint the chancellor's committee in our stead. Kindly give me an answer as early to-morrow as possible.

"Sincerely yours,

"[Signed]

Albert S. Caldwell,

"Chairman."

The answer avers: "Thus closed the repeated attempts of the city government and a committee of five to bring about the representation of all conflicting interests in an examination which should have been satisfactory to every citizen in the entire city of Memphis."

With respect to the selection of the committee whose chairman conducted the foregoing correspondence with the attorneys of the relator, the answer contains the following: "Respondent further states that, as complainant persisted in insisting on an investigation of the city's books by himself or others designated by him, without pursuing the

course prescribed and authorized by law, this respondent, in order to satisfy any reasonable demands of the complainant, or the desires of any other citizens, addressed a communication to Messrs. M. S. Buckingham, J. A. Omberg, James Nathan, C. W. Schulte, and A. S. Caldwell, requesting that they take charge of the matter of the investigation of the city's books, and to have them thoroughly examined by bonded expert accountants. These gentlemen agreed to serve in the matter. The complainant objected to this, and was himself determined to have a hand in such examination. Respondent states that the above five named gentlemen are citizens of Memphis of the very highest character and standing in the community, socially and commercially, and are men of spotless reputation for fairness, honor, and integrity. Not one of them will suffer if a comparison is made between him and the complainant. Any work which they may agree to undertake will be honestly done, and the result would entirely satisfy the public at large."

The answer then sets out the correspondence between the gentlemen referred to and the defendant, Williams, the substance of which was an offer to appoint them a committee to make an examination and their acceptance. The answer then sets out a communication from the mayor to the legislative council, asking that body to ratify his action in appointing the committee, and a resolution of the council making such ratification of the appointment and organization of the committee for the purpose of conducting a fair, impartial, and thorough examination of the books of the city of Memphis by such means and in such manner as they may decide on, and appropriating \$5,000 for the purpose.

The amended answer contains the following upon the same subject: "Respondent states that, since the filing of the answer on yesterday, February 18, 1903, the said committee reported to the board of police and fire commissioners that they had selected to do the said work the American Audit Company of New York, which is an institution of as high standing, character, and integrity as any in America; and the board of fire and police commissioners approved of said selection and recommendation, and placed said audit company immediately in charge of the books, papers, and vouchers of the city for the purpose indicated, and it is in charge and control of the same, in pursuance of the authority given said committee by said city council. Respondent submits that there should be no interference with the said work by either the complainant, respondent, or this honorable court. While respondent denies the right of the complainant to make such an examination as he had demanded of the books of the city through any agent he may appoint, and while respondent does not have the control of said books, yet so far as he is concerned, or is permitted to express his views, he states that he

is perfectly willing that the complainant, Wellford, should select, and that the court should appoint, a competent bonded expert accountant to examine, check over, and verify the work of said American Audit Company, and he would be glad to have this done. Respondent believes that the legislative council of the city would not object to this, although he has no authority to speak for them. The matter, however, is entirely in charge of the aforesaid committee of five, and respondent cannot interfere with them, nor in any way speak for them; but he believes from their high character, impartiality, and disinterestedness, that they would accede to any reasonable request made of them in the matter, to the end that the result shall be satisfactory."

The answer contains the following as further reasons why the relator has not a right to enforce a personal examination of the city's books on his part: "In addition to the lack of control of said books as already stated, respondent states that it is provided by the ordinance of the city of Memphis how an examination of the books shall be made, and who has the right and authority to grant the same. The ordinance controlling this matter was passed as early as the year 1870, in the month of February, shortly after the city of Memphis under its present form of government was created, and years before this respondent held any official position in the city government. The ordinance is as follows: 'Every officer or agent of the city shall at all times, when requested, submit his books and official papers to the inspection of the mayor, or any member of the legislative council, or to any person or committee appointed or authorized by the legislative council to examine the same.' City Digest (Watkins' Edition) p. 168. Respondent avers that by this ordinance the mayor or any member of the legislative council may inspect the books, and that the legislative council of the city is vested with the sole and exclusive authority to determine when, how, and by whom examinations shall be made of the papers, books, and records of the city of Memphis; and therefore your respondent denies the right of the complainant to inspect, or to make copies of the records from, the books of the city of Memphis, and this honorable court is without authority of law to grant or decree the same. Respondent would aver that it would cause a great deal of confusion, worry, and much inconvenience to the business of the city of Memphis, and to the various officers of the said city and other employes, to allow any and every one, at their own whim and desire, to make a continuous examination of the books, vouchers, and papers of the city, as the various officers thereof and their deputies would be required to keep a close and careful supervision over any and all examinations of the books and vouchers constituting the public records of the city of Memphis. They involve transactions covering a period of five years, and many millions of dollars, and it would take at least

five or six months to make a complete and thorough investigation of all of the affairs of the said city, during which period much valuable time would be lost by its employes and officers, public business would be interfered with, and the establishment of such a right would cause great damage to the public service, and would place within the power of the political enemies of the city administration, or any person, upon the least pretext and slightest suspicion, to demand and inaugurate examinations of the city books, which examinations would impede the public service and impair the usefulness of the various departments of the city. With such possibilities confronting it, the city of Memphis, as set forth herein, in the year 1879 passed the ordinance hereinbefore referred to, in order to provide and regulate such an examination as this complainant is now desiring at the hands of this honorable court. Respondent further states that, in addition to the said authority for and mode of examining the city books, under the law and ordinance aforesaid, the power to examine the books of all officials, state, county, and municipal, is vested by the law in the grand jury of Shelby county, which body has full power in the premises, not only to inspect and examine the papers, books, and records of the city officials, but also to summon witnesses and interrogate them, and examine and report upon the condition of the records of the city, and any wrongdoing or delinquency of this respondent, or any other official of the city of Memphis. Respondent submits that under the foregoing provisions of the law the complainant has no right to the inspection of the city records, as is claimed by him in his bill, in person and by his agents and employes, but that the grand jury of the county is the body designated by the law to perform this public service, and that it is their province and duty to act in the premises; and if they fail in this regard, or if any citizen or committee desire an investigation of the books of any city official, the law prescribes that the legislative council, upon proper application to it, may have this done."

It was stated in the beginning of this opinion that the relator, upon the coming in of the answer to the alternative writ, had made demand for the peremptory writ. As a matter of fact, while this was in substance what was done, the form of the proceeding was different. The decree of the court below recites that the cause has been specially set down for hearing by the complainant, or petitioner, on the bill or petition and the answer of the defendant, and was so heard. The effect of such an order would be, under our chancery rule, to treat every fact properly set out and averred in the answer as proven and as true. So the same result is reached as if the petitioner had formally demanded the peremptory writ, upon the coming in of the aforesaid answer to the alternative writ; the latter act, as already stated, being equivalent to a demurrer to the said answer or re-

turn. It results that we must treat every averment of fact in the answer, for the purposes of the present hearing, as true, and, after consideration thereof, either grant or deny the peremptory writ.

Turning to the legal questions involved, we shall first consider whether the relator, as one of the corporators of the municipality, has the right to make the general examination he asks for in the petition. Several authorities have been cited to us by the counsel for the respective parties.

For the petitioner we are cited to *Herbert v. Ashburner*, 1 Wilson, 297; *King v. Babb*, 3 Term Rep. 582; *Rex v. Guardians of Great Farrington*, 9 B. & C. 541, and other authorities which will be presently stated.

In *Herbert v. Ashburner* there was a rule made to show cause why the defendant should not have the liberty of inspecting the books of the session of the corporation of Kindale. It was objected that the party was not entitled to see the books, unless he could show to the court by affidavit that they contained matters relating to the thing in question, which was whether certain park lands were within the town or corporation of Kindale. Upon this matter the court said: "These are public books which everybody has the right to see." The rule was thereupon made absolute, without more.

In *King v. Babb*, when a rule had been granted for an information in the nature of a quo warranto against A. to show by what authority he claimed to be mayor of G., on the relation of some of the corporators, and another rule in that cause for inspecting all the corporation books, papers, etc., directed to the town clerk, an inspection of such only as related to the election and office of mayor was held to be a sufficient compliance with the latter rule, so as to protect the town clerk from an attachment as for a contempt of the court; it appearing that he had acted bona fide. But Lord Kenyon, in that case, in rendering judgment, assumed "that in certain cases the members of the corporation may be permitted to inspect all papers relating to the corporation."

In *Rex v. Guardians, etc., of Great Farrington*, 9 B. & C. 541, it was held that a rated parishioner had a right to inspect the accounts of the expenditure of the parish moneys, kept by the guardians for the poor, appointed under 22 Geo. II, c. 83, and the court granted a mandamus to the guardians, etc., commanding them to allow such inspection.

In *Glover on Municipal Corporations*, 262, it is said: "Every corporator has the right to inspect all records, books, and other documents of the corporation upon all proper occasions, and if, upon application, an officer who is interested refuses to show them, the court will grant a mandamus to enforce his rights."

In *Dillon on Municipal Corporations*, § 306, it is said: "The following points have

been ruled and stated by Mr. Wilcox: Every municipal corporator has the right to inspect all the records, books, and other documents of the corporation on all proper occasions; and if, upon application for that purpose, the officer who has the custody refuses to show them, the court will grant mandamus to enforce his right." Again the same author says in section 848: "In this country the records, books, and by-laws of a municipal corporation are of a public nature, and if such corporation should refuse to give inspection thereof to any person having an interest therein, or perhaps for any purpose, to any inhabitant of the corporation, whether he has any special or private interest, or not, a writ of mandamus will lie to command the corporation to allow such inspection, and copies to be taken under reasonable precautions to secure the originals."

The relator also referred to *People ex rel. v. Chas. B. Cornell*, 47 Barb. 329, not as an authority (because the decree in that case was subsequently reversed by the Court of Appeals, without any written opinion, however), but for the benefit of its reasoning. In the course of his opinion in that case, Mr. Justice Barnard in part said: "Upon the argument, I was strongly of the opinion that such corporator had such right, and subsequent reflection and investigation have confirmed that opinion. It was claimed, and strongly insisted upon in the argument, that the corporator had the right to inspect such records only when he had some private interest for the information and protection of which the inspection of said document was necessary, and that then this inspection must be limited to those documents, and it was claimed that this rule was established by English decisions. I have examined the English authorities referred to in the argument, and such as I have been able to discover in the books. I think that none of them so restrict the right of inspection, while many of them distinctly hold the right of a general inspection. And, again, I see no principle upon which it can be held that the corporator has not the right to a general inspection of the public records. It was true that the whole body of incorporators acting through their legally constituted representatives, as well perhaps as the Legislature under which the corporation holds its charter, may make laws and ordinances restricting the right of general inspection; but, unless there is such restriction, I am unable to see any principle upon which it can be held that a corporator has not the right to a general inspection of the public records of the corporation. In the language of the court in *Herbert v. Ashburner*: 'These are public books, which everybody has a right to see.' And, again, the citizens within the corporate limits constitute the corporation, while the mayor, aldermen, common council, street commissioner, and others, are its officers and agents, to whom are confided, under certain restric-

tions, the care and management of the property, business, and interests of the corporation. If, from the bare fact that the corporation can only act through officers or agents, and that, therefore, officers are appointed to whom the care of the property, business, and interest of the corporation are intrusted, and who are subject to removal before the time for which they are appointed has expired, and who are also subject, on the expiration of their terms, to be replaced by others at the will of the corporators, it results that, immediately upon the appointment of such officers, the corporators have no longer interest in the manner in which their property, business, and interest are cared for, conducted, and looked after by their agents, then also follows that the corporators have no right to inspect the books and papers in the custody of the officers relating to their official business. If, however, the corporators, notwithstanding the appointment of such officers, still retain an interest in the manner in which their property, business, and interests are cared for, conducted, and looked after, then it follows that they are entitled to have as full knowledge of all the official acts of their officers as the officers themselves have, so as to enable them to ascertain whether their officers have performed their duty in such manner as is acceptable to them, with the view to determining whether they will continue them in office or not."

In that case it appeared that the relator was a citizen of New York, and that the defendant was an officer of the corporation, being the head of the street department and the street commissioner. The affidavit, among other things upon which the application was founded, set forth that the defendant, as such street commissioner, had in his custody certain contracts for various public works done under his direction, and certain vouchers pertaining to the payment of public moneys of the corporation, made out for such works; that the relator had the right, as a member of the corporation, to see and inspect all such contracts and vouchers, and that it was the duty of the defendant to exhibit them to any member of the corporation; and that the relator had applied to the defendant in August, 1866, for permission to see such documents, and had been refused. It was held, under the foregoing opinion, that the relator was entitled to the inspection he asked, and had the right to make such copies of the record as he desired, and accordingly a peremptory writ of mandamus was awarded him. As before stated, however, the decree in this case was reversed in the Court of Appeals; but, no opinion having been handed down, we do not know what the ground of reversal was.

The relator refers to certain other cases—*Rex v. Shelley*, 7 Term Rep. 748; *Rogers v. Jones*, 5 D. & R. 484; *King v. Lucas*, 10 East, 235; *King v. Allgood*, 4 M. & S. 162—which indeed are referred to in some of the text-

books above mentioned; but they do not seem to bear, in strictness, on the point we now have under examination, referring, as they do, to the inspection of court rolls or records.

The defendant replies the American cases bearing substantially upon the same class of records, or similar ones. He refers to *Buck v. Collins*, 51 Ga. 391. It appears that the complainant there insisted upon the legal right to go into the office of the clerk of the Supreme Court, who was also the register of deeds, and make from the books an abstract of them. As he did not need the aid of the clerks, he insisted that he was entitled to do this without paying any fees. Section 14 of the Code of Georgia declares that all books kept by any public officer shall be subject to the inspection of all citizens of the state, within office hours, every day except Sunday. The fee bill provided fees for inspection and abstracts as follows: For such inspection when the clerk's aid is required, 25 cents, and for examination of books and abstracts of result, \$1. Under this law the complainant insisted that he had a right to go into the clerk's office, during office hours, from day to day and from month to month, at his pleasure, and copy from the books when they were not in use, and thus collect material for a book which he proposed to publish for sale. As he was able, by employing experts, to do this inspection and compilation himself, without the assistance of the clerk, he insisted that no fee was required, and, as the clerk refused to allow him to go on, except upon the payment of a fee for each separate investigation of the title, he prayed that the clerk might be enjoined.

To the same effect, in substance, was cited, also, the cases of *Webber v. Townley*, 43 Mich. 538, 539, 5 N. W. 971, and *Bean v. People*, 7 Colo. 201, 2 Pac. 909. They are cited by the defendant as supporting the general proposition that neither at common law nor by statute is the duty imposed upon the custodian of public records to allow continuing and permanent inspection and use of the books; that he is not bound to give so much of his time as would be required to watch the books while thus continuously examined and used; and that he is not bound to intrust them to persons who desire to so inspect and use them, and who require no aid from him in doing so. These cases are also cited as raising the objection that the right of inspection, whatever it may be, exists without regard to the character of the applicant.

Both sides quote from *High on Ex. Leg. Rem.* § 330, as follows: "Upon principles analogous to those already considered, the courts interfere by mandamus to compel municipal authorities to allow inspection of their records by persons entitled thereto, and the writ will be granted, in behalf of a member of a municipality who is entitled to the inspection of its books, to permit him to make such inspection and to take copies and abstracts of the record at his own cost. It is, of course, essential to the exercises of the jurisdiction in

such cases that the relator should show some interest in the records which he seeks to inspect, and it may well be doubted whether the writ would in any case be allowed upon the relation of a mere stranger. But a resident within a municipality, who has been sued by the corporation for a violation of one of its by-laws, is entitled to the aid of a mandamus to procure an inspection of the books of the corporation, so far as they relate to the matter in dispute, and to compel the clerks of the corporation to furnish his copies of the by-laws at his expense." The complainant relies for authority upon the first sentence of the excerpt, and the defendant upon what follows.

Both sides seek support in the cases which refer to the examination of the books of corporations other than municipal bodies. Among other cases, the relator refers to *Matter of Steinway*, 159 N. Y. 250, 53 N. E. 1103, 45 L. R. A. 461, and our own case of *Deaderick v. Wilson*, 8 Baxt. 108, and to the following text-books: 4 *Thompson on Corporations*, § 4406; *Morawetz on Corporations*, § 473; 2 *Cook on Stock and Stockholders*, § 511. The defendant cites: *Reg. v. Mariquita Min. Co.*, 1 El. & El. 289; *Commonwealth v. Iron Co.*, 105 Pa. 111, 51 Am. Rep. 184; *Rex v. Merchant's Taylor Co.*, 2 B. & Ad. 115; *Railroad Co. v. White*, 1 L. B. 282; *Imp. Gas Co. v. Clark*, 7 Bing. 95; *Hoyt v. Bank*, 1 Luer, 652; and other cases. Also the following text-books: 19 A. & E. Ency. Law, 231-233; *Taylor on Evidence*, § 1495.

We shall not undertake an examination of the cases. The conflict of opinion upon the subject will sufficiently appear from a few excerpts made from some of the text-books referred to.

In *Morawetz on Corporations*, § 473, it is said: "The members of a simple copartnership are entitled to examine the partnership books and accounts whenever they desire; but this rule is inapplicable to large joint-stock companies and corporations. The control over the affairs of associations of this description is, by common consent, delegated to directors and managing agents elected by the majority, and individual shareholders have no authority or control, except by their votes at shareholders' meetings. If every shareholder in a large joint-stock association were allowed to examine its books and accounts at pleasure, it would become impossible, in practice, to keep the books in a proper manner. Moreover, it is evident that the result would be to lay open the affairs of the company to the public, and render any privacy in its dealings impossible [citing *Reg. v. Mariquita Min. Co.*, 1 El. & El. 289; *Rex v. Merchant's Taylor Co.*, 2 B. & A. 115; *Rex v. Hostman*, 2 Strange, 1223; *Mayor of Southampton v. Graves*, 8 T. R. 590]. It is reasonable, however, that the majority of the company should have the power to examine its books and accounts, through agents appointed for that purpose at a meeting duly convened. However,

in the United States, the prevailing doctrine appears to be that the individual shareholders in corporations have the same right as the members of an ordinary partnership to examine their company's books, although they have no power to interfere with the company's management. The Supreme Court of Pennsylvania said: 'Unless the charter provides otherwise, a shareholder in a trading corporation has the right to inspect its books and papers, and to take minutes from them for a definite purpose at reasonable times. The doctrine of the law is that the books and papers of the corporation, though of necessity kept in some one hand, are the common property of all stockholders' [citing *Com. v. Phoenix Iron Co.*, 105 Pa. 111-116, 51 Am. Rep. 184; *Cockburn v. Union Bank*, 13 La. Ann. 289; *Deaderick v. Wilson*, 8 Baxt. 108; *State v. Einstein*, 46 N. J. Law, 479; *Union Nat. Bank v. Hunt*, 76 Mo. 439; *Wannell v. Kem*, 57 Mo. 478; *People v. N. P. R. R. Co.*, 50 N. Y. Super. Ct. 456]."

In *Thompson on Corporations*, § 4418, after citing several cases that confined the right to inspect to a case with reference to some defined, distinct dispute, as to which it appeared that it might be to his advantage to see the minutes of the corporation, all of them English cases except one (*Com. v. Phoenix Iron Co.*, *supra*), he adds: "It should be carefully added, however, that this theory has gained no considerable footing in America. nor is it based upon any foundation of sense. Subject to the convenience of the others, or of the common agency, which acts for all, it is the right of every proprietor to know how the business in which he has embarked his money is being carried on, whether there is any dispute about it or not."

In *Cook on Stock and Stockholders*, on the other hand, after stating (section 511) that the stockholders of a corporation had, at common law, a right to examine at any reasonable time any one or all of the books or records of the corporation, and that this rule grew out of an analogous rule applicable to public corporations and to ordinary co-partnerships, "the books of which, by well-established laws, are always opened to the inspection of members," he adds, in section 515, that, "in order to justify the granting of a mandamus, either the property, or some property right, of the stockholder must be involved, or some controversy exist, or some specific or valuable interest be in question, to settle which an inspection of the corporate records becomes necessary."

Passing from this conflict, it is said, in section 4419 of *Thompson's work*, that the right of a shareholder to inspect the books of a corporation will not be enforced for speculative purposes or the gratification of curiosity. It is also said, in section 4422, that it is no answer to an application to inspect that it is inconvenient to grant the right. Individual shareholders cannot, of course, appropriate the books of a corpora-

tion for the purpose of inspecting them to an unreasonable extent, and to the detriment of the interests of the corporation and the rights of other shareholders. But, the right of a shareholder to such an inspection being clear, it is not a sound view that the corporation can deny it upon the mere plea that it would be inconvenient to grant it. The convenience of the corporation and the convenience of the shareholder must to some extent yield to each other, and the law will not permit either, in the exercise of its rights, to act unreasonably toward the other. The stockholder must take the inspection in a peaceful manner. Section 4424. But he may exercise the right of inspection through an agent, attorney, or expert. Section 4426. And he has the right to make copies and extracts. Section 4421. The courts may control the manner of the inspection. But it is not always a matter of course for the court to grant the inspection when applied to. In section 4427 will be found numerous examples or instances in which inspection was granted, while in section 4428 will be found numerous other instances where the mandamus was refused.

Upon this subject the following from *Cook on Stock and Stockholders* is appropriate: "The writ of mandamus, however, does not issue herein as a matter of course. It is an extraordinary remedy, to be invoked only upon special occasions. The court does not grant the mandamus until it has taken into careful consideration all the facts and circumstances of refusal by the corporation. The specific purpose of the stockholder in demanding inspection, the general reasonableness of the request, and the effect on the orderly transaction of the corporate business in case it is granted, are all considered in granting or refusing the writ. It is granted in furtherance of essential justice."

Passing, for the present, the question as to who is the true custodian of the books of the city, we shall now consider some of the other reasons given in the answer of the defendant, or his return, to the alternative writ.

We do not think it material that there is an ordinance which provides that "every officer and agent of the city shall, at all times when requested, submit his books and official papers to the inspection of the mayor, or any member of the legislative council, or to any person or committee appointed or authorized by said legislative council to examine same." This provision is not exclusive, nor are we prepared to admit, as intimated in *People v. Cornell*, *supra*, that the city authorities could, through a by-law, cut off the right of a corporator to make an examination on suitable occasions. It is likewise immaterial that the grand jury has the right to make an examination. This right is not exclusive. Moreover, such examination is nearly always cursory and wholly inadequate. Nor is it a sufficient reply that the

applicant is politically hostile to the custodian of the papers, unless it appear that the examination he asks is sought with the corrupt purpose of merely furthering such animosity. If it appear that the examination is sought for an honest and laudable purpose, the personal antagonism of the parties will not be sufficient ground upon which to deny the right. It should not be granted for any political or other improper purpose. Nor is it sufficient reply that such an examination could produce worry and inconvenience, nor that the transactions to be examined are numerous and involve many millions of dollars. The inconvenience and obstruction to business can be very modified by the order of the court prescribing the method of examination, and the court's reserving the right to make additional orders from time to time as occasion therefrom may appear; and, indeed, that the objections referred to in this paragraph are not insuperable is shown by the fact that the defendant felt able to overcome them in making a way for such examination by the committee over which Albert S. Caldwell was named as chairman.

Before going further, we shall determine the question whether there is enough set forth in the answer, taken in connection with the admissions made, under the forms of the pleadings, of certain allegations in the bill or petitions, to show that the relator is actuated by a fraudulent and dishonest purpose. It appears that when the relator made his application the defendant had already called together the committee of 200, and had made known the fact that the city was badly in need of money to take care of the streets and was without funds for that purpose. The committee was convened for the purpose of devising ways and means to meet the city's needs. Under these circumstances it was natural that a citizen and taxpayer should desire to know the exact condition of the city's finances, and the plan of a thorough and exhaustive examination necessarily arose in the mind. The purpose he professed was to ascertain the real condition of affairs, how much money had come in, and where it had gone to, as a necessary preliminary to fiscal ameliorations. The defendant does not aver in terms that the present proceeding was instituted for a fraudulent and corrupt purpose, nor, indeed, would mere opinions prevail; but he states that he refused the request because he believed that the proposition was made rather to impede and thwart the object had in view by calling the committee of citizens together, than to forward such object. This is, at most, but the mere expression of an opinion, and, besides, refers to the proposition made by the committee. The correspondence that passed between the counsel for the relator and the chairman of the Caldwell committee was merely an attempt at an adjustment, and, while it manifests a very persistent purpose to obtain

leave to make examination, if possible, it contains no word of vituperation or anything indicating malice.

We pass, now, to a statement of our conclusions upon the general question of law as to the right of a citizen and taxpayer of a city to make an examination of the books and papers of the city. In stating these conclusions we shall not discuss the authorities above referred to, or attempt to reconcile their conflicts. After considering all of these authorities and the whole subject involved, we shall state what we believe to be the sound principles applicable to the matter. In theory the right of examination is absolute, but in practice it is at last only a matter of discretion, because such application is likely at any time to be refused on the part of the custodian of the books and papers sought to be examined, and then the right must be forced by mandamus, and this writ is not of absolute right, but merely of discretion, to be awarded only in a proper case; the facts claimed as authorizing its issuance to be judged of in every case by the court, and the writ to be awarded or withheld upon a consideration of all the circumstances presented. So, while the right is, in theory, absolute, yet it is in practice so limited by the remedy necessary for its enforcement as that it can be denominated only a "qualified right." The right to an examination for a special purpose, as, for example, to obtain specific information to use in a litigation between the applicant and third parties, or between the applicant and the corporation, and the like cases, while not, in principle, standing upon higher grounds, yet is the more easily grantable, because it does not involve so much time, and so much inconvenience to the custodian of the books and papers, and so much interruption of business, as in case of a general examination. Yet it cannot be doubted, under a state of facts showing it to be important to the public interest that the general examination of the books of a municipality should be had, that the court should allow such examination at the suit of one who is a citizen and taxpayer of the corporation. The right rests, not only on the ground that the books are public books, but also on the same principle that authorizes a taxpayer to enjoin the enforcement of illegal contracts entered into by the municipality, county, or state, for the protection of the applicant and all other taxpayers from illegal burdens. And it is obvious that, in making and enforcing such application, the taxpayer acts, in a very real sense, not only for himself, but for all other taxpayers, and acts, therefore, in the capacity, as it were, of a trustee for all. It must be admitted, also, that the exercise of such power, if prudently and carefully guarded, cannot be otherwise than salutary, because the knowledge that it can be exercised by a citizen and taxpayer, and may be exercised when the public good shall seem, on sound reasons, to demand it,

cannot result otherwise than in producing an added sense of responsibility in those who administer the affairs of municipal corporations, and in inducing a greater carefulness in the discharge of the trusts imposed upon them by their fellow citizens under the sanctions of law. Yet it is equally true that such general examinations must necessarily to some extent interrupt the ordinary and usual course of business in public offices, and require of the officers in charge thereof some additional duties for the time being. And it follows, from this, that such examinations should not be lightly granted, or permitted with unnecessary frequency; that the occasion should be grave and important; and that the person seeking the examination should be trustworthy and reliable, and at all times and at every stage subject to the supervision of the court, to the end that there may be no oppression practiced under the guise of doing service to the public, and that the safety of the books and records subjected to the examination shall be continually provided for. All of these matters fall within the principle that the granting of permission to make the examination rests in the sound discretion of the court, in the form of granting or withholding the writ of mandamus.

It only remains to determine whether the occasion shown in the present case is of sufficient gravity to move the discretion of the court. The case presented, as drawn from the petition and answer, is that the period of the examination sought covers the space of five years, during which time many millions of dollars have been collected by the city administration and expended; that during 1902 there were receipts to the amount of \$1,067,916.09 and disbursements to the amount of \$1,060,053.89, and the city borrowed from one bank \$53,357.04, on which \$3,172.36 was paid, from another bank \$52,135.43, on which \$2,982.17 interest was paid, and from another bank \$22,922.33, on which \$552.90 interest was paid, aggregating \$135,122.32, and that during the previous year there was borrowed \$101,361; that the taxes collected from year to year from the taxpayers of the city are already very heavy and very burdensome; and that the mayor, notwithstanding the great revenues collected, a liberal exercise of the power to borrow money, and the recent session of the Legislature, to which application could have been made for an increase of the means of raising taxes, if the property of the city could bear more, found it necessary, shortly before the petition was filed, to resort to the extraordinary expedient of calling a meeting of 200 citizens of Memphis to devise ways and means to pave, repair, and "round up" the streets of the city. Under such a state of facts, we think it not unnatural, and not unreasonable, that the taxpayers of the city should desire to have the books, papers, and vouchers of the city looked into, to the end that they may fully learn the financial condition of the municipality; and we think

the facts stated make a case sufficient to justify the court in allowing the general examination sought in the petition.

Indeed the conclusion as to the propriety of making such general examination is substantially conceded in the answer of the defendant, in the fact that he replies that he has set on foot just such examination, through a committee of citizens selected by him and agreed to by the legislative council. However, the creation of that committee can in no wise interfere with the present proceeding. After judicial proceedings have been started, as in the present case, for the purpose of obtaining a general examination, they cannot be thwarted by the appointment of a committee on the part of the custodian of the books, or his associates in authority, to make an examination in lieu of the one sought. The right of the petitioner to have his application passed upon on its merits became complete upon the filing of the petition, and, of course, cannot be affected by subsequent acts of the defendant, taken without his consent, and to which he was not a party. It follows that the writ must be allowed, if the defendant is the custodian of the books and papers of the city in such a sense that he can be justly called upon to produce them.

Upon examination of the laws governing the city, and the rights and power of its mayor—as shown in Watkins' Digest (1902) pp. 19, 20, § 6; Id. p. 22, §§ 1, 2; Id. p. 170, art. 5—we think sufficient powers are vested in the mayor to make it proper that the writ should go against him for the allowance of the examination sought in the petition and for the production of the books and papers.

It results that the decree of the chancellor must be reversed, and the cause remanded for the entry of a decree awarding the peremptory writ; but such decree shall reserve to the court below the powers and control above indicated to prevent oppression, and for the preservation of the books and papers, and to so order the examination as to interfere as little as practicable with the transaction of current business, and said decree shall reserve to each party the right from time to time to apply to the court for instructions pending the examination.

J. P. GENTRY CO. v. MARGOLIUS & CO.
(Supreme Court of Tennessee. May 25, 1903.)

SALES—CONTRACT—CANCELLATION—BREACH
—MEASURE OF DAMAGES.

1. Defendants contracted with complainants to deliver certain goods in esse at a future date, but prior to this date complainants notified defendants by two letters of the cancellation of the contract, which they, however, refused to accede to. A short time thereafter, and before the time for delivery, complainants had a broker representing defendants write them that, by an agreement with an agent of defendants, the contract had been revived, and that they were willing to accept the goods, to which defendants replied that they regarded the contract as canceled. *Held* that, as there was no uniting of the minds as to the cancellation, and as the

goods to be delivered were in esse, the contract was never canceled.

2. In an action to recover for the breach of a contract for the sale of goods which were to have been delivered "during" a certain month, the measure of damages is the difference between the contract price and the market price at the place of delivery on the last day of the month.

Appeal from Chancery Court, Shelby County; F. H. Heiskell, Chancellor.

Bill by the J. P. Gentry Company against Margolius & Co. Decree for complainants, and defendants appeal. Modified and affirmed.

Myers & Banks, for appellants. Smith & Trezevant, for appellees.

NEIL, J. The bill in this case was filed in the chancery court at Memphis on September 11, 1901, to recover for breach of contract to deliver to the complainant 5,000 bundles of cotton arrow ties, during August, 1901, at \$1 per bundle. The defendants do not deny making the contract, but claim that it was canceled by agreement of the parties.

The facts bearing upon this subject, so far as necessary to be stated, are as follows: The contract was made, as stated, on June 13, 1901, for the delivery of the 5,000 bundles of ties at the price stated, at any time during the month of August of the same year, at Memphis. In order to properly understand what followed, it is necessary to state that there had been a prior contract, of date April 22, 1901, for 5,000 bundles of ties to be delivered f. o. b. Pittsburg. A controversy arose between the parties as to the routing of these ties, that is, those embraced in the April contract, with the result that the following correspondence ensued:

Margolius & Co. having failed to route the April ties as directed by complainants, the latter wrote, July 8, 1901: "As you decline to comply with your contract, we hereby cancel all contracts with you."

This, of course, referred to the contract of June 13th, as well as that of April 22d.

On the same day, July 8th, defendants replied: "Our contracts are not subject cancellation; hence will not cancel."

On July 10th, complainants replied: "It is immaterial with us what you do. We will not receive or pay for any ties from you, and will have no transaction with you at all."

On July 15th, defendants replied: "We hereby tender you our delivery of ties you bought of us on all contracts, at same time stating for your information that we will pay you whatever lawful damages you would incur by our billing those ties f. o. b. Memphis instead of Pittsburg. We beg to state that you are not entitled to any railroad rebate of any kind, as we don't receive any money from any corporation or individual to induce us to make shipment over any particular line, nor do we receive any rebate of any kind on this shipment. Therefore, you will plainly see that you are not entitled to any reduc-

tion whatever. We beg further to state that in your letter of the 10th, you absolutely refused to complete your contract. You have also returned draft accompanying B-L- for your first shipment and contract. We ask that you give us no further trouble in this matter and wire us, so that we may forward draft immediately, and that you will honor same, otherwise we will put the matter in our attorney's hands at once, and sue you for damages, including demurrage, storage, insurance, drayage, loss of interest on money, and other inconveniences, etc., and force you to take these ties. You will bear in mind that we were very indulgent regarding transaction of 1,000 rolls of bagging sent you, and this must be thanks for our leniency. Please reply at once as to what you propose doing."

Up to this time, July 15, 1901, it is clear there had been no cancellation. The complainant, it is true, insisted upon it, but the defendant as strongly declined to agree to it. It takes two to make a contract; and just as truly, it takes two to do away with one, in the absence in the contract itself of a term allowing either party to retire at pleasure; and that would be, not a bond, but a rope of sand, because it would lack the quality of legal obligation. So upon July 15th the contract was still standing.

Matters rested in this condition until July 20, 1901, when, with the knowledge and consent of the complainant, the following letter was addressed by Booker & Gentry (a brokerage firm that had been representing defendants in the city of Memphis) to the defendants, viz.: "Your Mr. Margolius called upon us this morning. He saw Mr. Gentry, and arranged everything to his [Gentry's] satisfaction. He has arranged to ship 5,000 bundles to J. P. Gentry Company on your August contract at \$1.00 per bundle, signed June 13th, which ends all controversy as to the other July contract. These ties can be shipped in July if you wish or at any other time during the month of August. Regarding the other 2,000 bundles August for ourselves, you can ship them at any time after the first of August."

To this letter the defendants replied as follows, also addressed to Booker & Gentry, on July 23, 1901: "We have yours of the 20th inst. All the contracts between us having been cancelled by your Mr. Gentry, we have sold the ties to other parties. We have incurred considerable loss in doing so, having had to send our salesman to Memphis and other points at great expense, and don't think we were treated right in this matter by you cancelling these contracts. Had not the market rallied a little, you would have put us to great loss by your actions, and if we escape now without loss, it will certainly be by mere chance. You mentioned especially that all contracts were cancelled which therefore included the 2,000 sold to Booker & Gentry, as well as Gentry & Co. * * * The cancellation was for all ties, and the letter writ-

ten us with this cancellation, was a very insulting epistle, and was not fit to be written to any business house of good standing. * * * In conclusion we beg to say, that our contracts are not made for the purchaser to cancel at will, and then take them up at will especially when the material has advanced. We therefore do not wish to re-open this matter, and enter into new contracts."

This letter was shown by Mr. Booker to Mr. Gentry, who was the leading spirit of J. P. Gentry Company, and the matter was discussed between them. Then, without referring to the foregoing letters at all, the complainant addressed the following to the defendants on July 27, 1901: "Your Mr. Margolius was here a few days ago, and requested us to allow our contract which you have with us for 5,000 bundles cotton ties, August shipment, to stand. We asked him to write out a new agreement in view of the fact that we had written that we would cancel the old one, and you replied refusing to do so; he stated that it was unnecessary to write a new agreement, but was only necessary for us to advise you of our acceptance, our willingness to take the ties on the old contract. This we had Mr. Booker to do in Mr. Margolius' presence, and also in the presence of Mr. G. S. Scruggs of King. Scruggs & Co. of this city. After reviving the contract at Mr. Margolius' solicitation, and without request on our part, all of which was done in the presence of Mr. Scruggs, we sold the 5,000 bundles ties, and, on Mr. Margolius' return to our office during the day, we notified him in Mr. Scruggs' presence that we had sold the ties. We requested Mr. Booker to write you, stating that you could ship the ties at once, if you desired, with the understanding that same could be delivered either now, or during August. Of course, we prefer that you ship now, and should be glad to hear from you by return mail to this effect."

The defendants made no reply to this, and this closed the correspondence.

It is impossible to read these letters without coming to the conclusion that the minds of the parties never met upon the subject of canceling the contract. At first the complainants asked to cancel, or insisted that they had the right to do so. The defendants refused to agree to this, and said that they would hold complainants to the contract. At the last, on July 20th, when the complainants caused the communication of that date to be sent to the defendants, the latter changed front, and said: "You have already cancelled the contract." All of the foregoing happened before the time fixed for delivery by the contract.

It is immaterial that, when the letter of July 20th was written, the complainants were under the seeming impression that their own prior communications, the letters of the 8th and 10th of July, had been legally efficient to put an end to the contract. The

vital point is that, by virtue of the refusal of the defendants on the 15th of July to agree to a cancellation, the contract was still in force, and the complainants, by the communication of July 20th, through Booker & Gentry, brought to the attention of the defendants that they were still willing to accept the goods, and this was within the time fixed for delivery by the contract.

It is equally immaterial that the complainants believed that the legal efficiency of their act depended upon the conversation and agreement or understanding Gentry says he had with young Mr. Margolius, defendants' clerk, whereby he supposed an old contract previously canceled had been revived; because, as a matter of fact and of law, there had been no cancellation, and the contract needed no reviving. The legal relation still subsisted.

Again, if we ignore wholly the transaction of July 20th, the result is the same. That is to say, the complainants had sought on the 8th and 10th of July to cancel the contract. The defendants had replied on the 15th of the same month, refusing to cancel. So the matter stood on that day with the contract in full force, and there was no subsequent agreement between the parties for a cancellation, none, indeed, even up to the time the present suit was brought.

Or, if we regard the transaction of July 20th, proven, as insisted upon by the complainants, the condition of the defendants is the same, because, if David Margolius had the power to make that agreement, there was a clear recognition by it of the binding force of the old contract, that is, of June 13, 1901; if David Margolius did not have the power, then matters stood just as they did on the 15th of July, 1901.

So from every point of view the defendants are bound upon the contract.

This case, in respect of the correspondence that passed between the parties, is very much like the case of Ault v. Dustin, 16 Pickle, 366, referred to by counsel. But there is a striking difference between the two cases, in this: In the present case the subject of negotiation and contract between the parties was property in esse, while in the case referred to the goods ordered were to be manufactured, and a considerable time was required for their manufacture. So it was held in that case that, while the correspondence indicated that no agreement as to rescission had been reached, yet there was an implied term in the contract, which required that sufficient time should be allowed for the manufacture of the goods before they should be ordered out, and, that inasmuch as this term had been violated by the complainant in that case, in that the defendant was not allowed time to manufacture the goods, the contract was breached by the complainant; the defendant was in no default in refusing to deliver the goods, and there could be no recovery. In that case the principle

applied in the present case was recognized, in the following language: "A refusal to perform a contract, made by a party, at any time before the performance on his part is due, if not treated by the other party as a breach of the contract, is, in effect, merely the expression of an intention to breach the contract, and may be retracted," quoting with approval a passage from 2 Keene on Contracts. Again: "When one party assumes to renounce the contract—that is, by anticipation refuses to perform it—he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such renunciation does not, of course, amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but, by wrongfully making such a renunciation of the contract, he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract, by so acting upon it, as, in effect, to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. * * * If he adopts the renunciation, the contract is at an end, except for the purpose of the action for such wrongful renunciation. If he does not wish to do so, he must wait for the arrival of the time when, in the ordinary course, a cause of action on the contract would arise"—quoting, with approval, from 1 Beach on Contracts, §§ 409, 411, 412. It was held, however, that these rules were not controlling in that case, because the goods were not in esse, but were yet to be manufactured, and that, after one ordering goods has given the manufacturer notice not to proceed with his work, the party so notified has no right to continue the manufacture; that while a contract is executory a party has the right to stop performance on the other side by an explicit direction to that effect, subjecting himself to such damages as will be compensation to the other party for being stopped in the performance of his work, and that the party thus forbidden cannot afterwards go on and thereby increase the damages, and then recover such damages. But, as stated, the goods involved in the present case being in esse, and no defense being made that they had to be manufactured to fill the contract, the foregoing case does not control the present one.

From what has been already said, it follows that it is unnecessary to consider the question whether David Margolius was clothed with authority to make the agreement he is said to have made, and it is unnecessary to consider the credibility of the respective witnesses. However, we must say in this connection that, taking all the testimony as competent, and overruling all of the exceptions, the weight of the evidence seems to be

in favor of the complainants as to the question of fact. It seems singular, to be sure, that David Margolius would in July make such a contract, when the price of ties was up so high; yet it must be remembered that the ties in question were for August delivery, and he might well have thought that during the month of August the price would drop back to \$1 per bundle, especially in view of the fact that the advance was owing to a labor strike, which, of course, might be settled at any time. But however this may be, the view previously expressed we deem conclusive of the case as to the question of liability.

This disposes of all the errors assigned, except the question as to the price that should be paid, that is, how much damages should be allowed; and in order to ascertain this, at what price should the ties be fixed on the last of August, 1901? But before going to this subject, it should be premised that the measure of damages in such a case—an executory contract for the sale of goods and failure to deliver—is the difference between the contract price and the market price at the time and place of delivery. *Coffman v. Williams*, 4 Helsk. 233; *Cole v. Zucarello*, 104 Tenn. 64, 56 S. W. 850, and cases cited. The date of shipment fixed in the contract was "during the month of August, 1901." That gave the seller the whole of the month to make delivery in, and the purchaser could not demand delivery before the last day. Accordingly the price on that day must determine the rights of the parties, and the difference between the contract price and the price on that day in Memphis, the place of delivery, must show the amount of damages sustained by the complainant. *Paragon Refining Co. v. Lee Bros.*, 98 Tenn. 643-645, 41 S. W. 362; *Mecham on Sales*, § 1747. No one undertakes to fix the price, precisely, on the last day of the month. Mr. J. P. Gentry says he sold ties during the month—not during the whole month, as we understand him—but at some time during the month, at \$1.30. Mr. Levy Joy says he sold ties at from \$1.25 to \$1.27 "from the 10th of August on throughout the month." We have carefully read all the testimony, and we think this the most reliable, and the price fixed should be an average between the two figures. So we fix the price at \$1.26½.

The complainant is entitled to recover the difference between \$1 and \$1.26½ or the sum which will be produced by multiplying 5,000 by 26½ cents, together with four-fifths of the costs; the defendants will recover of complainants one-fifth of the costs. There is no necessity for any order of reference to the master, as suggested by defendants. The testimony showing the market price at the time and place of delivery, and the contract showing the price at which the property was sold, it is a mere matter of calculation.

Let the decree of the chancellor be modified and affirmed, as just indicated.

CHOCTAW, O. & G. R. CO. v. HILL.

(Supreme Court of Tennessee. May 9, 1903.)

RAILROADS — WRONGFUL EJECTION FROM TRAIN—RAILWAY NEWS AGENT—INSTRUCTIONS—PUNITIVE DAMAGES.

1. A servant employed by a railway news company was by agreement with the railroad company transported by it without payment of fare, subject to the orders of the railroad company and to its regulations in the same manner as any of its own servants. Being detected in a violation of the rules, he was ejected from the train, to which he subsequently returned, offering to pay his fare to a point to which he desired to go, but was again ejected. *Held*, that such ejection was wrongful.

2. In an action against a railway company for wrongful ejection from its train, evidence that plaintiff was jerked off the car was sufficient to justify an instruction authorizing damages for physical suffering.

3. In an action against a railroad company for wrongful ejection from its train, an instruction that the jury might consider plaintiff's loss of time, physical and mental suffering, humiliation of feeling, etc., and give what, in their sound discretion, would be fair and just compensation, was not error.

4. In an action against a railroad company for wrongful ejection from its train, in which there was evidence that plaintiff was forcibly jerked from the train, and then held and restrained of his liberty, a charge authorizing punitive damages was not error.

5. In an action against a railroad company for wrongful ejection from its train, an instruction that whenever the element of malice or oppression, or a reckless disregard of the rights of others, enters into a transaction, and when the act is done in the strict line of duty of the conductor, but done under a state of facts not justifying the act done, and in a wrongful or perhaps careless manner, the law authorizes exemplary damages, is not objectionable because of the use of the phrase, "and when the act is done in the strict line of duty of the conductor."

6. The charge was not erroneous because of the use of the expression "careless manner," the word "careless" being used in the sense of "reckless."

7. In an action against a railroad company by a railway news agent for wrongful ejection from the train, in which it appeared that plaintiff was forcibly jerked from the train, and thereafter held and restrained of his liberty, and that his stock in trade was lost or destroyed in consequence, a verdict for \$250 was not excessive.

Appeal from Circuit Court, Shelby County; J. P. Young, Judge.

Action by John W. Hill against the Choctaw, Oklahoma & Gulf Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Wright, Peters & Wright, for appellant.
Jno. E. Bell, for appellee.

NEIL, J. This action was brought in the court below by the defendant in error to recover damages for his wrongful ejection from one of the trains of the plaintiff in error. There was a verdict for \$250, on which the court below entered judgment. A motion for new trial was made and overruled in that court, and thereupon the plaintiff in

error prayed for and obtained an appeal to this court, and has assigned errors.

There was testimony introduced in the court below tending to show the following facts, viz.: That defendant in error was a newsboy on plaintiff in error's train, in the employ of the Van Noy News Company, but by contract between the latter and the railway company, likewise with the consent of defendant in error, he was subject to the orders of the railway company, and amenable to its rules and regulations just as any servant of the latter, and was to be transported back and forth without payment of fare. That on the 24th of August, 1902, while defendant in error was in this service on one of his accustomed trips, and while the train was standing at Oklahoma City, he was detected in the violation of a rule of the railway company, which, on pain of discharge from the service of the company, forbade its servants to drink beer or spirits, or to have the same in possession; the defendant in error having been seen drinking beer at a restaurant in Oklahoma City, and having purchased and carried upon his train a pint bottle of whisky for the conductor. That upon being so detected he was ordered by S. H. Barnes, the superintendent of that division of the road, to leave the train. That he threw the bottle of whisky out of the window of the car he was then in, and asked to be allowed to remain upon the train and proceed to Memphis, saying that he was willing to pay that fare. The superintendent denied this request, and upon his failure to go ordered the conductor to remove him from the train. That the conductor did so. That he in a very short time returned to the train, going through the ladies' car, and thence into the car in which he had previously been traveling, and in which his goods were, consisting of newspapers, fruit, tobacco, and confections. That he took off his cap, but still kept on the rest of his uniform. That he was again ordered from the train, but in response said he wished to pay his fare, and go at least to the next station, Shawnee Town, so that he could have time to get his goods together, that they might not be lost. That he tendered at this time \$5, but the conductor refused to receive the money. That the fare to Shawnee Town was only \$1.25. That during the same conversation in which he tendered the \$5 he also told the conductor he wished to go through to Memphis. That he knew that the fare to Memphis was more than \$5. That upon the conductor's refusal to accept the fare he was again removed from the train, and in accomplishing this the plaintiff in error's employes jerked him from the car. That after he had been so removed he was held by the servants of the company, and forcibly restrained from again returning to the train, and was so restrained until the train resumed its journey. That Oklahoma City was one of the regular stopping places of the train. That the usual stop was 25

¶ 3. See Carriers, vol. 9, Cent. Dig. §§ 1483, 1485-1487.

minutes, but on the occasion in question the train had been delayed an hour, awaiting the arrival of another train. There was evidence tending to show that the fare from Oklahoma City to Memphis was \$15.12, and that defendant in error had in his pocket at the time he was ejected from the train the sum of \$18. There is no testimony showing whether defendant in error knew the exact fare or not; nor is there any evidence showing that the conductor informed defendant in error of the amount, or that he demanded it, and from the attending circumstances we infer that he did neither. The defendant in error stayed in Oklahoma City until the next day at 10 o'clock, when he boarded a train of the plaintiff in error, and proceeded to Memphis, paying his fare as a passenger. By reason of his ejection from the train, defendant in error's goods, left upon the train, were wasted or lost, to the value of about \$12, for which he was compelled to account to the Van Noy News Company.

Upon these facts it is insisted, first, that, inasmuch as defendant in error was clearly in the wrong, in that he had violated a rule of the company for which the company had the right to discharge him from the service, and (as plaintiff in error insists) eject him from the trains, and for which he was so discharged and ejected, he had no right to again board the train, and then to attempt to acquire and maintain the status of a passenger by offering to pay fare. Counsel endeavor to support this contention by reference to those cases which hold that when a person upon a train, claiming the rights of a passenger, has forfeited or failed to perfect these rights by a refusal to pay fare, and the train has been stopped, and the train crew are in the act of putting him off the train, such person cannot restore his original status, and acquire and perfect his rights as a passenger, by then offering to pay the legal fare. *Railroad v. Harris*, 9 Lea, 180, 186, 187, 42 Am. Rep. 608; *Hibbard v. N. Y. & E. R. Co.*, 15 N. Y. 456; *State v. Campbell*, 32 N. J. Law, 309; *Hutchinson on Carriers*, § 591. The reason assigned in support of the rule is that, if one passenger might, by his unjustifiable conduct, delay the train to put him off, another might do the same thing, and thus the utmost irregularity in the running of the trains be produced, jeopardizing the safety of the company's property, and the lives of all on board. 9 Lea, 186. But the reason of the rule would not exist, and hence the rule itself would not obtain, when the train is stopped at a regular station, as is shown in the present case. *Toledo, W. & W. R. Co. v. Wright*, 68 Ind. 586, 34 Am. Rep. 277. Moreover, cases of the class referred to do not furnish a fair analogy for the case we have before us. While it is true that the company had the right to discharge the defendant in error because of his violation of the rules, and, upon his failure to pay fare, also to eject him from the train, it

did not have the right to eject him if he was willing and offered to pay fare to any station ahead. One reason given in many of the cases for the right of ejection even though one offers to pay fare after the ejection is begun is that the person in question has, by his previous conduct, broken the contract implied between him and the company, upon his entering the train, that it would carry him to his destination upon his paying the fare, by his refusal to pay fare in the first instance, and that, thus having broken the contract on his part, he has no status under it, and is in no position to tender a new contract, the company being in the very act of enforcing the right accrued to it upon the breach. The case, however, is different in respect of an employé being carried as this one was without payment of fare, under the terms of his service. Upon the discharge of such employé, it is true, his right to be transported without payment of fare would cease, but he would not forfeit his right to remain upon the train, and to proceed as a passenger, upon the payment of fare. The duty of the conductor, under such circumstances, would be to demand payment of fare, and upon failure or refusal to pay he would then have the right to eject such discharged employé. So, in the present case, the company was in the wrong in both the first and the second ejection—in the first, in that the conductor did not demand fare of the defendant in error to his destination, which destination was known to the conductor, or give him the option of paying fare to any other point between Oklahoma City and Memphis that he might desire or of leaving the train; in the second, in that he removed the defendant in error, notwithstanding the fact that he tendered fare to Shawnee Town, and subsequently, before his removal, manifested a purpose to go through to Memphis, and the conductor removed him from the train without making a demand for his fare.

We need not consider what the respective rights of the company and of the defendant in error would have been if the conductor had demanded the fare, or the defendant in error had refused, or the train had been stopped for the purpose of putting him off, and he had then tendered the fare. No such case appears in the record.

It is insisted that the court below erred in giving the following instruction to the jury, viz.: "If you find for the plaintiff under the foregoing instruction, you may consider his loss of goods, if any, his loss of time, his mental and physical suffering, if any, his humiliation of feeling, and give what, in your sound discretion, would be a fair and just compensation." We do not think there was any error in this instruction. It is said that there was no evidence of the value of the time lost. If so, then under the well-known rule the error will be held innocuous, unless the court can see that some injury resulted. In the present case

we are unable to see that any injury resulted.

It is said that there was no evidence to show physical suffering. There was, however, some evidence upon this subject, though slight, in the testimony of the defendant in error that he was jerked off the car.

It is said that the instruction was erroneous, in that the jury were told that they could give as damages what, in their sound discretion, would be fair and just compensation; and that this was contrary to the rule laid down in *Girdner v. Taylor*, 6 Heisk. 244, 246. In that case, however, it appeared that the circuit judge had instructed the jury that they could allow any amount of damages they should see proper, without directing their attention to the testimony, or indicating that they should be guided by it. In the present case the jury were referred to the testimony, and what was said in the instruction in question was said with reference to that testimony, and could not have been misunderstood.

It is insisted that the circuit judge erred in giving the following instruction upon the subject of punitive damages, viz.: "Whenever the element of malice or oppression, or a reckless disregard of the rights of others, enters into a transaction, and when the act is done in the strict line of duty of the conductor, but done under a state of facts not justifying the act done, and in a wrongful, or perhaps careless, manner, to the injury of the plaintiff, then the law blends the interests of society with those of the aggrieved individual, and authorizes the jury in its discretion to give exemplary damages. These are allowed in addition to damages for compensation or actual damages, to punish the offender, and deter others from the repetition of like offenses." We do not consider this instruction as a model of correct expression, but there is no reversible error in it.

It is said there was no testimony to justify the court in giving a charge upon the subject of punitive damages, and that, in the absence of such testimony, no charge upon that subject should have been given; citing *American Lead Pencil Co. v. Davis*, 108 Tenn. 257, 66 S. W. 1129; *Railway v. Lea*, 90 Tenn. 574, 18 S. W. 268. But there is much evidence in the fact that the defendant in error was forcibly jerked from the train, and was then held and restrained of his liberty by the company's servants.

Objection is taken to the language, "and when the act is done in the strict line of duty of the conductor." By this language, in the connection in which it was used, the circuit judge intended to indicate to the jury (and correctly) that the act or acts complained of must have been, not of a character lying outside of the scope of the employment of the conductor as a servant of the company, but of a character falling under that employment, but not justified by

the facts of the particular case; and, moreover, was done in a malicious or oppressive way, or in reckless disregard of the rights of others. *Railroad v. Garrett*, 8 Lea, 438, 449, 41 Am. Rep. 640.

Objection is taken to the expression "or perhaps careless manner." This expression, together with the preceding one, was copied by his honor from the opinion of this court in the case of *Railroad v. Garrett*, supra. The whole passage is as follows: "There is no class of cases where the doctrine of exemplary damages can be more beneficially applied than in the case of railroad corporations in their capacity as common carriers of passengers. We see no reason to go over the cases in other states to find support for this view. It is sound, in our judgment, and needs no further discussion. It is proper to say that the case of *Nashville & Chattanooga Railroad v. Starnes*, 9 Heisk. 53, 24 Am. Rep. 298, did not intend to announce any contrary general doctrine, and does not, when considered in connection with the facts. So far from limiting the liability of a railroad company for the acts of its servants, when an injury is done in the performance of the duties of their positions, it was extended in that case to the act of the servant in wantonly and for mischievous purposes using the engine of the company to alarm horses in a wagon (a proposition the writer of the opinion thinks a very doubtful one). In a case like that, however, it was said the company should not be liable for vindictive damages, because, says the judge: 'The act complained of was manifestly done without the defendant's knowledge or consent, and was the willful and unauthorized act of the servant alone.' Whether that be correct or not in reference to the facts of that case, we need not now determine, but it has no application whatever to the case before us, when the act was done in the strict line of the duty of the conductor, but was done under a state of facts not justifying the act done, and in a wrongful, or perhaps careless, manner, to the injury of the plaintiff." There can be no doubt that the word "careless" here was a misprint for the word "reckless." The facts recited in the opinion in respect of which the passage above quoted was used show that the word "careless" was wholly inappropriate, and that the judge writing the opinion intended to use, and no doubt did use, the word "reckless." The word "careless," therefore, appearing in the charge in question, was not, strictly speaking, a correct word to express the meaning intended; but it could not have misled the jury, because in the connection in which it was used it must have conveyed to their minds the meaning carried by the word "reckless"; not the idea of negligent indifference, but without care of consequences or for the rights of the person ejected.

It is next insisted that the verdict was excessive. We do not think so.

We have thus disposed of the substance of all of the errors assigned, except the third, concerning the exclusion of certain evidence. We think this testimony was so clearly incompetent that we need not extend this opinion by discussing it here.

It results that the judgment of the court below must be affirmed.

WAGNER v. EDISON ELECTRIC ILLUMINATING CO. OF CARONDELET.

(Supreme Court of Missouri. July 3, 1903.)

CONTRACT OF SERVICE—IMPLIED COMPENSATION—INTENTION—QUANTUM MERUIT—APPORTIONABLE CONTRACT—RECOVERY.

1. In complying with an ordinance requiring that all electric wires in a certain district be placed under ground, several electric companies acted jointly through a committee. This committee elected one of its members as engineer for the work. *Held* that, though the engineer was a member of the construction committee, he could recover on the quantum meruit for services rendered as supervising engineer.

2. A committee representing several electric companies, in supervising the work of placing wires underground, elected one of its members to act as engineer. The action of the committee was binding on all the companies, and the engineer could not be discharged except by a majority vote of the committee. There was no agreement as to the compensation the engineer was to receive, but the contractor was to receive monthly payments on estimates furnished by the engineer. *Held* that, as the benefits accrued with the progress of the work, it will be presumed that the compensation was to be paid from time to time, and hence the contract was apportionable, and the engineer entitled to recover for services rendered during the progress of the work and before its completion.

3. The engineer was not entitled to recover for services rendered unless both he and the defendant company had understood, or ought to have understood, that he was to be paid for his services, judging from what reasonable persons under like conditions would have understood.

Robinson, C. J., and Gantt, J., dissenting in part.

In Banc. Appeal from St. Louis Circuit Court; Wm. Zachritz, Judge.

Action by Herbert A. Wagner against the Edison Electric Illuminating Company of Carondelet to recover for services. Judgment for plaintiff affirmed by the St. Louis Court of Appeals (82 Mo. App. 287), and case certified to the Supreme Court. Reversed.

Judson & Green, for appellant. Morton Jourdan, for respondent.

BRACE, J. This case is certified here from the St. Louis Court of Appeals, upon the dissent of one of the judges of that court to the decision of a majority thereof, in an opinion by Bland, P. J., reported in 82 Mo. App. 287. A copy of that opinion, affirming the judgment of the circuit court in favor of the plaintiff, without additional argument or brief, is filed by his counsel in support of that judgment, and may be taken for the statement of the case. It is as follows:

"In 1896 the municipal assembly of the of St. Louis passed Ordinance No. 18,680

(known as the 'Keyes Ordinance'), which required electric light and power companies doing business within the district bounded by the river and Twenty-Second street, Wash and Spruce streets, to bury their wires underground, and forbidding the use of poles, etc., above ground within the designated territory after December 31, 1898. The ordinance provided certain privileges to persons and corporations complying with its terms. The defendant, the Phoenix Light, Heat & Power Company, the Missouri Electric Light & Power Company, and the St. Louis Electric Light & Power Company qualified under the ordinance, and presented to the board of public improvements of the city their several plans for construction of underground conduits. These plans were located in many instances on the same streets and alleys in the district, for which the several companies were compelled to construct jointly, by order of the board of public improvements, in the exercise of a power delegated to it by the ordinance. The above-mentioned companies on April 17, 1897, entered into a single but several contract with the National Conduit Construction Company of St. Louis and two other construction companies for the underground conduits to be used by them jointly. This contract provided for a construction committee of four members, one to be selected from each of the four companies, to which all disputes between the said companies and the construction companies should be referred for final decision. No engineer was named in this contract for these several companies, yet the contract in numerous places refers to one, and certain powers are given him with respect to supervision and approval of the work, showing that the appointment of such an engineer was contemplated by all the parties to the contract. The conduits are roughly described in the evidence as similar to a large gun barrel with numerous circular spaces extending its entire length with the ducts of each company, varying in number according to its needs, but made inseparable from the ducts of the other companies, so that the ducts of one could not be removed without removing all; so that the surveys, plans, supervision permits, and all that appertained to the construction of the conduits, was both the joint and individual undertaking of the four companies. The committee provided for in the contract was made up of E. V. Matlack, representing the defendant, A. Ross, representing the Phoenix Company, D. W. Guernsey, representing the St. Louis Company, and plaintiff, representing the Missouri Company. On April 30, 1897, the committee organized by electing Wagner chairman, and Ross secretary, and adopted rules for the conduct of its proceedings, among which was one providing that no motion could be carried unless it received three votes in the affirmative. On May 7, 1897, Mr. Ross moved that Wagner be appointed engineer to supervise the underground work

as provided for in the contract of April 17, 1897. The motion was seconded by Guernsey. On vote being taken, all voted aye, except Mr. Matlack, who voted no, and Wagner was declared duly appointed engineer. Mr. Wagner appointed the other gentlemen of the committee a committee of three to outline and define the duties of the engineer. A majority and minority report was made; the majority report was adopted by the full committee, Matlack voting in the negative. Briefly stated, the majority report, as adopted, required the engineer to provide all plans for construction, to secure permits therefor from the board of public improvements, and to have general supervision over the work provided for in the contract of April 17, 1897. The committee, in behalf of the several companies in interest, then gave to the board of public improvements the following notice:

"St. Louis, Mo., May 11th, 1897.

"To the Hon. Board of Public Improvements of the City of St. Louis—Gentlemen: The undersigned companies have appointed Mr. Herbert A. Wagner engineer for the construction of their conduits, under authority of Ordinance No. 18,680. You will please deliver permits for conduits to him or his order. Very respectfully, Missouri Electric Light & Power Co. & Edison Illuminating Co. of St. Louis. The Electric Light, Power & Conduit Co., S. B. Pike, Secretary. The Phoenix Light, Heat & Power Co., A. Ross, President. The Edison Illuminating Co. of Carondelet, E. V. Matlack, Secretary. St. Louis Electric Light & Power Co., D. W. Guernsey, President."

"Each block of street where it was planned to construct the conduit was obstructed by underground gas and water pipes, and in some instances by sewers; these it was necessary to go over or under without disturbing them, hence great care was required, and a study of the city records as to location of these obstructions and the preparation of maps and drawings showing their location, depth, etc., was necessary. All this was done under the supervision of Wagner, and a special preliminary plan of each block was made and furnished to each company. From these preliminary plans final plans were prepared by Wagner acceptable to all the companies, and then submitted to the board of public improvements for the purpose of getting permits for the construction of the conduit. Of this work about 20 plans were prepared for each block; to prepare them required the work of four or five draftsmen for a year; all the measurements were taken by Wagner, or by an engineer acting under him, and a record made of them; monthly estimates of the work was made by or under his (Wagner's) supervision, and submitted to the construction committee, on which monthly payments to the contractor were made; a large number of inspectors were employed to watch the contractor; these reported to Wagner, and were assigned to duty

by him, and all orders to the contractor came from Wagner. An office force of clerks, draftsmen, and inspectors, and a force of under engineers, were furnished by the respective companies, but all acted as a unit, and worked under the order and control of Wagner, as engineer in chief. The labor was not only great, but also, as to the work of the engineer, it had to be skillful and exact to meet the requirements of the ordinance, and to leave undisturbed the existing underground obstructions. The responsibility for plans, measurements, and successful construction were all on Wagner, as engineer in chief, and he supervised and directed all. The work of construction as it progressed was, on the estimate and certificate of Wagner, when approved by the construction committee, paid by the respective companies, pro rata, as follows: Missouri Company, $\frac{7}{12}$; Phoenix, $\frac{2}{12}$; defendant, $\frac{3}{12}$. A short time after the formation of the construction committee, the St. Louis Company was absorbed by the Missouri Company, but Mr. Guernsey continued on the committee, and acted thereon in the interest of the Missouri Company. At the time the construction committee was formed, Wagner was general superintendent and engineer of the Missouri Company and the Edison of St. Louis, receiving per month \$250 and \$200, respectively, for his services, which salaries he continued to receive during joint construction of the underground conduit. He made no special charges against these companies for extra services as engineer in chief of joint construction. Wagner represented on the construction committee the Missouri Company, the Edison of St. Louis, and the Electric Light, Power & Conduit Company. The three latter companies were absorbed by the Missouri Company. Ross and Guernsey testified that Wagner was chosen as chief engineer for the reason that they thought he would not charge as much for his services as an engineer who had no connection with any of the companies, and that on several occasions at committee meetings Wagner stated he expected pay for his services as chief engineer of the work, and that they always understood he was to be paid. Matlack, on the contrary, says that nothing was ever said about paying Wagner until in the summer of 1897, when the Imperial Electric Company wanted to come in. The question was then discussed in reference to its just proportion of the expenses, should it be let in; but that prior to that time the committee had never agreed upon any sum to be paid to Wagner for engineering work, and that the matter had never been discussed or reported to the companies, and that at this same meeting he expressly stated that his company would not pay for such work, but would provide for its due proportion of the engineering work; and whenever the matter came up afterwards, he invariably said to Wagner, 'We don't owe you anything, and won't pay you anything,' to which Wag-

ner would reply, 'I'll make you pay.' The Phoenix Company paid Wagner \$100 per month for 10 months' services as chief engineer of joint construction, without objection. On February 18, 1898, Wagner made a written request on appellant for payment of his services at the rate of \$100 per month. The appellant refused to pay the bill. The construction continued, and Wagner continued to act as chief engineer. Some time in the latter part of May, 1898, he placed his claim in the hands of Mr. Jourdan, his attorney, for collection. On June 4, 1898, in answer to a letter addressed to him by Mr. Jourdan, in regard to the account, Mr. Ryan, attorney for the defendant, stated, to use his own language: 'The defendant does not consider itself liable to Mr. Wagner for any duties he had theretofore or might thereafter discharge as engineer of conduit construction.' Wagner on the trial testified that he had rendered services as engineer on joint construction in November, 1898, and that he still considered himself in defendant's employ as engineer of joint construction, and that his total claim for services as such engineer rendered appellant, prior and subsequent to the beginning of the suit, was \$1,700.

"It was admitted on the oral argument that \$100 per month for plaintiff's services was a reasonable charge against defendant, if defendant is legally bound to pay for such services. The suit was commenced on June 6, 1898. The petition is as follows: 'That on May 7, 1897, plaintiff was employed by defendant to render service to it as engineer in charge of and to supervise work in and the construction of its conduit system, and promised to pay the reasonable value of the service; that he rendered the services from May 7, 1897, to May 7, 1898; that they were reasonably worth twelve hundred dollars; that payment has been refused, and prays judgment.' The answer was a general denial. The jury returned a verdict in favor of plaintiff for \$1,200. A motion for new trial proving of no avail, defendant appealed.

"The court gave on behalf of respondent the following instructions, to all of which appellant objected and excepted: '(1) If the jury find that defendant, through its secretary, Mr. Matlack, requested the plaintiff to perform the services in issue, and that plaintiff performed said services, then the verdict will be for plaintiff. (2) If the defendant's officers saw and knew that plaintiff was rendering the services in issue, and that plaintiff expected pay therefor, then the verdict will be for plaintiff. (3) Even though you find no employment or request to perform said service by defendant, yet if plaintiff rendered said services, and the defendant accepted the results of his labor, then the verdict should be for the plaintiff. (4) The defendant is a corporation, and hence can act only through its duly elected and acting officers; hence any act of Mr. Matlack, the secretary, or Mr.

Scott, the president, with reference to the employment of plaintiff, if you find there was such employment, or with reference to permitting plaintiff to do the work expecting payment thereof, or the acceptance of the results of the labor of plaintiff, if labor you find he performed—was the act of and bound the defendant.'

"Appellant, at the close of plaintiff's case, demurred to the evidence, which was overruled. To this ruling it duly objected and excepted at the time. There are a number of exceptions to the admission and rejection of testimony saved by appellant during the progress of the trial. An examination of these fails to disclose any material error in the rulings of the court on questions of evidence, and we will pass them over without further notice.

"The clause of the contract providing for the construction committee reads as follows: 'To prevent all disputes, it is agreed by and between the parties to this contract, that a construction committee composed of representatives, one to be selected by each of the companies, shall decide all questions which may arise relative to the execution of the contract on the part of the contractors, and its decisions shall be final and conclusive.' All through the contract the engineer of the contracting companies is mentioned; it is provided that the work of construction shall be done under his supervision, and must be accepted by him; he is authorized to supervise construction; to inspect and test material to be used in construction; he is required to locate and designate manholes; and all disputes between the contractor and the engineer are referred to the construction committee for final decision. In short, the supervision and execution of the contract on their part is delegated by the contracting companies to the committee and the engineer. The personnel of the engineer is not named in the contract, nor did the contracting companies, after its execution, at any time undertake to appoint one, but acquiesced in the appointment of Wagner by the committee. It may therefore be said that, even if the power to appoint an engineer was not expressly or impliedly conferred on the committee, yet its appointment of him was ratified and approved by all the companies, as shown by the notice of his appointment served on the board of public improvements May 11, 1897. The construction committee was the agent of all the companies—not each member thereof the agent of the company selecting him as a committeeman—and the powers given the committee under the contract were such as to authorize the appointment of an engineer, or to do anything that might be done by the contracting parties, acting jointly, necessary to be done to secure the construction of the conduit according to the terms and requirements of the contract. Wagner's employment, therefore, by the defendant is not an open question, in view of all the evidence in

the record. It is admitted that his services to the defendant were worth \$100 per month, but the contention of appellant is that he should not be paid for his services, because, first, it was not expressly agreed when he was employed that he should receive compensation; and, second, because all the companies furnished other engineers, inspectors, clerks, and messengers from their general force of employes, for whose services no extra charges were made or compensations claimed; and, third, because Wagner, at the time he was performing services for all the companies, was receiving salaries as the superintendent and engineer of two of the companies, against whom he made no extra charges for his special work as chief engineer of construction. The evidence of Wagner's intention to charge for his service when appointed is somewhat conflicting, but this question was squarely submitted to the jury by the third instruction given on the part of appellant, and the jury found against the appellant on this issue of fact. There is evidence tending to support that finding, hence the question is not open for discussion by us on appeal. That Wagner was receiving salary from other companies, against which he made no extra charge, is no reason why appellant should receive the benefits of his skill and labor for nothing; nor does the fact that employes of the several companies performed services under Wagner as chief engineer, for which no extra charges were made, stand in the way of Wagner's recovery for his services. That he was employed, that he earned what he had sued for, and that the appellant justly owes him, it seems to us, in view of all the evidence and the verdict rendered by the jury, are questions about which there is no longer reason for controversy. Some of the instructions given are not hypothecated on the evidence, and required the jury to find some facts not necessary to be found to entitle respondent to recover, and were therefore erroneous, but not prejudicial to appellant. The material question in the case was the right and purpose of Wagner to charge for his services. This was properly submitted by instructions given for appellant, and we find no reversible error in the giving of instructions.

"Appellant contends that the suit was prematurely brought. Wagner was employed by the committee for joint construction; his employment necessarily covered the entire construction, which was not completed until some time after the suit was brought; his services were therefore not at an end when he commenced his suit, unless the letter of appellant's attorney of June 4th terminated his employment in so far as the appellant was a party thereto. The peculiar relation of these several companies to each other makes this question a difficult one. They were not partners, but joint contractors, with a several, but not joint, liability for expense and charges for the construction of

the conduit under the joint contract. Appellant could not withdraw from the joint undertaking, nor revoke the agency (the construction committee) which it had agreed to create and had helped to raise. It might have withdrawn its appointee on this committee, and persuaded the other companies to do the same thing and make new appointments, but it could not destroy the committee, nor revoke any of its delegated powers, nor could it repudiate its actions when within the scope of its authority. It might have persuaded the committee to discharge Wagner, but it could not force it to do so, nor could it discharge him from the employment he had received from the committee, nor, under the circumstances, refuse to accept the benefit of his services. The position of appellant was somewhat anomalous, but it put itself in that position by its own contract, and we hold that the letter of June 4th did not discharge Wagner, and that he continued the servant and employe of appellant until the completion of the work of construction. The time for which Wagner was employed was not designated in the motion appointing him, but the circumstances of the appointment, the understanding of the members of the committee, and his own understanding, was that it was for the whole period of construction. There was no agreement to pay in installments, or to pay at any particular time, or to pay a stipulated sum. The contract being for the entire construction, and no agreement as to time or amount of payment, was anything due when the suit was brought? In other words, is the contract apportionable? If not, then the suit was prematurely brought. *Hill v. Mining Company*, 119 Mo. 9, 24 S. W. 223; *Bersch v. Sander*, 37 Mo. 104; *Alkire Grocer Company v. Tagart*, 60 Mo. App. 389. A deep-rooted principle of the common law is that, where parties have entered into a contract by which the amount to be performed by one, and the consideration to be paid to the other, are made certain and fixed, the contract cannot be apportioned. But where the services to be performed are specified and fixed, but the consideration to be paid is left to be implied by law, the contract may be apportionable, provided the nature of the contract is such that the accrual of the benefits go along and keep pace with performance, and are not dependent upon a completion of the contract in its entirety. Note to *Vutter v. Powell*, 2 Smith, Leading Cas. 1228; *Sickels v. Pattison*, 14 Wend. 257, 28 Am. Dec. 527; *Wade v. Haycock*, 25 Pa. 382. Where benefits accrue, as they did in this case, as the work progressed, it may be well presumed that the parties contemplated remuneration should be paid from time to time during the progress of construction; especially may we indulge this presumption here, in view of the fact that the contract provided for monthly payments, to the contractor, of estimates to be made by Wagner

and approved by the committee. Indulging this presumption, we hold that the contract is apportionable, and that the suit was not prematurely brought.

"Should the judgment be reversed on account of the error in instructions given for respondent? In view of all the evidence, we think not. The sole question of fact about which there was any controversy at the trial was whether or not Wagner intended to charge for his services when he was appointed chief engineer of construction by the committee. As hereinbefore stated, that issue of fact was properly submitted to the jury by appellant's third instruction, which reads as follows: 'The court instructs the jury that if they believe from all the facts and circumstances in evidence that the plaintiff, when he was appointed by the construction committee engineer for joint construction, did not intend to charge for his services, that he could not thereafter change his mind and charge therefor, even though you believe that the services were beneficial to defendant.' None of the instructions given for the respondent contradict or are opposed to this instruction. The jury were therefore bound to find that Wagner intended to charge appellant for his services, at the very time of his appointment, before they were authorized, under the evidence and instructions of the court, to return a verdict in his favor. The evidence on all the other issues of fact to entitle him to recover was practically all on the side of Wagner, and there is no controversy as to them. On this showing from the whole record, it is our duty to affirm the judgment, notwithstanding the giving of erroneous instructions, which in our opinion did not materially affect the merits or prejudice the appellant. Rev. St. 1889, § 2303; *Jones v. Poundstone*, 102 Mo. 240, 14 S. W. 824; *Homuth v. Street R. R.*, 129 Mo. 629, 31 S. W. 903; *Sullivan v. R. R.*, 133 Mo. 1, 34 S. W. 566, 32 L. R. A. 167; *Whitehead v. Atchison*, 136 Mo. 485, 37 S. W. 928; *Scotland County Nat. Bank v. O'Connell*, 23 Mo. App. 105; *Newberger v. Friede*, 23 Mo. App. 631; *Noble v. Blount*, 77 Mo. 235; *Browne v. Ins. Co.*, 68 Mo. 133; *Rowell v. St. Louis*, 50 Mo. 92; *Barr v. Armstrong*, 56 Mo. 577; *Nelson v. Foster*, 66 Mo. 381; *Gerren v. R. R. Co.*, 60 Mo. 405.

"The judgment, with the concurrence of Judge Bond, is affirmed. Judge Biggs dissents, and is of the opinion that the second instruction given for the respondent is in conflict with *Kinner v. Tschirpe's Ex'rs*, 54 Mo. App. 575, and that the third one is in conflict with the following cases: *Watkins v. Richmond College*, 41 Mo. 302; *Whaley's Ex'rs v. Peak*, 49 Mo. 80; *Painter v. Ritchey*, 43 Mo. App. 111; *Carter v. Phillips*, 49 Mo. App. 319; *Hiemenz v. Goerger*, 51 Mo. App. 586; and *Hartnett v. Christopher*, 61 Mo. App. 64—and that the error was prejudicial to the appellant, and that the judgment should be reversed and the cause remanded,

and requests that the cause be certified to the Supreme Court for final determination. It is so ordered."

In this court counsel for defendant present their side of the case anew, and in an elaborate brief, supplemented by oral argument, contend that the judgment of the circuit court should be reversed for error, the errors assigned being the refusal of the court to sustain defendant's demurrer to the evidence, and errors in the instructions given for the plaintiff in submitting the case to the jury. They contend that the demurrer to the evidence ought to have been sustained, because, on the undisputed facts and circumstances of the case, the law will not imply a promise on the part of the defendant to pay plaintiff for the services rendered; and, if it would, the action is premature.

1. In support of the first proposition, it is suggested that the relation which the plaintiff, as a member of the joint construction committee, sustained to the defendant, prevents such an implication, and in support of this suggestion the case of *Bennett v. Car Co.*, 19 Mo. App. 349, in which it was held that a contract between a corporation and a director thereof, fixing his salary, embodied in a resolution for the passage of which the director's vote was necessary, was invalid; and *Remmers v. Seky*, 70 Mo. App. 364, in which it was held that, in the absence of any express agreement, the officers of a corporation will be presumed to serve without compensation—are cited. As to these cases, and many others that might have been cited along the same lines, it is only necessary to say that this suit is not on an express contract, but on quantum meruit, and that the services rendered were not within the line of the plaintiff's duties as a member of the joint committee. A case more analogous to the case in hand than these cases is the recent one of *Taussig v. St. Louis & Kirkwood Ry. Co.*, 166 Mo. 28, 65 S. W. 969, 89 Am. St. Rep. 674, in which it was held that a lawyer could recover on quantum meruit for professional services rendered a corporation of which he was secretary, treasurer, and one of its directors, such services being without the line of his official duties in any of these relations. In considering that case, the recent cases on the subject were carefully examined, many cited, some of the leading cases reviewed, and the rule to be deduced therefrom stated as follows: "The rule applicable to such a case to be deduced from the modern and best considered cases is, we think, that a party, although a director or other officer of a corporation, may recover the reasonable value of necessary services rendered to a corporation, entirely outside of the line and scope of his duties as such director or officer, performed at the instance of its officers, whose powers are of a general character, upon an implied promise to pay for such services, when they were rendered under such circumstances as to raise a fair

presumption that the parties intended and understood they were to be paid for, or ought to have so intended and understood. *Fitzgerald Construction Co. v. Fitzgerald*, 137 U. S. 98 [11 Sup. Ct. 36, 34 L. Ed. 608]; *Pew v. Gloucester Nat. Bank*, 130 Mass. 391; *Bassett v. Fairchild*, 132 Cal. 637, 64 Pac. 1082 [52 L. R. A. 611]; *Nat. Loan & Investment Co. v. Rockland Co.*, 94 Fed. 335 [36 C. C. A. 370]; *Brown v. Silver Mines*, 17 Colo. 421 [30 Pac. 66, 16 L. R. A. 426]; *Greensboro Company v. Stratton*, 120 Ind. 296 [22 N. E. 247]; *Santa Clara Mining Ass'n v. Meredith*, 49 Md. 389 [33 Am. Rep. 264]; *Rogers v. Railroad*, 22 Minn. 25; *Shackelford v. Railroad*, 37 Miss. 202; *Chandler v. Monmouth Bank*, 13 N. J. Law, 255; *Cheaney v. Railroad*, 68 Ill. 570 [18 Am. Rep. 584]; *Citizens' Nat. Bank v. Elliott*, 55 Iowa, 104 [7 N. W. 470, 39 Am. Rep. 167]."

The principle of the cases cited may be sufficiently illustrated by a quotation from one of them used in the *Taussig* Case. In *Fitzgerald Construction Company v. Fitzgerald*, 137 U. S., loc. cit. 111, 112, 11 Sup. Ct. 36, 40, 34 L. Ed. 608, Chief Justice Fuller, speaking for the court, says: "The evidence tended to establish that Fitzgerald acted as treasurer for some month in 1886, and that while so acting he went to expense and trouble in the procuring of money for the company, and in discharge of duties outside of those assigned to the treasurer as such, as defined in section 6 of the by-laws already quoted, and that as manager or superintendent he procured right of way, superintended the doing of the work, the hiring of the men, the subletting of the contracts, etc., which were matters not at all pertaining to his office as director. The character of all these services placed them outside of official duties proper. The general rule is well stated by Justice Morton (since Chief Justice of Massachusetts) in *Pew v. Nat. Bank*, 130 Mass. 391, 395: 'A bank or other corporation may be bound by an implied contract in the same manner as an individual may. But in any case, the mere fact that valuable services are rendered for the benefit of a party does not make him liable upon an implied promise to pay for them. It often happens that persons render services for others which all parties understand to be gratuitous. Thus, directors of banks and of many other corporations usually receive no compensation. In such cases, however valuable the services may be, the law does not raise an implied contract to pay by the party who receives the benefit of them. To render such party liable as a debtor under an implied promise, it must be shown not only that the services were valuable, but also that they were rendered under such circumstances as to raise the presumption that the parties intended and understood that they were to be paid for, or at least that the circumstances were such that a reasonable man in the same situation with the person who received and is benefited

by them would and ought to understand that compensation was to be paid for them.' Tested by this rule, we think the court fairly left it to the jury to determine whether Fitzgerald rendered services of such a character and under such circumstances that he was entitled to claim compensation therefor. It could not properly be held as matter of law that he was not so entitled."

While the case in hand is anomalous, and no parallel for it, perhaps, can be found in the books, yet it is manifest, we think, that it comes within the principle of the rule laid down in the *Taussig* Case, and that that, and the last case quoted from, furnishes not only an answer to the suggestion that no promise to pay would arise, by implication, in this case, by reason of the relation which the plaintiff as a member of the joint committee sustained to the defendant, but furnishes a rule for such implication; and as we are satisfied with the reasoning of Judge Bland, which led to the conclusion that the action was not premature, we hold that the court did not err in overruling the defendant's demurrer to the evidence.

2. This brings us to the instructions with a rule by which to test them. It is well-settled law that "if a person render a service without intending to charge for the same, and this is so understood by the other party, no recovery can be had for such service" (1 Beach on M. L. Contracts, 647); or, as was said by Rombauer, P. J., speaking for the court in *Kinner v. Tschirpe's Ex'rs*, 54 Mo. App. 575: "In the absence of an express agreement, the contemporaneous intention of both parties that the services should be paid for must be implied to create an enforceable promise to that effect." But "where there is no relationship between the parties, and one accepts and retains the beneficial results of another's service, which he had no reason to suppose were gratuitous, and which he could, or not, accept, at his option, the law will imply a previous request for the services, and a promise to pay what they were reasonably worth." 1 Beach, M. L. Contracts, § 650.

The vice running through all the instructions given for the plaintiff is that they ignore the relation between the parties, which harmonizes the rules last quoted, and brings the case within the rule laid down in the first paragraph of this opinion. Under the first instruction the jury were authorized to find for plaintiff; non constat that he did not intend to charge for his services. Under the second they were authorized to find for the plaintiff; non constat that the defendant understood they were not to be paid for. And under the third they were authorized to find for the plaintiff; non constat that neither party intended nor understood that the services were to be paid for. So, under these instructions, read in connection with plaintiff's fourth explanatory instruction, the jury might well have returned a verdict for plaintiff for services rendered, which the defend-

ant had no option to refuse, for which the defendant had never agreed to pay, for which the plaintiff may not have intended to charge, and for which the defendant may have understood no compensation was to be made. They are erroneous in themselves, and inconsistent with the instructions given for the defendant, which are as follows: "(1) The court instructs the jury that although they believe from the evidence that plaintiff may have intended to charge defendant for such services as he might render it, yet if the jury further believe from the evidence that he did not disclose said intention to defendant at the time of or before his selection by the committee as engineer, and the defendant did not understand that it was expected to pay him and did not intend to pay him for such services, and that it notified him promptly, when it learned he meant to make a charge against it for such services, that it did not intend to pay him therefor, and you believe from the evidence that it had not the power, in the circumstances, to discontinue his services as such engineer, then the court instructs the jury the plaintiff is not entitled to recover. (2) The court instructs the jury that the defendant could not against its consent be made a debtor to plaintiff, and if they believe from the evidence that defendant first learned that plaintiff meant to make a charge against it, for services as engineer of joint construction, after his appointment by the committee, and that it promptly notified him it would not pay for such services, and that plaintiff continued to act as engineer under said appointment, and to render such services as his appointment required to this defendant, and that defendant had no power to cancel said appointment and discontinue plaintiff's service as such engineer, then the court instructs the jury the plaintiff cannot recover, and the verdict must be for defendant. (3) The court instructs the jury that if they believe from all the facts and circumstances in evidence that the plaintiff, when he was appointed by the construction committee engineer for joint construction, did not intend to charge defendant for his services, that he could not thereafter change his mind and charge therefor, even though you believe that the services were beneficial to defendant."

That the plaintiff's instructions are erroneous is conceded in the opinion of Judge Bland, but it is therein held that the judgment should not be reversed therefor, because under the third instruction for the defendant the jury were required to find that plaintiff did intend to charge for this service, and this was the only disputed question of fact. In this view we cannot concur. That the plaintiff intended to charge for his services constituted but a part of the issue which should have been submitted to the jury on the undisputed facts in the case. In order that the plaintiff recover in this case, it was necessary that the jury should have found

not only that plaintiff intended, but that under all the facts and circumstances both he and the defendant understood, or ought to have understood, that compensation for his services was to be made; and the jury would have been warranted in so finding if they found that reasonable men in their places, in the same circumstances, would have so understood. This is the issue which should have been clearly presented to the jury, and as it was not so presented in any or all of the instructions given, however read or construed, the judgment of the circuit court should be reversed and the cause remanded for new trial, and it is accordingly so ordered. All concur, except ROBINSON, C. J., and GANTT, J., who dissent on the point of apportioning the contract.

GANTT, J. I concur in the opinion of my learned Brother BRACE in every respect, except wherein it holds that the plaintiff could apportion his contract and sue for the same as for monthly payments up to the time of the commencement of this action. As I read the record, if there was any undertaking by defendant to compensate plaintiff pro rata for the services rendered, it was for his services in formulating and superintending the entire construction of the joint conduit; and, as the undertaking was entire, the compensation, in the absence of a specific contract to pay in installments or monthly, must also be one sum for the whole, and necessarily no action would lie until the work was completed, and in my opinion there can be no apportionment of the services on the showing made. *Hill v. Rich Hill Mining Co.*, 119 Mo. 9, 24 S. W. 223; *Sinclair v. Bowles*, 9 B. & C. 92; *Cox v. Western Pac. R. R. Co.*, 44 Cal. 18; *Quigley v. De Haas*, 82 Pa. 267; *Barker v. Reagan*, 4 Heisk. (Tenn.) 590.

I am unable to find any evidence of an agreement to pay plaintiff by the month, and, considering the character of the services rendered, it seems to me entirely illogical to apportion professional services, such as plaintiff rendered, by the month. If apportionable at all, they should be in proportion to the services rendered, with reference to the whole work to be performed. Assuming the predicate upon which Judge BRACE'S opinion rests, to wit, that "Wagner's employment was for the whole period of construction, that there was no agreement to pay in installments, or to pay at any particular time, or to pay any stipulated sum," and that Wagner so understood it, is strongly fortified by the fact that he never rendered any monthly bill to defendant, and that he says he made an entire charge of \$1,700 for the entire amount of work, the contract is not severable.

In a word, we have, if anything, an indivisible implied contract of employment for the entire work, and, there being no agreement to pay in installments, plaintiff cannot split up his cause of action and subject de-

pendant to as many suits as he may elect, and entail the costs of two or a half dozen actions where one only existed.

As I interpret the decision, the plaintiff is not estopped from suing for the balance of the time not included in this suit. This being so, this case is readily distinguishable from those cases in which the employer wrongfully terminates the employment, in which the employé is permitted to sue on quantum meruit for services rendered up to the dismissal, or may wait until the whole period of employment has expired and sue for damages for the breach of the contract. Having reached the conclusion that defendant did not and could not terminate the contract under the peculiar circumstances, it seems to me illogical to apply the rule which governs where the employé is discharged before his term of service is completed; and hence, in my opinion, the action is premature. *Cox v. Railway*, 44 Cal. 18; *Krumb v. Campbell*, 102 Cal. 370, 36 Pac. 664; *Coburn v. City*, 38 Conn. 290.

I fully agree as to Judge BRACE'S views as to the instructions, and that the judgment must be reversed for the errors in those given by the court; but I go further and hold that, the action having been brought before the completion of the work, it was premature, and hence I think it should be reversed altogether, and a new action brought for compensation for the entire work.

ROBINSON, C. J., concurs in my views.

In re WEST TERRACE PARK.

KANSAS CITY v. MULKEY et al.

(Supreme Court of Missouri. June 30, 1903.)

CONDEMNATION PROCEEDINGS—APPEAL—REVERSAL—SECOND TRIAL OR PROCEEDING—PRIOR VERDICT.

1. Though part only of defendants in a proceeding to condemn land for a park appeal, the verdict and judgment as to all is set aside by a reversal.

2. Whether a proceeding by a city to condemn land for a park be a continuation of the original proceeding after a reversal on appeal by part of defendants, or a new one based on an ordinance passed after repeal of the ordinance authorizing the first proceeding, the city charter providing that in case of such a repeal the judgment for compensation and benefits shall be void, the verdict on the first trial cannot be made the basis for the verdict on the second trial.

In Banc. Appeal from Circuit Court, Jackson County; Jas. Gibson, Judge.

In the matter of West Terrace Park. Condemnation proceeding by the city of Kansas City. From the judgment, defendants William Mulkey and another appeal. Affirmed.

Gage, Ladd & Small, for appellants. R. E. Ba!! and D. J. Haff, for respondent.

ROBINSON, C. J. This is a proceeding by Kansas City, begun in June, 1890, to condemn lands for a park, to be known as "West Terrace," under an ordinance of the city passed and approved April 5th of that year. The lands sought to be condemned included 28.62 acres, of which amount the appellants William and Catherine Mulkey own about 6 acres, valued by the jury in the present proceeding at \$55,590. For answer, defendants William and Catherine Mulkey (the appellants here) filed the following:

"Now at this day come the defendants, Catherine Mulkey and William Mulkey, her husband, and show to the court that heretofore, to wit, at the April term, 1896, of this court, the said city of Kansas City, under and by virtue of an ordinance of said city providing for the establishment of said West Terrace Park, approved on the 11th day of September, 1895, duly instituted proceedings to condemn the same property of these defendants which said city proposes to condemn in this proceeding as a part of said West Terrace Park; that said proceeding was regularly prosecuted to a final determination in this court, and a verdict was rendered therein on the 5th day of October, 1896, duly assessing the value of defendants' said property at the price and sum hereinafter mentioned. The said city filed no objections or exceptions to said verdict, and that on or about the 13th day of October, 1896, at the instance and request of said city, said verdict was confirmed and judgment rendered accordingly, condemning said property as and for said West Terrace Park. That said city never appealed from said verdict and judgment, and that the only parties who did appeal therefrom were Martha E. Bacon, James Munroe, and Willard N. Munroe, owners of a small portion of the property in the benefit district, which had been assessed with benefits in said proceeding, said appellants giving a supersedeas bond; and that said appeal remained pending in the Supreme Court of Missouri until disposed of as hereinafter set forth. That afterwards, on the 23d day of June, 1897, the park board of said city caused to be prepared and introduced into the common council of said city an ordinance to repeal said first-mentioned ordinance, and to modify said West Terrace Park by providing for the condemnation therefor of a part of the property condemned by said first proceeding, which said ordinance said council refused to pass. That afterwards, on the 5th day of September, 1898, said park board prepared and caused to be introduced into said council another ordinance to repeal said first-mentioned ordinance, and to reduce and modify said park by providing for the condemnation therefor of a part only of the property sought to be condemned under said first-mentioned ordinance, which said ordinance said council also refused to pass. That, in each of said ordi-

¶ 1. See Eminent Domain, vol. 12, Cent. Dig. § 687.

uanances so prepared and introduced by said park board, the property of these defendants was part of the property proposed to be condemned and taken as part of said West Terrace Park. That on the 5th day of April, 1899, with the concurrence of the Board of Park Commissioners, and before any benefits assessed in said first proceeding were paid, and not until then, an ordinance was duly passed by said city repealing said first-mentioned ordinance, which said ordinance is in words and figures as follows: [Here ordinance is copied in full.] That afterwards, on April 26, 1899, the attorneys for said city and for said Bacon and others, appellants in said first-mentioned proceedings, filed in the Supreme Court of Missouri a stipulation in writing, in words and figures as follows:

"In the Supreme Court of the State of Missouri. In the Matter of the Condemnation of Land for Opening and Establishing a Public Park in the West Park District in Kansas City, Missouri, to be Known as West Terrace. Kansas City, Respondent, v. Martha E. Bacon, James Munroe, and W. N. Munroe, Appellants. Stipulation. By authority of an ordinance of Kansas City, Missouri, number 11,429, approved April 5th, A. D. 1899, and entitled, "An ordinance to repeal ordinance number 6,751, of Kansas City, Missouri, approved September 11th, A. D. 1895, providing for the establishment of a public park in the West Park district in Kansas City, Missouri, to be known as West Terrace," it is hereby stipulated between the respondent and appellants in the above-entitled cause, that an order may be entered by this court reversing and remanding the above entitled cause to the circuit court of Jackson county, Missouri, and Kansas City, respondent in the above-entitled cause, hereby waives all right to exceptions to said order, and all right to file any motion for rehearing therein. Appellants to have taxed in their favor all taxable costs of appeal incurred by them. D. J. Haff, Attorney for Respondent. Brown, Chapman & Brown, Langston Bacon, Attorneys for Appellants. Filed April 26, 1899. Jno. R. Green, Clerk."

"That said Supreme Court, without hearing said cause, and pursuant to said stipulation and repealing ordinance, entered an order in said cause on the 26th day of April, 1899, in words and figures as follows:

"In the Supreme Court of Missouri, April Term, 1899. Court in Banc. In re West Park District. Kansas City, Respondent, v. Martha E. Bacon, James Munroe, and Willard N. Munroe, Appellants. Appeal from Jackson County Circuit Court. Now at this day come said parties, by attorneys, and upon their stipulation it is considered and adjudged by the Court that the judgment rendered in this cause by the Jackson County Circuit Court be reversed, annulled and for naught held and esteemed, and that the said appellants be restored to all things which they have lost by reason of the said judgment. It

is further considered and adjudged by the Court that the said cause be remanded to the said Jackson County Circuit Court for further proceedings to be had therein, and that the said appellants recover against the said respondent their costs and charges herein expended, and have therefor execution.

"State of Missouri, ss.: I, Jno. R. Green, clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full true and complete transcript of the judgment of said Supreme Court, entered of record at the April term thereof, 1899, and on the 26th day of April, 1899, in the above entitled cause. Given under my hand and seal of said court, at the City of Jefferson, this 4th day of May, 1899. John R. Green, Clerk. [Seal.]"

"That afterwards, the attorneys for said city procured an order to be entered in this court on the 27th day of May, 1899, dismissing said cause. All of which said orders and proceedings in said Supreme Court and in this court were without the knowledge or consent of, and without notice to, the said defendants. But these defendants say that nevertheless said city never did in good faith or at all, abandon its design and purpose of appropriating the property of these defendants as and for a part of said West Terrace Park. That, on the same day and at the same session of the common council of Kansas City said ordinance repealing said first-mentioned ordinance and annulling said first proceeding was passed, and immediately thereafter, to wit, on the 3d day of April, 1899, the ordinance under which this proceeding was instituted was passed by the common council of said city, and that said repealing ordinance was approved by the mayor of said city on the 5th day of April, 1899, at 11:10 o'clock in the morning, and at 11:20 o'clock in the morning of the same day the ordinance under which this proceeding was instituted was approved by said mayor, and that this proceeding was instituted in this court on the 3d day of June, 1899. That the ordinance under which this proceeding was instituted differs from said first ordinance and proceeding only in this: that the area of the park to be established is less, by the amount of $16\frac{1}{100}$ acres, than was provided for in said first-mentioned ordinance, and that such reduction in area is accomplished by omitting from the property to be taken a portion of the property condemned in the first proceeding, but not including any property, as a part of said park, that was not condemned by said first proceeding, the area under the first proceedings being $45\frac{1}{100}$ acres, and under this proceeding $28\frac{1}{100}$ acres. And these defendants say that said city passed said ordinance repealing and annulling said first-mentioned ordinance and proceeding, and enacted the ordinance providing for, and instituted this proceeding, simply and solely for the purpose of omitting a part of the property originally included in

said West Terrace Park, and of securing the remainder thereof, to wit, the defendants' said property and the other property retained for said park, at a new, and, if possible, a less valuation than was fixed by said first proceeding. And these defendants state that by reason of said first-mentioned condemnation proceeding, and the continuation thereof by this proceeding, they were, from the institution of said first proceeding until this date, deprived of their right to sell said property or to improve the same, or to make other beneficial use of the same. That they were put to great cost and expense for counsel fees and otherwise, in defending their rights in said first-mentioned proceeding, and were thereby otherwise greatly damaged and injured. Defendants allege that to permit said city to take their said property in this proceeding at a less sum than was allowed them therefor in said first proceeding, under all the circumstances hereinbefore set forth, would be contrary to the Constitution of this state, which prohibits the taking or damaging of private property for public use without just compensation, and provides that no person shall be deprived of his property without due process of law, and would also be contrary to the fourteenth amendment to the Constitution of the United States, which provides that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law. Wherefore defendants say that said city, by reason of the matters and things hereinbefore set forth, and the law of the land, is and ought to be estopped to take the said property of these defendants in this proceeding for less than the sums awarded to them in and by the verdict and judgment of this court in said first-mentioned proceeding, which is and was as follows, to wit: [Here follows a description of defendants' property sought to be condemned, with the amount of the award made to them by the jury in the first or prior proceedings.] Wherefore these defendants pray the court to enter judgment herein fixing the value of defendants' said property, sought to be taken in this proceeding, at the sum aforesaid, so awarded therefor in said first proceeding, and for such other relief as defendants are entitled to in the premises."

This answer, on motion of the city, was stricken out, and when the case came up for hearing, and before any evidence was introduced by the city, these appellants (two of a large number of defendants then before the court) objected to the introduction of any evidence as to the value of their property, except the verdict of the jury in the former condemnation proceedings referred to in their answer. When the city called its witness to prove the values of defendants' property to be condemned, the defendants Mulkey objected to the witnesses testifying as to the value of their property, for the same reason given above, that the value thereof had been

fixed by the jury in the former condemnation proceedings mentioned in their answer. This objection was overruled by the court, and the witnesses were permitted to testify, to which ruling and action of the court appellants duly excepted. At the close of the city's testimony the appellants Mulkey offered to show in their behalf the prior condemnation proceedings by the city to condemn their property, the amount of the verdict of the jury therein, and all the matters and facts set up in their answer, to which offer the city objected, and said objections were by the court sustained, and appellants duly excepted. The appellants then called several witnesses, who were permitted to testify as to the value of their property to be taken, and after due consideration the jury returned into court a verdict assessing the value of appellants' property to be taken at \$55,590, out of a general total allowed to all the interested defendants of \$217,256.20. From the judgment predicated upon this assessment, the defendants Mulkey, after the usual steps taken, have brought the case here by appeal.

It will be observed that while defendants' answer that was stricken out contains the statement that "the city never in good faith, or at all, abandoned its original design and purposes of appropriating the property of these defendants as and for a part of said West Terrace Park," and also contained the further statement that the city "enacted the ordinance providing for the institution of this proceeding simply and solely for the purpose of omitting a part of the property originally included in said West Terrace Park, and of securing the remainder thereof, to wit, the defendants' said property and other property retained for said park, at a new, and, if possible, a less valuation than was fixed by said first proceedings," they did not ask therein, nor in any way seek, to have the present proceedings quashed, dismissed, or abated for either of these reasons, nor do they plead the trial and judgment in the former proceeding in bar of the present proceeding; but, on the contrary, their chief claim seems to have been that the city "ought be estopped to take the said property of these defendants in this proceeding for less than the sum awarded to them by the verdict and judgment of the court in said first-mentioned proceeding," amounting to \$93,964. Their answer closes with the prayer that the court "enter judgment therein fixing the value of defendants' said property sought to be taken in this proceeding at the sum aforesaid so awarded therefor in said first proceeding," etc.

As said, while the allegation of want of good faith on part of the city in abandoning the prior proceeding to condemn defendants' property is contained in defendants' answer, as also the averment that the subsequent or present proceedings was begun simply and solely for the purpose of securing defendants' property at a new and less valuation

than was fixed in the prior proceeding, the facts and circumstances under which the abandonment did occur, as well as the purpose of the change in the present proceeding, was so set out and disclosed in the answer as to rob the allegation of want of good faith in the city of all force, even though the subsequent part of defendants' answer had not disclosed the fact that their real purpose was not to have the present proceedings abated on account of the city's want of good faith, but was to have, as they prayed the court to do, assess their property in the present proceeding at the value fixed by the jury in a prior proceeding that had for its purpose the condemning defendants' land along with that of the land of others not included in this proceeding.

The chief question then for determination, as we understand appellants' position, is, did the trial court err in striking out appellants' answer setting up the verdict in the prior proceeding, and in excluding such verdict and the judgment thereon from the consideration of the jury in the present proceeding, and in permitting them to consider other and independent testimony as to the then valuation of the property sought to be taken under the present proceeding?

Appellants in their brief expressly say that no contention is now made by them that the city was bound to take their property at the valuation fixed by the determination of the jury in the first proceeding, or that the city might not have abandoned, in good faith, the purpose of taking said property absolutely, and subsequently to have instituted a new proceeding to condemn same; yet by a process of reasoning, not altogether clear to the writer, the proposition is reached that the verdict of the jury in the prior proceeding of the city against them should in some way be treated as a final adjudication upon the question of the value of their property, and binding upon the court upon that issue in the present proceedings, and that the city should be now estopped to dispute that valuation so fixed in the prior proceedings.

There is in this case no place for the application of the doctrine of *res adjudicata* or estoppel, so much discussed in appellants' brief. It is most certain that the city could not have availed itself, in the present proceedings, of the verdict establishing the value of appellants' property in the prior proceeding. Against such an effort on part of the city it would have been a complete answer to have said, "You prosecuted the former proceeding under authority of an ordinance which you have since repealed, and by the provisions of your charter, which is the sole law governing your right to prosecute the former, as this latter, proceeding, it is provided that the repeal of the ordinance providing for a given improvement will operate to render void all proceedings had thereunder; in other words, leave the parties thereto, and

all findings therein, as if the proceedings had never been instituted."

Section 19 of article 10 of the charter of Kansas City provides: "The common council shall have the power, with the concurrence of the board of park commissioners, at any time before any of the parties assessed with benefits shall have paid the amount so assessed to repeal the ordinance ordering the proposed improvement, if such repeal be deemed for the best interests of the city; and in such event the judgment for compensation and benefits shall be void."

That the city, in view of this charter provision, could not have claimed the benefit of any portion of the prior proceeding, or of any question determined therein after it had repudiated and abandoned such proceedings by the repeal of the ordinance upon which the proceeding was predicated, needs only to be mentioned to assert the correctness of the proposition. If then, the city could not claim the benefit of any and every question determined in the prior proceedings after the repeal of the ordinance upon which that proceeding was predicated, the defendants, for like reasons, ought also be denied that right. A contrary proposition would violate every principle upon which estoppel is founded. If the repeal of the ordinances under which the prior proceeding was instituted rendered void all that was done thereunder, if it released the property sought to be taken as well as the property assessed with benefits to pay therefor, on what principle can it be contended that the city in an independent proceeding, brought under a new and independent ordinance, is bound, at the option of one whose property is sought to be condemned in said second proceeding, by the value of said property assessed in a prior abandoned proceeding? If the judgment upon the question of the value of defendants' property in the prior proceeding is void—and such is its effect by the terms of the charter under which both this and the prior proceedings were authorized and instituted—upon what theory, or under the application of what principle of law, did appellants ask or expect the trial court to take cognizance of a verdict and judgment rendered in the original proceedings, and impose it (as a fixed and unalterable standard of value of defendants' property) upon the jury impaneled in the present proceeding called to determine that question, before appellants' property could be taken for public use under such proceeding?

If we will suppose that appellants' property, the value of which had been fixed by the verdict of the jury in the prior proceeding begun by the city in 1896 to condemn same, had doubled or quadrupled in value since that time (a condition not unusual in the prosperous and growing cities of our country), what court would have tolerated for an instant an effort by the city to have

it appropriated for public use, under a new and independent proceeding brought in 1899, at the value fixed for its appropriation in 1896, under proceedings voluntarily abandoned by the repeal of the ordinance authorizing the proceedings? Or, if we will again suppose that, since the value of defendants' property was determined in 1896 under proceedings afterward abandoned by the city, they had placed thereon valuable improvements, would that additional value be ignored under new proceedings begun in 1899 to condemn the same property for a like contemplated use? Most certainly not, and yet such would be the result if the position of the appellants in this case is correct, that the award of the jury in the prior abandoned proceedings by the city should be made the valuation of defendants' property in the present inquest. As the valuation of defendants' property by the jury in the prior proceedings, under the circumstances given, could not be made availing to the city in a subsequent proceeding begun to condemn the same property and to determine defendants' damage for its appropriation for a like reason it must be unavailing to defendants, now that their property, judging from the great discrepancy between the previous and subsequent valuations made thereof, has undergone a decline—a condition also quite common in our cities when they have become more progressive, at times, than prosperous.

But if we should ignore the effect of the repealing ordinances passed by the city April 5, 1899, and the dismissal of the first proceedings in obedience to its terms, and treat this as in some way but a continuance of the case under the original proceedings, and consider the case simply as if it had been reversed by this court upon the stipulation and agreement between the city and the appellants in that proceeding, as it was reversed according to the averment of appellants' answer, these appellants would still be in no better attitude to make the contention that a new verdict by a jury in a subsequent hearing would not be necessary before their lands could be appropriated by the city for public use, or that the prior award was the proper basis for the subsequent valuation to be made for the property to be taken; nor could it make any difference, in considering the effect of the assessment made by the first jury, that the appellants here did not appeal from the judgment on said first assessment, or that they were satisfied with the appraisement then made by the jury called to determine the question of the value of their property proposed to be taken.

An appeal was taken by two of the parties interested in the result of that proceeding, and these appellants, as defendants therein, though not appealing, are equally bound by the result of that appeal as though they had joined therein. This court has

held, in cases of this character, that upon a reversal the whole verdict and judgment is set aside, even though one person only prosecuted his or her appeal, and the assessment of damages was made to each individual defendant as his or her interest in the property to be taken was made to appear, and that a new trial must be had as to all defendants upon the issues of the value of their property sought to be condemned. So, whether we consider the case now before us as in some way but a continuation of the original proceeding begun in 1896 by the city to condemn defendant's property for public use, or as a new proceeding begun for that purpose in 1899, based upon an ordinance passed subsequent to the repeal of the ordinance authorizing the first proceeding, the result must be the same, so far as concerns the question of the mode and manner of ascertaining the value of defendants' property proposed to be taken. On a new trial, in the original proceedings resulting from a reversed judgment therein, as at a trial in a new proceeding, as this is, to condemn defendants' property, their damages should be determined by the then value of their property to be taken, independent of the consideration of its value as determined, in any way or by anybody, at some previous date or on some prior occasion.

We have examined all the authorities cited by appellants, but in none do we find where a rule has been announced, or where a court of last resort has held, that a jury impeached in a new or subsequent condemnation proceeding by a municipality to assess damages and benefits was bound by or must adopt the verdict or award made by a jury in a prior proceeding that had been prosecuted for the same purpose; but in one case cited (the City of St. Joseph v. Hamilton et al., 43 Mo. 282, from our own state), where this question was directly presented, the attempted practice was condemned. In that case, which was a proceeding begun originally before the mayor of the city of St. Joseph to condemn a strip of lands owned by certain of its citizens, for the purpose of widening one of the streets of the city by order of its council, under its charter power, it seems that, when the jury was sworn the defendants sought, as the appellant did in this case, to have the damages to be awarded them determined by a prior award that had been made in their behalf in a previous condemnation proceeding by the city against them for the same purpose. This was denied to them in the proceeding before the mayor, and their damages was assessed at the sum of \$1,500. From this assessment the defendants prosecuted their appeal to the circuit court, and in that court they again moved that judgment be entered in their favor for \$3,000, the amount awarded by the jury in the first or prior condemnation proceeding. This motion the court sustained, and gave judgment accordingly. The

case was then taken to the district court, where a reversal was had, and from there it came to this court for revision, and upon this point the court said: "The first question that will be considered in the action of the circuit court in entering up judgment for the amount assessed by the first jury. How it was presented, in such a shape that the court could take jurisdiction of it, I cannot comprehend. It was a distinct proceeding, of itself. The second proceeding was, in the nature of a new suit, commenced, on new process, and was not a continuation of the former. * * * If the second assessment in this case was a nullity, that was good ground for quashing it, but it could not authorize the court to render a judgment on a matter not before it."

Although this case has since been overruled upon the main proposition discussed therein, and upon which the case was made to turn, to wit, that the city, by the first proceeding against defendants' property, was bound absolutely from beginning the second proceeding in which the appeal was taken, upon the first question considered by the court, which was as to the court's want of authority to take cognizance of the assessment and verdict in the first or prior proceedings to condemn and make a jury impaneled in the new or second proceeding for the same purpose adopt arbitrarily the assessment or verdict of the jury in the first proceeding, no question has ever been made, and the proposition then announced is still the law.

The next case from this state cited by appellants, as supporting their contention, is *Rogers v. City of St. Charles*, 3 Mo. App. 41. This was an action by plaintiff, a citizen of St. Charles, to recover against the city the value of certain real estate which the city had taken and appropriated for street purposes. To this action the city answered, claiming the property under condemnation proceedings previously begun to appropriate same to widen one of its streets, and averred its readiness to pay to plaintiff the amount awarded him in that proceeding, and tendered the amount into court, and prayed judgment. To this answer plaintiff replied, denying the legality and regularity of the condemnation proceedings under which the city claimed the property taken, and also set up the fact that a prior proceeding to the one under which the city claimed the property had been begun by the city to condemn the same identical property, and that the amount of his damages for the property to be taken as then made fixed its value at \$1,000, and pleaded that prior condemnation proceeding was a bar to the commencement of the second proceeding. On motion, this last part of plaintiff's reply was stricken out. At the trial plaintiff's contention seems to have been that he was entitled to damages in the sum of \$1,000, the amount of the award under the first or

prior condemnation proceedings begun by the city against his property, while that of the city was that plaintiff's damages should be limited to \$450, the amount of the award at the second or subsequent condemnation proceedings, begun by it, for the purpose of condemning defendant's property after the abandonment of the first proceeding. In that case no occasion existed for a consideration of the proposition involved, in the prayer of defendant's answer, that was stricken out in this case; nor was there said in that opinion, in disposing of the issues involved, or in the dicta indulged of which it abandons, anything giving sanction to the contention made by the appellants in this case, that the verdict of the jury in the prior abandoned proceeding by a city to condemn one's property for public use could, by any process known to the law, be imposed upon a jury impaneled in a subsequent proceeding by the same municipality to condemn a part of the same property involved in the prior abandoned condemnation proceeding. All that was said by the court in that case, after it had determined that the second condemnation proceeding begun by the city of St. Charles to condemn plaintiff's property was invalid because the record thereof failed to show any attempt on the part of the city to agree with the plaintiff upon the value of his property prior to the institution of the proceeding (as the charter required should be done as a condition precedent to the city's right to exercise the right of eminent domain) was: "But we are of the opinion that this value was fixed by the first award; that this is binding upon the city, except in the event of the abandonment of the design of widening the street; and that it is not competent for the city, adhering to its original purpose to widen the street, to have recourse, tentatively, to a number of juries, to reject such findings as it does not think eligible, and to fasten upon and hold the citizen to the first one which places an estimate in its eyes sufficiently low upon the property the condemnation of which is sought. * * * We cannot perceive what possible advantage can arise from the constitutional declaration that private property shall not be taken for public use without just compensation, if the state, or any of its deputies, exercising the right of eminent domain, may cause as many inquests as it pleases of the value of the property to be condemned, and set aside as many of them as it sees fit, until one is found sufficiently small to suit its notions of a just compensation, and then to declare it to be so. Of course, this permits one of the parties to a controversy to determine a judicial question in his own favor, and compel the other party to submit to the decision."

Under the issue tendered by the pleadings in that case, and as the parties thereto sought to have the case tried, the question of the amount of damages for which the

plaintiff was suing was made to turn upon the validity or invalidity of proceedings in which the measure of plaintiff's damages for the property taken by the city had been previously awarded, the city tendering the amount of one award made, the plaintiff asking that his damages be determined at the amount fixed in a prior award made in the same character of proceeding; but no question of the right to have imposed a verdict, or the judgment based thereon, in one proceeding, upon a jury impaneled in another proceeding of the same character, was contemplated, considered, or discussed in that case. Not only does that case not support appellants' contention that the verdict or award in the prior proceeding against appellants' property should determine the amount of the judgment in the present proceeding, but the proposition of law which the opinion does assert, also urged upon our consideration by appellants, that a municipality in this state should be denied the right to pronounce a particular property sought to be condemned necessary or unnecessary, according to the terms at which it may be acquired, has been expressly disapproved by this court. *Simpson v. K. C.*, 111 Mo. 243, 20 S. W. 38.

It will be sufficient, without further comment upon the numerous authorities cited by appellants, to say that none go further than to hold that, where there is a valid, subsisting, and final judgment in condemnation proceedings, unappealed from, not vacated, or set aside, such former proceeding or judgment therein may be interposed as to bar the prosecution of a new proceeding for the condemnation of the same property for the same purpose by the same corporation. None have gone to the extent of holding that in a second proceeding, whether barred or not barred by a former proceeding, the verdict or judgment of the former proceeding may be made the basis for a verdict and judgment in the latter proceeding, as appellants sought to have the court do for them in this proceeding.

Seeing no error in the action of the trial court striking out appellants' answer filed, and nothing appearing to indicate that appellants have been aggrieved by the award made to them at the present inquest, the judgment of the circuit court will be affirmed. All concur.

STATE v. KENNEDY.

(Supreme Court of Missouri, Division No. 2.
July 3, 1903.)

HOMICIDE—CONSPIRACY—EVIDENCE—ADMISSIBILITY OF STATEMENTS OF CO-CONSPIRATORS—INSTRUCTIONS—TRIAL—PROSECUTING ATTORNEY—REPLY STATEMENT.

1. Under Rev. St. 1899, § 2027, providing that, after a jury is sworn, the prosecuting attorney must state the case and offer the evidence in support of the prosecution, and then the defendant or his counsel may state his defense and offer evidence in support thereof, and

the parties may then respectively offer rebutting testimony, it was prejudicial error to permit the prosecuting attorney to make a reply to the statement of defendant's attorney, and attack defendant's character; the statement of the defense containing no intimation that defendant would testify and put her character in issue, and defendant not testifying nor putting her character in issue.

2. On a trial for murder, under an indictment which charges defendant alone with the crime, and contains no averment of a conspiracy between her and third persons to commit the crime, evidence showing the conspiracy is admissible.

3. Where a conspiracy to the satisfaction of the trial judge is shown to have existed, the statements and acts of each conspirator, made or done in pursuance of the common design prior to the commission of the crime, may be shown against the others on their trial for the crime.

4. Where, on a prosecution for murder, it was shown that more than two months before the killing a conspiracy existed between defendant, her father, and brothers to kill decedent if he did not marry defendant, evidence that, while the conspirators and decedent were in the recorder's office to procure a marriage license, the father said to decedent, when attempting to go over to a newspaper reporter in the office, "No, you don't; this isn't over yet," did not tend to show a conspiracy between defendant and her father to murder the decedent if he did not live with defendant after the marriage, which occurred on the day the license was issued.

5. Evidence that after the marriage of defendant and decedent the father presented to decedent a bill for a month's board of defendant, and asked payment, and, on decedent's refusal to pay, the father said he would show what a low-down man decedent was, and that he did not deserve to live, did not tend to prove a conspiracy between defendant and her father to kill decedent if he did not live with defendant.

6. The evidence was inadmissible against defendant, who was not present at the time and knew nothing about the bill for board.

7. Evidence that on the evening of the killing, and shortly prior thereto, defendant, her father, and brothers met at the father's pool room and had a conversation, and that afterwards defendant and one of the brothers had a conversation in the hall outside, without showing what the conversation was about, did not tend to show a conspiracy between them to kill decedent.

8. Where no conspiracy was shown to exist between defendant, on trial for murder, and her father and a brother to kill decedent, it was error to admit in evidence the statements made by the father and brother with respect to the killing.

9. Where, on a trial for murder, resulting in a conviction of murder in the second degree, the court erroneously admitted testimony of statements of the father and brother of defendant which tended to show that the homicide was committed with malice and deliberation, where but for such evidence defendant might have been found guilty of manslaughter merely, the error was prejudicial.

10. The declaration of a conspirator to a homicide, made after the homicide, is inadmissible against a co-conspirator.

11. On a prosecution for murder, evidence in chief tending to show that defendant was guilty of unchaste conduct, and tending to attack her character by specific acts of immorality in her associations with a third person, was inadmissible.

12. On a prosecution for murder, the petition by decedent for the annulment of his marriage to defendant was not competent evidence.

¶ 10. See Criminal Law, vol. 14, Cent. Dig. § 1002.

13. Under Rev. St. 1899, § 4659, providing that a physician shall be incompetent to testify concerning any information acquired from any patient while attending him in a professional capacity, and which information was necessary to enable him to prescribe for the patient, a physician, over the objection of a patient, cannot testify to conversations with her, in the absence of a showing that the conversation related to information not necessary for the physician in order to prescribe for the patient; it being presumed that such information was necessary.

14. Where, on a prosecution for murder, evidence of the statements and acts of third persons were admitted in evidence on the theory that a conspiracy to murder decedent existed between defendant and the third persons, the court should instruct the jury that, if a conspiracy was proven, then the evidence of the declarations and acts of the third persons might be considered in considering the guilt or innocence of defendant.

15. Where, on a trial for murder, the court announced that the question of conspiracy between accused and third persons was one of fact for the jury to decide, and of its own volition instructed the jury, it was unnecessary for defendant to ask for instructions on the question of conspiracy, or to call the court's attention to the fact that it failed to instruct thereon.

16. Under Rev. St. 1899, § 2627, requiring the court to instruct on all questions of law, and declaring that a failure to so instruct in cases of felony shall be a cause for granting a new trial in case of conviction, on a prosecution for murder, the failure of the court to instruct that the question of a conspiracy between defendant and third persons to kill decedent was for the jury, and that they must find the existence of the conspiracy before they could consider the evidence of the statements and acts of the third persons, was error.

Gantt, J., dissenting.

Appeal from Criminal Court, Jackson County; Jno. W. Wofford, Judge.

Lulu Kennedy was convicted of murder in the second degree, and appeals. Reversed.

Chas. H. Nearing, Blake L. Woodson, and Thos. J. Mastin, for appellant. The Attorney General, for the State.

BURGESS, J. At the April term, 1901, of the criminal court of Jackson county, the defendant was convicted of murder in the second degree, and her punishment fixed at 10 years' imprisonment in the penitentiary, under an indictment theretofore presented by the grand jury of said county charging her with murder in the first degree for having at said county, on the 10th day of January, 1901, shot and killed with a pistol her husband, Philip H. Kennedy. In due time defendant presented motion for new trial, which being overruled, she saved her exception, and brings the case to this court by appeal for review.

The defense was insanity; the homicide being admitted. The salient facts which led to the killing are about as follows:

The defendant was about 23 years of age at the time of the homicide, and lived with her parents and two brothers, Charles William and Albert K. Prince, commonly called "Bert." The deceased, Philip H. Kennedy, was about 30 years of age at that time, and

was employed as clerk and solicitor in the Merchants' Dispatch Transportation Company, with offices on the second floor of the New Ridge Building, situated on the east side of Main street between Ninth and Tenth, Kansas City. He lived with his father, mother, brother, and sister. The defendant and the deceased had been acquainted for about two years prior to the killing, and in the latter part of 1899 and the early part of 1900 the deceased called on the defendant frequently at her home and at the place where she worked. In the month of April, 1900, Will, the brother of the defendant, noticed the attention of the deceased to the defendant, went to him, and asked him if his intentions were serious. On being answered in the negative, Will Prince requested Mr. Kennedy to cease calling on his sister, and after that time the evidence discloses that they were together but twice until the 4th day of December, 1900. On December 4, 1900, the deceased was called by telephone, while in his office in the Ridge Building, and asked to go at once to the office of Charles H. Nearing, a lawyer in the Nelson Building, at Missouri avenue and Main street, on important business. Kennedy went to Mr. Nearing's office, and was there informed by Mr. Nearing that he would have to marry Lulu Prince or her father would kill him. Kennedy informed Nearing that there was no reason why he should marry Lulu Prince, and that, besides, he was engaged to marry another woman. He left Mr. Nearing's office, went out into the hall, and there met C. W. Prince and Will Prince and the defendant. On that morning, before going to Nearing's office, Will Prince had oiled up his pistol, and put it in his pocket. C. W. Prince and Will Prince told Kennedy that, unless he married the defendant at once, he would be a dead man in five minutes. He then went with the defendant, her father, and brother to the recorder's office for a marriage license, which he procured; and he and defendant then went before Judge Gibson and were married, through threats of violence to deceased by her father and brother. The parties then left the courthouse; Mr. Kennedy returning to the office where he worked. That evening Kennedy visited the Prince household, but slept at his own home, as he continued to do up to the time he was killed. So far as the evidence discloses, he did not see the defendant again up to the time of the homicide. In conversation with Mr. Bullene, he asked the defendant what was the cause of the forced marriage, and she informed him that it was because Kennedy had been engaged to marry her and was about to marry another woman. He asked her if there had been any intimacy between them, and she replied that there had not. He asked her why it was that she wanted to marry a man who wanted to marry another girl, and she replied that "she wanted her revenge." A day or two

before, she called on the city editor of the Star, Capt. Wade Mountfort, and asked him to publish the marriage license. She said that Kennedy had been forced to marry her because he had tried to jilt her, and she said that she wanted him to get some notoriety, and that she wanted him roasted. On the Saturday evening following the marriage the defendant and Will Prince called again at the Star office, saw Mountfort, and requested that an article be published in the Star to the effect that the marriage had been brought about by the fact that Kennedy was about to marry another girl after having been engaged to Lulu Prince. Will Prince stated in the defendant's presence that the marriage was a forced marriage, but that he didn't want that fact published, as it would annul it; and he further stated that there never had been any intimacy between the defendant and Kennedy. It was finally proposed by Mountfort that Bullene accompany Prince and his sister to Kennedy's house to verify their story, and in response to this suggestion Prince assented, saying: "I have had one round with that fellow. I gave him his choice of marrying the girl or going to hell, and he chose to marry her." He called Kennedy a puppy and a coward, and other offensive names, and said that he did not deserve to live. Will Prince, the defendant, and Bullene started on the street car for the Kennedy house, and on the way out Will Prince and the defendant proposed to Bullene that he call Kennedy out on the porch, while he and the defendant stand around the corner of the house. This Bullene refused to do, and Prince and his sister remained in the street, while Bullene entered the house and had a conversation with Kennedy. From the day of the forced marriage, December 4th, up to the day of the killing, January 10, 1901, Will Prince, Bert Prince, and C. W. Prince had conversations with several parties in which covert threats, besides those already mentioned, were made against Kennedy, and statements made in reference to the relations between him and the defendant, her father, and brothers. Four or five days after the forced marriage, R. J. Costello, deputy recorder, who issued the marriage license, met C. W. Prince, and asked him how the couple were getting along. C. W. Prince said that the young lady was at home with him. Costello replied that it would only be a question of time until Kennedy got a divorce, and C. W. Prince said: "I would like to see him get a divorce. He is dealing with the old man now, and he isn't so old he couldn't take care of himself." About a week or ten days before the killing Costello again met Prince on the street car, and asked him again how they (the defendant and deceased) were getting along, and C. W. Prince replied that Kennedy wasn't doing the right thing, to which Costello replied, "That boy will never live with your daughter," and C. W. Prince answered him by saying, "He had

better do the right thing, or the papers will have something to write about."

On the evening of January 8, 1901, Kennedy filed in the circuit court of Jackson county a petition seeking to annul the marriage into which he had been forced to enter. The filing of this suit was published in the morning and evening papers of the 9th, but the summons was never served. About 4:30 on the evening of January 9th Will Prince was seen walking around on the second floor of the New Ridge Building at and near the place where, on the evening of the next day, the killing took place. The same evening the defendant was also seen in the New Ridge Building, on the stairway between the second and third floor, from which place one could see into the office in which Kennedy was employed. That evening, between 5 and 6 o'clock, the defendant met Steve O'Grady, a newspaper reporter on the Kansas City World, at Ricksecker's cigar store, at Ninth and Walnut, where she was waiting for a telephone message from some one, or else trying to call some one by telephone. She had a conversation with O'Grady, an acquaintance, and in this conversation O'Grady asked her what was the cause of the forced marriage—if she and Kennedy had been intimate. She said there had been no intimacy between them, but that Kennedy had been going with her and was about to marry another girl, and that she "had beat her to it," or "had beat her time." O'Grady asked her what she was going to do about the annulment suit, and she answered "that her time would come to get even," or "to get her revenge." He asked her if it would be soon, and she said it would.

On January 10th Bert, Will, and C. W. Prince left home at different times in the morning. Bert went to the New Ridge Building some time between 8 and 11 o'clock on that morning. Will returned home at the noon hour, and ate lunch with his sister. They left the house together, or else joined each other shortly after, and were seen walking together west on Eleventh street, between Park and Olive. When about midway between these streets Will handed the defendant something which she retained. At Eleventh and Brooklyn the defendant got onto an electric car, and as she did so her brother made some remark to her, to which she replied, "All right." This occurred about 3 o'clock. Will went direct to his father's pool hall in the Exchange Building, to which place defendant came shortly afterwards. She went into the pool hall, and had a conversation with her father and her two brothers, Bert and Will, after which she and Will went out into the hall and held a conversation for 15 or 20 minutes, after which she left. At about 4:30 o'clock Bert appeared at the fire department headquarters on the east side of Walnut street, between Eighth and Ninth, one block north of the Ridge Building. He left there, going south, across Ninth

street, in the direction of the Ridge Building. Between 4:30 and 5 o'clock he and the defendant were seen engaged in conversation in the hallway of the Ridge Building on the third floor. They separated, she going to Dr. Cross' office in the Rialto Building, a block and a half east, while Bert took the elevator on the third floor, riding to the first floor, and went out of the Main street entrance. Some time between 4:30 and 5 o'clock the defendant called at Dr. Cross' office, and told him she was not Mrs. Case Patten, whom she had represented herself to be on her previous visits, but that her name was Mrs. Kennedy; that the story she told him on the occasion of her last visit, to the effect that she had gotten rid of her child by an abortion, was not true, and that she was still in a pregnant condition. She requested the doctor to go to Mr. Kennedy's office, and tell him that she was in the same condition that she had been in. The doctor at first refused to go, and said that he would telephone to Mr. Kennedy to come to his office. He did telephone to Mr. Kennedy, but Kennedy informed him that he could not leave his office until after 6 o'clock. The defendant again requested the doctor to go and see Mr. Kennedy, and urged him to do so, saying that it would be a great favor, as the papers in the annulment suit would be served that night, and then she added: "My father will make me fight this suit, and everything will come out." She also said, in urging the doctor to go and see Kennedy, "I am afraid my father and brothers will hurt him." I don't remember, which she said—harm or shoot him, or do some damage to him." He asked her what was the great hurry of having the matter attended to that night, and she replied that "the papers will be served to-night, and it must be attended to this evening." The defendant was in and out of the doctor's office three times that afternoon, and after he consented to go she left, and he, after attending to some matters at his office, followed. It was about 45 minutes after her first call that the doctor started from his office in the Rialto Building for the Ridge Building. He entered the Ridge Building at the Walnut street entrance, which is on a level with the third floor of the new Ridge Building, and walked through the hall to the stairway leading from the third floor down to the second floor, on which floor Mr. Kennedy worked. He met the defendant at the top of the stairs on the third floor, and stopped and conversed with her a moment. She said to him, "You go down and see him, and then I will come down." She, however, preceded Dr. Cross down the stairway, and stepped back into the corridor toward the east, so she couldn't be seen from the entrance of the office of the Merchants' Dispatch Transportation Company. Dr. Cross came down the stairs, went to the door of the office, and asked for Mr. Kennedy, who was called to the door by Roland Butler, and

he (Kennedy) stepped out into the hall. As Mr. Kennedy stepped out in the hall, he was addressed by Dr. Cross, and just then Roland Butler, who was looking through a crack in the door, noticed the defendant approach Mr. Kennedy and Dr. Cross, unbuttoning her jacket. When she saw Butler she stepped back. Dr. Cross told Mr. Kennedy what the defendant had requested him to tell him, and just then the defendant stepped up to them. She said to Mr. Kennedy, "Wait a minute; I want to talk to you." Kennedy replied, "I haven't got anything to say to you." She then said, "Are you going to live with me?" and he answered, "No." While these questions were being asked and answered, Dr. Cross turned to the south to go toward the elevator. Kennedy and the defendant had moved away a few steps east in the hall. Dr. Cross had gone not over ten feet when he heard the report of the revolver. When the defendant began to shoot, Kennedy turned toward the west and started for the door of the office; the defendant continuing to fire very fast. Tom Kennedy, the brother of the deceased, and Roland Butler, the stenographer, rushed out of the office as quickly as possible. Tom Kennedy grabbed the defendant just as she fired the last shot, and they fell to the floor; she uttering a scream as they fell. Just as Tom Kennedy grabbed Mrs. Kennedy, he was struck from behind a blow by Will Prince, who appeared immediately upon the scene of the tragedy. Tom Kennedy sprang to his feet and grappled with Will Prince, and with the assistance of two others, who had rushed out of the office, pushed him against the wall. Prince said to Tom Kennedy, "Who in the hell are you?" and Kennedy answered, "Yes, who in the hell are you?" to which Prince answered by saying, "I thought you were striking a lady." The defendant then turned to the three men who were holding Will Prince, struggling to get away, and said, "Turn that man loose; it was I who did the shooting." No sign of recognition passed between the defendant and her brother. Prince was then released, as he was not recognized at the time, and left his hat, which had fallen off in the scrimmage, and ran upstairs to the third floor, down the hall, and out the Walnut street entrance. Kennedy got just inside the office, uttering the words, "It wasn't her gun that did it," and fell dead. He had been hit six times, the number of shots fired. One of the shots entered from the front of his body, one from the side, two in the back, one pierced his ear, and the other struck his forehead. J. J. Mountjoy was standing in the east and west hallway on the third floor, about 30 feet east of and facing the stairway leading from the third to the second floor, at the time his attention was attracted to the shooting, and saw Will Prince struggling with those who were holding him when he reached the top of the stairs on the third floor. Tomlin-

son and Kincaid were in a printing office within a few feet of the door, about 50 feet east of the place of the killing.

The defendant stated in conversation with the police matron, Mrs. Pattie Moore, after the shooting, that she went to the Ridge Building to talk to the deceased; that he refused to talk to her, and pushed or brushed her aside; and that she lost her temper and shot him. The defendant was visited that evening at the police station by her father and brother Bert. Will Prince claimed his hat when it was identified at the coroner's inquest. Before the defendant was seen by her father and brother, she told Mrs. Moore that she was afraid her father would not speak to her; but when her father and Bert came to the police matron's room they and the defendant greeted each other pleasantly, conversed in low tones, and laughed and smiled while talking. Her manner and appearance at the police station, where she remained from Thursday evening to Saturday afternoon, was cool and collected, and it was shown by the testimony of Mrs. Moore, who was the mother of 11 children, that the defendant suffered no miscarriage while in her charge, and showed no signs or symptoms of pregnancy. It was shown by the testimony of Dr. Boorman, the jail physician, who saw the defendant almost daily from January 12th to June 12th, that she suffered no miscarriage while in the county jail, and showed no signs or symptoms of pregnancy. This was in substance the case in chief made by the state. The defendant did not take the stand in her own behalf.

The evidence upon the part of the defense tended to show that Kennedy began paying attention to defendant about two years before the homicide, and under promise of marriage he debauched her. From the illicit intercourse between them she became pregnant, and he had her go away; but she returned. This was during the year 1899, but that thereafter, early in the year 1900, he began to treat her with indifference, in consequence of which she became very sad, low-spirited, and cried a great deal. Upon investigation by her father, he learned from her that Kennedy had maintained criminal relations with her under promise of marriage. Her father and brother Will Prince then compelled Kennedy by threats of violence to marry her; but he refused to live with her, and in a few days brought suit against her for an annulment of the marriage. She asked him to live with her, if only for a short time, until she could live her trouble down, and then was willing to let him obtain a divorce, if he desired. This he refused to do. She continued to become more moody and worried. On Saturday, January 5th, she went down town. She came home and went to her room. When she was called for supper, she did not respond. A servant went to her room, and found her on the bed crying. In about half an hour the servant

went back, and found her very sick. A doctor was called, who described her condition as follows: "She was ill and restless, and complained of having lost sleep, with dilated pupils. Her appearance was unusual. It was an unusual appearance." She was confined to her bed until Tuesday. Meanwhile a suit for divorce had been filed by Mr. Kennedy. She came home about noon, went into the kitchen, laid her head upon the table, commenced crying, and cried for half an hour. That night she was unable to sleep, and talked of Kennedy and his wrong to her. The next morning she did not get up early, and remained around home until after luncheon. She then dressed and went down town. Learning of this suit, she went to the office of Dr. Cross, and, while she had stated to him on a former occasion that she was Mrs. Case Patten and thought she was pregnant, she stated to him that this was not so, that she was Mrs. Kennedy, and wanted him to tell Kennedy that she said she was in the same condition that she had been all the time. On the day of the homicide, and a few minutes before it occurred, she was in Dr. Cross' office, and at her request he went to see Kennedy for her, when the homicide occurred as before stated. Other facts will be hereafter stated in course of the opinion.

The court instructed for murder in the first and second degrees and manslaughter in the fourth degree.

I shall not undertake in this opinion to call attention to the many errors with which this record abounds, nor to say that defendant is not guilty, under the facts and law, of some criminal offense; but I shall try to satisfy the unbiased mind, however enormous the crime with which defendant stands charged, that she did not have a fair and impartial trial, but was manifestly convicted in utter disregard in many respects of the law in regard to criminal prosecutions.

In the first place, notwithstanding the statute (section 2627, Rev. St. 1899) provides that, after the jury is impaneled and sworn, the prosecuting attorney must state the case and offer the evidence in support of the prosecution, and, second, the defendant or his counsel may then state his defense and offer evidence in support thereof, and the parties may then respectively offer rebutting testimony, the prosecuting attorney was permitted to make two statements—an opening statement, and a reply statement to the statement in behalf of the defendant—and in the latter, over the objection and exception of defendant, was permitted to make an assault upon defendant's character, and to state, "If evidence in support of the contention suggested by defendant's counsel is brought before you, the state in rebuttal will introduce along two lines: First will relate to the character and reputation of the defendant, a line of investigation unpleasant to those connected with criminal prosecution. * * * In reference to the first branch of

rebuttal testimony to which I have referred, it will be shown in evidence by reputable people that, in the years prior to the time when the defendant in this case came into the life of the deceased, her reputation, her conduct, and her course of life were such that she couldn't have been led by him aside from the path of virtue." There had been no statement that defendant would be placed upon the witness stand to testify in her own behalf, nor was she; but, even if she had been, unless she first put her character in issue by offering evidence of her good character, the prosecution could not have attacked it—"the reason being that such evidence is too likely to move the jury to condemnation irrespective of his actual guilt of the offense charged." 3 Greenleaf on Evidence (16th Ed.) § 14, b; State v. Lapage, 57 N. H. 289-296, 24 Am. Rep. 69; People v. Sharp, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851. Citations are hardly necessary for support of this fundamental rule. These statements, made as they were with the approbation of the court, could but have led the jury to believe they were true, and were just as prejudicial as if they had been proven, and could but have, from the very inception of the trial, imbued the jury with the idea that defendant was for years prior to the time she formed the acquaintance of deceased of bad reputation for chastity. This of itself is sufficient to reverse this case.

It is said that the court erred in permitting the introduction of testimony on the part of the state for the purpose of showing a conspiracy between defendant, her father, and brothers to kill Kennedy; they not being included in the indictment, nor such an averment contained therein. There is some conflict among the authorities upon this question. For instance, Mr. Wharton, in his work on Criminal Evidence (9th Ed., § 700), says: "It makes no difference, as to the admissibility of the act or declaration of a conspirator against a defendant, whether the former be indicted or not, or tried or not, with the latter, for making one a codefendant does not make his acts or declarations any more evidence against another than they were before; the principle upon which they are admissible at all being that the act or declaration of one is the act or declaration of all united in one common design, a principle which is wholly unaffected by the consideration of their being jointly indicted." The same rule seems to be announced in Bishop's New Criminal Procedure, §§ 1248, 1249; 3 Greenleaf on Evidence (13th Ed.) § 92. On the other hand, it was held in State v. Carroll, 31 La. Ann. 860, that the conversation of an accused, on trial for murder after the alleged killing, with a person jointly indicted for the murder, are not admissible in evidence when the indictment does not charge conspiracy. The court observed: "It is too elementary to require rea-

soning that, if the indictment did not charge a conspiracy, the conversations were not admissible." While we are constrained to hold in accordance with the rule announced by Mr. Wharton, we do so very reluctantly, for certainly the better practice is to make all of the conspirators parties defendant to the indictment, or to aver therein the existence of such conspiracy, the parties thereto, if known, and their purpose; for then the defendant upon trial will have reason to anticipate what evidence will, or may be, offered against him, and to prepare to meet the same, otherwise he will not. A conspiracy is a combination by two or more persons to do a thing criminal or unlawful in itself, and may be proven by facts and circumstances, if sufficient; and, when shown to have existed, then the statements and acts of each of the conspirators, made or done in pursuance of the common design, may be proven against the others upon a prosecution against them for the commission of the crime, but nothing said or done by them after the crime has been accomplished is admissible. But, to justify the admission of such evidence, the proof must show *prima facie*, in the first place, in the opinion of the judge, that the conspiracy existed, and thereafter the question of the actual existence of such conspiracy submitted to the jury. State v. Walker, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133; State v. McGee, 81 Iowa, 17, 46 N. W. 764, and authorities cited. It will not be contended that the evidence did not show a conspiracy between defendant, her father, and brothers to compel Kennedy to marry defendant, and to kill him if he refused to do so, nor that there was not a conspiracy between defendant and her brother William to kill him if he refused to live with her after such marriage, nor that the homicide was not committed in pursuance of the conspiracy with William; hence his acts and statements with respect thereto, after such conspiracy was formed, up to and at the time of the homicide, were admissible in evidence against her. But I contend that there was no such conspiracy as this last one, either expressed or implied, between defendant, her father, and her brother Bert Prince, or between defendant and either of them, and that therefore their statements and acts, whatever they may have been, were inadmissible in evidence against her.

To establish the conspiracy between defendant, her father, C. W., and Will Prince, the state was permitted to show by one Fred S. Bullene, a newspaper reporter, that he was in the recorder's office when Kennedy, defendant, her father, and her brother Will Prince came in, and he thought Kennedy asked for a marriage license; that the clerk started to issue it, when Kennedy got up and started to come over where witness was; that he had a pen in his hand, and had started to take notes; that, as he started toward witness, C. W. Prince stepped up, in

between Kennedy and himself, and, with a motion of his hands to his side, either touching him or Kennedy, shoving them apart; that C. W. Prince then said, "No, you don't; this isn't over yet;" that Kennedy then said, "All right." Witness then testified to the facts attending the ceremony of marriage. The objection to the admission in evidence of these statements by Bullene was upon the grounds "that it was incompetent, irrelevant, and immaterial; but the objection was overruled and exceptions saved. But, whether the objection was specific enough, or not, the remark of C. W. Prince, "No, you don't; this isn't over yet," had no reference whatever to anything other than the marriage, and cannot be tortured into anything tending to show a conspiracy between defendant and him and defendant's brother Will to kill Kennedy if he did not live with defendant after he was married to her. The preliminary steps to the marriage were then being arranged, and the expression and acts of C. W. Prince could not by any fair construction have had reference to anything else.

Another circumstance relied upon as tending to show a conspiracy between defendant and her father to kill Kennedy was that, after the marriage, he presented a bill to Kennedy for \$40 for one month's board of his wife, which Kennedy refused to pay, and, upon being asked by defendant's father, "Are you going to pay it?" deceased said, "No," to which the father replied, "I will show you what a low-down son of a bitch you are; you don't deserve to live." Defendant was not present at the time of this controversy, nor is it pretended that she knew anything about the bill, its presentation, or that she was in any wise concerned in it; and the conversation between Kennedy and C. W. Prince with respect thereto was clearly inadmissible against defendant, nor did the remark of C. W. Prince to Kennedy have any tendency to show a conspiracy between him and defendant to kill Kennedy, or even a threat by C. W. Prince to do so himself.

Still another circumstance relied upon by the state as tending to show a conspiracy between defendant, her father, and her two brothers was that on the evening of the killing, and shortly prior thereto, Will Prince went to his father's pool room, where defendant soon joined him, and that she, her father, and two brothers had a conversation, after which she and Will went into the hall and held a few minutes' conversation, in which a witness stated "they seemed to be very much interested," after which, somewhere between 3:30 and 4 o'clock she left. There was no evidence of any whispered conversation, as claimed by the state, between defendant and Will, nor as to what the conversation was about. But it will scarcely be contended, even if it were proven that defendant and her father and brothers were engaged in a private conversation, that such an

occurrence is unusual between persons occupying such a relation, or that it could be inferred therefrom that they were conspiring to kill Kennedy. Upon these and other facts, not tending in any way to show that C. W. Prince and Bert Prince had conspired with defendant to kill Kennedy, was the basis for the admission in evidence against defendant of the statement of Bert Prince, when reading an account of the suit in an evening paper by Kennedy against defendant for annulment of the marriage. "That was a shotgun wedding, and you will read something a good deal worse than that," and other statements made by him, and also the statement of a witness for the state by the name of Costello, who testified that on the evening of the homicide, and just after it occurred, he met C. W. Prince at the entrance to the Ridge Building, and spoke to him; that about that time somebody came running out of the building, and said there was a woman up there shooting her husband. Witness said to Prince, "That is your daughter up there, shooting that fellow Kennedy, her husband," to which Prince replied, "That is who it is; keep still."

When the evidence of this last witness was offered, it was objected to by counsel for defendant upon the grounds that it was "incompetent, irrelevant, immaterial, that there is no charge of any conspiracy in the indictment, it is not part of the *res gestæ*, and there has not been any evidence of any nature tending to show a conspiracy." The court observed: "The question of conspiracy is a question of fact, that is, of course, left to the jury. It is not necessary for the indictment to charge a conspiracy in order for it to be proven. * * * It is not offered by the state as a part of the *res gestæ*. The question for the jury is whether a conspiracy is proven or not. I will overrule the objection." Defendant saved exception. As there was no conspiracy shown to exist, as we contend, between defendant, her father, and Bert Prince, or between her and either of them, to kill Kennedy, it was error to admit the statements made by them, or of their acts at any time, with respect to the homicide, in evidence against her. If the evidence showed them to be guilty of any connection with the homicide, it was that of accessories or principals, but certainly not as conspirators. It was upon the theory, alone, that they had conspired to take the life of Kennedy, that the testimony with respect to the statements and acts of C. W. and Bert Prince was admissible, which tended to show that the homicide was committed with malice and deliberation, and defendant guilty of murder in the first degree, when but for such evidence defendant might have been found guilty of manslaughter; hence, prejudicial to her.

But the conversation between C. W. Prince and this witness was inadmissible, even though C. W. Prince was a conspirator to the

homicide, because Kennedy had then been killed, and the conspiracy, if there ever was one, ended, and anything said by Prince thereafter with respect to the homicide was inadmissible as evidence against the defendant. 3 Greenleaf on Evidence (16th Ed.) § 94. It was not offered as *res gestæ*.

The state was permitted to introduce, over the objection and exception of defendant, evidence in chief as follows: That in the summer of 1900, one Case Patten, a professional baseball player, came to Kansas City as one of the pitchers on the local team, and that he and defendant soon thereafter became acquainted; that he called upon her a few times at her home. That she called for him on several occasions where he boarded. That they walked together on the streets, and were out riding together upon one occasion. That she wore his gold watch and chain during the summer of 1900, and she loaned him her diamond ring, which he wore. That in the latter part of September or the early part of October the defendant called to see Case Patten at his boarding house one evening, and arrangements were made that Patten should call at her home on the next morning and return to her her ring. This Patten did not do, as he got out of town that night without letting the defendant or her family know of his departure. On the 15th of October the defendant went to the police station in Kansas City, and stated to Andy O'Hare, a city detective, that Case Patten had left Kansas City with a diamond ring belonging to her, and requested that a letter be written to the chief of police of Westport, N. Y., where Patten lived, requesting that the ring be secured and returned. In defendant's presence the following letter was written by Mr. Hickman, the secretary of the chief: "Kansas City, Mo., Oct. 15, 1900. Chief of Police, Westport, N. Y.—Dear Sir: Miss Lulu Prince called at my office this morning, and reported that last July she loaned a small diamond ring to Case Patten, who was a ball player with our local club the last year, and that he left for his home (which is your city) Saturday night, taking the ring with him. Will you kindly see Mr. Patten, and get the ring, and express it to me. Thanking you in advance, I am, very truly, _____, Chief of Police." That the defendant called at the police station at police headquarters to inquire in reference to this matter, and finally, no reply having been received, she told O'Hare that she was going to Westport, N. Y., and see Patten and get her ring. O'Hare asked her the value of the ring, and, when the defendant told him it was worth about \$20, he suggested to her that it would be cheaper to let him keep it. That the defendant replied that she intended to go and see Patten and get the ring back, even if it cost her several times its value. That she left the city for Westport, N. Y., her brother Will knowing of her departure and the reason of it. That he tried to dissuade her from the

trip, and offered to buy her another ring, but she refused the offer. That shortly after her return she met O'Hare, showed him a ring, and told him she had been to Westport, N. Y., and had seen Patten, and had recovered the ring.

The admission of this evidence, if it be entitled to be called such, is attempted to be justified upon the ground that it was competent to go to the jury to disabuse their minds that the mind of defendant had been deranged by brooding over the faithlessness of deceased; that deceased was not a suitor, but had been a visitor, and that during the summer of 1900 the defendant was the constant associate of another young man, Case Patten, to whom she had loaned her ring; that she was wearing his watch, was seeking his company, and made a trip to New York to get her ring; that it was entirely competent to prove her acts and statements, to show she was perfectly rational, and that her conduct was that of a sane, and not an insane, person, as the defendant intimated she was. But this position is absolutely untenable, for the record shows that it was not offered for any such purpose, but was offered for the sole purpose of besmirching defendant's character. It was introduced in chief, when it could not properly have been introduced under any circumstances otherwise than in rebuttal of evidence offered by defendant as to good character (State v. Gabriel, 88 Mo. 631; State v. Creson, 38 Mo. 372; Wharton, Crim. Ev. [8th Ed.] §§ 62, 63; People v. Bodine, 1 Denio, 281), and, as defendant did not testify, there was nothing to rebut.

Great stress was placed upon the fact that Case Patten was a professional baseball player, both in the opening statement of the prosecuting attorney to the jury and throughout the trial. For instance, the following is a sample of the questions that were permitted to be asked over the objection and exception of defendant: "Q. I will ask you to state if you saw the defendant and Case Patten, this baseball pitcher, together in the summer and fall of 1900. A. I have, walking up and down Olive street." And as if to make that fact more prominent, and by innuendo that he was a disreputable character, the court took it upon itself to ask a witness for the state the following questions: "He played with a professional baseball team? Witness: Yes, sir. The Court: They went on trips sometimes? Witness: Yes, sir. The Court: Did he play on Manning's team here? Witness: Yes, sir. They went out in Kansas for a trip." Can it be thought for a moment that if it had been some gentleman of high character, who was engaged in any unquestionable business, any such questions would have been asked the witness? The question furnishes its own answer. These facts threw no light whatever upon the homicide; for certainly defendant's flirtation with Patten could not, nor did not, furnish

a motive for the homicide, and no one will so contend, so that it must follow that they were inadmissible for any purpose.

Moreover, when the facts connected with this episode are considered in connection with the testimony of Dr. Cross, hereafter discussed, also introduced in chief by the prosecution, that she was pregnant by Patten, this was to assault defendant's private character by proving specific acts and by innuendoes, which was clearly erroneous and prejudicial.

But it is said the facts connected with the Patten episode were properly admitted in evidence to prove her acts and statements, to show she was perfectly rational; that her conduct was that of a sane, and not an insane, person, as the defendant insisted she was. But there is not one word in this immense record of over 650 typewritten pages which tends to show that it was introduced or admitted in evidence for any such purpose, nor was it, but that it was admitted for the sole purpose of showing defendant to be guilty of unchaste conduct, and to attack her character by specific acts of immorality and the associate of a disreputable person, clearly appears. The facts with respect to defendant's association and connection with Case Patten, and everything connected therewith and growing out of it, had nothing whatever to do with the homicide, either directly or indirectly, and threw no light upon it, nor the condition of defendant's mind at the time of homicide, and were not, as it seems to us, within the range of legitimate inquiry, but were even beyond what might be properly called the boundary line of even the shadow of evidence, improperly admitted, and prejudicial to defendant.

So with respect to the contents of the petition for the annulment of the marriage, which counsel for the state say in their brief was read to the jury, they were nothing more than the statements of deceased, which were not competent evidence for any purpose or from any standpoint, and no more so than if the statements had been merely verbal, which no one will seriously contend would have been permissible.

It is also said that the court erred in permitting Dr. Cross, a physician who prescribed for defendant, to testify over her objections to statements made to him during that time. The following occurred: "Q. Before you proceed to that, did you make an examination? A. Yes, sir. Q. Did she give you a history of her condition? A. Simply a history that led me to believe. Q. What did she say? Mr. Nearing: Wait a minute. We object to that as incompetent and privileged conversation. The Court: You are asking what the defendant said? Mr. Hadley: Yes, sir. The Court: Overruled. Q. I will ask you to state to the court whether or not she made any statement to you, on the occasion of the third visit, whether or not she was then in a pregnant condition? Mr. Nearing: Object-

ed to as incompetent, irrelevant, and immaterial, and privileged communication. The Court: That isn't necessarily privileged communication. The Court: I will ask you the question. You can save your exception to it. When she came to you, did she call for treatment for any purpose with reference to her pregnancy? Mr. Nearing: Objected to as incompetent, irrelevant, and immaterial, and privileged communication. The Witness: Oh! can't say. She asked treatment for sleeplessness, but not for pregnancy. The Court: You may state whether at that time she said she was pregnant or not. Mr. Nearing: Objected to as incompetent and immaterial, and privileged communication. The Witness: I asked her if she was all right otherwise. She said, 'All right.' Mr. Nearing: Exception, and asked that it be stricken out for the same reason. The Court: Overruled. Mr. Nearing: Exception. Mr. Hadley: Answer the question. The Witness: I understood from her she was not. Mr. Hadley: Not what? The witness: Pregnant. Mr. Woodson: We move to strike it out. The Court: Strike out what? Mr. Woodson: I asked her if she was all right otherwise, and she said, 'Yes, sir.' The Court: I am ruling it is not privileged for her to say whether she was pregnant or not. I hold that is not a privileged communication. Mr. Woodson: Exception. The Court: That is a communication that may be made to anybody. Mr. Woodson: Exception. Q. I will ask you to state to the jury whether or not she told you about having been treated—about having had an abortion performed by another physician in the city. Mr. Nearing: Objected to as incompetent, irrelevant, immaterial, and privileged communication. The Court: Objection overruled. Mr. Nearing: Exception. The statement made to you on the occasion of her third visit, namely, that she wasn't in a pregnant condition, was true or not true? Mr. Nearing: We object to that. The Court: Overruled. Tell what she said. Mr. Nearing: Exception." It will be observed that no exceptions were saved to the action of the court in overruling a number of objections to questions propounded to this witness, but beginning with the question propounded by the court, and beginning with the following language: "I will ask you the question. You can save your exceptions," etc., and from that on, the objections were timely made and exceptions duly saved.

Section 4659, Rev. St. 1899, provides that a physician or surgeon shall be incompetent to testify concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician or do any act for him as a surgeon. We take it that the physician or surgeon must as a general rule, under the statute, determine for himself whether the information acquired by him from his patient

is necessary for him to prescribe for such patient, and, in the absence of some showing to the contrary, as in the case at bar, the presumption must be indulged that the information in question was necessary for that purpose; otherwise, he would not desire it. To rule otherwise would be to usurp the prerogative of a physician learned in his profession, which we have no inclination or right to do. We, of course, do not mean to say that we will not pass upon questions which are apparent to the ordinary observer, and to one not learned in the sciences of medicine and surgery, which have nothing whatever to do with the case under consideration, and hold them not privileged. In *Gartside v. Conn. Mutual Life Ins. Co.*, 76 Mo. 446, 43 Am. Rep. 785, it said: "Not only the statements from the patient, but the information obtained through his observation or examination while attending the patient in a professional capacity, are privileged." In the case of *Edington v. Mutual Life Ins. Co.*, 67 N. Y. 194, the court said: "The statute is very explicit in forbidding a physician from disclosing any information received by him which is necessary to enable him to prescribe for a patient under his charge. It is a just and useful enactment, intended to give protection to those who were in charge of physicians from the secrets disclosed to enable them to properly prescribe for diseases of the patient. To open the door to the disclosure of secrets revealed on the sick bed or when consulting a physician, and destroy confidence between a physician and the patient, it is easy to see, might tend very much to prevent the advantages and benefits which flow from the confidential relationship. The point made, that there was no evidence that the information asked for was essential to enable the physician to prescribe, is not well taken, as it must be assumed from the relationship existing that the information would not have been imparted, except for the purpose of aiding the physician in prescribing for the patient. Aside, however, from this, the statute in question, being essential, should receive a liberal interpretation, and not be restricted by any technical ruling."

No error was committed by the exclusion of the evidence of the witnesses for defendant Lewis and Kuhn, unless what they testified to was part of the *res gestæ* (*State v. Curtis*, 70 Mo. 594; *State v. Nocton*, 121 Mo. 537, 26 S. W. 551; *State v. Punshon*, 124 Mo. 457, 27 S. W. 1111; *State v. Fitzgerald*, 130 Mo. 407, 32 S. W. 1113; *State v. Bauerle*, 145 Mo. 1, 46 S. W. 609); and we do not think it was.

While the authorities all hold that "it is for the court in the first place to say whether there is any evidence of a conspiracy, and for the jury to determine whether there was one and its objects" (*State v. Walker*, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133; *State v. McGee*, 81 Iowa, 17, 46 N. W. 764; 2

Thompson on Trials, § 2455), and the court so announced from the bench, the case was tried by the state upon the theory that there was a conspiracy between defendant, her father, and brothers, Bert and Will Prince, to force the deceased to marry her, and to kill him if he did not do so and thereafter live with her, and the case is so presented in this court, yet the trial court ignored this theory of the case in the instructions—in fact, did not say one word about a conspiracy, but usurped the province of the jury in that regard, regardless of the law governing the case. In *State v. McGee*, *supra*, it is said: "The rule is, as to a conspiracy, to justify such evidence, that the proof must show *prima facie*, in the opinion of the judge, its existence. 1 Greenl. Ev. § 111; Rosc. Crim. Ev. (7 Am. Ed. 1874) §§ 417, 418; *State v. George*, 29 N. C. 321; *Card v. State* (Ind.) 9 N. E. 591. The question of the sufficiency of such proof is one peculiarly for the determination of the trial court. *Card v. State*, *supra*. It should be borne in mind that the question of the actual existence of a conspiracy is one to be finally submitted to the jury, and that the finding or conclusion of the trial judge is only a basis for the admission of evidence."

The court should have instructed the jury in effect as was done in *Hardin v. State*, 4 Tex. App. 355; that is, "if you believe from the evidence that the state has proven a conspiracy between the defendant, her father, and brothers, or with any of them acting with her, to force Kennedy to marry her, and to take his life if he refused to do so and to live with her thereafter, and that she and her father and brothers, or any of them, acting with her, did so force Kennedy to marry her, and did so take the life of Kennedy because he thereafter refused to live with her, then, in considering the guilt or innocence of the defendant, you may take into consideration every act and declaration of each member of the confederacy in pursuance of the original concerted plan, and with reference to the common object, which has been given in evidence before you." *Thompson on Trial*, § 2455.

As the court announced from the bench that "the question of conspiracy is one of fact the jury has to decide," and of its own volition instructed them, it was wholly unnecessary for defendant to ask it to instruct on the question of conspiracy, or, after the instructions were read, to call its attention to the fact that it had failed to do so, because it cannot, under such circumstances, be presumed that it was an oversight that it did not do so. As to whether or not there was a conspiracy between defendant and others to kill Kennedy was a question to be found in the affirmative by the jury before the statements and acts of the conspirators could be considered in evidence against defendant, and the court should have

so instructed the jury, whether asked to do so or not (section 2627, Rev. St. 1899), and in failing to do so committed error.

For these intimations the judgment should be reversed, and the cause remanded.

FOX, J., concurs.

GANTT, J. (dissenting). The defendant was indicted by the grand jury of Jackson county at the February term, 1901, for the murder of her husband, Philip H. Kennedy, on the 10th day of January, 1901. The cause was tried at the succeeding April term of said court, and resulted in a verdict of guilty of murder in the second degree on the 18th day of June, 1901. A large number of witnesses testified, and the transcript includes more than 600 pages. An extended and detailed statement of the facts in evidence is essential to an understanding of the various propositions urged by defendant for a reversal of the judgment and sentence. As gleaned from the mass, the following is an abstract of the facts proven:

Lulu Prince Kennedy, the defendant, was about 23 years old at the time of the murder. She had been a stenographer for about three years, having been employed in a number of different offices in Kansas City. She lived with her parents near Olive and Peery avenue, and her two brothers, Charles William (commonly called "Will") and Albert (commonly called "Bert") Prince. The latter, a professional mandolin player, who claimed to have returned in the December prior to the killing from a trip around the world, also resided at the same place. The defendant's father conducted a pool room in the Exchange Building, at Eighth and Central. The deceased, Philip H. Kennedy, who was about 30 years of age, had been employed for a number of years as a clerk and solicitor with the Merchants' Dispatch Transportation Company, with offices on the second floor of the New Ridge Building, situated on the east side of Main street, between Ninth and Tenth. He lived with his father, mother, brother, and sister at 2305 Troost avenue. The defendant and the deceased had been acquainted for about two years prior to the killing, and in the latter part of 1899 and the early part of 1900 the deceased called on the defendant frequently at her home and at the place where she worked. In the month of April, 1900, Will, the brother of the defendant, noticed the attentions of the deceased to the defendant, went to him, and asked him if his intentions were serious. On being answered in the negative, Will Prince requested Mr. Kennedy to cease calling on his sister, and after that time the evidence discloses that they were together but twice until the 4th day of December, 1900. In the summer of 1900, Case Patten, a professional baseball player, came to Kansas City as one of the pitchers on the local team, and he and the defendant soon became acquainted with

each other. She called frequently at the place where he roomed, and he called on her at her home, taking her riding and walking, and was seen frequently in her company. He gave her his gold watch and chain, which she carried during the summer of 1900, and she loaned him a diamond ring, which he wore. These intimate relations apparently continued through the summer of 1900 and up until the close of the baseball season. In the latter part of September or the early part of October, the defendant called to see Case Patten at his boarding house one evening, and arrangements were made that Patten should call at her home on the next morning and return to her her ring. This Patten did not do, as he got out of town that night without letting the defendant or her family know of his departure. On the 15th of October the defendant went to the police station in Kansas City, and explained to Andy O'Hare, a city detective, that Case Patten had left Kansas City with a diamond ring belonging to her, and requested that a letter be written to the chief of police of Westport, N. Y., where Patten lived, requesting that the ring be secured and returned. In defendant's presence the following letter was written by Mr. Hickman, the secretary of the chief:

"Kansas City, Mo., Oct. 15, 1900.

"Chief of Police, Westport, N. Y.—Dear Sir: Miss Lulu Prince called at my office this morning and reported that last July she loaned a small diamond ring to Case Patten, who was a ball player with our local club the last year, and that he left for his home (which is your city) Saturday night, taking the ring with him. Will you kindly see Mr. Patten, and get the ring, and express it to me. Thanking you in advance, I am, very truly,
_____, Chief of Police."

The defendant called at the police station at police headquarters to inquire in reference to this matter, and finally, no reply having been received, she told O'Hare that she was going to Westport, N. Y., and see Patten, and get her ring. O'Hare asked her the value of the ring, and, when the defendant told him it was worth about \$20, he suggested to her that it would be cheaper to let him keep it. The defendant replied that she intended to go and see Patten, and get the ring back, if it cost her several times its value. She left the city for Westport, N. Y.; her brother Will knowing of her departure, and the reason of it. He tried to dissuade her from the trip, and offered to buy her another ring; but she refused the offer. Shortly after her return she met O'Hare, showed him a ring, and told him she had been to Westport, N. Y., and had seen Patten, and had recovered the ring. About the last of October, or during the first week in November, the defendant went to the office of Dr. Cross, in the Rialto Building, at Ninth and Grand avenue, and told him that she was the wife of Case Patten, the

baseball player; that she was in a pregnant condition, and wanted him to perform an abortion on her, as her husband would lose his position if it was known that he was a married man. Dr. Cross refused to perform the abortion, and she left. The doctor made no examination of the defendant by which her pregnancy could be determined, taking her statement on that matter as true. Some time after the first part of December she called again on Dr. Cross, and continued to represent herself as Mrs. Case Patten, and informed him that she had had an abortion performed upon her by another physician, and asked him for some treatment for nervousness. The doctor gave her a prescription for a simple nerve sedative. Dr. Cross was not acquainted with the deceased. He did not see the defendant again until the day of the killing.

On December 4, 1900, the deceased was called by telephone, while in his office in the Ridge Building, and asked to go at once to the office of Charles H. Nearing, a member of the bar, in the Nelson Building, at Missouri avenue and Main street, on important business. Mr. Kennedy went to Mr. Nearing's office, and was there informed by Mr. Nearing that he would have to marry Lulu Prince or her father would kill him. Mr. Kennedy informed Mr. Nearing that there was no reason why he should marry Lulu Prince, and that, besides, he was engaged to marry another woman. He left Mr. Nearing's office, went into the hall, and there met C. W. Prince and Will Prince and the defendant. On that morning, before going to Nearing's office, Will Prince had oiled up his pistol and put it in his pocket. C. W. Prince and Will Prince told Kennedy that, unless he married the defendant at once, he would be a dead man in five minutes. At this his courage failed him, and he went with the defendant, her father, and brother to the recorder's office for a marriage license. While sitting at the table in the recorder's office, waiting for a deputy to make out the license, Mr. Kennedy saw Fred Bullene, court reporter for the Kansas City Star, and, apparently recognizing him, got up from his chair and started toward him. C. W. Prince stepped between them, and with his left hand, his right remaining significantly in his overcoat pocket, pushed them apart, and ordered Kennedy to go back and sit down, remarking, "This thing is not over yet." While in the recorder's office Will Prince and C. W. Prince kept their hands apparently on their pistols in their overcoat pockets. After Kennedy's futile effort to communicate with Bullene, he made no further effort to escape, but went resignedly to Judge Gibson's chambers, where a marriage ceremony was performed. The parties then left the courthouse, Mr. Kennedy returning to the office where he worked. That evening Kennedy visited the Prince household, but slept at his own home, as

he continued to do up to the time he was killed. So far as the evidence discloses, he did not see the defendant again up to the time of the murder. On the Saturday following the Tuesday on which the marriage ceremony was performed, the defendant went to the county courthouse and saw Mr. Bullene, the reporter for the Kansas City Star, for the purpose of having another article written, in addition to the one that had been published, giving the bare facts of the marriage. In the conversation that ensued Mr. Bullene asked the defendant what was the cause of the forced marriage, and she informed him that it was because Kennedy had been engaged to marry her, and was about to marry another woman. He asked her if there had been any intimacy between them, and she replied that there had not. He asked her why it was that she wanted to marry a man who wanted to marry another girl, and she replied that "she wanted her revenge." A day or two before, she called on the city editor of the Star, Capt. Wade Mountfort, and asked him to publish the marriage license. She said that Kennedy had been forced to marry her, because he had tried to jilt her; and she said that she wanted him to get some notoriety, and that she wanted him roasted. On the Saturday evening following the marriage the defendant and Will Prince called again at the Star office, saw Bullene and Mountfort, and requested that an article be published in the Star to the effect that the marriage had been brought about by the fact that Kennedy was about to marry another girl after having been engaged to Lulu Prince. Will Prince stated in the defendant's presence that the marriage was a forced marriage, but that he did not want that fact published, as it would annul it; and he further stated that there never had been any intimacy between the defendant and Kennedy. It was finally proposed by Mountfort that Bullene accompany Prince and his sister to Kennedy's house to verify their story, and in response to this suggestion Prince assented, saying: "I have had one round with that fellow. I gave him his choice of marrying the girl or going to hell, and he chose to marry her." He was very bitter against Kennedy in his conversation, calling him a puppy and a coward, and other offensive names, and said that he did not deserve to live. Will Prince, the defendant, and Bullene started on the street car for the Kennedy house, and on the way out Will Prince and the defendant proposed to Bullene that he call Kennedy out on the porch, while he and the defendant should stand around the corner of the house. This Bullene refused to do, and Prince and his sister remained in the street, while Bullene entered the house and had a conversation with Kennedy, in which Kennedy denied that he had ever been engaged to marry Lulu Prince, and said that he was engaged to marry another woman. He also told Bul-

lene the circumstances of the forced marriage as they have been stated above; and this conversation Bullene repeated to the defendant and Will Prince when he rejoined them after leaving the house. No publication was made as a result of the visit.

From the day of the forced marriage, December 4th, up to the day of the killing, January 10, 1901, Will Prince, Bert Prince, and C. W. Prince had conversations with several parties in which covert threats, besides those already mentioned, were made against Kennedy, and statements made in reference to the relations between him and the defendant, her father, and brothers. Four or five days after the forced marriage, R. J. Costello, deputy recorder, who issued the marriage license, met C. W. Prince, and asked him how the couple were getting along. C. W. Prince said that the young lady was at home with him. Costello replied that it would only be a question of time until Kennedy got a divorce, and C. W. Prince said: "I would like to see him get a divorce. He is dealing with the old man now, and he isn't so old he couldn't take care of himself." About a week or ten days before the killing Costello again met Prince on the street car, and asked him again how they (the defendant and deceased) were getting along, and C. W. Prince replied that Kennedy was not doing the right thing, to which Costello replied, "That boy will never live with your daughter," and C. W. Prince answered him by saying, "He had better do the right thing, or the papers will have something to write about." One evening about two or three weeks after the ceremony C. W. Prince met Edward J. Curtin, a shoe salesman, in a drug-store in Kansas City, and Curtin said to him, "Mr. Prince, what is this I hear you are doing?" Prince said, "I am not going to let any son of a bitch jilt my daughter." Then, apparently thinking that Curtin was Bullene, as they resembled each other, Prince said, "You were there, weren't you, Mr. Bullene?" Curtin nodded to this, and then Prince said to him, "That was a pretty good story; and, if things don't go right, you will get a good deal better story than that." He was excited and mad, and, when Curtin asked him if the couple were living together, Prince answered, "No; and he would see that they didn't live together." Curtin also heard somebody in the drug store say to Prince that Kennedy would try to get a divorce from his daughter, and Prince replied: "Let the son of a bitch try it. He is dealing with the old man now, not the girl." On the morning after the forced marriage, Will Prince, in conversation with Jack Caldwell, a machinist, with whom he had some business connections, said, in speaking of the circumstances of the forced marriage, after the ceremony had been performed, "I remarked to him (Kennedy) that he had prolonged his life three weeks by doing what he had done." He also stated to Caldwell that Kennedy had been going

with his sister, and was about to marry another woman, and so they called him down to Mr. Nearing's office, met him when he came out, and took him to the courthouse, and made him get a license and get married. At another time Caldwell asked Will Prince if Kennedy was living with his sister, and Will Prince answered him by saying: "It is an immaterial fact whether he does or not. He has crossed his Rubicon long ago."

On the 1st of January C. W. Prince sent Philip Kennedy by a messenger boy the following bill, to which Kennedy did not reply: "C. W. Prince, Exchange Pool Hall, 717 Central. Kansas City, Mo., Dec. 31st, 1900. Mr. Philip H. Kennedy, Dr., to C. W. Prince. To one month's board and maintenance of your wife, \$40.00. Please remit. [Signed] C. W. Prince." On the envelope were the following indorsements: "Return in 5 days to C. W. Prince, Exchange Pool Hall, 717 Central Street, Kansas City, Mo." Addressed: "Philip H. Kennedy, Care Merchants' Dispatch, Ridge Building, Kansas City, Mo."

On the evening of January 3d, at about 6 o'clock, and just after Mr. Nash and Mr. Porteus, the only two men connected with the office in which Kennedy was employed, had left, C. W. Prince and Will Prince, with their hands again suggestively in their overcoat pockets, appeared at the door of the office and inquired for Mr. Kennedy of Roland Butler, a boy employed there as a stenographer. They stepped in the office and asked Kennedy if he had received the bill they had sent him. Mr. Kennedy replied that he had. C. W. Prince said, "Are you going to pay it?" and Mr. Kennedy said, "No." Mr. Prince said, "You refuse to pay it?" and Mr. Kennedy said: "Yes; you can sue me for maintenance. I am acting under the advice of counsel." Mr. Prince then said to Mr. Kennedy: "I will show you what a low-down son of a bitch you are. You don't deserve to live." At that remark, by reason of some movement on the part of Will Prince or C. W. Prince, Kennedy ran for the door. Will and C. W. Prince tried to intercept him at the door, but Kennedy got out into the hall, pursued by Will Prince; Butler having grabbed C. W. Prince around the waist and holding him back. When Kennedy got to a flight of stairs leading from the second to the first floor, he was either struck down stairs by Will Prince, who was following, or else slipped and fell. He cried for help, and then Will turned and ran back to his father, and called out to him to "come out this way." C. W. Prince tore himself loose from Butler, and the two men ran upstairs to the third floor, and down the hall to the Walnut street entrance. Kennedy, with the blood streaming down his face from a cut over the eye, found a policeman who returned with him to the Ridge Building.

The state offered evidence to the effect that on the Monday following, the first day Ken-

nedy was able to get out of the house after the assault on the evening of the 3d, he sought and secured an order for a peace warrant against C. W. Prince and Will Prince from C. E. Burnham, assistant prosecuting attorney. This evidence the court excluded on the objection of the defendant. On the day after this assault was made Will Prince told Jack Caldwell how Kennedy had dived downstairs from "under the shadow of a gun," and said that "he was the most immaculate coward Christ ever died to save."

On the evening of January 8, 1901, Kennedy filed in the circuit court of Jackson county a petition seeking to annul the marriage into which he had been forced to enter, which was never served. The filing of this suit was published in the morning and evening papers of the 9th, but the summons was never served. About 4:30 on the evening of January 9th Will Prince was seen walking around on the second floor of the New Ridge Building, at and near the place where, on the evening of the next day, the killing took place. He was apparently studying "the lay of the ground." The same evening the defendant was also seen in the New Ridge Building, on the stairway between the second and third floor, from which place one could see into the office in which Kennedy was employed. That evening, between 5 and 6 o'clock, the defendant met Steve O'Grady, a newspaper reporter on the Kansas City World, at Ricksecker's cigar store, at Ninth and Walnut, where she was waiting for a telephone message from some one, or else trying to call some one by telephone. She had a conversation with O'Grady (with whom she had chanced to become acquainted while employed as a stenographer at the Home Product Show in Convention Hall the first week in October), and in this conversation O'Grady asked her what was the cause of the forced marriage, and if she and Kennedy had been intimate. She said there had been no intimacy between them, but that Kennedy had been going with her, and was about to marry another girl, and that she "had beat her to it," or "had beat her time." O'Grady asked her what she was going to do about the annulment suit, and she answered "that her time would come to get even," or "to get her revenge." He asked her if it would be soon, and she said it would. He asked her if it would be by a proceeding in court, and to this question she made no reply. The same night Bert Prince was in a saloon on the Southwest Boulevard, and started a conversation with a bartender, whom he noticed reading an account of the annulment suit in the evening paper. He said, pointing to the article, "That was a shotgun wedding, and you will read something a good deal worse than that." He seemed to be angry, and called Kennedy a son of a bitch.

On January 10th Bert, Will, and C. W. Prince left home at different times in the

morning. Bert went to the New Ridge Building, apparently to look over the ground, as Will had done the night before, and his presence there at some time between 8 and 11 o'clock on the morning of the 10th was testified to by one of defendant's witnesses. Will returned home at the noon hour, and ate lunch with his sister. They left the house together, or else joined each other shortly after; for the two were seen walking close together west on Eleventh street, between Park and Olive. When about midway between these streets, Will handed the defendant something which she retained, apparently covered with a pocket handkerchief. At Eleventh and Brooklyn the defendant got onto an electric car, and as she did so her brother made some remark to her, to which she replied, "All right." This occurred about 3 o'clock. Will went direct to his father's pool hall in the Exchange Building, to which place defendant came shortly afterwards. She went into the pool hall, and had a conversation with her father and her two brothers, Bert and Will, after which she and Will went out into the hall and held an earnest conversation for 15 or 20 minutes, after which she left. This was somewhere between 3:30 and 4 o'clock. At about 4:30 o'clock Bert appeared at the fire department headquarters on the east side of Walnut street, between Eighth and Ninth, one block north of the Ridge Building. He left there, going south, across Ninth street, in the direction of the Ridge Building. Between 4:30 and 5 o'clock he and the defendant were seen engaged in close conversation in the hallway of the Ridge Building on the third floor. They separated; she going to Dr. Cross' office in the Rialto Building, a block and a half east, while Bert took the elevator on the third floor, riding to the first floor, and went out of the Main street entrance. While going down the elevator he was asked by an acquaintance if he was going to play that night, and he answered that he was not. He apparently returned to his father's pool hall, and with his companions furnished some music for the patrons of the place. Some time between 4:30 and 5 o'clock, the defendant called at Dr. Cross' office, and told him she was not Mrs. Case Patten, whom she had represented herself to be on her previous visits, but that her name was Mrs. Kennedy; that the story she told him on the occasion of her last visit, to the effect that she had gotten rid of her child by an abortion, was not true; and that she was still in a pregnant condition. She requested the doctor to go to Mr. Kennedy's office, and tell him that she was in the same condition that she had been in. The doctor at first refused to go, and said that he would telephone to Mr. Kennedy to come to his office. He did telephone to Mr. Kennedy, but Kennedy informed him that he could not leave his office until after 6 o'clock. The defendant again requested the doctor to go and see Mr. Kennedy, and

urged him to do so, saying that it would be a great favor, as the papers in the annulment suit would be served that night, and then she added: "My father will make me fight this suit, and everything will come out." She also said, in urging the doctor to go and see Kennedy, "I am afraid my father and brothers will hurt him." "I don't remember," the doctor continues in his testimony, "which she said, 'harm or shoot him,' or 'do some damage to him.'" He asked her what was the great hurry of having the matter attended to that night, and she replied that "the papers will be served to-night, and it must be attended to this evening." The defendant was in and out of the doctor's office three times that afternoon, and after the doctor consented to go she left, and he, after attending to some matters at his office, followed. It was about 45 minutes after her first call that the doctor started from his office in the Rialto Building for the Ridge Building. He entered the Ridge Building at the Walnut street entrance, which is on a level with the third floor of the New Ridge Building, and walked through the hall to the stairway leading from the third floor down to the second floor, on which floor Mr. Kennedy worked. He met the defendant at the top of the stairs on the third floor, and stopped and conversed with her a moment. She said to him, "You go down and see him, and then I will come down." She, however, preceded Dr. Cross down the stairway, and stepped back into the corridor toward the east, so she could not be seen from the entrance of the office of the Merchants' Dispatch Transportation Company. Dr. Cross came down the stairs, went to the door of the office, and asked for Mr. Kennedy, who was called to the door by Roland Butler, and he (Kennedy) stepped out into the hall. As Mr. Kennedy stepped out in the hall he was addressed by Dr. Cross, and just then Roland Butler, who was looking through a crack in the door, noticed the defendant approach Mr. Kennedy and Dr. Cross, unbuttoning her jacket. When she saw Butler, she stepped back. Dr. Cross told Mr. Kennedy what the defendant had requested him to tell, and just then the defendant stepped up to them. She said to Mr. Kennedy: "Wait a minute. I want to talk to you." Kennedy replied, "I haven't got anything to say to you." She then said, "Are you going to live with me?" and he answered, "No." While these questions were being asked and answered, Dr. Cross turned to the south to go toward the elevator, and Kennedy and the defendant had moved away a few steps east in the hall. Dr. Cross had gone not over ten feet when he heard the report of the revolver. When the defendant began to shoot, Kennedy turned toward the west and started for the door of the office; the defendant continuing to fire very fast. Tom Kennedy, the brother of the deceased, who had called at the office to protect his brother

each evening after the assault of January 3d, and Roland Butler, the stenographer, rushed out of the office as quickly as possible, passing Kennedy staggering toward the door. Tom Kennedy grabbed the defendant just as she fired the last shot, and they fell to the floor; she uttering a scream as they fell. Just as Tom grabbed Mrs. Kennedy, he was struck from behind a vicious blow by Will Prince, who appeared immediately, as if he had been in waiting, upon the scene of the tragedy. Tom Kennedy sprang to his feet, and grappled with Will Prince, and with the assistance of two others, who had rushed out of the office, pushed him against the wall. Prince said to Tom Kennedy, "Who in the hell are you?" and Tom answered, "Yes, who in the hell are you?" to which Prince answered by saying, "I thought you were striking a lady." The defendant then turned to the three men who were holding Will Prince, struggling to get away, and said coolly: "Turn that man loose. It was I who did the shooting." No sign of recognition passed between the defendant and her brother. Prince was then released, as he was not recognized at the time, and left his hat, which had fallen off in the scrimmage, and ran upstairs to the third floor, down the hall, and out the Walnut street entrance. Kennedy, who was staggering toward the office door when his brother and Roland Butler rushed past him, got inside the office, turned in his death throes, and, uttering the words, "It wasn't her gun that did it," fell dead in the hall. He had been hit six times, the number of shots fired. One of the shots entered from the front of his body, one from the side, two in the back, one pierced his ear, and the other struck his forehead. Either of the body wounds were mortal.

Before Kennedy fell to the floor Will Prince appeared upon the scene. Where he came from no one seems to know. He had probably stationed himself in the hallway on the second floor to the east of the stairway, or on the landing of the stairway, between the second and third floors. J. J. Mountjoy, the head janitor of the building, was standing in the east and west hallway on the third floor, about 30 feet east of and facing the stairway leading from the third to the second floor, at the time his attention was attracted by the shooting. He testified positively that no one was in the hallway on the third floor between him and the stairway, that he ran to and down the stairway, and that no one passed down the stairway in advance of him. Mountjoy saw Will Prince struggling with those who were holding him when he reached the top of the stairs on the third floor. Dr. Cross did not see Prince come down the stairway, and Tomlinson and Kincaid, who were in a printing office, within a few feet of the door, about 50 feet east of the place of the killing, rushed out in the hallway on hearing the reports of the pistol, and saw Will Prince moving in a westerly direction

toward Tom Kennedy and the defendant. At the time Mountjoy heard the firing he had just looked at a regulated clock in the window of a jewelry store on the third floor of the Ridge Building, and it was exactly 17 minutes to 6 o'clock by that clock when the shooting took place. Two parties went for an officer immediately after the shooting; one riding down the elevator and the other running down the stairs. They found Officer Crane going south on Main street about 10 feet to the north of the entrance of the Ridge Building. He ran at once into the building, took the elevator, which was waiting, and was carried to the second floor. Officer Anderson was standing on the west side of Main street, across from the Ridge Building, and, seeing Officer Crane running into the building, he followed on a run, going upstairs to the second floor. Crane had just arrested the defendant when Anderson arrived. Crane told him to call the ambulance, and Officer Anderson stepped into the Merchants' Dispatch Transportation office, secured prompt telephone connections with the police station, and called for the ambulance; the call being received at 15 minutes to 6 o'clock by the regulated clock at the police station. It was shown in evidence that all that was done in the calling of the officers and their arriving upon the scene and the calling of the patrol could easily be done in less than two minutes. The police ambulance responded at once to the call, and arrived at the Ridge Building in about four minutes after the call was received, as was shown by subsequent tests. Before Officer Crane arrived, the defendant had been held by the wrist by Tom Kennedy. A physician in the building, who had been attracted by the shooting, knelt down by the side of Kennedy's body, placed his ear to his breast, and, hearing no heart beat, the physician raised his head and said, "He is dead." The defendant stepped up and asked, "Is he dead?" and the doctor answered, "He is dead." The defendant then kicked the deceased in the face, and said, "He will never seduce another girl." Her manner was cool and collected. When Officer Crane arrived he took hold of the defendant by the wrist, and she said to him, "Turn my hands loose, officer. I want to fix my hair." When the officer let loose of her hands, she said, "I am not going to run away." The officer remained but a moment—"less than two minutes," was his testimony—until he started with the defendant for the station. They walked down the stairs at her request, and when they got onto the first floor she requested the officer to walk ahead of her and let her follow. This the officer refused to do. He also asked her who it was she had killed, and she said it was her husband. He asked her what she did it for, and she said, "I can't tell you now." He asked her her name, and she refused to give it. This was after they got to the ground floor. They went out of the door and turned north on Main street.

Between the entrance of the Ridge Building and Ninth street the defendant kept looking back, and when they got in front of the Sheldley Building, at the southwest corner of Ninth and Main streets, she turned clear around, facing the south, as if looking for some one, and the officer said to her, "Are you looking for some one?" and she answered evasively, "It doesn't seem to create much excitement, does it?" They went on north to the police station, passing the ambulance going south on a run near Sixth and Main. The defendant was taken to the station and placed in charge of the police majron.

At 20 minutes to 6 Bert Prince went into Jenkin's music store, about 50 feet south of the entrance of the Ridge Building, went behind the counter, as was his custom, and left his mandolin. One of the clerks, on account of the change in the closing hour of the store, looked at his watch and said to Bert, "It is now 20 minutes to 6, and you had better not leave your mandolin, if you want to use it again to-night." Bert replied, "I won't need it to-night," and went out, turning to the north toward the entrance of the Ridge Building. Two women, who had an office at the south end of the north and south hall on the third floor of the Ridge Building, heard the shooting, and, together with a gentleman friend, ran at once to the stairway leading from the third to the second floor. When they got there Bert Prince was leaning over the banister, looking down upon the scene of the tragedy. The three, the two women and the man, went down to the landing of the stairs, between the second and third floors, and saw the defendant kick the deceased in the face, saw the officer take the defendant away, and then at once went back to the third floor. Bert was still there, and in response to an inquiry by one of the women, with whom he was acquainted, as to who had done the shooting, Bert said: "Why it was Lou. She fixed him. She gave him all that was coming to him. He didn't treat her right." Bert was smiling. R. J. Costello, deputy county recorder before mentioned, had left a barber shop on Ninth street, between Main and Walnut, at about 25 minutes to 6 by his watch. He walked west on Ninth street to Main, south on Main to the entrance of the New Ridge Building, at which place he met C. W. Prince, who was standing there and seemed to be excited. He stopped and spoke to Prince for a moment, and while he was talking a man ran out of the entrance of the building and said there was a woman upstairs shooting her husband. Costello said, "That is your daughter up there, shooting Kennedy, her husband," and he said, "That's who it is." Costello then said: "Prince, this is some of your work. You could have prevented this if you had wanted to." Prince said to Costello, "Keep still." He then went into the building, and Costello saw him start upstairs to the second floor. Shortly after the policeman

came down with the defendant, and in from five to seven minutes after Costello had met Prince the ambulance arrived. There was no crowd in front of the Ridge Building, only the ordinary travel passing to and fro on the sidewalk, when Costello first met Prince; but the crowd quickly gathered. Just about the time the ambulance arrived, another party saw Prince come out of the entrance of the Ridge Building; and as the driver of the ambulance drove up he saw Prince come out of the door without his hat, look up and down the street, and then disappear in the crowd. It was shown in evidence that before 5:30 o'clock Will Prince was noticed sitting on the armchair in his father's pool hall, intently looking at the clock on the wall.

It was contended by the defendant that Will Prince went from the scene of the tragedy to his father's pool hall, knocked on the window, called his father out, told him of the killing, and then his father went back into the pool hall through the Exchange Building, and out the south entrance of the Exchange Building, down Eighth street, to the Ridge Building, meeting Bert Prince in the Exchange Building, and that the two went over to the Ridge Building together. Some witnesses gave testimony tending to support this theory; but it appeared beyond dispute that Will left the pool hall a little before 5:30 o'clock, Bert a few minutes later, and it appeared from the evidence of several witnesses called by the defendant that somebody knocked on the window of the pool hall, that it was too dark out on the walk to see who it was, and that C. W. Prince at once got his coat and hat, went to his desk, got his pistol, went out the side door of the pool hall on Central street, and did not return. It appeared in evidence that it took over six minutes to go from the second floor of the Ridge Building over the course traveled by Will Prince to the Central street entrance of the pool hall, and that it took $4\frac{1}{2}$ minutes to go from the pool hall to the west entrance of the Ridge Building. Bert Prince admitted owning the pistol with which the defendant shot her husband.

The defendant stated, in conversation with the police matron, Mrs. Paul Moore, after the shooting, that she went to the Ridge Building to talk to the deceased, that he refused to talk to her, and pushed or brushed her aside, and that she lost her temper and shot him. The defendant was visited that evening at the police station by her father and Bert; but Will discreetly failed to make his appearance, and did not claim his hat until it was identified at the coroner's inquest. Before the defendant was seen by her father and brother, she told Mrs. Moore that she was afraid her father would not speak to her; but when her father and Bert came to the police matron's room they and the defendant greeted each other pleasantly, conversed in low tones, and laughed and smiled while talking. Her manner and appearance at the

police station, where she remained from Thursday evening to Saturday afternoon, was cool and collected; and it was shown by the testimony of Mrs. Moore, who was the mother of 11 children, that the defendant suffered no miscarriage while in her charge, and showed no signs or symptoms of pregnancy. It was shown by the testimony of Dr. Boardman, the jail physician, who saw the defendant almost daily from January 12th to June 12th, that she suffered no miscarriage while in the county jail, and showed no signs or symptoms of pregnancy. This was in substance the case in chief made by the state.

The defense interposed was, as has been stated, insanity—hysterical insanity. The contention of the state that the defendant's father and brother conspired with her, and aided and abetted her in the murder, was denied, and evidence offered to establish an alibi for Bert and C. W. Prince, and Will's presence at the time of the killing was explained on the theory that he was a "victim of circumstances." Defendant's attorneys stated in their opening statement that her relations with Case Patten, and her trip to New York for the alleged purpose of securing her ring, and her passing under the name of Mrs. Case Patten, and her visits to Dr. Cross, would all be explained in such a manner as to convince the jury that these facts had nothing to do with the killing, and that the sole cause of the killing was that she had been wronged by Kennedy, and, distressed in mind by this fact, she had lost her ability to distinguish between right and wrong as to that particular act, and while in this condition of mind had shot him. The defendant did not testify in her own behalf, nor did her father, C. W. Prince, Sr.; but on the trial she offered in evidence statements made by deceased to Edward W. Lewis and Arthur Kubn tending to prove that deceased had seduced the defendant and then refused to marry her. It was not asserted that these declarations of defendant were part of the *res gestæ*. After the offer was made the state objected to it as incompetent, because the deceased was not a party to the record, and the admissions and statements were not a part of the *res gestæ*, and the court sustained the objections, and defendant excepted. Outside of the declaration made by defendant in the Ridge Building, after she had been told that Kennedy was dead, and at the time she kicked his dead body, that "he would never seduce another girl," there was no evidence that Kennedy had seduced and abandoned her.

Other evidence for defendant was as follows:

W. C. Michaels and Sidney F. Woody, two unmarried men, testified that they had roomed at the Prince house at 1516 East Fifteenth street from August, 1898, to April, 1899, and during that period Kennedy called frequently to see the defendant; that she was then employed as a stenographer in a

downtown office. Woody met her twice on the street after the forced marriage, and testified that she looked worried. Michaels also testified that during the winter of 1898 and 1899 Kennedy, with whom he was acquainted, was taking the regular course in the Kansas City Law School, in addition to his work as solicitor for the Merchants' Dispatch Transportation Company.

R. S. Swaggar testified that in the early spring of 1900 he was guarding the Prince home as a smallpox guard, and during the time that he was there (25 days) the deceased communicated by letter frequently with the defendant.

H. H. Allen, Thomas Field, and Edwin R. Marvin testified that the defendant worked as a stenographer in the office with which they were connected, which was visited by a large number of people daily, from February, 1899, and up to the 1st of December, 1899, and that during that period the deceased called frequently at the office during the noon hour to see the defendant. Mr. Field and Mr. Marvin were unmarried men.

Judge Gibson, of the circuit court, was called to the stand, and told of his performing the marriage ceremony between the deceased and defendant, and stated that when the deceased stood up to be married he kept his hat on, and that he was asked to remove it. He was asked the question: "No information came to you at the time you performed this ceremony as to what had occurred in the recorder's office?" He answered it: "No, sir; or I wouldn't have performed it."

Mrs. Rebecca Walker stated that she visited in the neighborhood where the Princes lived in September, 1900; that she saw the defendant, and thought she "acted rather strange"; that on several occasions she saw her walking down the street as if she seemed to be thinking about something, and all at once she picked up her dress and ran as though somebody was after her. Mrs. Walker was the only witness who testified to such performances.

Mrs. Sarah Filleau, and her husband, E. A. Filleau, portrait artists, testified that they were at the Prince house the night before the shooting; and they both testified that at that time the defendant was quite uncommunicative, that she sat a great deal with her head down, and that she went out into the dining room and ate an apple.

Mrs. Nellie Taylor, a domestic employed in the Prince family, testified that she had worked at the house from 1898 until November, 1899; that during that time Kennedy called frequently at the house; that she returned to work for the Prince family in May, 1900; and that she saw Kennedy but once after that, as one of the Princes forbade him to come there. She testified on cross-examination that Case Patten called at the Prince home to see the defendant during the summer of 1900, and that the defendant

called on Case Patten at his boarding house; that Case Patten had a small diamond ring belonging to the defendant; that she and the defendant went to see Patten in regard to the ring one evening, and the next morning he was to bring the ring to her house, but instead of doing so he left town; that this occurred early in October. The witness also testified that the defendant carried a gold watch which belonged to Case Patten during the summer of 1900, and during the time that he had her ring. Witness also testified that the defendant did not sleep well during the week prior to the killing; that she had choking spells, in which she would lose consciousness, and that she was quiet and sad; that she was sick on Saturday previous to the killing, and was attended by Dr. Murphy. Witness stated that she slept with the defendant the night before the killing, and that the defendant was nervous; that when she arose the next morning she only drank a cup of coffee for breakfast; that on the day before the killing she was down town to see about a position which she expected to get as a stenographer; that she only drank a cup of coffee or tea for lunch, which she ate with Will Prince, Mrs. Prince, and a married sister; that she left her house on the day of the killing about 2 o'clock, and that Will didn't leave until some time afterwards. The witness further testified that she had gone with the defendant to Dr. Doyle, at Fifteenth and Charlotte, about the first of the year, and that the defendant had got some medicine from him, and that she had been with her to see Dr. Doyle frequently. She denied on cross-examination of having testified at the coroner's inquest that on the day of the killing she noticed "nothing in particular about the defendant, except that she was sitting in a chair in the back parlor talking with the family." The witness also testified on cross-examination that before the defendant left the house she and Will had a conversation which witness did not hear.

C. W. Prince, Jr., known as "Will Prince," testified that he left home on the morning of January 15th, and went to Mr. Nearing's office, and from there to the circuit court, returned to Mr. Nearing's office, and went from there to his home, ate lunch with his sister, and that she "hardly ate nothing"; that she left in advance of him, he following some time afterwards; that he went down town, and went to his father's pool hall, and that the defendant came into the pool hall about 4 o'clock, and that he and the defendant went out in the hall and had a conversation lasting five or ten minutes, and that she then left and he waited for her to return, as she said she would; that he did not know the exact time that he left the pool hall, but that it was after 20 minutes after 5; that he went to the Ridge Building, third floor, Walnut street entrance; that in going through the hall on the third floor he heard a woman scream; that he "knew it was his

sister"; that he rushed downstairs, saw some man apparently choking his sister, and ran up and hit him; that he saw it was not Kennedy, the one he thought it was, and apologized; that he lost his hat, and, seeing that he was a "victim of circumstances," "went up" on the third floor and went out; that he went north on Walnut street to Eighth, west on Eighth five blocks to Central, and north on Central to the west entrance of his father's pool hall, called his father out, and told him what his sister had done. In reference to the appearance and conduct of the defendant, he stated that prior to the killing he had seen her have "three strangling spells," and that these strangling spells would affect her something as follows: that while talking she would reel and fall, and clutch at her throat, and that his mother and the servant would throw water in her face, "seemingly the only thing that would help her"; that these three occurred between December 4th and January 10th. He also testified that he noticed that she was despondent and falling off some in flesh. He testified that he knew of the defendant leaving town in October, 1900, to get a ring, and that he tried to dissuade her from going, offering to buy her a ring in the place of the one that Patten had taken. On cross-examination he admitted having taken part in public boxing matches, but did not think that they were professional, as he was not connected with the box office; that he had noticed that the defendant was noncommunicative in her manner from July, 1899; that in April, 1900, he had inquired of Kennedy if his intentions were serious, and, finding they were not, forbade her and the deceased from going with each other, and the defendant had promised him that she would comply with his wishes. He admitted that after his conversation in the hall of the Exchange Building with the defendant he had returned to the pool hall and sat looking at the clock. He admitted that he ran away after he was released at the time of the shooting, and did not go back to claim his hat that evening or the next day, as "his attorney told him not to."

Albert Kimmons (or "Bert") Prince testified that he came to Kansas City a short time before the holidays; that he left home on the morning of the day of the killing, was around town at different places, went to his father's pool room at about 2 o'clock, and remained there until about 5:30; that when he left the pool hall he went out in the Exchange Building into the water closet, and remained there for some time, and while returning to the pool hall he met his father in the corridor of the Exchange Building, and was informed of the killing, and together they went over to the Ridge Building; that he went up to the second floor, and saw Kennedy's body lying on the floor, and then went up to the office of a lady friend on the

fourth floor, and was refused permission to leave his mandolin, and then went down and left his mandolin at Jenkin's store a few minutes before 6, contradicting the testimony of three witnesses who placed him there at 20 minutes before 6. He denied that at any time he had any understanding with his sister about killing Mr. Kennedy. He testified that his pistol, with which the defendant had shot her husband, had been left by him on the dresser in his room on the morning of the killing. He denied having any conversation with a bartender on the Southwest Boulevard. On cross-examination he denied being in the Ridge Building on the morning of January 10th, as testified to by Tracy Derrick, a witness called by the defendant. He denied having had a conversation with C. J. Dillon on the night of January 10th, in which he said that he had heard of the killing while in the pool hall, and had heard of it by telephone. He also denied having been at the fire department headquarters between 4:30 and 5 o'clock, as testified to by three witnesses. This witness gave no testimony relating to the conduct, actions, and appearance of the defendant.

Thomas S. Ridge testified that he was on the fourth floor of the Ridge Building at the time of the shooting on the evening of January 10th; that his attention was attracted by the shooting and a woman's screams; that he ran down two flights of stairs to the place of the killing, and saw the circumstances that occurred afterwards, substantially in accordance with the testimony of the other witnesses. On cross-examination he stated that it was about a minute after he got there that a policeman came.

T. J. Noble testified that he officed on the fourth floor of the Ridge Building; that his attention was attracted by the shooting; that he went down to the landing between the second and third floor, and that he saw Will Prince scuffling with two other men; that somebody seemed to search him for a gun; that he saw an officer come, and that the defendant appeared to be excited; that, after he had been down to the place of the killing for about five or seven minutes, he looked at his watch, and it was then 15 minutes to 6. This witness also heard the defendant say, when Will Prince was struggling with those who sought to detain him: "Turn that man loose. It was I who shot him."

C. F. Bernhart, who was in the same office with Noble on the fourth floor of the Ridge Building, testified that his attention was attracted by the shots; that he went to the place of the killing, saw Will Prince scuffling with those who were holding him, and heard the defendant say: "Turn that man loose. It was I who shot him;" that he noticed the appearance of the defendant, and that she was excited, "clenched her fists, and her eyes blazed." This witness also testified that he returned to his office when the police-

men left with the defendant, and that he looked at his watch, and that it was then 15 minutes to 6.

Miss Clemie Lallmand, a hair dresser, with offices on the fourth floor of the Ridge Building, heard the report of the pistol, went into the hall, but did not go to the place of the shooting, returned to her office, and stayed there about 15 minutes (she fixed the time by the length of time she thought it took her to do certain work on a customer), and then went again to the stairway, where she saw Bert Prince with his mandolin, and was told by him that his sister had shot Kennedy. She denied that Bert Prince had been in her office on the morning of the shooting.

Tracy Derrick, connected with Miss Lallmand in the hair-dressing business, heard the shooting, ran to the stairway of the fourth floor, and returned to her work, and in a few minutes (the witness thought it was 15) heard Bert Prince out in the hall, looked out, and saw him with his mandolin in his hand. She fixed the time by the length of time she thought it took her to do some work on a customer. This witness also testified that "Bert Prince was a friend of mine and Miss Lallmand. He was in the office on the morning of the shooting, and Miss Lallmand was there at the time. He remained in the morning about a half an hour, and it was somewhere between 8 and 11 o'clock that he was in the office."

George M. Jarvis, who was engaged in selling fire extinguishers, saw C. W. Prince and Bert Prince on Wall street between Eighth and Ninth, walking south on the evening of the killing. They passed him on this street. He went on down Wall street to Ninth, east on Ninth to the Stickney cigar store, stopped there and played a slot machine five times, bought a cigar, lighted it, and then went out. As he went out of the cigar store, east on Ninth to Main, and south on Main to the Ridge Building, he saw the ambulance in front of the Ridge Building. Witness had nothing to fix the time that he saw C. W. and Bert Prince on the street, but thought it was from 15 to 20 minutes to 6.

Benjamin C. Brock, engineer at the Exchange Building, was in the pool hall on the evening of the killing; saw Bert, C. W., and Will in the pool room; saw Will leave the pool room some time after 5 o'clock; thought the music stopped about 5:30, and that Bert left immediately afterwards; saw Will come to the Central street entrance of the pool hall and tap on the window; saw C. W. Prince go out side door, come back and get a coat and two hats, and go out the west entrance of the pool hall. On cross-examination the witness testified that before Will left he had noticed him sitting on the arm of a chair looking intently at the clock on the wall. He did not want to be certain as to whether Bert left at 5:30 or five minutes before 5:30. He had nothing to fix the time in his mind. He thought it somewhere near

5:30 that Bert went out the south door of the pool room, through the Exchange Building. He saw C. W. and Bert return to the pool hall about 5 minutes to 6. C. W. left the pool hall a few minutes after Bert left; from two to five minutes, the witness estimated. Witness saw C. W. Prince go to his desk and get something, and somebody remarked that the old man was getting his pistol just before he left. Witness thought it was about 25 minutes to 6 that Bert left the pool hall, and about 20 minutes to 6 that C. W. left.

Max Smallberg, a meat cutter employed in a saloon adjoining the pool hall, heard the music, and saw Bert, C. W., and Will Prince in the pool hall on the evening of the killing; said the music stopped about 5 o'clock; was in the pool hall after Bert and Will had left; heard a rap at the window on the Central street side of the pool hall about half-past 5 to a quarter of 6, but did not see who it was; saw C. W. Prince put on a hat, go outside, come back without a hat, put on his coat and hat, go to his desk, and then leave; saw Bert and C. W. Prince return to the pool hall about 7. He testified, on cross-examination, that C. W. Prince did not go out the west entrance of the pool hall, but went out the south entrance, through the Exchange Building.

George A. Brockman, employed in the Prince Pool Hall as a helper, testified that the music stopped between 5 and 5:30; after the music stopped Bert Prince went out of the south door of the pool hall, through the Exchange Building; after Bert had left heard a rap on the window on the Central street entrance; saw Will there bareheaded; saw C. W. Prince go out with his hat on, come back without a hat, put on another hat, and go out the west door of the pool hall. He testified that it was about 5:30 that Will Prince rapped on the window.

R. H. Hall was in the pool hall on the evening of the day of the shooting; heard the music, which was being made by Bert Prince and his accompanist, Guy Daniels; heard a rap on the window, which witness thought occurred about a quarter of 6 to the best of his recollection; looked out, but "could see no one, as it was so dark I couldn't tell"; saw C. W. Prince go out at once, and immediately return, put on his coat and hat, and go out the west entrance of the pool hall. Witness was closer to the window upon which the rap was made than any other parties in the pool hall, about 10 feet away. He testified on cross-examination that Bert had left from a half an hour to an hour prior to the time the rap was heard on the window.

L. G. Myers, who was playing pool with R. H. Hall, testified that the music stopped between 4:30 and 5 o'clock, and after the music stopped he did not see Bert Prince any more; did not see Will leave the pool hall, but heard a knock on the window; looking around, he

recognized Will Prince on the sidewalk, and did not think he had a hat on; saw C. W. Prince go outside, and come back, get his coat and hat, and leave the building; could not say whether he had a hat on the first time he went out or not. On cross-examination the witness testified that it was about 5:30 that Will Prince rapped on the window and C. W. Prince left the pool hall. He further testified that it was pretty dark out on the sidewalk, and he would not say whether he had testified before the grand jury that he could not recognize who it was who rapped on the window; saw C. W. Prince go to his desk and get something out, and heard somebody make the remark that the old man was putting a gun in his pocket; saw the defendant in the pool hall in the afternoon about half-past 3 o'clock; saw her talking with Will and Bert, and he thought C. W. also was in the party. This question was asked and answered: "Q. It is your recollection that Bert left about 5 o'clock, and it was about 5:30 that you heard this rap on the window and the old gentleman went away? A. That was as near as I can recollect."

Guy Daniels, who accompanied Bert Prince on the guitar, testified that he played with Bert at the pool hall on the afternoon of the killing; that the music continued until half-past 5, and that he and Bert then went into the saloon; that he stopped in the saloon, and Bert went on out, through the Exchange Building; that Bert left about five minutes before he did. On cross-examination he stated that Will was in the pool room from 3 o'clock until about half-past 5, at which time he left, and that Bert left a few minutes after Will; that Will did not leave until Bert was putting on his overcoat to go.

Edwin Richter testified that he was in the pool hall about half-past 5, and remained there about ten minutes, and that Bert was playing on his mandolin at that time. He did not see Will Prince.

Orsa Elliott heard Bert Prince and Guy Daniels play some music on the afternoon of the day of the killing in the pool hall, and that he left the building at from a quarter after 5 to half-past 5.

B. F. Barrett testified that he was in the pool room; heard the music and saw Mr. Elliott at the time; had nothing to fix the time that he was in there, but thought he left about half-past 5.

John W. Moore was in the pool hall on that evening; heard the music, and left the pool hall about half-past 5.

Edwin W. Lewis, Theodore Remley, and Arthur A. Kuhn were called to the witness stand, but were not permitted to testify.

Dr. Franklin Murphy, a practicing physician, testified in behalf of the defendant, and stated that on January 5th, Saturday night, he was called to attend the defendant, and found her in "rather a nervous condition, restless." The question was asked: "Was

her talk connected or disconnected? A. Well, I couldn't call it disconnected. She manifested some petulance and indisposition to be disturbed." This witness further testified that he considered that the defendant was suffering from a "slight indisposition"; that she had a small increase in temperature, which might come from indigestion. He saw her on Saturday evening, and gave her some mild sedative, and on the Monday following he called at the house, on his way to the office, before she had gotten out of bed. She called on the doctor at his office that day or the next day, and he then dismissed her from his charge. She was in bed about 36 hours. On cross-examination the witness was asked this one question and made the one answer: "Q. I will ask you to tell the jury whether, in your opinion, during those three or four days you saw the defendant, she was sane or insane. A. I think she was not insane."

Dr. John Punton, a specialist in nervous and mental diseases, was called as a witness by the defendant. He testified that hysteria is a nervous disease affecting the brain center; that it is considered a mental disease, and affects the will power of the individual. This was his examination in chief. On cross-examination he testified that hysteria is largely a functional trouble, and in a general way it is a manifestation of a generally recognized female characteristic. He was asked: "If a person, at the time of a homicide, should say in a cool and collected manner, to bystanders who were holding another person: 'Let that man go. It was I who did the shooting'—would you find in that any manifestation of a hysterical condition? A. I don't think so. Q. If a person should also state, immediately after the commission of a homicide, to an officer who was holding her hands: 'I wish you would release my hands. I want to fix my hair. I am not going to run away,'—would you find in that statement any manifestation of a hysterical condition? A. No, sir; I would not." A number of other questions, based upon the actions and remarks of the defendant made immediately following the shooting, were suggested to the witness, and he answered that he found in them no manifestations of a hysterical condition. The witness further testified that he examined the defendant while she was in jail; that he took her temperature, and talked with her for some time. He was asked the question, "What is your opinion, whether she was sane or insane?" and he answered, "I think she was sane."

The defendant introduced evidence showing that Warren Prince, the grandfather of the defendant, was confined in a hospital for the insane, at the age of 73 years, on October 23, 1888, and was sent home with his daughter on April 6, 1889.

Various assignments of error are noted in the brief of defendant's counsel and were urged on the oral argument.

The first proposition is that the criminal court erred in admitting evidence of a conspiracy between the defendant and her father and her two brothers to murder the deceased, without having first charged such conspiracy in the indictment. In *King v. William Stone*, 6 Term Reports, 527, the prisoner was indicted for treason. The evidence tended to show that the prisoner conspired with John Hurford Stone and William Jackson. The two latter were not indicted, nor was there a charge of conspiracy in the indictment. The evidence of his conspiracy was received. In *Gill v. State*, 59 Ark. 422, loc. cit. 430, 27 S. W. 598, 600, the court said: "Nor is it material, as to the admissibility of the acts and declarations of a conspirator against a defendant, whether the former (the conspirator) be indicted or not, nor what the nature of the indictment is, provided the offense involved a conspiracy"—citing *Wharton's Crim. Ev.* § 700. In *People v. McKane*, 80 Hun, 332, 30 N. Y. Supp. 95, the court said: "It is not necessary that the co-conspirator, whose acts and declarations in furtherance of the ends of the conspiracy are offered in evidence, should be a party to the record. It is plain that the indictment or nonindictment of the conspirator whose acts and declarations are offered against his fellow can neither impart any quality of verity or of relevancy to such acts and declarations, nor withdraw it from him; and hence his inclusion or exclusion as a party to the indictment is not material." That case was subsequently taken to the Court of Appeals and is reported in *People v. McKane*, 143 N. Y. 455, 38 N. E. 950. Judge O'Brien wrote the opinion, in which all the judges concurred. He said: "When a conspiracy is shown, or evidence on the subject given sufficient for the jury, then the acts and declarations of the conspirators in furtherance of its purpose and object are competent; and in a case like this it is not necessary, in order to make such proof competent, that the conspiracy should be charged in the indictment." This statement of the law on this point is reiterated in some of our most careful text writers. *Wharton's Crim. Ev.* § 700; 1 *Greenleaf's Ev.* § 111; *Roscoe's Crim. Ev.* (8th Ed.) p. 432. See, also, *People v. Kief* 126 N. Y. 661, 27 N. E. 556; *Goins v. State*, 46 Ohio St., loc. cit. 463, 464, 21 N. E. 476. In our opinion the point is not tenable. Where the act of conspiring is itself the crime, it is essential to charge it in the indictment; but where the conspiracy is merely the common purpose, leading up to another distinct crime, it need not be alleged, nor all the conspirators indicted.

This brings us to the more important objection that conspiracy was not established, or sufficiently so to permit the evidence of the acts and threats of her father and brothers against the deceased to be admitted in evidence, to determine whether there was or was not such a conspiracy to murder Philip

Kennedy. The general rule unquestionably is that the conspiracy must be shown before the acts and declarations of the conspirators, other than the defendant on trial, can be admitted in evidence; but this rule, wisely formulated for the protection of defendants, is not inflexible. As said in *State v. Ross*, 29 Mo., loc. cit. 51: "Such acts and declarations are sometimes admitted for the sake of convenience before sufficient proof is given of the conspiracy." *State v. Wm. Walker*, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133; *State v. Daubert*, 42 Mo. 239; *Spies v. People*, 122 Ill. 238, 12 N. E. 865, 17 N. E. 893, 3 Am. St. Rep. 320. It is a matter largely resting in the discretion of the trial court as to when the proof shall be offered. The prosecution may prove the declarations and acts of one, made and done in the absence of the others, before proving the conspiracy, provided proof is afterwards made. *State v. Winner*, 17 Kan. 298; *Wharton's Crim. Ev.* (8th Ed.) § 698a; 1 *Greenleaf Ev.* § 111. It should be further premised that a conspiracy, like any other fact, may be established by circumstantial evidence, and it is not essential that it should be proven by express agreement or compact between the conspirators, or by direct evidence of any agreement. Indeed, from their very nature, conspiracies, like frauds, are usually concocted in secrecy, and can seldom be shown by direct and positive testimony, and this makes it peculiarly necessary to permit them to be established by proof of facts and circumstances tending to show their existence. *U. S. v. Goldberg*, 7 Biss. 175, Fed. Cas. No. 15,223; *State v. Sterling*, 34 Iowa, 443; 2 *Wharton's Crim. Ev.* (9th Ed.) § 1398; *State v. Walker*, 98 Mo. 104, 9 S. W. 646, 11 S. W. 1133. With these observations, we proceed to the objections urged in this court to the admission of the specific evidence which it is asserted was error.

First, Fred S. Bullene, a witness for the state, testified that he had resided in Kansas City nearly 37 years, and on the 4th of December, 1900, was at the county courthouse in said city on duty as a reporter for the *Kansas City Star* newspaper; that he saw defendant, Philip H. Kennedy, the deceased, C. W. Prince, the father, and Will Prince, the brother, of defendant, all there. It was about 11 o'clock in the morning. He was asked to state what happened, and answered: "The persons above mentioned came into the recorder's office, where I happened to be at the time. * * * I think Mrs. Kennedy asked for a marriage license. The clerk started to issue it, when Kennedy got up and started to come over where I was. I had a pen in my hand, and had started to take notes. As he started toward me, Mr. C. W. Prince, the father, stepped up in between Mr. Kennedy and myself, and with a motion of his hands to his side, either touching me or Kennedy, shoving us apart, said— We object to any statement by C. W. Prince as

incompetent, irrelevant, and immaterial. Was that in the presence of the defendant? Yes, sir; in the presence of all of us. The Court: I believe I will overrule that objection. Exception." Thereupon Bullene proceeded to state what the father of defendant, C. W. Prince, then said: "He said, 'No, you don't. This isn't over yet.' Kennedy thereupon said, 'All right,' and sat down in front of the deputy recorder." The witness then detailed that the parties all went to the private chamber of Judge James Gibson, who was trying a case at the time. The judge was called from the bench and performed a marriage ceremony for defendant and the deceased.

The objection in the form it was made amounted to no more than saying, "I object," and hence gave no reason why the evidence was not admissible; but it really was not objectionable. One of the four parties whom the reporter saw on that occasion had been shot and killed by another of the parties, the defendant in this case; and it was entirely competent to show the relation of these two parties as husband and wife, the obtaining of the license, and the circumstances surrounding it. It was proper for the state to show the jury, who were to determine the guilt or innocence of the defendant, how that marriage came to be solemnized, whether by duress or the free act of the parties to it; and, taken in connection with the other evidence in the case, the act of the father at that time in preventing the deceased from communicating with the reporter was at least very significant. The purpose and purport of Bullene's testimony was to show that deceased had been compelled to go through a marriage ceremony with defendant, and it was perfectly proper to advise the jurors of the fact of the relations existing between the defendant and Phillip Kennedy; and the conduct and remark of C. W. Prince, made at the time in the presence of both defendant and deceased, in connection with the procuring of the license, was an inseparable part of that transaction. Moreover, the testimony of Mr. Mountfort, the city editor of the Star, was that the defendant sought him at his office the next evening, and told him that the marriage was a forced one. This evidence was properly admitted to show the relations of defendant and deceased, and to show, moreover, who were the parties compelling and assisting in enforcing a marriage ceremony.

The same considerations must govern as to the second assignment, that the court erred in permitting Bullene to state what defendant said to him the next day, when she requested a different article or story to be printed in the Star. The reasons she gave tended to show and further explain the relations and the state of feeling existing between her and deceased at the time.

The third proposition is that the court erred in admitting the statements of Will

Prince, made in the presence of defendant, at the Star office, the next evening after the forced marriage, on the ground that there was no charge of conspiracy in the indictment, and none shown. This objection raises the question how far the testimony tended at that time and subsequently during the trial to show a conspiracy to compel deceased to marry and maintain defendant, and to kill him if he refused. In this court we must look at the whole evidence to determine this point:

On December 4, 1900, the deceased, while attending to his duties in the Ridge Building, on Walnut street, was called by telephone to go at once to the office of Charles H. Nearing, an attorney, in the Nelson Building, corner Missouri avenue and Main street, on important business. The deceased went to Nearing's office, and was then and there informed by Nearing that he would have to marry Lulu Prince, the defendant, or her father would kill him. Deceased told Nearing there was no reason why he should marry Lulu Prince, and that he was engaged to marry another lady. He left Nearing's office, went out into the hall, and there met C. W. Prince, her father, and Will Prince and the defendant. Will Prince had that morning oiled his pistol and put it in his pocket. When deceased encountered these parties in the hall, C. W. Prince, the father, and Will Prince, the brother, told Kennedy, the deceased, that unless he married the defendant at once he would be a dead man in five minutes. Under this threat he accompanied them to the recorder's office and the marriage ceremony was pronounced. On the following Saturday the defendant and Will Prince went to the Star office, and in defendant's presence Will Prince said the marriage was a forced one; and, upon the suggestion that the paper could not afford to give a different version of the forced marriage without ascertaining what Kennedy, the deceased, had to say about it, William Prince consented to go out to Kennedy's home, saying: "I have had one round with that fellow. I gave him his choice of marrying the girl or going to hell, and he chose to marry her." To Jack Caldwell, a machinist, to whom he was talking of the forced marriage, Will Prince said, "I remarked to him [Kennedy] that he had prolonged his life three weeks by doing what he had done." Later on Caldwell inquired of Will Prince if his sister was living with Kennedy, the deceased, and he replied: "It is an immaterial fact whether he does or not. He has crossed his Rubicon long ago." On the 1st of January, 1901, some three or four weeks after the forced marriage, the father of defendant sent deceased a board bill for one month's board and maintenance of defendant, \$40, to which deceased made no reply. On the evening of the 3d of January, 1901, about 6 o'clock in the evening, after all the other employes in the office with deceased had left, except Roland Butler, a

boy stenographer, the father, C. W. Prince, and Will Prince, with their hands in their overcoat pockets, appeared at the door of the office and inquired for Kennedy. They stepped in and asked him if he had received the board bill, and he answered that he had. The father then asked, "Are you going to pay it?" and deceased said, "No." Whereupon C. W. Prince said, "You refuse to pay it?" and Kennedy said: "Yes; you can sue me for maintenance. I am acting under the advice of counsel." Whereupon the father said: "I will show you what a low-down s— of a b— you are. You don't deserve to live." At that remark, or by reason of some movement of Will Prince, Kennedy ran, and they tried to intercept him. Will Prince pursued, but Roland Butler caught him. Kennedy cried for help, and then Will Prince called to his father to "come out this way." Will Prince the next day told Caldwell how Kennedy had dived down stairs "under the shadow of a gun," and was an "immaculate coward." On the evening of January 9, 1901, the evidence discloses that about 4:30 o'clock William Prince was seen walking on the second floor of the New Ridge Building, at and near the point where the killing of Philip Kennedy took place next day, and on the same evening defendant was seen on the stairway between the second and third floors. On the 10th of January, 1901, Will Prince and defendant ate their lunch together at home, and either left together, or soon after joined each other, as they were seen walking together west on Eleventh street, between Park and Olive. He was seen to give her something, which she retained, apparently covered with a handkerchief. About 3 p. m. she got aboard an electric car. Will went to his father's pool room, where defendant soon joined him. There she, her father, and the two brothers had a conversation, after which she and Will went into the hall and had an earnest conversation for 15 or 20 minutes, and she left, somewhere between 3:30 and 4 o'clock. Without repeating the details of the homicide, it is sufficient to say that when Thomas Kennedy, a brother of deceased, seized the defendant as she fired the last shot into the body of his brother, William Prince was so close that he struck Thomas Kennedy and pulled him away from defendant. No one recognized him just then as defendant's brother, and he slipped out of the Ridge Building, leaving his hat, and did not return to claim it, he says, because advised by his lawyer not to do so.

This, in brief, is an epitome of the part played by William Prince in this tragedy; and it is urged by defendant that there is no evidence of conspiracy between this brother and sister to kill Philip Kennedy or do him any bodily harm. Recalling the steps of the defendant, her father, and brothers from the time they met deceased in the Nelson Building on the 4th of December, 1900, when the alternative was pre-

sented to him of marrying defendant or death; the enforced trip to the recorder's office under the guard and surveillance of the four; denied the right to communicate with Bullene until the mockery of a marriage had been consummated; the oiling of his revolver by William Prince on that morning; the demand of a month's maintenance by the father and William about the 1st of January, and the flight of Kennedy "under the shadow of William's gun," when he refused the demand; the whispered conferences of defendant with the other three at her father's pool room, not exceeding an hour before the fatal shots were fired by defendant; the reconnaissances by William and defendant of the halls and entrances to the office of deceased in the New Ridge Building on the afternoon preceding the homicide; the hovering of William Prince and defendant in the halls while Dr. Cross was sent forward to decoy the deceased into the hallway; the sudden appearance of defendant on the scene, armed with a deadly weapon which she had hidden under her jacket; and the shooting to death of Kennedy because he declined to talk with her or live with her—this to our minds and our understanding of the law is the evidence of a deliberate scheme and combination between the defendant and her father and brothers to force Kennedy to marry defendant and live with her as her husband, and to murder him if he refused to do so. To the self-serving statement to Dr. Cross that she was afraid her father and brothers would hurt him we attach little importance, in view of the fact that at that very moment she herself was armed with the revolver with which in a few minutes she, not her father or brothers, shot and killed Kennedy. That she was a party to the criminal conspiracy, and that William Prince, who was lurking near in the hall, was fully cognizant of her purpose to kill, and was hovering there to aid and assist in the execution of the conspiracy, the testimony leaves no doubt whatever in our minds. That he was a party to the conspiracy, and that the conspiracy had been formed prior to the forced marriage ceremony on the 4th of December, 1900, and that the subsequent acts down to the fatal shooting of Kennedy were but parts of one and the same unlawful purpose, we think was clearly established. The authorities are quite conclusive that the conspiracy is sufficiently shown when it is made to appear that the common purpose was to commit an unlawful act, even dissimilar to the one actually perpetrated, if the latter was one that might have been reasonably contemplated as likely to result from the attempt to commit the act intended. 4 Amer. & Eng. Ency. Law, 619. But here the purpose was expressed to be to kill Kennedy if he refused to marry defendant, and then, when he had submitted to that, to kill him if he refused to live with her or persisted in trying to annul the marriage. These threats, while

varying in form, all indicated one fell purpose. We think the court properly admitted the proof of William Prince's statements pending the conspiracy.

The fourth objection to evidence relates to what occurred on the trip which defendant, Will Prince, and Bullene made to Kennedy's home on Saturday night after the forced marriage. When the editor of the Star had refused to change the report in that paper at the demand of defendant, unless Mr. Kennedy would agree to her version, it was agreed that she, her brother, and Bullene should go and see him. Will Prince proposed that Bullene call Kennedy to the door, and that Bullene should interview Kennedy while they stood around the corner out of sight, but in hearing. Mr. Bullene refused to do this. Arriving at the house, Bullene went in and talked with Kennedy, and when he came out told defendant, at her request, what Kennedy said—in substance, that he (Kennedy) had gone to Nearing's office on the morning of the marriage, and had been told that he had to marry her; that he refused, and in going out into the corridor was met by her father, C. W. Prince, Will Prince, and Mrs. Kennedy; and that her father and Will told him he had to marry her or be a dead man in five minutes, "and he married her." The sole and only objection to this statement, which Bullene made to defendant at her request, after she had requested him to get Kennedy's version of the marriage, was that it was incompetent. No ground was assigned for its incompetency, and in fact the same evidence as to the forced marriage was shown in other ways; and she had told various witnesses herself of his engagement to another woman, and assigned that as a reason for forcing him to marry her. Bullene was detailing a conversation with defendant.

The evidence of Roland Butler, the stenographer, as to the interview of C. W. Prince, the father, and William Prince, the son, with Kennedy over the board bill, and the flight of Kennedy, was admitted, but subsequently excluded by an instruction of the court. In our opinion, as it was a step and an act tending to show the settled purpose to force Kennedy to support and recognize defendant as his wife, or kill him if he refused, the first ruling was correct, and the court erred in excluding it by instruction. It necessarily follows that it is no ground for reversal.

Again, it is insisted that the court erred in permitting Costello to state that a few moments after 25 minutes to 6 o'clock on the evening of January 10, 1901, he met C. W. Prince, the father of defendant, at the entrance of the New Ridge Building, as some person ran by saying "there was a woman up there shooting her husband," and Prince was much excited, and the witness said to Prince, "That is your daughter up there, shooting that fellow Kennedy, her

husband," and he answered: "That is who it is. * * * Keep still." We think it was competent. It tended to prove that C. W. Prince knew the homicide was to take place at that time, and was there at the place of its perpetration as one of the conspirators. But in no event could it have injured the defendant, as all the evidence established that his daughter, the defendant, did do the shooting, and this was the statement merely of a conceded and otherwise thoroughly established fact in the case. It was, moreover, contemporaneous with the killing, and not subsequent.

It is asserted that error was committed in permitting Costello to testify that C. W. Prince said to him, in answer to his suggestion that Kennedy would get a divorce: "I would like to see him get a divorce. He is dealing with the old man now, and he isn't so old he can't take care of himself." The evidence being sufficient to go to the jury to show that C. W. Prince was a party to the conspiracy, the covert threat implied in this language was competent to go to the jury to show the purpose of the conspirators to kill Kennedy if he refused to live with defendant as her husband.

The most important and serious error assigned on the admission of evidence on behalf of the state is the ruling of the court in permitting Dr. Cross to testify as to what occurred between the defendant and himself. This testimony is severable—that which occurred on the day and just previous to the homicide, and that which occurred on a previous occasion.

As to what occurred on the 10th of January, 1901, the record discloses that defendant went to the office of Dr. Cross and said to him that she was not Mrs. Case Patten, but was Mrs. Kennedy; that she was in trouble, and requested him to go and tell her husband that she was in the same condition in which she had been—begged him to go; said he would be doing her the greatest favor he had ever done anybody else, and he would never regret it; that the papers (the suit for annulment) would be served on her, and her father would make her fight this suit, and everything would come out. She said, "I am afraid my father and brother will hurt him." He didn't remember which she said—"harm him," or "shoot," or "do some damage to him." "If you will go over there and tell him I am in this condition, he will talk to you." The doctor at first refused to go to see Kennedy, when she said, "Do you want me to go home and shoot myself?" and thereupon he went to Kennedy's office. The doctor explicitly testified that treatment of the defendant was not mentioned on that day; that she did not want to be treated by him in a professional way, and made no statement with that in view. Her statement at that time that she was not Mrs. Case Patten, but Mrs. Kennedy, was not made with a view to treatment, but was a com-

munication that she could have made as well to any other person, and we see no ground for holding what there occurred was privileged or incompetent. The defendant was invoking the physician's aid as a friendly act, wholly disconnected from his professional obligations. The relation of physician and patient did not exist as to any communications made to him that afternoon.

Section 4659, Rev. St. 1899, prescribes the rule of privilege and incompetency in this state. That section provides that a physician shall be incompetent to testify "concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon." Now, it is perfectly obvious, as Dr. Cross testifies, that defendant did not seek his services as a physician on the afternoon of January 10, 1901. She desired no treatment at his hands as a physician, and what she told him of her physical condition was with no purpose on her part to enable him to prescribe intelligently for her, but was made, ostensibly at least, to induce Kennedy, the deceased, to receive and treat her as his wife. What she told him as to her pregnancy, then, was not a privileged communication within the meaning of the law, and it was competent.

Now, as to the evidence of statements made on a previous occasion. Dr. Cross without objection was permitted to testify that he was a physician in Kansas City, and had been for 12 years. His office was in the Rialto Building, and had been for nine or ten months previous to January 10, 1901. He knew Philip Kennedy and the defendant, Lulu Prince Kennedy. He first saw and met defendant in his office in the Rialto Building in the latter part of October or first part of November, 1900. She came to his office and requested him to make an examination to determine her condition, but he first asked her name and several other questions. She refused to tell him her name, but finally told him her name was Mrs. Case Patten. She said her husband was a baseball player. She said she was recently married, and she wanted to know what her condition was. She did not want it known who she was, who she married, because Mr. Patten would probably lose his job if it was known he was married. She requested the examination, which he made. She said she thought she was pregnant, and wanted him to determine. She gave him a history of herself, but he could not positively determine, but, based on what she told him and her symptoms, condition, and all, he was of opinion she was. He gave her no treatment. Asked if she requested an abortion, the doctor declined to answer, or said nothing. To all the foregoing there was neither objection nor exception taken. She came again the next day, or day after, and requested treat-

ment, and he treated her. For what he treated her, or what treatment he gave her, he did not state. The only objection raised to anything said on second visit was her name, which the doctor says she still gave as Mrs. Case Patten. The information as to her name did not and could not enable him to prescribe for her.

The greatest difficulty in reaching a proper conclusion arises as to what information the doctor testified he received from defendant on her third visit to him. The substance of it was that she told him she wanted something in the way of medicine for sleeplessness, and he inquired if she was all right otherwise, and she told him, "Yes; all right," and he understood that she was not pregnant. Conceding, which we think is correct, that it would ordinarily be necessary and proper for a physician to know whether a female patient was pregnant or not in order to prescribe medicines for any other ailment, and that the doctor was permitted or required to state that the defendant told him she was not pregnant on her third visit, and he then prescribed for her sleeplessness, and conceding this was a misconstruction of our statute, the question arises, was it reversible error? How did it materially affect the case? The evidence allunde abundantly established she was not pregnant. The material fact disclosed was that she stated to the physician she was all right—that is, not pregnant—at that time. Abundant testimony was introduced to show affirmatively that defendant was not pregnant, and without objection or exception. As was said in *State v. Rapp*, 142 Mo. 449, 44 S. W. 272: "Now, with all that nonexcluded testimony as to numerous other threats left with the jury. It is difficult to conceive how testimony as to a single threat could seriously prejudice the defendant, and we hold it did not." So we say here, with all this evidence that defendant was not pregnant, confirming her statement made at that third visit, how can it be said that the admission of that statement, albeit made to a physician, and therefore privileged under the circumstances, prejudiced the defendant's rights before the jury? and we hold it was not reversible error.

Counsel for defendant also insists that error was committed in permitting the state to show the relations of defendant with Case Patten in the summer of 1900, and down to October, and her visit to him at Westport, N. Y., just a few weeks prior to the forced marriage with Kennedy. As to this objection many reasons suggest themselves why it was not error. It must be borne in mind that the defense interposed in this case was emotional or hysterical insanity, produced by the inconstancy of the deceased as a suitor to defendant. Because of said alleged breach of his promise to marry defendant, deceased had been forced by defendant and her father and brothers, under threat of death, to marry

her. What more pertinent evidence could have been introduced to the jury to disabuse their minds that defendant's mind had been deranged by brooding over the faithlessness of deceased than that which disclosed that he was not only not a suitor, but had been forbidden to visit her early in the spring of 1900, and that during the summer of 1900 the defendant was the constant associate of another young man, Case Patten, to whom she had loaned her diamond ring, and was wearing his watch, and that she was seeking his company, and walking and riding with him, both night and day, and that she had even gone unattended to Westport, N. Y., as late as October, 1900, to see him and get her ring from him. Certainly this was utterly inconsistent with the theory that she was infatuated with deceased, and was pining away because of his neglect, or was driven to madness because he had jilted her. The evidence tended strongly to disprove that she was, during all the months, the trusting affianced of deceased. Moreover, it was entirely competent to prove her acts and statements to show she was perfectly rational; that her conduct was that of a sane, and not an insane, person, as the defendant insisted she was. But, in addition to all this, the defendant proved the Patten episode—her trip to New York—with much more particularity than the state did. For all these reasons we hold no error was committed in permitting the state to show the very intimate relationship with Patten at a time when the jury were asked to believe she was the trusting affianced of deceased.

Neither was error committed in proving that deceased brought his suit to annul the forced marriage. The petition itself was not offered and read in evidence, though for some reason not apparent to us counsel for the state have incorporated it in their statement of the facts and abstract. An examination of the entire record discloses no such paper as the petition in the annulment case in the record. It was shown by defendant's statement that such a suit was filed, but not served, prior to the homicide. The fact that it was begun, simply as a fact, was admissible, in connection with the threats of C. W. Prince as to what would follow such an attempt.

We are now brought to an examination of the errors assigned on the exclusion of evidence offered by defendant. It was too plain for argument that the testimony of Edward W. Lewis and Arthur A. Kuhn as to statements by deceased not a part of the *res gestæ* were properly excluded. The deceased was no party to the record, and his admissions, unless a part of the *res gestæ* or as dying declarations, do not conclude the state. *State v. Curtis*, 70 Mo. 594; *McMillen v. State*, 13 Mo. 31; *State v. Punshon*, 124 Mo. 457, 27 S. W. 1111; *State v. Bauerle*, 145 Mo. 1, 46 S. W. 609; *State v. Nocton*, 121 Mo. 537, 26 S. W. 551.

Equally inadmissible were the statements of defendant in her own behalf, made at the pool room to Will Prince. There was not the slightest foundation or offer to show that her statements made at that time would have tended to show her insane. There was no offer whatever to make such proof for that purpose.

Judge Gibson was allowed to state all the circumstances of the marriage ceremony he performed, and hence there is no ground for complaint in regard to his evidence.

As to the instructions, the counsel for defendant have not pointed out any specific instruction which they assert was erroneous. We have examined them carefully, and find no error in those given for the state; but we gravely doubt whether the court was justified, in view of all the evidence, in submitting the issue of insanity to the jury. As that was altogether favorable to defendant, of course, she has no ground to complain of it.

A careful examination of the objection as to the indorsement of the names of the witnesses relieves the prosecuting attorney of any charge of unfair practice to defendant. He served the written list on the defendant. As it was so large, all the names could not have been well indorsed on the indictment itself. Counsel for defendant had expressed himself as being satisfied with the list, and made no objection as to the time of the service. A few witnesses were discovered after the trial began, and notice was given of the intention to use them. We agree with the criminal court there is no merit in this point.

Upon a full examination of this record I think the judgment should be affirmed, and hence dissent from the judgment of my Brethren.

JOHNSON v. FLUETSCH.

(Supreme Court of Missouri, Division No. 2.
June 30, 1903.)

PUBLIC LANDS—WARRANTS—ASSIGNMENT—LOCATION BY ASSIGNEE—FAILURE TO RETURN WARRANT TO GENERAL OFFICE—SUBSEQUENT ENTRY BY OTHER PERSON—RIGHTS OF ADVERSE CLAIMANT—NOTICE—STATE COURTS—JURISDICTION—APPEAL—CORRECTION OF ERRORS.

1. Act Cong. Feb. 11, 1847 (9 Stat. 125, c. 8) provides, in section 9, that each noncommissioned officer, etc., who has served or may serve during the present war with Mexico, and who shall receive an honorable discharge, etc., shall be entitled to receive a certificate or warrant from the War Department for the quantity of 160 acres, and which may be located by the warrantee or his heirs at law, and on the return of the certificate or warrant, with evidence of the location thereof, a patent shall be issued. The section further provides that all sales, mortgages, powers, or other instruments of writing going to affect the title or claim to any such bounty right, made or executed prior to the issue of such warrant or certificate, shall be null and void. *Held* not to prevent the assignment of a certificate or warrant after its

issuance, and the assignee may locate the same in his own name.

2. The assignee of a land warrant, who locates the same and secures his certificate of entry or purchase, and, as required by law, delivers up his warrant to the register of the land office, is not responsible for the latter's neglect in failing to report his location to the General Land Office.

3. While the state has no right to control the primary disposition of the public lands belonging to the United States, yet, when the title passes from the government, the state courts have jurisdiction to determine a controversy between adverse claimants thereto.

4. The assignee of a land warrant located the same, and turned it over to the register of the land office at St. Louis and received his certificate of location in 1849. The officers failed to return the warrant to the General Land Office. He and his grantees thereafter had continuous possession of the land for 50 years. In the tract book in the recorder's office in the county in which the land was situated appeared the entry made in 1852, "Located with bounty land Warrant about April, 1849, but the name of the purchaser does not appear on our books," and in the Boonville land office, to which the books of the St. Louis office appear to have been transferred, was the entry, "Vacant. See Commr.'s letter May 22nd, 1867." A certified copy of this letter recited that "a duplicate certificate has been received at this office for a location" purporting to have been made of the land by the assignee of the warrant, and that the land appears vacant on our books, and directed the Boonville office to "permit no entry of any of such tracts, if they appear vacant, until otherwise directed." Starting with the assignee of the warrant, the record of deeds would have shown a straight line of conveyances of the land down to defendant. Plaintiff entered the land in 1898. *Held*, that he was charged with notice of defendant's rights.

5. In ejectment, where the answer stated an equitable defense and asked affirmative relief, and the judgment, which was in defendant's favor, included 25 acres not sued for by plaintiff and not claimed by defendant, the court on appeal could correct the error without remanding the cause.

Appeal from Circuit Court, Gasconade County; R. Hirzel, Judge.

Ejectment by Wilber T. Johnson against Nicholas Fluetsch. Judgment for defendant. Plaintiff appeals. Corrected and affirmed.

J. W. Jamison, for appellant. Kiskaddon & Meyer and Robert Walker, for respondent.

GANTT, J. This is an action of ejectment for the following lands in Gasconade county, in this state: The north half of the southwest quarter of section 3, and west half of lot No. 1 (1) of the northeast quarter, and the east half of lot No. one (1) of the northwest quarter, of said section 3, all in township 44, range 5 west, except 25 acres, described by metes and bounds as follows: Beginning at the northwest corner of said east half of lot 1 of northwest quarter of said section three (3), and running thence east forty (40) chains to the northeast corner of the west one-half of said lot number one (1) of the northeast quarter of said section three (3); thence south 6 chains and 25 links to a stake; west forty (40) chains to a stake; from thence north 6 chains and 25 links to the point of beginning.

Ouster is laid as of January 10, 1899. Monthly rents and profits are alleged to be of the value of \$15, and damages for detention \$200.

The answer is (1) a general denial; (2) that defendant's remote grantor, one John F. Stephan, had entered the lands in controversy at the United States Land Office in St. Louis, Mo., on the 8th day of May, 1849, with a military bounty land warrant, No. 30,960, issued to one Phillip Rausch, and by him assigned to said Stephan; that when said entry was made the register of said land office executed and delivered to said Stephan a certificate of such entry; that by mistake or accident the proper officers had failed or neglected to post such entry on the proper books of the said land office, and the land warrant with which the entry was made was, by mistake or accident, lost or not properly returned to the General Land Office; that said Stephan, immediately after said entry, took possession of said real estate, and shortly thereafter, by warranty deed, sold and conveyed said land to one Henry Oschner, and that by several mesne conveyances said land had been conveyed to defendant; that plaintiff, at the time he acquired the legal title to said land by a patent from the government, had notice of the claims and equities of defendant. Prayer, that plaintiff be divested of all title acquired by him by virtue of said patent, and that the title in fee be vested in defendant, and for other proper relief.

This part of the defendant's answer plaintiff sought to have stricken out, but the court overruled his motion.

Reply, a general denial; that at the date of plaintiff's entry of the land said lands appeared by the records of the United States Land Office to be vacant, and that no entry had been made by any one; that said lands are shown to be vacant and subject to entry since the year 1880 by a certified book of original entries from the United States Land Office on file in the office of the recorder of deeds of Gasconade county, Mo., and had so appeared vacant and subject to entry for more than five years prior to the date of the purchase of said lands by plaintiff; that defendant and his grantors had notice that said lands were shown to be vacant by said records of more than 20 years prior to plaintiff's entry, but that they had failed to perfect their title; that because of such failure plaintiff was induced to make his entry, and did so without notice of defendant's alleged claims, etc.

On these pleadings the case went to trial before the judge, a jury being waived.

The evidence of the substantial and material facts in the case is undisputed. About May 8, 1849, one Phillip Rausch was the holder of military bounty land warrant No. 30,960, issued to him. John F. Stephan bought this land warrant from him, going before a justice of the peace in St. Louis to have the transfer made in writing and acknowledged. Stephan immediately went to the land office

in St. Louis, Mo., and on said last date, with said land warrant, entered the land in controversy. The register of the land office took up the warrant, and issued to Stephan the following certificate:

"Register's Office, St. Louis, Mo., May 8, 1849. Military Land Warrant No. 30,900, in the name of Philip Rausch, has this day been located by John F. Stephan, upon the north half of the southwest quarter, east half of lot No. 1, of the northwest quarter, and west half of lot No. 1 of northeast quarter of section 3, in township 44, of range 5 west, subject to any pre-emption claim which may be filed for said land within thirty days from this date. Contents of tract located 160 acres.

"The date of assignments in all cases must be given at the time they are acknowledged, and no assignment of this certificate will be regarded. Tho. Watson, Register."

Confirmatory of this evidence and certificate is the following: The tract book of lands in Gasconade county, certified to by the register and receiver of the land office at St. Louis, July 19, 1852, in connection with the description of the lands in controversy, contains the following memorandum: "Located with bounty land warrant about April, 1849, but the name of the purchaser does not appear on our books."

Plaintiff attempts to meet this evidence by a subsequent memorandum made October 9, 1880, in red ink, on the same book, by the register and recorder of the Boonville land office, to which the St. Louis land office books seem to have been transferred, as follows: "October 9, 1880—Erroneous—The tracts appear vacant on the record R. and R."

It further appears rather indefinitely, by the testimony of officers of the Boonville land office, that on the books of the office, in connection with the description of this land, some pencil memorandum had been made and afterwards erased. Within three or four months after the entry of the land by Stephan on May 8, 1849, he went into possession and cleared about two acres. On October 11, 1850, Stephan, by warranty deed, conveyed the land to Henry Oschner. The deed expressly refers to the entry aforesaid, giving the number of the warrant with which it was made, and there is undisputed evidence that the certificate of entry hereinbefore set out was delivered to Oschner with the deed. This deed was filed for record and recorded October 12, 1850.

The other conveyances which transferred the land to defendant were a last will of Henry Oschner, duly probated, and a warranty deed from his devisee to defendant. The last will was probated in Gasconade county, Mo., October 2, 1875. The deed from the devisee to defendant was recorded in the same county March 19, 1885. The application of plaintiff for a patent was made May 15, 1898, and the patent issued on said application is dated December 17, 1898.

From the time that Stephan went into the possession of the land in the autumn of 1849 until this action was commenced, Stephan and his grantees were in possession of the land, had about 60 acres of it cleared and under cultivation, a good dwelling house on the land in which he lived, and the necessary outbuildings for the use of a farmer. It also appeared on the cross-examination of John Stephan, a son of John F. Stephan, that about the year 1875 Mr. Oschner had written to him requesting an affidavit touching his knowledge of the entry made by his father, but that he had not done anything in the matter.

A letter of the Commissioner of the General Land Office at Washington, D. C., addressed to the register and receiver of the land office of Boonville, Mo., was also read in evidence. This letter is dated May 22, 1867. By this it appears that the duplicate certificate issued to Stephan had been sent to the General Land Office, but that by the records there the land seemed to be vacant. It directed the officers at Boonville to search their records for any evidence of location, and to "permit no entry of said tracts, if they appear vacant, until otherwise directed." The original of this letter could not be found in the Boonville office, and a certified copy of it was read; but on the books at Boonville, in connection with a description of this land, was a memorandum in red ink, as follows: "Vacant. See Commr.'s letter, May 22, 1867." There was no evidence that the order of the Commissioner of the General Land Office contained in his letter of May 22, 1867, had ever been recalled.

It was admitted at the trial that plaintiff had never paid any taxes on this property, and that defendant and those under whom he claims title had paid all taxes, and had been in possession, claiming title, since 1850.

Appellant, in his statement of the case, calls attention to the fact that 25 acres of land which was not sued for, as appears by the petition, although covered by his patent, is included in the judgment, and that by said judgment plaintiff is divested of title to said 25 acres, and the same is vested in defendant. There is nothing in the record, however, which indicates that the attention of the court below was called to this obvious clerical misprision, and respondent contends that this error is not sufficient to warrant a reversal, but that the description may under the statute be corrected in this court.

At the conclusion of the evidence, numerous instructions were asked by plaintiff, all of which were refused. Defendant asked one instruction, which the court refused. On the equitable defense the court found the issues for defendant, and rendered judgment in accordance with the prayer of the answer.

1. The fundamental proposition advanced in this case by the plaintiff is that a bounty land warrant issued under the act of con-

gress of February 11, 1847, 9 Stat. 125, c. 8, was not assignable until the act of Congress of March 22, 1852, 10 Stat. 3, c. 19, because the right of defendant to have plaintiff declared the trustee of defendant, and to require a conveyance of the legal title to the lands in controversy, depends upon defendant's ability to show that as assignee of military land warrant No. 30,960, issued to Philip Rausch, May 8, 1849, entitled defendant to locate the 160 acres, and to receive a patent from the government of the United States. In *Bohall v. Dilla*, 114 U. S. 47, 5 Sup. Ct. 782, 29 L. Ed. 61, the Supreme Court of the United States announced the doctrine, which commends itself as equitable and just, that "to charge the legal holder of a patent from the United States as trustee of another, and to compel him to transfer the legal title, the claimant must present such an equity as will show that he himself was entitled to a patent from the government, and, in consequence of some erroneous ruling of the officers of the Land Department of the law applicable to the facts found, it was refused to him." "It is not sufficient to show that there may have been error in adjudging title to the patentee. It must appear that, by the law properly administered, the title should have been awarded to claimant." *Smelting Co. v. Kemp*, 104 U. S., loc. cit. 636, 26 L. Ed. 876; *Sparks v. Pierce*, 115 U. S., loc. cit. 408, 6 Sup. Ct. 102, 29 L. Ed. 428. Unless, therefore, defendant has shown that his remote grantor, John F. Stephan, was entitled to a patent as the assignee of the military land warrant No. 30,960, and his location thereof on the lands in suit, he is not in a position to challenge the patent issued to said lands by the government in 1898, as he would be a stranger to plaintiff's title, and it would be no concern of his that the land department had erroneously granted plaintiff a patent. Moreover, the answer of defendant relies upon the assignment of this warrant, and the entry by virtue thereof, by John F. Stephan, and he must defeat plaintiff's legal title through this equity thus pleaded, or not at all. *Kennedy v. Daniels*, 20 Mo. 104; *Russell v. Whitely*, 59 Mo. 195.

With this preliminary statement of the issue, we come to the consideration of the very interesting contention that a military land warrant under the act of February 11, 1847, was not assignable by the soldier to whom it had been issued by the government for his services in the Mexican War. To fully grasp the insistence of plaintiff that such warrant was not assignable prior to the act of March 22, 1852, which expressly authorized the assignment of all land warrants (10 Stat. 3, 4, c. 19), we quote from the act of 1847 (Act Feb. 11, 1847, 9 Stat. 125, c. 8): Section 9 provides "that each non-commissioned officer, musician, or private, enlisted or to be enlisted in the regular army, or regularly mustered in any volunteer company for a

period of not less than twelve months, who has served or may serve during the present war with Mexico, and who shall receive an honorable discharge, or who shall have been killed, or died of wounds received or sickness incurred in the course of such service, or who shall have been discharged before the expiration of his term of service in consequence of wounds received or sickness incurred in the course of such service, shall be entitled to receive a certificate or warrant from the War Department for the quantity of one hundred and sixty acres, and which may be located by the warrantee or his heirs at law at any land office of the United States, in one body, and in conformity to the legal subdivisions of the public lands upon any of the public lands in such district then subject to private entry; and upon the return of such certificate or warrant, with evidence of the location thereof having been legally made, to the General Land Office, a patent shall be issued therefor." It is further provided that "all sales, mortgages, powers, or other instruments of writing going to affect the title or claim to any such bounty right, made or executed prior to the issue of such warrant or certificate shall be null and void to all intents and purposes whatsoever nor shall such claim to bounty right be in any wise affected by or charged with or subject to the payment of any debt or claim incurred by the soldier prior to the issuing of such certificate or warrant."

It is asserted by plaintiff that under the provisions of this act there is absolutely no authority for the sale or assignment of a land warrant issued in pursuance of it. The argument of plaintiff may be epitomized as follows: The warrants issued under the act were to be located by the warrantee or his heirs, but in the event of his death the warrant might be sold for the benefit of his family; but it is nowhere provided in the act that the soldier himself could sell it, and all sales prior to the issue of the warrant are rendered null and void; that it was not intended he should have the right to sell. It was intended to keep them out of the hands of speculators. In a word, because the act does not in express terms authorize the location of a warrant by the soldier or his heirs, "or his assigns," an assignment by him of his warrant is absolutely void in the absence of an enabling act, which plaintiff asserts was first passed in 1852.

The construction placed upon the act of 1847 by the General Commissioner of the Land Office and the practice of that department is entitled to great consideration, in the absence of an affirmative decision by the Supreme Court holding that construction erroneous. By reference to 1 *Lester's Land Laws*, 576, 579, it will be seen that the Commissioner of the General Land Office on June 3, 1847, in his instructions to the registers and receivers of the United States Land Office, gave a contemporaneous construction of

the act of 1847, in which he clearly recognized the right of the holder of the warrant to assign it, and directed the registers and receivers that, when a warrant was presented by an assignee for location, they should see to it that the assignment bore date subsequent to the warrant, and gave specific directions as to the proof of the assignment by acknowledgment before an officer, or power of attorney properly authenticated. In the very same month the Attorney General of the United States fully recognized that an assignee was entitled to his patent. 5 Atty. Genl. Opinions, pp. 387, 388. Speaking of the respect which these acts of these high officials of the government should receive, Judge Cooley, in *Johnson v. Ballou*, 28 Mich., loc. cit. 384, in a similar case, says: "These opinions of very eminent lawyers are worthy of high consideration, especially as, when giving them, they were the official advisers of the government, and their advice was accepted and acted upon by the Department of the Interior. The government has thus given a practical construction to its own grants which the state authorities should accept and follow, unless it is found that the proper judicial authority of the federal government has reviewed and found it erroneous." *Sutherland on Stat. Construction*, § 309. The very opposite views urged by contending counsel in this case clearly bring it within the first situation, in which the courts resort to contemporary construction by official usage, to wit, that the statute is more or less of doubtful meaning. *U. S. v. Tanner*, 147 U. S. 661, 13 Sup. Ct. 436, 37 L. Ed. 321. Again, the practice then adopted appears to have been uniform, and has existed for a half century, and no decision of the federal courts condemning it has been called to our attention. It must be borne in mind that the officials of the General Land Office were required to inaugurate a system for carrying out the beneficent policy of the government. The government had provided a bounty to those who had worthily worn its uniform and fought its battles. The Commissioner of the General Land Office in his directions shows that he has carefully digested the act, and he must be presumed to have carefully weighed all its provisions. He reached the conclusion that a soldier, after receiving his warrant, could sell and assign it, and that his assignee could locate the land for which it called, and, the act having thus been interpreted, doubtless many did assign their warrants. When it is considered that he was the representative of the government, and that his construction could injure no one but the government, this practical construction, contemporaneous with the act of 1847, so long acquiesced in and never overturned by the judicial department, is entitled to great weight, and our most serious consideration, when the rights of those who relied upon it are jeopardized by assailing the construction of the Land Department as

unsound. We think it clearly appears that the General Land Office regarded such warrants as assignable before the act of 1852 made all such warrants assignable by express enactments.

But it is urged that the very fact that in 1852 Congress authorized all land warrants to be assigned is conclusive evidence that prior to that act they were not assignable. We do not think this is a necessary inference by any means. The laws of this state and of our sister states abound in statutes which the courts have adjudged to be merely declarative of the common law. Such statutes have often been enacted to remove all question that the common law still obtains, and it may easily be conjectured that a doubt had been raised whether the warrants under the act of 1847 were assignable, and the Congress by the act of 1852 intended to set that doubt at rest. Statutes are read and construed in the light of the common law. "Rules of interpretation and construction are derived from the common law, and, since that law constitutes the foundation, and, primarily, the body and soul, of our jurisprudence, every statutory enactment is construed by its light, and with reference to its cognate principles." *Sutherland on Stat. Cons.* § 289.

Looking now at the act itself: When Philip Rausch obtained his land warrant, he had secured a most valuable property right. It is too plain for discussion that it would have passed to his heirs or personal representatives, in the absence of specific direction given in the statute as to its devolution in the event of his death. Such a right in the holder of the warrant, in the absence of an express prohibition of his right of alienation, was assignable. The act contains no restriction on the warrantee to assign his certificate, except that contained in the words "and all sales, mortgages," etc., "made or executed prior to the issue of such warrant or certificate shall be null and void," etc. Keeping in mind the general right to assign a property right, and the restriction as to sales of these warrants prior to their issue, it seems perfectly clear that it was not the intention of Congress to prevent their assignment after their issue. "Expressio unius, exclusio alterius." We may appropriate the language of the Supreme Court of the United States in *Myers v. Croft*, 13 Wall., loc. cit. 297, 20 L. Ed. 562, to wit: "If it had been the purpose of Congress to attain the object contended for, it would have declared the lands themselves unalienable until the patent was granted. Instead of this, the legislation was directed against the assignment or transfer of the right secured by the act, which was the right of pre-emption, leaving the pre-emptor free to sell his land after the entry, if at that time he was in good faith the owner of the land." That act was much more drastic in its terms than the one before us, and yet the court construed the act so as to let him sell his right before re-

ceiving his patent. Here the only inhibition is that he shall not sell or assign his right before receiving his warrant. After he gets it, there is no restraint upon his alienation in the act.

As to the point made that the act provides that the warrant may be located by warrantee or his heirs at law, we do not think it affects the question of the assignability of the warrant. The mere designation of the holder and his heirs as entitled to locate the warrant, in no manner negatives or restricts his power of alienation. The right to assign land warrants was so fully recognized by Congress that, wherever it intended to prevent its exercise, it used unmistakable language. 2 Stat. 729, c. 77; 3 Stat. 286, 287, c. 56; *Lamb v. Davenport*, 18 Wall. 307, 21 L. Ed. 759; *Myers v. Croft*, 13 Wall. 291, 20 L. Ed. 562; *Dixon v. Caldwell*, 15 Ohio St. 412, 86 Am. Dec. 487; *Holland v. Hensley*, 4 Iowa, 222.

Our conclusion is that the certificate or land warrant of Philip Rausch was assignable in the absence of a restriction in the act granting him the same, and that there are no words which forbade its sale and alienation by him after the warrant issued to him, and by its assignment John F. Stephan became the owner thereof, and entitled to enter or locate the land in controversy in his own name. Hence we answer the first contention against the plaintiff, and hold that, when the register of the land office at St. Louis took up his warrant and issued him the certificate of location of the lands in suit, he was entitled to have the patent thereof issued to him, and hence the defendant, as his remote grantee, is entitled to maintain his defense to have plaintiff declared to hold the legal title in trust for him, unless it further appears that plaintiff is an innocent purchaser for value and without notice.

2. When John F. Stephan located his warrant and received his certificate of entry and purchase, he was required by law to deliver up his warrant to the register of the land office at St. Louis, and this, the evidence shows, he did. He could not control the officers of the land office, neither is he responsible for their neglect of duty in failing to report his location to the General Land Office at Washington City. The equitable title of the United States passed to the defendant's remote grantor Stephan, and the government had no right to patent it to plaintiff. The right to patent once vested, as respects the government, is equivalent to a patent. *Wickersham v. Woodbeck*, 57 Mo. 59; *Wirth v. Branson*, 98 U. S. 118, 25 L. Ed. 86; *Stark v. Starrs*, 73 U. S. 402, 18 L. Ed. 925. While the state has no right to control the primary disposition of the public lands belonging to the United States, yet, when title passes from the government, the state courts have jurisdiction to determine the controversy between the adverse claimants thereto. *Magwire v.*

Tyler, 40 Mo. 406; *Hedrick v. Beeler*, 110 Mo. 91, 19 S. W. 492; *Carman v. Johnson*, 20 Mo. 108, 61 Am. Dec. 598.

What, then, are the further equities of the defendant? Stephan, having bought and received an assignment of Rausch's warrant, duly located it and turned it over to the register at St. Louis, and received his certificate of location, and went into actual possession of the land in 1849, and made improvements thereon, claiming title under his certificate. The evidence shows a continuous possession in defendant and his grantors since 1849. Defendant had built a dwelling house on the land, in which he lived, and also other necessary buildings, and had about 30 acres of the land cleared and in cultivation, and he and his grantors had paid the taxes on the land ever since the year 1850. When the plaintiff made his entry and obtained his patent in 1898, the defendant was living on the land, and in the open and notorious possession of it. But plaintiff insists that the land appeared vacant on the books of the United States land office at Boonville when he made his application and paid his money in 1898, and obtained his patent. In the tract book in the recorder's office in Gasconade county, in which the land is situated, the following memorandum, made and certified by the register of the land office at St. Louis, July 16, 1852, appears: "Located with bounty land warrant about April 1849, but the name of the purchaser does not appear on our books;" and in the Boonville land office, as appears by the evidence of Herman Pickin, a clerk in that office, appears in that office the following memorandum: "Vacant. See Commr.'s letter May 22nd, 1867." This memorandum was in red ink, and appeared in the tract book at the time plaintiff made his entry in 1898. This witness testified he looked for the Commissioner's letter of 1867, but could not find the same in the 1867 bunch. Having accounted for his inability to produce the original of the Commissioner's letter of 1867, defendant offered and read in evidence a certified copy thereof from the Department of the Interior at Washington, D. C.

"Department of the Interior, General Land Office.

"Washington, D. C., May 22, 1867.

"Register and Receiver, Boonville, Missouri—Gentlemen: A duplicate certificate has been received at this office for a location purporting to have been made at St. Louis, Mo., May 8th, 1849, by John F. Stephan, with bounty land warrant certificate No. 30,960, Act of 1847, on the north half of the southwest quarter, east half of lot one of northwest quarter and west half of lot one of northeast quarter of section 3, T. 44, R. 5, W. The Register's returns of locations at St. Louis, in May, 1849, contain no such location as that described in the certificate, nor does it appear that warrant certificate No.

30,960 has ever been returned to this office as located. Moreover, the tracts described in the certificate appear vacant upon our tract books. You will therefore carefully examine the plat and records of the late St. Louis office and report the condition of said tracts as shown by such plat and records, and permit no entry of any of said tracts, if they appear vacant, until otherwise directed. I am very respectfully,

"Your Ob't Serv't,
"Jos. J. Wilson, Commissioner."

In pursuance of this letter, the tract was marked on the tract book with the red letters above noted. So that, while the register and receiver at St. Louis had neglected to return the Rausch warrant No. 30,960 to Washington to the General Land Department, it does appear that in 1867 the department was advised of the location by John F. Stephan, the number of the warrant, the act under which it was issued, and the exact description of the land on which it was located. Evidently the duplicate had been sent in for the purpose of obtaining the patent. Thereupon all this information was furnished to the land office at Boonville, Mo., and the land marked "See Commr.'s letter May 22, 1867." When plaintiff went to the land office at Boonville to enter this land, with these red letters staring him in the face, he could not depend wholly on the word "vacant," but was required to call for the Commissioner's letter of 1867. If he had called for it, and the incumbent of the office could not find it, prudence required that he should apply to the department at Washington for a copy, and when he received the copy he would have been advised that on May 8, 1849, at St. Louis, John F. Stephan had located the lands with land warrant No. 30,960, and that the officers of the Boonville office had been directed to "permit no entry of said tracts if they appear to be vacant, until otherwise directed." Having ascertained, then, that Stephan claimed to have entered the land, he could have gone to Gasconade county and examined the tract book certified to the recorder by the register and receiver at St. Louis before the records were consolidated at Boonville, and there he would have found that on July 16, 1852, they had certified that some one had located these lands about April, 1849, but his name did not appear on the books. Starting with Stephan, the records of deeds would have shown a straight line of conveyances to defendant. A visit to the lands would have disclosed defendant in possession, and inquiry would have developed that possession had been maintained for 50 years. In view of all these circumstances and facts, and the absolute failure of plaintiff to testify that he had no knowledge or information of defendant's occupancy of the lands in suit, it must be held that he is chargeable with notice thereof, and that he was bound in

good faith to follow up the facts indicated by the possession of defendant for 50 years, and by the call for the letter of the Commissioner of the General Land Office at Washington. These facts were amply sufficient to put him upon inquiry and bring home notice to him of the prior entry by Stephan. *Vaughn v. Tracy*, 22 Mo. 417; *Leavitt v. La Force*, 71 Mo. 353. In *Freeman v. Moffitt*, 119 Mo. 280, 25 S. W. 87, it was said that, if the purchaser "had not ignored all the ordinary rules of prudence, he would have learned of the true state of the title and that Wilkinson was the owner. The fact of Moffitt's possession put him upon inquiry, and he should not have blindly shut his eyes to the truth as it existed, and the court should have so declared." So we say here. It is a most unusual proceeding for one to purchase real estate without seeing it or making inquiries concerning its character, whether timber or prairie land, whether cultivated or uncultivated, whether in possession of any one or vacant. This land was attempted to be entered by plaintiff in 1898. It was located in the very heart of Missouri. Every probability was that if it was not utterly worthless it had been entered and was occupied. Outside of the significant call for an examination of the Commissioner's letter, which would have disclosed defendant's prior entry, the fact of an unbroken possession for 50 years would have been disclosed by the most ordinary diligence of a trip to Gasconade county or a letter of inquiry. Can a purchaser fail to use these simple precautions, and then assert in a court of conscience that he is an innocent purchaser, and entitled to take from an equitable owner in possession the home on which he and his grantors have resided openly for 50 years, and have enhanced by their labor and means? We think most clearly he cannot, and that he must be held to be chargeable with actual notice, which does not mean direct evidence that he actually knew of defendant's prior entry, but that the possession and the facts and circumstances coming to his knowledge were such as to put a man of ordinary circumspection upon inquiry, and reasonable inquiry would have disclosed defendant's prior entry and superior equity. *Morrison v. Juden*, 145 Mo. 298, 46 S. W. 994; *Conn. Mut. v. Smith*, 117 Mo. 292, 22 S. W. 623, 38 Am. St. Rep. 656; *Maupin v. Emmons*, 47 Mo. 304.

3. In some way the decree of the court erroneously included the 25 acres excepted in the petition. This was a perfectly obvious mistake. Plaintiff had not sued for this 25 acres, neither had defendant claimed it. It was a mere clerical error, and, as the answer of defendant states an equitable defense, and prays for affirmative relief, it is entirely competent for this court to correct this mistake at this time, without remanding the cause for that purpose only.

In view of the whole evidence, the judg-

ment of the circuit court is in all things affirmed, save and except so much thereof as inadvertently vested the title to the 25 acres, described by metes and bounds in plaintiff's petition, in defendant. As that portion of the decree is an apparent clerical error, it will be stricken out, and the decree, so corrected, is affirmed. All concur.

TENNESSEE CENT. R. CO. v. CAMPBELL
et al.

(Supreme Court of Tennessee. July 25, 1903.)

EMINENT DOMAIN—APPEALS—DECISIONS REVIEWABLE—FINAL JUDGMENT—CERTIORARI—SUPREME COURT—JURISDICTION.

1. Shannon's Code, §§ 4834, 4853, 4854, provide that certiorari may be granted whenever authorized by law for the correction of errors in judgments of inferior courts, where an inferior tribunal has exceeded its jurisdiction or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy. Sections 6329 and 6336 also authorize appeals, writs of error, or other proceedings for the correction of errors in the Supreme Court, and give such court authority to issue writs necessary to the exercise of its jurisdiction. *Held*, that such sections conferred on the Supreme Court power to issue a writ of certiorari to review a proceeding by a railroad company to condemn land for a right of way when no other adequate remedy was available.

2. The right of the Supreme Court to issue certiorari is not restrained by Const. art. 6, § 10, providing that inferior courts of law and equity shall have power to issue such writs in civil cases to remove them from any inferior jurisdiction into a court of law.

3. Where, in a suit to condemn land for a railroad right of way, judgment for the recovery of the land has been entered, such judgment is final and appealable, though the question of damages to which the landowner is entitled is still pending and undetermined.

4. In a proceeding for the condemnation of land for a railroad right of way, a determination by the trial court, on a preliminary trial of the issues, that plaintiff had the right to have the land condemned for railroad purposes, was not appealable until final judgment was rendered for the recovery of the land by petitioner.

Application by Lemuel R. Campbell and others for a writ of certiorari against Tennessee Central Railroad Company to review a determination on preliminary trial of issues in condemnation proceedings by the latter that it had a right to condemn certain lands belonging to petitioners for a railroad right of way. Application denied.

See 73 S. W. 112.

Jno. J. Vertrees, J. C. Bradford, J. S. Plicher, T. M. Steger, T. H. Malone, Jr., J. M. Anderson, J. H. Acklen, and J. A. Ryan, for petitioners Campbell et al. Pitts & Witherpoon, for respondent Tennessee Cent. R. Co.

SHIELDS, J. This is an action brought by the Tennessee Central Railroad Company in the circuit court of Davidson county by petition, in the form prescribed by the statutes in relation to such proceedings, to have a portion of the lands of the defendants condemned and set apart for a right of way for

its railroad, which it had located over the same, and the damages accruing to the defendants from such appropriation assessed and adjudged. The defendants made defense by answer, denying the right of the plaintiff to maintain its action for want of power to exercise the right of eminent domain, and to appropriate the lands in question, upon several grounds, not necessary to be stated. The circuit judge, upon the preliminary trial of the issues thus made, held that the plaintiff had the right to have the land described in its petition condemned for railroad purposes, and appointed a jury or commissioners to lay it off by metes and bounds, and assess the damages, actual and incidental, accruing to the defendants in consequence of such appropriation. The defendants tendered a bill of exceptions to this action of the court, and prayed an appeal to this court, which was denied; and the commissioners are proceeding to execute the order of the court in the premises, but as yet have filed no report of their action. The case is now before us upon a petition for writs of certiorari and supersedeas to bring it into this court to review this judgment of the trial court, and stay the proceedings thereunder until it shall be here heard and determined.

This application is resisted by the plaintiff, insisting that this court cannot acquire or take jurisdiction of cases for the correction of errors in judgments and decrees of trial courts otherwise than by appeal, appeal in the nature of a writ of error, and writ of error, and that the writ of certiorari will not lie for this purpose, and, further, that the judgment of the circuit court in this case is not final, and cannot be reviewed by any proceeding in error. The writ of certiorari does not owe its existence to constitutional provision or statutory enactment. It is a common-law writ, of ancient origin, and one of the most valuable and efficient remedies which come to us with that admirable system of jurisprudence. This court, the highest tribunal in the state, with appellate and supervisory jurisdiction over proceedings and judgments of all inferior courts, has the inherent power to grant it whenever necessary in the exercise and enforcement of this jurisdiction. It is not restricted from its use by section 10 of article 6 of the Constitution, providing that the judges of inferior courts of law and equity shall have power to issue it in civil cases to remove them from any inferior jurisdiction into a court of law. This provision was only intended as a guaranty of the continuance of a power with which these judges were already vested. The use of the writ was originally confined to criminal cases, and its extension by the judges of this class of the courts of North Carolina, when Tennessee was yet a part of that state, to civil cases, was controverted, for which reason, upon the organization of this state, in order to settle the matter beyond all con-

trovery, a provision was placed in its first Constitution in substance the same as that contained in the present Constitution, and above stated. It was not doubted that the highest court created by that and subsequent Constitutions would have this power, and no provision was thought or was necessary upon the subject. While there is no doubt of the inherent power of this court to use this writ as a mode of exercising and enforcing its jurisdiction, yet statutory authority to do so is not wanting. It is fully authorized by the general provisions contained in the Code for the correction of errors in the judgments of inferior courts, which include certiorari as one of the means by which this may be done; and it is there provided that it may be granted whenever authorized by law, and in all cases where an inferior tribunal exercising judicial functions has exceeded its jurisdiction or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy, and that it will lie on a suggestion of diminution, where no appeal is given, as a substitute for an appeal, and instead of a writ of error. Code 1858, §§ 3106, 3123, 3124; Shannon's Code, §§ 4834, 4853, 4854. The power is also expressly conferred by the provisions of the Code on the subject of the appellate jurisdiction of this court, which provide for appeals, writs of error, or other proceedings for the correction of errors, and the authority to use all writs and process necessary for the exercise and enforcement of its jurisdiction. Code 1858, §§ 4496-4503; Shannon's Code, §§ 6329, 6336.

There are then four well-established, substantive modes by which the judgments of inferior courts may be reviewed, and errors therein corrected, by this court, in proper cases for their application. They are: Appeal, appeal in the nature of a writ of error, writ of error, and certiorari; and in a proper case the latter is as much a matter of common right as any of the others. We have numerous cases in which certiorari has been used by this court and held a proper proceeding for this purpose, among the most important of which are *Durham v. United States*, 4 Hayw. 69; *Kearney v. Jackson*, 1 Yerg. 294; *Railroad Co. v. Bate*, 12 Lea, 573; *Warner v. State*, 13 Lea, 52; *Johnson v. Harris*, 16 Lea, 135; *State v. Taxing Dist.*, Id. 245; and *Brizendine v. State*, 103 Tenn. 677-683, 54 S. W. 982. This writ, as said by Judge Peck in *Durham v. United States*, supra, is of the highest utility and importance for many purposes, and especially in curbing excessive jurisdiction and correcting errors, and most essential to the safety of the people and the public welfare. It was originally held to be a discretionary writ, and its use largely confined to the revision of proceedings not according to the forms of the common law; but under our practice and statutes its scope has been broadened and extended until it is now one of the recognized modes for the cor-

rection of errors used by this court. The reason that it has not been so freely resorted to as other modes is that because in most cases it is less convenient, but it is none the less effective. The cases in which it will lie cannot be defined. To do so would be to destroy its comprehensiveness and limit its usefulness. It is peculiarly applicable to all cases where the judgment or decree complained of is pronounced in a statutory proceeding, and not according to the course of the common law, where the tribunal is exceeding its jurisdiction, where no appeal or writ of error is allowed, or these remedies have been lost without fault or negligence of the applicant, and in all cases where errors in the adjudications of inferior courts over the judgments of which this has a revisory jurisdiction are sought to be corrected, and there is no other plain, speedy, and adequate remedy; and wherever this writ will lie a supersedeas will be granted to stay the proceedings under the judgment or decree sought to be reviewed, in the sound discretion of the court, much the same as in cases where it will be when a writ of error is granted. These writs are peculiarly applicable to the case at bar. It is a statutory proceeding, widely differing from the courts of the common law, in which judgments may be pronounced against a defendant and executed before final disposition of the entire case is made, and from which no appeal or writ of error will lie, which will be more fully stated in disposing of the other question involved.

We are of the opinion that certiorari is the proper proceeding to bring before this court for review judgments in condemnation proceedings of this character appropriating the lands of citizens for public purposes, where the right of the plaintiff to do so is for any reason denied; and, where merits are shown, a supersedeas will issue to prevent the petitioner from entering upon the premises until the case is here decided.

It only remains to determine at what stage of the proceeding the judgment of the circuit court is so far final as to be reviewable in this way. This is an anomalous action or proceeding, dual in its objects and results. The plaintiff recovers of the defendants the land sought to be appropriated, and the defendants recover of the plaintiff the value of the land and the damages accruing to the remainder of their property in consequence of the appropriation and the construction thereon of the proposed improvement, the former of which judgments may be pronounced and executed before the case is tried upon the question of damages. The form of the petition and the procedure in the circuit court are prescribed in detail by the statute authorizing it, and are to be found in the Code of 1858, §§ 1325-1348 (Shannon's Code, §§ 1844-1867). When the petition is filed and the defendant brought before the court by due service of notice, he may make defense by any appropriate pleading, and show cause,

If he can, why relief sought should not be granted. A jury of five or more commissioners is then appointed, and instructed to go upon the land along with the sheriff of the county, lay off by metes and bounds the land required for the proposed work, and assess the damages of the owner, and reduce their action to writing, and deliver the same to the sheriff, to be returned by him to the court in which the proceeding is pending. If no objection is made to the report, it is confirmed and proper judgments entered; but either party may except to it, and, upon sufficient reasons appearing, new commissioners may be appointed, who will be instructed and proceed in the same manner as those first appointed. Either or both parties on the coming in of the report of the first or the second jury, if a second be appointed, may object thereto, and demand and have a trial in the usual manner before the court and a jury of all issues arising in the assessment of the damages the owner of the property may be entitled to recover. But the petitioner, notwithstanding the case is undetermined upon the question of damages, and is yet pending for a trial upon this issue, may file a bond, with solvent sureties, in a sum double the amount of the damages assessed by the commissioners, payable to the defendants, and conditioned to abide by and perform the judgment of the court in the premises, and take possession of the property sought to be appropriated, and proceed with the construction of its railroad, or other improvement upon the same. The proceeding in this case has not progressed this far, as the commissioners have not filed any report of their action.

The plaintiff insists that there is no final judgment which can be reviewed by proceedings in error until the issues as to the damages to be recovered are tried, and the amount adjudged, while the defendants insist that the order of the court appointing the commissioners to lay off the land and assess the damages is such a final judgment. We do not agree with either contention. There may be two final judgments in this action, which can be reviewed by separate proceedings in error prosecuted at different times. The circuit court by implication clearly has authority, upon the filing of the report of the commissioners, and an appeal therefrom upon the question of damages, to a trial by jury in court, to award a recovery of the land described in the report, and issue a writ of possession to the plaintiff upon bond being filed as provided by the statute. Judgment for the recovery of the land is final for every purpose. The exact part to be appropriated is ascertained and set apart, and possession given the plaintiff. There is nothing left in relation to this part of the proceeding to be adjudged, and it is immaterial to the

plaintiff whether the other branch is ever tried. It will not do to hold that the defendants must wait until the question of damages has been adjudged before they can bring the judgment depriving them of the title and possession of their property before this court to have the right of plaintiff to appropriate it finally determined. It would be of small consolation and little profit to them, should the judgment of the trial court be reversed in the end, if in the meantime the plaintiff has dismantled their premises, made excavations therein, or erected fills or structures upon it, so altering and changing it as to destroy its value to them; and it must be remembered that the bond which the plaintiff is required to give does not cover damages done to the property in constructing the railroad or other improvement upon the same if the court upon final hearing determine that the plaintiff is not entitled to appropriate it. It only covers the damages which the defendants are entitled to when the land is condemned. The defendants, if the insistence of the plaintiff is correct, could be deprived of the possession of their property, and its usefulness destroyed, without compensation made or secured; and, if the plaintiff be insolvent, their final success in resisting its attempt to appropriate their land would be a fruitless victory. No such result was contemplated by the Legislature, nor can be suffered to take place. Every citizen has a right to have the decision of the court of last resort in cases of this character before he can be deprived of the possession of his property. Every principle of right and justice demand that this be so. We are therefore of the opinion that in proceedings of this kind, when the right to appropriate property is contested by the owner, and the case reaches the stage where the petitioner can give bond and take possession of the portion of the premises set apart in the report of the commissioners, and file such bond, the judgment of the circuit court condemning the property may be brought before this court for review by certiorari, although the issues as to the damages to be recovered by the defendants, if the appropriation is allowed, are yet pending, untried, in the lower court, and that in a proper case supersedeas will issue to restrain the plaintiff from taking possession until the case is here determined. This case, however, does not come within this rule. The commissioners have not filed their report, no demand has been made or could be made for a trial by jury in court in the ordinary manner, and no bond has been filed, and it is only then that the judgment becomes final and can be reviewed for the correction of errors.

The application in this case for writs of certiorari and supersedeas is therefore premature, and must be denied.

WORRELL et al. v. DRAKE.

(Supreme Court of Tennessee. June 30, 1903.)

HUSBAND AND WIFE—CONVEYANCE BY WIFE TO HUSBAND—VALIDITY.

1. Acts 1869-70, p. 113, c. 99, providing that married women over 21 years of age, owning real estate, shall have the same powers of disposition as are possessed by unmarried women, but declaring that the provision shall only apply to such women as have abandoned their husbands, or have been abandoned by their husbands, or whose husbands are insane, does not validate the deed of a married woman, not belonging to the excepted classes, conveying her real estate to her husband, when signed by her alone, though she was privily examined.

Appeal from Chancery Court, Crockett County; A. G. Hawkins, Chancellor.

Suit by C. Worrell and others against W. F. Drake. From a decree for the complainants, defendant appeals. Affirmed.

McFarland & Bobbitt, C. A. Goodloe, and W. W. Craig, for appellant. C. E. Jerman, for appellees.

NEIL, J. This was an action brought in the chancery court of Crockett county by the heirs at law of Mrs. Nannie A. Drake, deceased, to recover of her surviving husband, the defendant, W. F. Drake, a tract of land, her general estate, which she during the marriage had conveyed to her husband, her privy examination having been taken, but the deed having been signed by her alone. The chancellor held that the conveyance was void, and gave the complainants relief.

There was no error in the decree. This exact question was decided by this court in the case of Giffin v. Giffin at the September term, 1896. No written opinion was filed by this court, but the opinion of the court of chancery appeals (37 S. W. 710), which presents that single point, was affirmed. That case contains a full discussion of the subject.

Complainants' counsel seem to have been misled by a dictum of McFarland, J., in *Molloy v. Clapp*, 2 Lea, 586, 588, 589, which intimates a contrary view as the proper construction of the act of 1869-70, p. 113, c. 99. What was there said, however, upon the subject of the general estate of the wife, was pure dictum, the question before the court being the wife's power to convey her separate estate. In making the deliverance referred to, Judge McFarland overlooks the sixth section of the act referred to, which reads as follows: "The provisions of the act, except the provision of the third section of this act, shall apply to and embrace only such *femes covert*, or married women, as have abandoned their husbands, or whose husbands may be non compos mentis, insane, or of unsound mind, and also to such married women, or *femes covert*, whose husbands may fail or refuse to cohabit with or

have abandoned such married women, or *femes covert*," etc. The section on which Judge McFarland based the remarks relied on was the first, which reads as follows: "That married women over the age of twenty one years, owning the fee or other legal or equitable interest or estate in real estate, shall have the same powers of disposition, by will deed or other wise, as are possessed by *femes sole* or unmarried women." But it is seen that the generality of this language is confined by the sixth section to certain specific classes of married women. Mrs. Nannie A. Drake did not belong to either one of these excepted classes when she attempted to make the deed referred to. Hence her deed was void, and the complainants, as her heirs at law, are entitled to recover the land. Affirm the decree.

McNULTY v. STATE.

(Supreme Court of Tennessee. June 6, 1903.)

CRIMINAL LAW—ASSAULT AND BATTERY—CONVICTION—DEATH—PROSECUTION FOR MURDER—FORMER JEOPARDY—PLEA—STATUTES.

1. Where, on a prosecution for murder, a plea to the effect that accused had been convicted of the assault which caused the death was not tendered until after the state had closed its case, and accused had been examined as a witness in his own behalf, it was proper to refuse to allow the plea to be filed.

2. A conviction for assault and battery is no bar to a subsequent prosecution for murder, predicated on the fact that the person assaulted had died from his injuries.

3. Shannon's Code, § 7180, providing that in criminal cases in which a defendant shall have been brought before a justice under the small offense law, and fined as provided by law, and shall thereafter be indicted for the same offense, "as a felony," he may plead the former conviction in bar, does not render a conviction of an assault a bar to a conviction for a murder, the result of the assault.

Appeal from Criminal Court, Shelby County; Jno. T. Moss, Judge.

Charles McNulty was convicted of manslaughter, and he appeals. Affirmed.

J. J. Du Bose, for plaintiff in error. The Attorney General, for the State.

SHIELDS, J. Chas. McNulty, plaintiff in error, upon his plea of guilty to a warrant issued by a justice of the peace of Shelby county, January 15, 1903, charging him with assault and battery upon one Cottrell Childress upon a previous day of that month, was fined \$50, and committed to the workhouse. Childress died about 30 days thereafter from injuries sustained from the assault and battery committed upon him, and the plaintiff in error was indicted for his murder in the criminal court of Shelby county, and upon trial was found guilty of voluntary manslaughter, and his punishment fixed at two years in the State Penitentiary.

¶ 1. See *Husband and Wife*, vol. 26, Cent. Dig. § 242.

¶ 2. See *Criminal Law*, vol. 14, Cent. Dig. § 392.

After the state had closed its case, and the plaintiff in error had been examined as a witness in his own behalf, his counsel tendered to the court a plea stating the proceedings before the justice of the peace, and relying upon them, and the judgment there given against the plaintiff in error, as a former conviction, in bar of the indictment under which he was then being tried, without any affidavit explaining why it was not tendered at the proper time. The trial judge refused to allow the plea to be filed, and directed the trial to proceed upon the plea of not guilty. This action is now assigned as error. There was no error in the refusal of the trial judge to allow the plea tendered to be filed. It should have been tendered, along with the plea of not guilty, before the trial was begun; and not having been tendered until the state had closed the evidence in its behalf, and the plaintiff in error was introducing this, and the delay not being satisfactorily explained, it was within the discretion of the court to refuse permission for it to be then filed. But the action of the trial judge was correct upon the merits. The plea did not set forth a meritorious and valid defense to the indictment. The facts stated in it did not show that the plaintiff in error had once been in jeopardy for the offense for which he was being tried—the murder of Cottrell Childress. The proceeding had against him was for a misdemeanor—assault and battery. The indictment in this case is for a felony—murder committed upon Cottrell Childress—a greater offense, containing other and materially different elements from the former one, and requiring different proof to convict, and which had not been committed and was not in existence when the first trial was had, Childress being alive. The two offenses are entirely distinct, and the identity necessary to sustain a plea of the former conviction is wholly wanting. It is well-settled law that a conviction of a misdemeanor included in a felony is no bar to a prosecution, for the felony is not consummated until after the conviction of the misdemeanor, as was the murder in this case by the death of the assaulted party after the judgment before the justice of the peace. *Mikels v. State*, 3 Heisk. 321; *Clark's Crim. Prac.* pp. 402, 403. It is, however, insisted by counsel for plaintiff in error that this rule has been abrogated in this state by statute; and chapter 27, p. 31, of the Acts of 1870-71 (Shannon's Code, § 7180), is relied upon to sustain this contention. It is as follows: "In all criminal cases in which a defendant shall have been brought before a justice of the peace under the provisions of the small offence law, and shall have submitted and been fined in manner and form as provided by law, and shall thereafter be indicted or presented for the same identical offence as a felony, said defendant may plead said former conviction as a bar to any conviction of a misdemeanor under said indictment, or presentation for

felony, provided the jury shall find the plea of the former conviction valid under the present laws of this state." This statute will not bear the construction insisted upon, but it is plainly to the contrary. It is unmistakably provided that a conviction under the small offence law for a misdemeanor included in a felony may be pleaded in bar of another conviction of the same misdemeanor under an indictment against the defendant for the felony involved, and upon which he is being tried for such felony. It will not be presumed that the General Assembly intended to provide such a convenient mode for felons to escape their merited punishment.

The failure to file a plea at the proper time being unexplained, and no merit being shown, the assignment of the error is overruled, and the judgment affirmed.

EMBRY v. GALBREATH et al.

(Supreme Court of Tennessee. May 19, 1903.)

TRUST DEED—FORECLOSURE—COLLECTION OF RENTS—LIABILITY OF AGENT—REGISTRATION OF PURCHASER'S DEED—NOTICE TO AGENT—ACTUAL NOTICE BY PURCHASER.

1. An agent, employed by the grantor in a deed of trust to collect the rents on the land conveyed, who continued to collect and pay them over to the grantor after the sale under the deed to a third person until the purchaser was awarded possession of the property, was not liable to the purchaser for the rents so collected and paid over after the sale.

2. An agent employed by the grantor in a deed of trust to collect the rents on the land conveyed and, pay them over to him is not affected by the registration of the deed made to a third person on the sale of the land under the trust deed, registration being notice only to creditors and subsequent purchasers, or parties claiming some interest in or lien on the property.

3. The agent is not affected by actual notice that the purchaser at the sale of the land under the trust deed claimed the property and would hold the agent for the rents collected, the parties paying the rents to the agent alone having the right to stop them in the hands of the agent.

4. An agent, employed by the grantor in a deed of trust to collect the rents from the grantor's tenants occupying the land conveyed, who continued to collect the rents after the sale of the premises under the trust deed to a third person, was not a trespasser as against the purchaser.

Appeal from Chancery Court, Shelby County; F. H. Heiskell, Chancellor.

Suit by M. F. Embry against T. M. Galbreath and others. From a decree for complainant, defendants appeal. Reversed.

Thos. M. Scruggs and M. G. Evans, for appellants. Jno. Johnson, for appellee.

SHIELDS, J. Complainant purchased certain property in Memphis, January 12, 1897, at a sale made under a deed of trust executed by W. M. Sledge, the then owner in possession, and had the conveyance made to him by the trustee registered January 19, 1897. W. M. Sledge continued in possession, through his tenants, claiming that the sale

was invalid, and on June 13, 1899, filed a bill against complainant, attacking it. Complainant filed an answer and cross-bill, and on the hearing June 1, 1900, his title was sustained, possession awarded him, and decree pronounced in his favor against W. M. Sledge for \$948.37, the rents accruing since his purchase. The defendants, who were real estate and rental agents of Memphis, were collecting the rents for W. M. Sledge previous to the purchase of complainant, and continued to collect and pay them over to him until complainant recovered possession as stated. They had no notice of complainant's claim to the property until April 18, 1899, when he notified them of his purchase, and that he would hold them for rents collected. He made no other effort to obtain possession or collect the rents previous to June 1, 1900. This bill is now brought to hold the defendants liable for the rents they collected as agents and paid to their principal, W. M. Sledge, from his tenants occupying the property after complainant's purchase January 12, 1897.

We are of the opinion that the complainant is not entitled to this relief. The complainant was not in possession of the property, and asserted no claim thereto previous to April, 1899. The parties occupying it held under W. M. Sledge, and were his tenants. They had no notice of complainant's purchase. The defendants were the agents of W. M. Sledge, and collected the rents, voluntarily paid them by the actual tenants, for their principal. They were mere carriers or instruments through which the rents were paid by the occupants of the property to W. M. Sledge, whom they acknowledged as their landlord. The money was paid to the defendants to be paid to their principal, and they had no right to withhold it from him or question his right to it. When an agent pays to his principal money voluntarily paid to him for that purpose, without notice from the party from whom he receives it not to do so, the payment relieves him from all responsibility for it. *Metcalf v. Denson*, 4 Baxt. 565; *Roach v. Turk*, 9 Heisk. 709, 24 Am. Rep. 360.

It is said that the defendants had constructive notice from the registration of the complainant's deed January 19, 1897, and actual notice from April 18, 1897, of complainant's title to the property from which they collected the rents, and that they are therefore liable to him. That is not true. Registration is only notice to creditors and subsequent purchasers, or parties claiming some interest in or lien upon the property. *Frizzell v. Rundle*, 88 Tenn. 397, 12 S. W. 913, 17 Am. St. Rep. 908.

Nor does the actual notice which complainant gave defendants April 18, 1899, aid him. The money which the defendants collected did not belong to him. It was not paid for him. Defendants were not his agents. The

money was paid to defendants to be paid to W. M. Sledge, and they had no right to withhold it from him upon the demand of the complainant. The parties who paid the money alone had the right to stop it in the hands of the defendants for sufficient cause, and the defendants, having paid it to their principal without any notice from them, are discharged from all further liability for it. The complainant is not in any way prejudiced by the action of the defendants. W. M. Sledge is answerable to him for the rents which he received, and he has in fact recovered a judgment against him for them. *Bank v. Washington Bank*, 6 Pet. 8, 8 L. Ed. 299; *Hancock v. Gomez*, 58 Barb. 490; *Aubry v. Fish*, 36 N. Y. 47.

It is further said that the defendants were trespassers in collecting the rents, and therefore are liable along with their principal. If they were trespassers, they would be so liable, but they are not. They did not take possession of the property, but merely received the rents which the tenants had contracted to pay W. M. Sledge, and delivered them to him.

The decree of the chancellor is reversed, and the bill dismissed, with costs.

BEDFORD et al. v. BEDFORD et al.

(Supreme Court of Tennessee. June 16, 1903.)

WILLS—CONSTRUCTION—REAL ESTATE—EXECUTORS—POWER TO SELL—POWER OF SURVIVORS—EQUITABLE CONVERSION.

1. Testator's will directed that his house and lot "be rented out annually for the next twenty years after my death, and at the end of said twenty years said house and lot be divided. As regards my 240 acres in H. county, Fla., * * * I wish disposed of by sale or division as my executors may think best or to retain it for sale or division until the orange trees can bring oranges, * * *. I wish all my property or the proceeds of the same to be divided into three parts, one part to go to my son H., and one part each to the children of two deceased sons. Held to contemplate a sale of the house and lot, if necessary, after the expiration of the 20 years, as well as the orange grove.

2. The power of sale was in the executors.

3. One of three executors having died, the power to make the sale of the realty authorized by the will was in the two survivors.

4. The exercise of an executor's discretion as to the necessity or propriety of a sale authorized by the will would be conclusive, and not subject to review.

5. A provision in a will for the sale of real estate and distribution of the proceeds is only effective to work a conversion of the real estate into personalty where the direction to sell is imperative and unconditional. If there is a discretion to sell or to divide, a conversion is not effected.

Appeal from Chancery Court, Shelby County; F. H. Heiskell, Chancellor.

Bill by H. L. Bedford and another against William H. Bedford and others to obtain the construction of a will, etc. Decree rendered. Defendants appeal. Modified.

¶ 5. See *Conversion*, vol. 11, Cent. Dig. § 38.

H. M. McKay, for appellants. H. D. Minor, for appellees.

SHIELDS, J. Benj. W. Bedford, having first made his will, died October 24, 1883, at his residence in Shelby county, Tenn. The first clause of the will directs the executors to convey to certain parties lands the testator had sold them, when the balance of the purchase money should be paid. The remainder of the will is in these words:

"It is my last will and wish that my house and lot on Madison street, Memphis, of 27 by 68 feet of the original lot No. 102, at the southeast corner of Madison street and Front Alley, and directly opposite the First National Bank in Memphis, be rented out annually for the next twenty years after my death, and at the end of said twenty years said house and lot be divided.

"As regards my 240 acres of land in Hillsboro county, Fla., and all the land I may hereafter own in Florida, I wish disposed of by sale or division as my executors may think best or to retain it for sale or division until the orange trees can bring oranges, to do that which they may think best for the interest of my descendants.

"I wish all my property or the proceeds of the same to be divided into three parts, one part to go to my son Hugh L. Bedford, one part to the children of my deceased son Julian Bedford, and one part to the children of my deceased son Benj. W. Bedford, except my watch, which I will to Wm. Bedford, my grandson, and son of my son Julian, as it was willed to me by my brother, Wm. H. Bedford. It is right and proper to will it to his namesake.

"If I owe a dollar, I do not know of it, except for Whyte Bedford for having four wagon tires cut, which I will pay tomorrow.

"I do hereby name Hugh L. Bedford, of Shelby county, Tenn., Whyte Bedford, of De Soto county, Miss., and C. C. Glover, of Panola county, Miss., my executors, and do not require them to give bond and security, and wish them to act as executors in Mississippi, Tennessee and Alabama.

"This October 8, 1883."

The will was duly admitted to probate, and the executors, who were his son and grandson and the husband of a granddaughter, all beneficiaries, qualified and entered upon the discharge of the duties of their trust, and two of them continue in the execution of it, the other, C. C. Glover, having died. When the will was made and the testator died, there were eight beneficiaries, all of whom survive except C. C. Glover and W. H. Bedford, the latter being a grandson, who died intestate, leaving a widow and two children. The estate devised consists of a lot on Madison street in Memphis and an orange grove in Florida. The lot is now valued at \$40,000, and the orange grove is worth about \$16,000.

This bill is brought by the surviving executors for the purpose of having the will construed, their present powers declared, and for instructions as to the distribution of the property when sold. The questions which the court is called upon to determine are these: (1) Are the executors vested with power by implication to sell and convey the lands devised, and especially the lot in Memphis, after the expiration of 20 years? (2) If so, does this power exist and continue in the two survivors? (3) Do the provisions contained in the will for the sale and division of the property operate as an equitable conversion of it into personality? We will dispose of these questions in the order stated.

Construing the will as a whole, as we must, we think it is clear that the testator contemplated a sale of both the lot in Memphis and the orange grove as a possibility, at least, in the execution of his direction that the entire estate be divided between his son and grandchildren. It is certain that the property or its proceeds are directed to be divided into three equal shares, two of which are to be subdivided into three and four parts, respectively. The lot is of such description and so situated that it cannot be divided advantageously, yet its value is greater than one, and even two, whole shares, while the Florida lands are less in value than one share. Division of the property is the end to be accomplished, and it must be done. The means by which it is done is a matter of secondary consideration. We think that a sale is authorized, if necessary to carry out the purpose of the will, and it is clear that such is the case. That a sale of the orange grove is authorized, if deemed to the interest of the beneficiaries under the will by the executors, is not disputable, and it is more than probable that this discretion was intended to extend to the lot. It is also clear that the proceeds of the sale, if one was made, are impressed with a trust in favor of the objects of the testator's bounty, and that the executors are charged with the duty of administering this trust. This being a proper construction of the will, and the power of sale not being vested in express terms in any one, especially so far as the lot in Memphis is concerned, we are of the opinion and hold that the power to determine the propriety of a sale and to sell and convey all the property, if deemed necessary or proper by the executors, is vested in them by implication, and that, when 20 years shall have elapsed from the death of the testator, it is their duty to distribute the estate as directed, by a sale or division of the property devised, as may be most advantageous to the beneficiaries, considering its nature and situation. It is well-settled law that when a testator directs property to be sold without expressly vesting the power in any one, and the proceeds of the sale are made a trust fund, or are to be distributed by the executors,

the power to make a sale by implication is vested in the executors.

In an opinion of this court, delivered by Judge Nelson, it is said: "The provisions already quoted, and especially the direction that the executor shall faithfully execute the will, conferred upon him an implied power to make the sale. The principle is firmly established, and well sustained by the highest authority, that where a testator directs his estate to be disposed of for certain purposes without declaring by whom the sale is to be made, and the proceeds are to be distributed by the executor, the power to sell is vested in him by implication. 1 Will. on Exrs. 413, marg.; 2 Redf. on Wills, 123; 1 Sugd. on Pow.; 13 Law Lit. 136 m. See, also, *Gee v. Graves*, 2 Head, 239. In the case before us the power to sell is not expressly given, but as the real and personal estate are to be equally distributed into nine parts, and it is manifest that this could not be done without a sale of the land and slaves, the power to sell necessarily results. This construction is aided by the express direction that the executor shall faithfully execute the will, which he could not do without a sale for distribution." *Queener v. Trew*, 6 Heisk. 69.

In another case it is said: "The rule as to the power to an executor to sell real estate is thus given by Chancellor Kent (volume 4 of Commentaries, p. 326): 'If the will directs the estate to be sold, without naming a donee of the power, it naturally and by implication devolves upon the executors, provided they are charged with the distribution of the fund.' The question whether the executors are to distribute the fund need not be found expressed in direct terms on the face of the will, but it is to be arrived at from the whole scope and context of the will—the fairly inferred intention of the testator; in other words, such a power to sell on the part of the executors may be gathered from the will by necessary implication, as well as express designation. It was so held in *Meakings v. Cromwell*, 1 Seld. 139, where by a statute of New York it was provided, if the testator omitted to designate by whom the power is to be exercised, its execution shall devolve on the court of chancery." *Parker v. Sparkman*, 2 Tenn. Cas. 545.

The adjudications of other courts are in accord with those of this state. *Rankin v. Rankin*, 36 Ill. 298, 87 Am. Dec. 205; *Silverthorn v. McKinster*, 12 Pa. 71; *Vaughan v. Farmer*, 90 N. C. 607; *Mandlebaum v. McDonell*, 29 Mich. 84, 18 Am. Rep. 61; *Clark v. Hornthal*, 47 Miss. 469; *Davis v. Hoover*, 112 Ind. 423, 14 N. E. 468. The power of sale vested in the executors being coupled with an interest, and a trust created, the survivors are fully authorized to execute the power originally vested in all three, and a sale made by those now living, or the survivors of them, in the execution of such power, will be valid and effective to pass the title to the property. The exercise of

their discretion as to the necessity or propriety of a sale instead of a division will be conclusive, and not subject to review. *Fitzgerald v. Standish*, 102 Tenn. 389, 52 S. W. 294; *Matthews v. Capshaw*, 109 Tenn. —, 72 S. W. 964.

The only question remaining to be determined is whether the provisions of the will authorizing a sale and distribution of the property disposed of operates as an equitable conversion of it into personalty. A decision of this question is made necessary by the death and intestacy of W. H. Bedford, a son of Julian Bedford. If the real estate is thus converted into personal property, his widow shares with his two children, but, if it remains realty, the children take the entire share of their father. The doctrine of equitable conversion of real into personal property is recognized in this state, and a provision for the sale of real estate and distribution of the proceeds, contained in a will, is evidence sufficient to show the intention of the testator to make such a conversion, and effective to do so. Indeed, this is the most frequent way in which a conversion is made. But the intention to make the conversion must be clear and certain, and the direction to sell the lands for that purpose imperative and unconditional. The intention must appear by explicit direction, and the conversion be obligatory upon the executor or trustee. A change of the form of property, and consequently direction of the estate of the deceased, presents a serious proposition, and must be considered with the utmost caution, and never decreed unless the intention of the testator be evident and unmistakable. If the direction to sell is made to depend upon contingencies, or discretion is given to the executors to sell for distribution or divide the property in kind, the intent of the testator to make a conversion is not sufficiently evident and positive, and none is effected. *Wheells v. Wheells*, 92 Tenn. 296, 21 S. W. 595; *Wayne v. Fouts*, 108 Tenn. 145, 65 S. W. 471.

The authority or direction to the executors to sell the lands disposed of in the will under consideration for distribution is not of this imperative and absolute character. The executors are given the discretion to sell for distribution or divide the property, as may be necessary and most advantageous to the descendants of the testator. While the testator clearly intended the property to be sold by his executors, if necessary for distribution, yet it is evident that he contemplated the possibility of partition, and he left the decision of the necessity and desirability of a sale to his executors, to be determined when the time for action should arrive. There was therefore no equitable conversion of the property devised, and it is yet real estate, and the share of William H. Bedford descended to his children to the exclusion of his widow, and they should receive his share of the proceeds of the sale, if one is made; to which

extent the decree of the chancellor is modified, he having held that there was an equitable conversion. In all other respects the decree of the chancellor is affirmed. The costs will be paid by the executors out of the estate of their testator.

WEBSTER et al. v. STATE.

(Supreme Court of Tennessee. June 27, 1903.)

INTOXICATING LIQUORS — FOUR-MILE LAW — CONSTITUTIONALITY — ILLEGAL SALES — PERSONS GUILTY — WHOLESALER — STATUTES — AMENDMENT — EFFECT.

1. The "Four-Mile Law," prohibiting the sale of intoxicating liquors within four miles of institutions of learning (Acts 1877, p. 37, c. 23, as amended by Acts 1887, p. 293, c. 167, Acts 1899, p. 474, c. 221, and Act 1903), is not unconstitutional, as class legislation, because it excepts from its operation sales by manufacturers in wholesale packages or quantities.

2. The act does not deny to all citizens equal protection of the law, within the meaning of Const. U. S. Amend. 14.

3. Acts 1899, p. 474, c. 221, amended Acts 1887, p. 293, c. 167, prohibiting the sale of intoxicating liquors within four miles of any schoolhouse, so as to extend its provisions to towns of not more than 2,000 inhabitants, but saved sales made by persons having licenses "at the date of the passage of the act during the time for which such licenses were granted." This act was amended by an act approved February 2, 1903, by "striking out the word 'two' and inserting therefor the word 'five,'" so that it resulted in extending the provisions of Act 1887 to cities of not more than 5,000 inhabitants. *Held*, that Act 1903 did not reenact or revitalize the provision of Act 1899 excepting from its operation sales made under licenses in force at the time the act was passed, but such exception in Act 1899 could only be effective for a year from its passage, licenses being granted only for that time, and had thus expired by its own limitation previous to the passage of Act 1903.

4. A wholesale liquor dealer, who advanced money to a saloon keeper to open up a business, and who went with the saloon keeper to the mayor of the city to make negotiations to be allowed to engage in business, and, failing in that, notified the mayor that they would commence selling liquors, and was present in and about the saloon when illegal sales were made, and was in fact the chief beneficiary of the business, was equally guilty with the saloon keeper of an illegal sale, though the sale was made in the name of the saloon keeper.

Beard, C. J., and Shields, J., dissenting in part.

Appeal from Circuit Court, Obion County; R. E. Maiden, Judge.

Roy Webster and Max Heilbronner were convicted of unlawfully tipping liquors within four miles of a schoolhouse, and appeal. Affirmed.

Lehman & Lehman, Wright, Peters & Wright, Ownby & Kellar, and H. C. True, for appellants. Attorney General Moore and Wells, Owen & Smith, for the State.

WILKES, J. Defendants are convicted of unlawfully tipping intoxicating liquors within four miles of a schoolhouse, and sentenced to pay a fine of \$50 each and to suf-

fer imprisonment for 60 days in the county jail. There was a motion to quash the indictment in the court below upon the grounds that the act of the General Assembly of 1903, under which this indictment was based, was void (1) because the act and those it amends are vicious class legislation, in that manufacturers are exempt from their operation and permitted to sell intoxicating liquors at wholesale within the prescribed limits, and (2) because the acts violate the fourteenth amendment of the Constitution of the United States, in denying to all citizens the equal protection of the law. The motion to quash was overruled, and the cause was heard upon its merits before the court and a jury, with the result as stated; and the defendants have appealed and assigned errors.

The facts, so far as necessary to be stated, are that previous to January 26, 1903, W. R. Webster, the brother of defendant Roy Webster, had been for several years engaged in the retail liquor business at the White Oak saloon in Union City, Tenn.; that he had been in the habit of taking out his license quarterly; that on the 26th of January, 1903, he had an unexpired license, taken out shortly before that date, and having nearly three months to run; that on that date he went to the office of the county court clerk of Obion county, at Union City, and procured a license to be issued in the name of Roy Webster, or R. L. Webster, one of the defendants herein, to run for the period of one year from that date, and paid therefor the license tax due the state and county. It was further shown that there was no apparent change in the business carried on at the White Oak saloon; that W. R. Webster continued in business there until the 31st of March, 1903, when an act was passed by the Legislature, which then took effect, repealing the charter of Union City, and thereupon no further business was done at the saloon until the 17th of April, 1903, when the sale on which this indictment is predicated was made. It also appears that up to the date of trial W. R. Webster had not settled and paid his ad valorem taxes to the county court clerk under his original license. On the 16th of April, 1903, Roy Webster commenced to do business at this saloon. The defendants testified in the case for themselves. Defendant Roy Webster stated that on the 26th of January, 1903, he bought out the business of his brother, W. R. Webster, and took out a license for the full year in his own name, and that thereafter the business carried on at the White Oak saloon was his own, and not that of his brother; that he closed said business March 31, 1903, and did not reopen until April 16, 1903; that he procured the money from the firm at Memphis of which his codefendant was a member to buy his license, and that this money was procured by draft for \$500 on Heilbronner's firm, and was cashed 27th of January; that Heilbronner offered Roy Webster to put

him into business, and told him that, if he would take out a license for a year, he would furnish him money to pay for the same, and honored the draft in pursuance of his promise, and with the understanding that the liquors would be bought from his firm, though there was no express agreement to that effect. The defendant Heilbronner claimed that his only interest in the business was to sell goods to his codefendant, Webster, and that his firm advanced money to purchase the license as a matter of business, and that thereafter he sold to his codefendant a large amount of goods, on which his firm had been paid considerable sums, and he denied that he was in any way interested in the business, or that he participated in the sale for which he, with his codefendant, was indicted. It is shown that there was no apparent change in the business between January 26, and March 31, 1903, but that it was understood that W. R. Webster was operating still the business of the White Oak saloon when it was closed on March 31, 1903. It is further shown that on the day before the saloon was reopened on April 16, 1903, both the defendants paid a visit to the mayor of Union City, and endeavored to secure immunity from the municipal authorities, in order that they might test the question and their right to do business in Union City with the state and county authorities. It seems that at this conference Heilbronner did most of the talking, and he gave the mayor to understand that he and his codefendant, upon the advice of their attorneys, were going to open business and test the question. The mayor declined to make an agreement with them, and thereupon on the next day the saloon was opened for business and sales made, both of defendants being about the saloon, when they were arrested upon a warrant issued by a justice of the peace and bound over to court. Upon these facts the jury found both defendants guilty.

The legislation drawn in question in these two causes is what is known in Tennessee as the "Four-Mile Law," and originated with chapter 23, p. 37, of the Acts of 1877, which is as follows:

"Chapter 23.

"An act to prohibit the sale of intoxicating liquors near institutions of learning.

"Section 1. Be it enacted by the General Assembly of the state of Tennessee, that it shall not, hereafter, be lawful for any person to sell or tippie any intoxicating beverage within four miles of an incorporated institution of learning in this state, and that any one violating the provisions of this act shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars, nor more than two hundred and fifty dollars, and imprisonment for a period of not less than one nor more than six months.

"Sec. 2. Be it further enacted, that this

act shall not apply to the sale of such liquors within the limits of any incorporated town, nor to sales made by persons having licenses to make the same at the date of the passage of this act, during the time for which such licenses were granted, nor to sales by manufacturers of such liquors in wholesale packages or quantities.

"Sec. 3. Be it further enacted, that this act take effect from and after its passage, the public welfare requiring it.

"Passed March 19, 1877."

The constitutionality of this act was attacked, but sustained by this court. *State v. Rauscher*, 1 Lea, 97; *Hatcher v. State*, 12 Lea, 368.

The provisions of this original act were extended, so as to prohibit, under certain conditions, sales of liquor as a beverage within four miles of any schoolhouse, public or private, by chapter 167, p. 293, of the Acts of 1887, as follows:

"Chapter 167.

"An act to prohibit the sale of intoxicating liquors as a beverage near any schoolhouse, public or private, where a school is kept, whether the school be in session or not."

"Section 1. Be it enacted by the General Assembly of the state of Tennessee, that it shall not hereafter be lawful for any person to sell or tippie any intoxicating liquors, including wine, ale, and beer, as a beverage, within four miles of any schoolhouse, public or private, where a school is kept, whether the school be in session or not, in this state, and any one violating the provisions of this act shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine for each offense of not less than ten dollars nor more than one hundred dollars, and imprisonment for a period of not more than six months, at the discretion of the court.

"Sec. 2. Be it further enacted, that this act shall not apply to the sale of such liquors within the limits of any incorporated town, nor to sales made by persons having licenses to make the same at the date of the passage of this act during the time for which such licenses were granted, nor to sales by manufacturers of such liquors in wholesale packages or quantities.

"Sec. 3. Be it further enacted, that all laws in conflict with this act be, and the same are hereby repealed.

"Passed March 23, 1887."

The act of 1887 was enforced by this court in *Moore v. State*, 96 Tenn. 544, 35 S. W. 556, and *Harrison v. State*, 96 Tenn. 548, 35 S. W. 559.

In 1899 section 2 of chapter 167 of the Acts of 1887 was amended so as to prohibit sales of liquor in towns thereafter incorporated of not more than 2,000 inhabitants by the federal census of 1890, or any subse-

quent federal census. The act of 1899 is as follows (Acts 1899, p. 474):

"Chapter 221 (House Bill No. 55).

"An act to amend section 2, chapter 167, of the Acts of the General Assembly of 1887, to prohibit the sale of intoxicating liquors as a beverage near any schoolhouse, public or private, where a school is kept, whether the school be in session or not.

"Section 1. Be it enacted by the General Assembly of the state of Tennessee, that section 2, chapter 167, of the Acts of the General Assembly of 1887 be amended so as to read as follows: 'That this act shall not apply to the sale of such liquors within the limits of any incorporated town, except towns hereafter incorporated with a population of not more than two thousand inhabitants by the federal census of 1890, or any other subsequent federal census, nor to sales made by persons having licenses to make the same at the date of the passage of this act, during the time for which such licenses were granted, nor to sales by manufacturers of such liquors in wholesale packages or quantities.'

"Sec. 2. Be it further enacted, that all laws or parts of laws in conflict with this act be, and the same are hereby repealed, and that this act take effect from and after its passage, the public welfare requiring it.

"Passed April 14, 1899."

The constitutionality of the act of 1899 was attacked, but sustained by this court, in *State v. Frost*, 103 Tenn. 686, 54 S. W. 986, and *Brinkley v. State*, 108 Tenn. 476, 67 S. W. 796.

There was passed by the General Assembly on January 26, 1903, and approved by the Governor on February 2, 1903, the following act:

"Senate Bill No. 1.

"An act to amend section 1, chapter 221, of the Acts of the General Assembly of 1899 entitled: 'An act to amend section 2, chapter 167, of the Acts of the General Assembly of 1887, to prohibit the sale of intoxicating liquors as a beverage near any schoolhouse, public or private, where a school is kept, whether the school be in session or not,' so as to amend the provisions of said chapter 167 of the Acts of the General Assembly of 1887 and said section 1, chapter 221, of the Acts of the General Assembly of 1899 to towns of not more than five thousand inhabitants hereafter incorporated.

"Section 1. Be it enacted by the General Assembly of the state of Tennessee, that section 1, chapter 221, of the Acts of the General Assembly of 1899, be amended by striking out the word 'two' in line eight of said section, and inserting therefor the word 'five.'

"Sec. 2. Be it further enacted, that this act shall take effect from and after its passage, the public welfare requiring it.

"Passed January 26, 1903."

It will be seen that each of these several acts (except the act of 1903) has been fully considered by this court, and their constitutionality maintained; and we need not further mention this special feature of the case. The exact point of criticism made in the first ground of the motion to quash is that the act is invalid, because partial and not the law of the land, in that manufacturers are exempted from its operation. It has been held that this exemption is operative in favor of manufacturers only when they sell in wholesale quantities, or in packages or quantities designed and suitable for purposes of trade and to be sold again, and not to sales to persons for consumption, or as retailers, though the same may be a manufacturer. *Harrison v. State*, 98 Tenn. 548, 35 S. W. 559. And a fraudulent evasion of the law would not protect the manufacturer who in fact sold by the quantity, but for the purpose of its being consumed among the indirect purchasers. And it was held that the distinction between the wholesale and retail dealer did not depend upon the amount sold, but whether sold to be consumed, or in the regular course of trade to be resold again. We will consider the question from the standpoint of sales made in good faith by bona fide manufacturers and for the purpose of resale by the purchasers in smaller quantities. And the question is: Does the exemption of manufacturers from the operation of the law make it invalid? or is the distinction based upon valid, legal, and constitutional grounds and reasons? And this also presents the question whether such a discrimination between wholesale and retail dealers of whisky is contrary to the provisions of the Constitution of the United States and the fourteenth amendment thereof.

From the infancy of our governments, state and national, the regulation of the traffic in and the use of intoxicating liquors has been the subject of special and continued legislation. This legislation has been based upon what is known as the "police power" of the government—a power the proper exercise of which has been said by this court to be essential to the safety and tranquility of every well-ordered community. *Theilan v. Porter*, 14 Lea, 626, 52 Am. Rep. 173. This police power extends over a large range of subjects—the public health, the public morals, the public safety, the public welfare—under any one of which the regulation and restriction of the sale of intoxicating liquors would readily fall. The courts have wisely refrained from prescribing limits to the exercise of the police power by the government; and it has been held to embrace all such legislation as will preserve and promote the public welfare by prohibiting all things hurtful to the comfort, safety, and welfare of society, and the establishing of such rules and regulations for the conduct of all persons, and the use and management of all property, as may be conducive

to the public interest. 22 Am. & Eng. Ency. Law (2d Ed.) p. 916, and cases cited. The traffic in intoxicating liquors is universally recognized as a proper subject for police regulation, and may be controlled, restricted, or even totally prohibited, without violating any constitutional right under the police power. *Id.* p. 927, and cases cited; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989; *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. Ed. 929; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205.

The regulation, restriction, and even prohibition of the liquor traffic being clearly within the police power of the state, it is for the Legislature to decide when the exigency exists for the exercise of that power, and its exercise is not to be controlled by the courts. *Powell v. Pennsylvania*, 127 U. S. 683, 8 Sup. Ct. 992, 32 L. Ed. 253 (Rose's Notes). And the exercise of this power with respect to the manufacture and sale of intoxicating liquors, even to the extent of abolishing them, is not a denial of an equal protection of the law, nor a violation of the fourteenth amendment to the Constitution of the United States. *Cooley's Constitutional Limitations*, 720; *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 846; *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620; *Miller v. Ammon*, 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759; *Gray v. Connecticut*, 159 U. S. 74, 15 Sup. Ct. 985, 40 L. Ed. 80; *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. Ed. 929; *Foster v. Kansas*, 112 U. S. 205, 5 Sup. Ct. 8, 97, 28 L. Ed. 629; *Ellenbecker v. Plymouth Co.*, 134 U. S. 31, 10 Sup. Ct. 424, 33 L. Ed. 801; *License Cases*, 5 How. 504, 12 L. Ed. 256; *Glozza v. Tiernan*, 148 U. S. 657, 13 Sup. Ct. 721, 37 L. Ed. 599. This power of regulation and restriction may be, and usually is, exercised by means of licenses as a condition to selling liquors; and the Legislature may not only prescribe the conditions upon which such licenses will be granted, but may also regulate the conduct of the business after the license had been granted. See cases cited and illustrations in 17 Am. & Eng. Ency. Law, p. 209. And the Legislature may, for proper cause shown, revoke such license. *Id.* p. 215.

The fact that manufacturers are not subject to the provisions of the act, when they sell in wholesale packages or quantities, does not render the act invalid or unconstitutional. *Reymann Brewing Co. v. Brister*, 179 U. S. 445, 21 Sup. Ct. 201, 45 L. Ed. 269. As was said in *Adler v. Whitbeck*, 44 Ohio St. 574, 9 N. E. 682: "It was for the Legislature to determine the form of the traffic that required to be regulated as a source of evil. It has in a measure drawn a line between a distillery and a brewery on the one hand, and a saloon on the other. There is nothing unreal in this distinction. It is known by all men, and in one respect, probably, too well by many men, and, unless absolute prohibition is

resorted to, no more practical distinction can be made." Precisely the same distinction in principle is made in our own case of *Harrison v. State*, 96 Tenn. 548, 35 S. W. 559, in which the doctrine was announced of a distinction between wholesale and retail liquor dealing, based, not upon the amount or quantity sold, but upon whether it was sold to be consumed, or sold to be again resold.

Our Legislature for a century has distinguished between the wholesale and retail dealer, and for the most obvious reasons, and upon the plainest ground, to wit: Sales by dealers and manufacturers in quantities and packages, and not for consumption, do not furnish the occasion for disorder and disquiet that attends the sale in smaller quantities, to be consumed in saloons or public places. We conclude that the exemption of manufacturers who sell in wholesale packages or quantities from the operation of the law does not render it invalid, when tested by either the Constitution of the United States or of the state of Tennessee.

It is said, however, that, conceding the validity of the act, it cannot be held to deprive the defendant from exercising the privilege of selling intoxicating liquors during the life of a license granted him by the state for that purpose. The charter of Union City was abolished on the 31st of March, 1903, by legislative enactment. The town was rechartered by an act of the General Assembly on April 1, 1903. It had a population of more than 2,000 and less than 5,000 inhabitants. The license was issued on 26th of January, 1903, to be operative for one year. The sale was made within four miles of a schoolhouse, where school was kept, and accustomed to be kept, within the corporate limits of Union City, and on the 1st day of April, 1903. On the one hand it is contended that it is not the effect of the law of 1903 to cancel and destroy an existing license to sell liquors, but the license continues until it expires by its own limitations, and that it was not the intention of the Legislature to cancel existing licenses. On the other hand it is contended that the effect of the law is to cancel and annul the license when the new corporation goes into operation, and that such was the intention of the General Assembly.

In *Johnson v. State*, 3 Lea, 470, 31 Am. Rep. 648, it was held that the grant of a privilege to tipple, which might be exercised within an incorporated town, irrespective of its proximity to incorporated institutions of learning, did not include the right to do so upon the repeal of the charter of the town, nor preclude the Legislature from repealing the charter of the town, nor change the results of such repeal. This case arose under the operations of the act of 1877. The case was decided upon the theory that the party was licensed to exercise the privilege subject to such reasonable police regulations as might be deemed necessary for the protection of the community; and it was said that by the terms

of his license the defendant might keep a tippling house at any one place in Trousdale county, except that after the incorporation he could not keep it in the town of Harts-ville. This holding was reaffirmed in *Brinkley v. State*, 108 Tenn. 475, 67 S. W. 796, apparently upon the theory that, when the old charter was repealed, it put an end to the corporate life of the town, and, when reincorporated, that was the beginning of a new corporate life. Being, then, within the terms of the act of 1899, the new municipality was from the beginning subject to the provisions of that act.

It is said, however, that it was not the intention of the Legislature to cancel and render inoperative existing licenses, as appears from the fact that in the acts of 1877, 1887, and 1899 it was provided that they should not apply to sales made by persons having license to sell at the date of the passage of the several acts, and that this indicated a legislative policy not to interfere with unexpired licenses by the enactment of such laws. On the other hand, it is said the failure to keep up this protection of existing licenses by the act of 1903 indicated a change of state policy, and that existing licenses should be canceled. So that different inferences are drawn by the opposing counsel from this action of the General Assembly. Again, it is said that the only amendment made to the act of 1899 was to substitute the word "five" for the word "two" in designating the number of inhabitants required in the new town, and that the effect of the amendment was to continue in force the entire provisions of the act of 1899, exceptions and all, so that the act of 1903 should read as though it contained the same exception in favor of licenses in force at its passage as is contained in the act of 1899 as to licenses then in force. On the other hand it is contended that the provision of the act of 1899 excepting licenses then in force expired by its own limitations when the licenses then existing terminated, so that this exception was not living law at the passage of the act of 1903, and did not become incorporated into it nor resuscitated by it.

Recognizing the force of the view taken by defendants, we are of opinion that the amendment made by the act of 1903 recognized the act of 1899 only so far as it was in force and effect at the date of the passage of the act of 1903, and no further, and the amendment merely continued the act with the substitution of "five," instead of "two," thousand, so that the act of 1903 became operative as to towns of less than 5,000 inhabitants, as it was with respect to towns of 2,000 inhabitants before the latter act was passed; but it did not re-enact or revitalize a provision of the act of 1899 which had expired and had become obsolete by its own limitations before the passage of the act of 1903, nor did it substitute a new limitation for licenses for one which had already become extinct. In other words, the act of 1899 was

passed April 14, 1899, and excepted licenses then in force. None of these licenses could extend beyond April 14, 1900, and the act of 1899 should be so read that no sales could be made under then existing licenses after April 14, 1900, or earlier if the license sooner expired. Such a provision has no vitality after the limit fixed, and could have none unless revitalized by a provision to that purpose; and an act amending the act of 1899 only amended and continued the act as it was in existence and effect when the amending act was passed. The act of 1899 saved only licenses then existing. The present license did not then exist, and could not be covered by its terms, nor could any other license not then in existence.

We cannot, in arriving at this conclusion, be controlled by our conceptions of what might have been proper or politic upon this matter. It may work a hardship, and no doubt will, to at once and summarily close up a business theretofore legalized and licensed; but this was a matter addressed to the General Assembly, and not to this court. It is a canon of construction that an amended statute is to be understood, as far as future acts are concerned, in the same sense as if it had read from the beginning as it reads when amended, but not to take effect retroactively, but only in the future. The question is one of great difficulty, and there is great force in the view of the defense that the Legislature did not intend to revoke licenses which had been granted to the injury of persons who had bought property, entered into business, and incurred liabilities on the strength of such licenses. But, on the other hand, we are unable to see how a dead and inoperative provision may be enforced, unless it is in some way revitalized and resuscitated. If the Legislature had intended to protect existing licenses, it could easily have provided that they should be respected, as was done in previous acts. But it did not do so; and we are forced, from this fact, to hold that it did not intend to do so.

As to the defendant Heilbronner, it is not contended that he had any license, and hence, if he made the sale or assisted in it, he is guilty, since, the offense being a misdemeanor, aiders and abettors are guilty as principals. It is insisted for him that he has committed no offense; that he merely sold to defendant Webster liquors in the due course of his business as a wholesale dealer. We are convinced from this record that he is the instigator of the entire matter; that he encouraged and induced Webster to enter into the business; that he, or his firm, furnished the money to conduct it and the liquors which were sold. It is shown that he went with the defendant Webster to the mayor to make negotiations with him to be allowed to open up for business, and, failing in this, notified the mayor that they (meaning Webster and himself) were going to commence the sale of liquors that day, and asked what the mayor

would do about it; that he was present in and about the saloon when the sale was made; that he is chief beneficiary, as Webster is shown to be without property and the business is really for the benefit of his firm and himself. He notified the mayor that he was going to "back up" Webster in the sale of liquor in Union City, and had plenty of money, and, when told that he could not lie in jail for him as the result of the sale of liquor, he replied that he would not object to it, and was cautioned by the mayor that such would be the probable result of his acts. Heilbronner did most of the talking, and Webster but little, except to assure the mayor: "We are going to give you a run for your money." It does not matter that the sale was made in Webster's name. Under the facts, he was really the accomplice of Heilbronner, who was present, aiding and abetting. If Webster is guilty, so is Heilbronner. This is so legally, and still more so morally. *Atkins v. State*, 95 Tenn. 475, 32 S. W. 391; *Swift v. State*, 108 Tenn. 610, 69 S. W. 326; *State v. Bonner*, 2 Head, 136.

For the reasons stated, we are satisfied the conviction of both Webster and Heilbronner is correct, and the judgment is affirmed, with costs.

There are several minor exceptions to testimony and charge, none of which are well made, and it is not necessary to pass upon them in a written opinion.

The holding in this case is a determination of the cases of *State v. Roy Webster* and *State v. Samuel Redfean*; the latter from the *Hardeman* state docket.

Judgments in all the cases are affirmed.

BEARD, C. J., and SHIELDS, J., do not concur in this opinion as to the construction of the act of 1903, but are of opinion the exception in the act of 1899 in favor of existing licenses was intended to be, and was, brought forward into and made part of the act of 1903.

THOMAS v. STATE.

(Supreme Court of Tennessee. July 25, 1903.)

CRIMINAL LAW—NEW TRIAL—JURORS—DISQUALIFICATION—OBJECTIONS—TIME—APPEAL—FINDING.

1. Where the finding of a trial judge on a motion for new trial that certain jurors, claimed to have been disqualified by reason of previous opinions formed and expressed against accused, were competent, was sustained by material evidence, such finding will not be reversed on appeal.

2. Where, on an application for a new trial on the ground that certain jurors were disqualified, there was no showing that the alleged disqualification was unknown to defendant or his counsel when the jurors were sworn, or at any time before verdict, and such disqualification was not called to the attention of the court until after verdict, a new trial will not be granted.

Error to Circuit Court, Maury County; Sam Holding, Judge.

John W. Thomas was convicted of voluntary manslaughter, and brings error. Affirmed.

Dinning & Dinning, Figures & Padgett, Greenlaw & Whitthorne, J. C. Voorhees, and J. A. Smiser, for plaintiff in error. Chas. T. Cates, Jr., Atty. Gen., Moore & Wells, and Owens & Smith, for the State.

SHIELDS, J. John W. Thomas, plaintiff in error, was convicted of voluntary manslaughter upon trial in circuit court of Maury county, and his punishment fixed at six years' confinement in the penitentiary, and from the judgment upon this verdict he has prosecuted an appeal in the nature of a writ of error to this court.

Upon the hearing of the motion to set the verdict aside and grant him a new trial the plaintiff in error introduced before the court evidence tending to show that four of the jurors trying the case had previously formed and expressed opinions unfavorable to him upon the question of his guilt or innocence of the charge preferred against him, and were not such fair and impartial jurors as he was entitled to be tried by under the law. This is a serious assault upon the integrity of the verdict of a jury and the judgment of the court thereon, and whenever made with merit is entitled to the most careful consideration. The Constitution guarantees to every one accused of crime the right of trial by an impartial jury, and it is the duty of the courts to see that this right is not denied. The Constitution also provides for the creation of the courts which shall have jurisdiction to conduct trials of all charged with criminal offenses, direct the procedure and order of trial, and protect them in their rights. Circuit courts are specially provided for by the Constitution, and are courts of a high order, conducted upon well-regulated principles and rules of practice certain in their enforcement, and have from the organization of this state been vested with jurisdiction of all criminal offenses. The judges of these courts are of necessity and with great propriety given much discretion in the conduct of trials therein, and its exercise will not be interfered with except in cases where it is clearly made to appear it has been abused. Jurors are elected, impaneled and sworn, and the trial conducted under their immediate direction; and upon all motions for new trials they have the witnesses in relation to the new matter relied upon before them—the better practice being to examine them in open court—and can observe their manner of testifying, see the truth, and determine the matter correctly than this court can from the manner in which the case is presented to it in a bill of exceptions. Therefore every presumption is made in favor of the regularity of the proceedings of trials in those courts, including the qualifica-

¶ 2. See Criminal Law, vol. 15, Cent. Dig. § 2225.
75 S.W.—65

tions of jurors elected by the parties and impaneled by the judges in such matters. This makes it necessary and highly proper that the findings of the trial judges upon all questions of fact that arise upon motions for new trials should be given the same force and effect as in cases tried by them on the merits or the findings of juries, and is always done. These principles are well settled by a long line of decisions of this court. We will only cite some of them: *Mann v. State*, 3 Head, 873; *Collins v. State*, 15 Lea, 68; *King v. State*, 91 Tenn. 617, 20 S. W. 169; *Ellis v. State*, 92 Tenn. 100, 20 S. W. 500. The question here made upon four of the jurors trying the plaintiff in error was fully investigated by the trial judge, the jurors examined, the evidence heard for and against the charges made against them, and upon the whole record thus made the circuit judge found, his special finding to that effect appearing in the record, that the charge that the jurors were not impartial, and were disqualified on account of previous opinions formed and expressed, was not sustained, but, on the contrary, it was found that said jurors were qualified and competent, and such as the law guarantees to the plaintiff in error; and there is material evidence to sustain this finding. The law, as we have said, is well settled that upon all questions of fact tried by a trial judge upon a motion for a new trial his findings are entitled to the weight of a verdict of a jury, and will not be disturbed when there is material evidence in the record to support them, as in this case. *Ryan v. State*, 97 Tenn. 211, 36 S. W. 930.

Further, it does not appear by affidavits of the plaintiff in error, or of his counsel, or otherwise, that the alleged disqualification of the jurors attacked was unknown to them when they were sworn, or at other times before the verdict was rendered, or that he called the attention of the court to their disqualification as soon as he received the information. This is necessary in all cases where new trials are asked upon account of the misconduct or disqualification of jurors. Parties cannot knowingly permit incompetent jurors to try their cases, and then take advantage of the incompetency when the verdict is adverse to them. They cannot experiment with the courts in this way, but must call the attention of the trial judge to the facts in the proper manner at the earliest opportunity, or they will be held to have waived the disqualification. Attacks upon jurors after adverse verdicts are said by Judge Caruthers in *Mann v. State*, supra, to be the last resort of the worst of criminals, and will always be closely scrutinized, and required to be clearly made out to be effective. The presumption is in favor of the qualification of the jurors and of the regularity of trials, and this presumption must be overcome by clear and competent evidence before a motion for a new trial will be allowed for these

reasons. This assignment of error must be overruled. Other assignments of error were disposed of in an oral opinion.

Judgment affirmed.

WILKINS et al. v. CHICAGO, ST. L. & N. O. R. CO. et al.

(Supreme Court of Tennessee. June 22, 1903.)

MUNICIPAL CORPORATIONS — DEDICATION — USES OF PROPERTY — STARE DECISIS — INJUNCTION — PERSONAL RIGHTS.

1. Where the Supreme Court has decided that a city was not bound by a designation indicating the uses for which dedicated property was intended by the original proprietors, and the decision has been acquiesced in for 60 years, and treated, as respects the particular land, as establishing a rule of property, on the faith of which rights have been acquired, it will not be disturbed on a bill by property owners seeking to enjoin contracts by the city, affecting the property, on the ground that the city in respect to it sustains towards complainants the relation of trustee.

2. Property owners, having no special or peculiar interest different from that of other inhabitants of a city as to the period of time for which city contracts extend, cannot restrain the execution of the contracts because they are for too long a time.

3. Property owners, who own no property abutting on a street about to be closed by a contract with the city affecting the street, have no special or peculiar interest authorizing them to restrain the execution of the contract.

Appeal from Chancery Court, Shelby County; F. H. Helskell, Chancellor.

Bill by W. G. Wilkins and others against the Chicago, St. Louis & New Orleans Railroad Company and others to restrain the execution of certain contracts between the city of Memphis and the other defendants, as diverting property to a use different from that to which it was dedicated. From a decree for defendants, complainants appeal. Affirmed.

Carroll, McKellar & Bullington, for appellants. J. M. Dickinson, Cooper, Hirsch & Cooper, and W. B. Henderson, for appellees.

NEIL, J. The case comes before us on bill and demurrer. The allegations of the bill necessary to be noted are the following:

That the city of Memphis as originally laid out was the west part of the Rice grant, and its site appeared as a town reserve on a plat attached to the deed of partition between the proprietors of that grant, which was surveyed on the 28th day of July, 1820, as appears of record in the register's office of Shelby county; that the plat or map, as originally laid out in 1819, showed between Bayou Gayoso on the north and Jackson street on the south an area or strip of ground designated as a public landing, and between Jackson street on the north and Union street and Howard Row on the south, and Mississippi Row (now Front street) on the east and the bank of the Mississippi river on the west, a strip of land

¶ 2. See Injunction, vol. 27, Cent. Dig. § 206.

designated as the "Public Promenade," and that these words indicated unmistakably the purpose of the proprietors; that by this map they dedicated the said landing and promenade, as well as the streets, to the use of the public, and that, as to the landing and the public promenade, the purpose indicated was that they were not to be diverted to other and different uses than these thus specifically indicated by the use of the words themselves.

That prior to the passage of the taxing district act, approved by the Governor on the 31st of January, 1879 (Acts 1879, p. 15, c. 11), the municipal authorities of the city of Memphis made no grant of any portion of the public promenade or public landing to railroad companies for stations or depot purposes, save only in the lease to the Memphis & Little Rock Railroad Company, as reorganized, of certain portions of the wharf, and of the center landing:

That this lease was recognized by the taxing district government, by a contract dated the 9th day of September, 1880.

That prior to this recognition the Mississippi & Tennessee Railroad Company, a corporation under the laws of Tennessee and Mississippi, by an agreement of date June 21, 1880, between it and the taxing district of Shelby county, claimed to acquire a right to lay down and maintain, from that date, a single railroad track, beginning at a point in the south side of Calhoun street, extending thence, crossing the north side of Calhoun street; thence northwestwardly through private property to the south side of an alley between Calhoun street and _____; thence crossing said alley, parallel with Main street, to the south side of Butler street; thence crossing Butler street at about 245 feet west of Main street; and thence as set forth in the contract exhibited with the bill.

That the taxing district attempted to grant to the Mississippi & Tennessee Railroad Company the right to operate a branch track to connect the main track with the tracks of the Memphis & Charleston Railroad Company over the public grounds between Adams and Poplar streets, which by the terms of the contract was to terminate at the end of 40 years from its date.

That the third clause of this agreement was in the following words: "The right of way and occupancy herein granted to the railroad company for the construction and operation of said union passenger and freight railroad shall include only so much of the streets, alleys, and public grounds as may be occupied by the embankments, excavations, tracks, and bridges of the main track and branches herein specified; the taxing district only granting the right of way over public property, and none other."

That afterwards, on the 1st day of September, 1880, the Memphis, Paducah & Northern Railroad Company entered into a

contract with the taxing district, whereby the municipality granted a lease for a track for the period of five years, and also the right to erect a temporary wooden depot building on the following piece of ground, to wit, that certain portion of the river front bounded on the east by Front Row, on the south by Poplar street, on the west by Promenade street, on the north by Exchange street, being a strip of land about 50 feet in width by 250 feet in length.

That afterwards, on the 26th of April, 1881, the municipality entered into another contract with the last-named railroad company, whereby, among other things, it undertook to lease to the said company, for the term of 50 years, from the 1st day of May, 1881, to the 1st day of May, 1936, upon certain conditions set forth, the following public property: "Those lots of ground on the river front, lying on the east of Promenade street, and on the west of Front street, being bounded by Promenade street on the west, Front street on the east, by Market street on the north and by Poplar street on the south; and those other lots, bounded on the north by Union street, on the south by Beale street, on the east by Clinton street, and on the west by the line of the Mississippi & Tennessee Railroad extension; and also granted, or attempted to grant, to said railroad company the right and privilege of laying down, maintaining, and operating its tracks over and through said premises south of Market street, across said Market street, upon or under Promenade street to Auction street, and thence continuing north on that line to Bayou Gayoso, and along Promenade south to Market street, to the southern limit of the premises leased, on Poplar to Washington street, with the privilege of extending its main line and side tracks not more than three, over and across said first described premises, and over the square south of Poplar street to Washington."

That by the second clause of the contract just referred to it was provided as follows: "And upon said premises so leased to the aforesaid, the second party, its successors or assigns, may erect such substantial brick, stone, or iron depots for freight and passenger uses, and such platforms, main and side tracks, and such usual appurtenances, as they may deem proper for the transaction of their said business, and shall remove the banks or bluffs on said ground south of Union street so as to bring the same to the grade of Clinton street or the levee; but all these matters are always to be under the supervision of the district engineer."

That by this contract it was expressly provided that it was to determine whenever the said leased premises ceased to be used for railroad purposes by the railroad company, its successors and assigns.

That the successor to the Memphis, Paducah & Northern Railroad Company constructed a passenger depot on the leased premises,

and closed up all the streets leading from the northern portion of the city to the river except Poplar street, and rendered Poplar street, between Front street and the river, practically useless by reason of the operation of the cars over and storage upon its tracks on the river front; that these tracks are over the public promenade and public landing before referred to.

That on the 20th of March, 1893, the municipality attempted to enter into another contract with the Illinois Central Railroad Company (the successor to the roads previously mentioned, except the M. & L. Railroad Company) for a period of 15 years, during which time it purported to grant to that company, for an annual rental of \$500, the right to the use of Georgia street for the purpose of maintaining its then present and any additional tracks thereon, and that the contract provided for the erection of a foot passenger bridge.

That on the 25th day of March, 1895, and during the years 1900 and 1902, the municipality entered into contracts with other railroad companies (the Kansas City, Springfield & Memphis Railway Company, the Union Railway Company, and the Little Rock, Charleston & Memphis Railroad Company), none of which are made defendants to the bill, whereby these companies were allowed the privilege or right of building and operating tracks upon the said strip of ground known as the "Public Promenade" and the "Landing."

That, "notwithstanding these several legislative concessions, and the occupation of public property under them, the defendants the Chicago, St. Louis & New Orleans Railroad Company and the Illinois Central Railroad Company were not satisfied with the munificent donations of public property to them, but desired other and further gratuities, reasonably worth upwards of one million dollars, and consequently, on or about the 6th of June last (1902), addressed a petition of nine paragraphs to the legislative council of the city of Memphis, and therein prayed for the additional privileges desired by them; that they are substantially: (1) for authority to abandon the use of Poplar Street Station, and to authorize the premises to be put to any railroad uses for which they might be fitted; (2) for the extension of the three several contracts mentioned in the aforesaid petition for a period of time that will probably continue beyond the life of the present inhabitants of the city of Memphis; (3) for the right to lay and maintain such other tracks on Senatobia street as may be found convenient; (4) to cross Calhoun street; (5) to lay an additional track across Butler street, Shelby and Trezevant streets, and all intervening alleys; to connect with the existing tracks on Tennessee street, between Trezevant and Huling streets."

That, unless restrained by injunction, the prayer of the above-mentioned petition will

be granted, and all the rights and privileges therein sought to be obtained will be conferred upon the defendant railroad companies, and that this grant will be of such serious moment that it will operate to destroy the public landing, the public promenade, and the use and occupation of several of the highways of the city of Memphis, for any purpose other than railroad purposes.

The complainants are W. G. Wilkins and 26 other residents of the city of Memphis, and the defendants are the Chicago, St. Louis & New Orleans Railroad Company, the Illinois Central Railroad Company, the city of Memphis, and its board of police and fire commissioners, and its board of supervisors of public works, the two composing the legislative council of the city.

The complainants describe themselves in the bill, and their interests to be affected by the matters complained of, as follows: "That they are severally property owners and taxpayers in the city of Memphis, county of Shelby, and state of Tennessee; that their property consists in part of real estate which is situated north of Union street, in the city of Memphis, and on Front street, between Union and Auction streets, some of it lying immediately east of the depot hereinafter more particularly described, and all of said property, in so far as its uses are concerned, and its rental value, directly affected by the administration of the municipal authorities of the city of Memphis, of the trust hereinafter to be more specifically set forth."

Speaking further to the interest of the complainants, the bill alleges: "That just prior to these contracts the business houses on Front street yielded large and remunerative rents. The property was exceedingly valuable, occupied by some of the largest merchants in the city, who had a remunerative trade, and the streets that were closed, and injuriously affected through the railroad operation under the aforesaid agreements, afforded every facility for the passage of freights from said business houses, both on Front street to the river, and from the landing to said business houses. After the contracts were made, the railroads severally and exclusively occupied with their tracks part of the landing and public promenade."

Again, speaking of the petition filed by the defendant companies with the municipal authorities, it is said that, if this is granted by the city, such action "will produce an irreparable injury to them, in that it will transfer and divert trade and traffic, and render the use of the property less desirable, and reduce the rental value thereof, without affecting the assessment value thereof."

The charges of the bill in respect of the trust are, in substance, that, by virtue of the plat or map which the original proprietors caused to be prepared and registered, containing the situs of the town or future city, the streets, the squares, the promenade, and the landing appearing thereon were dedi-

cated to the public use, and that a trust was thereby created for the benefit of the citizens of Memphis, of which trust the municipality became the trustee; that this trust particularly affected the public landing and the public promenade, in that they were by such dedication devoted for all time to the uses indicated by this designation.

There is also filed with the bill an exhibit dated on the 18th of September, 1828, several years after the original dedication, which purports to explain the purposes of the original proprietors in making the original dedication, and to remove doubts which it states had arisen in respect of that purpose. Touching the streets and alleys, it is said in this instrument that it was the purpose of the proprietors that they should always remain public streets and alleys, and subject to the same regulations that all streets and alleys are subject to in towns or cities. In respect of the promenade, the following language occurs: "In relation to the piece of ground laid off and called the 'Promenade,' said proprietors say that it was their original intention, is now, and forever will be, that the said public ground [be] for such use only as the said word imports, to which heretofore, by their acts for that purpose, it was conceived all right was relinquished, for themselves, their heirs, etc.; and it is hereby expressly declared, in conformity with such intention, that we, for ourselves, heirs, and assigns, forever relinquish all claims to the said piece of ground called 'Promenade' for the purpose above mentioned. But nothing herein contained as to the promenade shall be or bar the town from authorizing one or more ferries to be kept by the representative proprietors, their heirs or assigns, opposite said promenade, and south of any of the cross streets on the Mississippi Row." As to the public landing, it was said in this instrument: "It was the original intention of the proprietors that there should on said ground forever be a landing or landings for public purposes of negotiation or trade, and that the same should be forever enjoyed for these purposes, obligatory on themselves, their heirs and assigns, but all other rights not inconsistent with the above public rights incident to the aforesaid it was never the intention of the proprietors to part with, such as keeping a ferry or ferries on any of the public grounds, an exclusive right which they have always held sacred, and never intended to part with in whole or in part." This instrument was signed by John Overton, one of the original proprietors, and by John C. McLemore, Geo. Winchester, and William Winchester, the latter described as "surviving owner."

It is charged that the contracts before mentioned constituted a diversion of this property to a use wholly different from that to which it was dedicated, and constituted a breach of duty on the part of the trustee.

It is insisted in the bill that the complain-

ants have the right to come before the court in the present proceeding and have the breaches of trust complained of corrected, and further breaches restrained.

In respect of the depot complained of in the bill, it is alleged: "The owners of the property contiguous thereto, prior to the erection of said depot, took no steps in the premises, doubtless misled by the clause in the stipulation which referred to the further consideration of a greatly increased facility for commerce and travel resulting from the great continuous railway connecting from Memphis to the Atlantic Seaboard."

It is charged that the city of Memphis, either as originally constituted, or as the taxing district, was without power, through its legislative council or otherwise, to make these contracts referred to, first, because such action was a violation of the trust under which the property passed to the city, and, secondly, because it had no authority under its charter to make such contracts.

The defendant companies interposed the following grounds of demurrer, viz.: "(1) That the several contracts and ordinances in the bill of complaint set forth are legal and valid contracts and ordinances, and within the competency of the legislative council of the city of Memphis, and were within the legal competency of the taxing district of Shelby county, its predecessor, to make, enter upon, and ordain. (2) Because the said complainants in the said bill of complaint do not stand in such relation to such contracts and ordinances as to entitle them in law to call into question the validity thereof. (3) Because the said contracts and ordinances, if illegal, can be challenged and brought in question only by the public authorities, and not by private individuals. (4) Because the said complainants, and none of them, had or has shown any peculiar and particular injury by them, or by him or her, suffered and sustained, which entitles the said complainants, or either of them, to maintain the bill of complaint in the cause exhibited. (5) Because the said complainants, as shown by the bill, have acquiesced in the making of said contracts and ordinances, in the bill set forth, through a long period of time, during which these demurrants, as complainants well knew, were expending large sums of money upon the faith of the rights granted to them by said contracts and ordinances, whereby the said complainants are estopped to call in question the validity of said contracts and ordinances. (6) Because complainants, if entitled to proceed in this honorable court touching the matters in the bill set forth, have been guilty of laches, and have lost the right, if ever it existed, to call in question the validity of said contracts and ordinances, by the lapse of time."

The city of Memphis joined in all of these demurrers, except the fifth and sixth.

The chancellor sustained the demurrer and dismissed the bill, whereupon the complain-

ants appealed to this court, and have assigned errors.

Elaborate and very able briefs have been filed upon both sides, and we have given to the case the care and attention which its importance required. One feature of the case that should be noted is that in their briefs and printed arguments counsel upon the respective sides of the case have not confined themselves to the facts set forth in the bill, but have referred to other matters, which are partly matters of which the court can take judicial cognizance, and partly facts alleged to be well known concerning the position, situation, and character of the property in controversy, although perhaps not of such a character as that the court can take judicial notice of them.

On the part of complainants the following matters are stated which are partly a repetition of some allegation in the bill, partly additional matters, to wit: That the principal contract of which complaint is made is the one dated July 31, 1902, between the city of Memphis and the two defendant companies, by which, it is said, all of the contracts specified in the bill, to which these two roads are parties, are extended so as to expire on the 1st day of May, 1986; that by that contract the two companies referred to, among other things, are also granted the privilege of closing the following streets, viz., Main, from the south side of Gilbert to Walker avenue, west side of First alley to Barton avenue, and Main street to the present Illinois Central yards. That the effect of the contract is to confirm all of the rights and privileges theretofore granted under the contracts, which it enumerates, until May 1, 1986. That among the contracts thus confirmed is one dated August 15, 1887, by which the city of Memphis, then the taxing district, granted to the Newport News & Mississippi Valley Company, its successors and assigns, the privilege of closing Overton, Concord, Jackson, and Market streets from the west line of Front street or Chickasaw street to the east line of Promenade street, and Promenade street north of Market, and did thereby declare that said streets be closed for the term of 99 years from that date, and should not be public streets of the city of Memphis. That by the contract the Newport News & Mississippi Valley Company, its successors and assigns, were given the further right and privilege of erecting on said premises, or so much thereof as may be necessary therefor, such substantial and commodious buildings and sheds, of stone, brick, or iron, as are necessary and adaptable to such union passenger depot uses and purposes, and to lay down, maintain, and operate on said premises such railroad tracks as it may desire and find necessary to accommodate the business of itself and other railroads now or hereafter entering the city at such union passenger depot. That the premises are described in the contract of date August 15, and also in the contract of date April 26, 1881, and are be-

tween Poplar and Market streets on the north and south, and between First and Promenade streets on the east and west. That the taxing district leased these premises, by the contract of August 15th, for 50 years from the expiration of the term of the lease of April 26th, so that under the contract of April 26, 1881, the term will expire on May 1, 1936, and by the contracts of July 31st and August 15th the term was extended to May 1, 1986. That it thus appears that "the trustees of the public promenade have granted a use of a part of that public promenade to the defendant railroad companies for a term of years, extending now more than eighty-three years, these uses being wholly inconsistent with and destructive of that particular use for which the public promenade was donated."

The complainant's counsel have also interspersed through the pages of their printed argument, photographic views, as follows: Three views of different portions of Front street, with corresponding portions of the promenade strip opposite; a view of Jackson street, one of the depots of the defendant companies, another of the depot of the Choctaw Company, another of the Choctaw Depot and tracks, and still another of the present landing.

On the part of the defendants, the following additional facts not contained in the bill are brought forward in their printed arguments: After averring that the commercial interests of the city of Memphis are to a great extent dependent upon the maintenance of those conditions which have resulted from a slow growth and development of the means and facilities of transportation and distribution of the vast commerce which moves through that city, and after recurring to the fact that the bill shows that for more than 20 years the local authorities have by contracts and ordinances permitted railroad tracks and structures upon those portions of the public property located along the river banks, which are noted on the original map of the city of Memphis as "Public Landing" and "Public Promenade," it is averred: That, of the nine railroads entering the city, the bill shows that five have secured privileges of that character, and also that the Union Railroad Company, a belt line connecting all of the railroads with each other and with the various and numerous manufacturing establishments in the city, has been granted the right to run its tracks over and across the promenade and public landing, and that the map or photographic views introduced by complainant, as above stated, show the physical conditions now existing along the river front, a general statement of which is that, in addition to the structures before referred to, depots and tracks, there are numerous other structures upon the said ground in controversy. That the course of the Mississippi river has greatly changed since the original plat was made; that 20 years ago deep water extended as far north as Poplar street (that

is, to a point below the northern terminus of the promenade), and it was apprehended that the bluff south of and near that street would be eaten into by the current of the river. That the revetment of the opposite bank at Hopefield, by the United States, has resulted in the deposit of a large bar extending from the mouth of Wolf river to a point south of Jefferson street (a point south of the northern terminus of the "promenade"). That it is probably more than a half-mile from the foot of old Poplar street to the river across the sand bar. That there is no public landing north of Jefferson street, and that throughout a large part of the river front, cotton sheds and other buildings now stand where elevators were once located. That a square of the old promenade is now owned by the United States, and the post office, customhouse, and courthouse of the federal government are located thereon. That, immediately south of the post office, another square is taken up by the Public Library, and south of that another by the engine house of one of the fire companies. That Front street, which runs east of the old promenade, is almost wholly given up to wholesale business houses, many of which are directly connected with the railroads by switches, by means of which car load lots of freight are received and delivered, and connection between the carriers by rail and by river are made only on those grounds, and that, as shown by the exhibits, there is no other locality in the city where such connection can be made. That from north to south and from south to north, over a part of the old promenade, there is probably carried more than twenty times as much freight as goes out and comes in by the river, and far more in a single busy month than during the lives of the original proprietors came in and went out of the village they platted in 1820. That when the original dedication was made, the Chickasaw Bluffs extended as far north as Jackson street on the immediate river front, and then receded a little from the river. That an inspection of the exhibit to the bill will show that no dedication whatever was made for a public landing from Jackson street south. That all that portion of the river was occupied by a precipitous bluff, and that it was on this bluff that the public promenade was supposed to be located. That no street whatever is laid off on the map west of what was then Mississippi Row, and which is now Front street, between Jackson street on the north and Union street on the south. That there are some dotted lines, which probably suggest strollways or driveways, but that exactly what they mean is not clear. That, looking at this exhibit (the plat of 1820 filed with the bill), it is entirely certain that on the whole of what is now the river front of Memphis no means was provided for the commerce of the city to reach the river. That the public landing on that plat lies entirely north of Jackson street (which marks the northern

limit of the promenade), and is now entirely useless for commercial purposes. That no boat can reach it, and a large sand bar, which is many feet under water when the river is high, extends not only across what was then the public landing, at the mouth of Wolf river, but also down and in front of much of the bluff from Jackson to Jefferson streets. That the whole of what was called the "Public Promenade," from Union street north, has been cut down, commencing to slope at about what was Mississippi Row, and running thence by gradual decline to the river front; that this promenade ground is now what is called the Levee Front, and it is given up entirely—the river front of it—to commercial purposes. That it is evident that if the prayer of the bill can be granted and the property described on the plat as a public promenade be devoted to the uses of a public park, the river commerce of the city of Memphis will be absolutely destroyed.

Again, it is said by the defendants that the strip referred to as "The Promenade" was not accepted by the city as a promenade, but only as general public property; that this is evidenced by its dealings with the property; that it was never occupied or used as a promenade; that the assertion of the right to use it for general public purposes goes as far back as the case of Mayor and Aldermen v. Wright, 6 Yerg. 497, 27 Am. Dec. 489, which was decided in 1834; that in 1844 the right of the city was again asserted, and successfully, in a controversy between persons claiming under the original grantors and the city of Memphis, in reference to the rights of the respective parties along the river front, which point also included the west boundary of the promenade; that the matters involved in said controversy were submitted (as shown by the statement of facts contained in Hardy v. Mayor and Aldermen, 10 Helsk. 127) to Judges Turley, Green, and Reese (then members of this court) as arbitrators; that they were to determine whether the successors to the original grantors, or the mayor and aldermen of the city of Memphis, had the right to the alluvial lands on the margin of the Mississippi river; that the controversy thus submitted was determined by the arbitrators in favor of the city, and that the dedication made by Overton, Jackson, and Winchester was declared to be absolute and unconditional; again, that the right of the city to mortgage, and thus virtually to dispose of, the property in question, or a part thereof, was successfully asserted, as stated in the case of Adams v. Memphis, 2 Cold. 645, decided in the year 1866; that the result is that at no time since the organization of the city of Memphis has that corporation ever treated the public promenade as a promenade; that it has never inclosed, ornamented, controlled, or managed it as such; that it has all the time regarded and treated it as corporate property, to be devoted by it to any legitimate corporate purpose; that it has disposed

of parts of it to private persons and to corporations; that it has asserted these rights in opposition to the representatives of the original grantors, and never at any time conceded to the representatives of such grantors or to any other persons, the right to remove said property from perfect municipal control.

Again, it is said by the defendants that there is nothing disclosed in the record regarding the use of the public promenade as such by the citizens of Memphis; that the bill fails to show that at any time since 1820 has the public promenade been used as a place of public recreation by the citizens; that if this fact had existed, without doubt the bill would have so stated, and that its silence on this subject is conclusive; that if the public during the past 80 years has never asserted any right to use "the so-called" promenade as such, it can hardly now be allowed to these complainants to assert the right after having acquiesced in a hostile use and when the rights of third parties have intervened.

Upon these facts extraneous to the bill, several contentions have been advanced. Among other things it is said, on the part of defendants, that the court should hold that the city never accepted the promenade as such, but only as public property which it might devote to any use deemed best for the public welfare. Again, it is urged that these facts show that the original purpose as to the promenade and the landing, by the change of time and circumstance, has been rendered incapable of accomplishment, or, at least, of preservation and enjoyment; that the city has made the best use of the property that it could have been put to, under the new order of things, undreamed of by and unimaginable to the original proprietors; that this use is a public one, and such as a court of equity would have authorized if it had been applied to in the first instance; and, seeing that it has already been accomplished, and that the result is beneficent, considering, in the largest sense, the welfare of the whole city, its commercial importance, and its general material prosperity, the court should now sanction what has been done, or at least should decline to interfere.

It would, perhaps, be doing an injustice to eminent counsel to say that it is seriously urged that in the present state of the pleadings these consequences could be legally deduced, but rather it should be said that the points referred to are made more in the nature of weighty suggestions, with the purpose of indicating to the court the gravity of the matter under consideration, and that the real insistence of counsel on this subject is that while the court cannot, in general, on demurrer, look beyond the facts stated in the face of the bill, yet that it should consider as imported into the bill all pertinent facts of which it can take judicial notice, and that several of the facts above cited as extraneous to the bill are of that

character, and, upon being considered in connection with the facts stated in the bill, present such a showing as would make it the duty of the court to decline to entertain the bill.

Passing this view of the case, we come to a consideration of the grounds of relief insisted upon by the complainant. We shall first consider the case made in respect of the strip of ground indicated on the old town map as the "Public Promenade" and the "Public Landing," laying aside the question made as to the closing of streets. As to the strip of land referred to, it should be premised that the rights of the city and of its inhabitants must be predicated upon the original dedication, and that no weight can be attached to the instrument of September 28, 1828, eight years thereafter. The original dedication by the registration of the map or plan, and the acceptance of the city thereunder, whatever may have been the terms of that acceptance, must control. But it is contended that under the original dedication the strip embracing the public promenade and the public landing passed to the city, and the title was vested in it as trustee for the purposes indicated by the words, and the high sanctions that protect and guard trust property are invoked in behalf of the complainants in respect of this property, and the court is urged to apply those principles in the present case. It is stated that the public promenade became at once, upon the acceptance by the city, a perpetual pleasure ground for the people of the city, and that the municipal authorities had no power to sell it, or donate it, or in any manner to contract it away, for railway purposes, or for any purpose foreign to that indicated by the name which the original proprietors gave to it, and that the Legislature itself could not, acting constitutionally, empower the city authorities to make any such disposition of it, since that would be a disposition of the property of the citizens of Memphis without their consent. It is said that a court of equity has the right to enforce the execution of such a trust, either upon the application of the owners of lots abutting upon a park or square, or upon application of the trustee; citing *City of Jacksonville v. Jacksonville Ry. Co.*, 67 Ill. 540, 544; *City of Cincinnati v. Lessees of White*, 6 Pet. 431, 8 L. Ed. 452; *Watertown v. Cowen*, 4 Paige, 510, 27 Am. Dec. 80; *Le Clercq et al. v. Trustees of the Town of Gallipolis*, 7 Ohio (7 Ham.) 217, pt. 1, 28 Am. Dec. 641; *Carter v. Chicago*, 57 Ill. 287; *Price v. Thompson*, 48 Mo. 361; *Warren v. Mayor of Lynn City*, 22 Iowa, 351; *New Orleans v. United States*, 10 Pet. 662, 730, 9 L. Ed. 573; *Hardy v. Mayor*, 10 Helsk. 127. Numerous other cases are cited to the same general effect; among others, *Church v. Portland (Or.)* 22 Pac. 528, 6 L. R. A. 259; *Davenport v. Buffington*, 97 Fed. 234, 38 O. C. A. 453, 46 L. R. A. 377; *Sturmer v. Randolph County (W. Va.)* 26 S. E.

532, 36 L. R. A. 300; and *Rowzee v. Pierce* (Miss.) 23 South. 307, 40 L. R. A. 403, 65 Am. St. Rep. 625—all of them interesting and instructive cases.

The defendant's counsel, while not denying the soundness, in general, of the principles above recited, point to the absence in the bill of any allegation that the ground referred to as a promenade was ever accepted or used by the city as such, and to the facts, of which the court must take judicial notice, that a large portion of this place has been long cut down and used as a wharf by the city, and thereby rendered incapable of the original use intended and that this use as a wharf has been necessitated by the filling up of the old landing place by a sand bar; that on other parts of this same ground are the courthouse, customhouse, and post office building of the United States, located as far back as 1877, also the Cossett Library; that as far back as 1844 the city of Memphis ceded a portion of this land to the United States for a navy yard, and that in 1852 the latter reconveyed the property to the city, and that in 1857 the same portion of this property was mortgaged by the city to secure the bonds of the M. & L. Railroad Company, for the payment of which debt it was subsequently sold, and, as shown in the bill, for more than 20 years railway tracks have been permitted upon the land—all as facts negating any application of the property to purposes of public amusement or recreation. So it is insisted that the complainants are left alone to a construction of the bare map, with the space marked off upon it and designated by the words "Public Promenade." And while conceding that, if the question were *res integra*, it should probably be held to be the true construction that this ground was intended only for a pleasure ground, yet it is said that the question has been heretofore settled in this state by a decision rendered in 1834, and that that decision has become a rule of property in respect of the particular strip of land in controversy in the present case. The application of that case is the chief question for consideration.

The case referred to is *Mayor & Aldermen of Memphis v. Wright*, 6 Yerg. 497, 27 Am. Dec. 489. The case was decided in this city at the May term, 1834. The statement of facts upon which the decision was based is as follows: That the corporation of Memphis laid off part of the promenade in front of the city, on the Mississippi river, for a steamboat landing, and other parts for a landing for flatboats and other craft; that the charter of incorporation provided that the city should have power "to do all things necessary to be done by corporations"; that the mayor and aldermen enacted an ordinance forbidding flatboats and other water craft (other than steamboats) to lie in the steamboat landing, under a penalty of \$1 per hour after the expiration of half an hour from the time the owner should be notified by the town constable to remove

his boat or craft; that the defendant, in defiance of this ordinance, lay to at the steamboat landing with his flatboat for 50 hours after he was notified to remove; that a suit was brought before a justice of the peace to recover the penalty, when a judgment was obtained for \$50, and an appeal was taken to the circuit court; that upon the trial in the circuit court the judge charged the jury, among other things, "that if it were not proved to them that this landing was a public one, laid off, marked out, and designated as such by the proprietors, on the town plan, but that this landing was made on the ground laid off as a public promenade, they should find for the defendant"; that the jury found a verdict for the defendant, and, a motion for a new trial having been made, on the part of the plaintiffs, and overruled, they prosecuted an appeal in the nature of a writ of error to this court.

In this court, as appears from the brief of counsel for defendant in error, published with the opinion, it was contended, as in the present case, that there was no error in the action of the court below, "because the corporation of Memphis had no right or power to change or divert the public dedications as designated on the map, without the aid of a court of chancery, from their indicated purposes." Counsel for plaintiff in error relied upon the incorporating act of 1826 (chapter 115) and the general law in relation to the powers of corporations. Responding to these contentions as applicable to the judge's charge, this court, speaking through Green, J., said: "The part of the charge complained of assumes that a corporation cannot apply the public property of a town to any new use than that for which it was designated when the town was originally laid off. In this we are of the opinion the court erred. The public property belongs to the corporators, and may be appropriated by them to any use they may think proper. The mayor and aldermen are the representatives of these corporators, and have vested in them all the right to dispose of, or apply to any use they may think proper, the public promenade, public squares, etc., which existed in the original proprietors. If this were not so, a thriving town would be exceedingly crippled in the exercise of its corporate rights. Few persons would have sufficient foresight, in laying off a town, to anticipate and provide everything that was calculated to promote its prosperity and good government. It must therefore be among the powers of a corporate town, having by its charter a right to do all things necessary to be done by corporations, to lay off new streets, squares, lanes, and alleys, and other conveniences for the trade and comfort of the citizens, and by ordinances to regulate the manner in which they shall be used. These powers are 'necessary to be done' that the prosperity of the town may be promoted, and that its peace and order may be preserved." For these reasons the charge of the circuit judge was held

to be erroneous, and the judgment was reversed.

It is perceived that the occasion of the decision was the establishment by the city of a steamboat landing on one portion of the promenade, and of a flatboat landing on other portions of it, and the regulation of these landings—uses foreign to the occupation of the ground merely as a promenade; and it is further perceived that in the broadest terms it was held by the court, in deciding that case, that the city was not bound by the designation upon the map indicating the uses for which the property was intended by the original proprietors, but, acting through its board of mayor and aldermen, it might apply it to any new use deemed by them necessary or proper to promote the welfare of the city.

We need not consider whether this case was erroneously decided at the time; certainly it is opposed to the current of modern authority. But now, 69 years after this decision was rendered, during which long period it has been treated and acted upon as the law governing this particular strip of land, as a rule of property, on the faith of which the city of Memphis has acted, and others have acted, claiming under that municipality, and in accordance with which rights have been acquired and money and labor expended—after this long time, and in the face of these considerations, shall this court overrule that decision? Would it be wise? Would it be right? Would it be just? We think not.

This court was confronted with a similar situation in 1881, when it decided the case of *State ex rel. v. Whitworth*, 8 Lea, 594. In the case of *State v. Hicks, Ewing & Co.*, 9 Yerg. 486, 80 Am. Dec. 423, decided in 1836, the opinion of this court having been delivered by Judge Turley, it was held that the lands granted to Davidson Academy by the Legislature of North Carolina were exempt from taxation for the period of 99 years, whether in the hands of the original grantees, or in the hands of their vendees or sub-vendees. In 1881, the Comptroller of the State Treasury attempted by mandamus to compel the trustee of Davidson county to assess these lands for taxation, and the correctness of the decision in *State v. Hicks, Ewing & Co.* was directly challenged in the above-mentioned case of *State ex rel. v. Whitworth*. The court held that, if the question were brought before it for the first time, it would have been constrained to decide against the exemption, on the ground that it would not pass to a vendee of the original grantees unless there were words showing beyond a reasonable doubt that such was the intention of the Legislature, and that there was no such commanding evidence of intention that the exemption should so pass; but further held that the decision in the case from 9 Yerg. had grown to be a rule of property, in respect of the particular property involved, which should not be disturbed. The court said:

"The state, the county, and the city have acquiesced in it for over forty years. Upon its correctness capital has sought investment in that 'territory,' and built valuable improvements thereon. The petition makes a solemn admission that since 1836 'this decision has been treated by the profession as settling the question that this property was exempt from taxes for the state, county, and city.' It has to all intents and purposes become a rule of property, so far as a decision of the highest court in the state can make and establish that rule. While a court should not hesitate to overrule a decision which has been recently made, when fully convinced that it is erroneous, rather than perpetuate error, yet a very different principle prevails when it has been acquiesced in for many years and established a rule of property. Judge Catron, in delivering the opinion of the court in the case of *Talbot v. McGavock, Lessee*, 1 Yerg. 277, referring to the decision of the court in the case of *Napier, Lessee, v. Simpson*, 1 Tenn. 448, says that he understood the bench and the bar, the Legislature and the community, to have acquiesced, during the intermediate period of twenty years, in that decision as being the law, and a correct construction of the act of 1797, and that, with all possible deference to the opinion of others, it should not now be disturbed, independent of any doubts that may be entertained of its correctness.' In 1840 Judge Reese, in delivering the opinion of the court in the case of *Smith v. McCall's Heirs*, 2 Humph. 166, referring to the case of *Talbot v. McGavock*, says: 'If we doubted, as we do not, the correctness of the judgment in that case, we should still yield to its authority. A greater evil can scarcely be imagined than an habitual fluctuation in judicial opinion as to questions affecting the rights and regulating the conduct of a whole community in relation to real property.' In 1870, Judge Shields, a special judge, who delivered the opinion of the court in the case of *Sherfy v. David Argenbright et al.*, although overruling some decisions of the Supreme Court of Tennessee, made directly after the close of the war, in relation to the validity of contracts founded upon Confederate treasury notes, clearly recognizes the soundness of the law, as held by Judges Catron and Reese, in this strong language: 'When a decision or a series of decisions have established a rule of property, and, more particularly, a rule affecting the title to real estate, which has become generally known, and has been acted upon, such a landmark should not be disturbed.' 1 Heisk. 143, 2 Am. Rep. 690. See, also, the opinion of Judge Whyte, in the case of *Nelson v. Allen*, 1 Yerg. 876. The exceptions to the rule, as thus established by the judicial decisions of the Supreme Court of Tennessee, may be found in the cases cited in the brief of counsel of *Vance v. McNairy*, 8 Yerg. 197, 24 Am. Dec. 553. and of *Mitchell v. Lipe*,

8 Yerg. 179, 29 Am. Dec. 116, but Judge Green, in delivering the opinion of the court in the case of 8 Yerg., overruling his opinion in the 3 Yerg. case, says: 'We feel the importance of adhering to former adjudications, and the mischief which results from a fluctuation of opinion on any question, yet question will sometimes occur where a point may be adjudicated without the benefit of all the authorities which could shed light upon it, and when a reconsideration of it is highly proper.' It is thus plainly seen that the reasoning of the learned judge, so far from forming a rule, tends to bring that case within an exception to what he acknowledges to be a sound and well-established rule of law. Chancellor Kent says: 'If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness, and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them, and the people in general can venture to buy and trust, and to deal with each other. If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of prosperity.' 1 Kent. 415. Cooley, in his work on Constitutional Limitations, says: 'It will, of course, sometimes happen, that a court will find a former decision so unfounded in law, so unreasonable in its deductions, or so mischievous in its consequences, as to feel compelled to disregard it. Before doing so, however, it is well to consider whether the point involved is such as to have become a rule of property, so that titles have been acquired in reliance upon it, and vested rights will be disturbed by any change; for in such case it may be better that the correction of the error be left to the Legislature, which can control its action so as to make it prospective only, and thus prevent unjust consequences.' Cooley on Con. Lim. 52. Judge Bronson, in the case of Sparrow v. Kingman, 1 N. Y. 242, says: 'That after an erroneous decision touching the rights of property has been followed thirty or forty years, and even a much less time, the courts cannot retrace their steps without committing a new error nearly as great as the one at first.' The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute. See 2 Black, 603, and a long list of authorities cited."

Again: "A decision of this court which for eleven years has constituted a rule of property, of frequent application affecting titles to real estate, should be adhered to after repeated recognitions by this and the other courts of the state, regardless of whether it was originally correct or incorrect." Case v. Joyce, 89 Tenn. 837, 16 S. W. 147, 12 L. R. A. 519, citing and approving Sherfy v. Argenbright, 1 Helsk. 143, 2 Am. Rep. 690; Atkin-

son v. Dance, 9 Yerg. 427, 30 Am. Dec. 422; Thompson v. Watson, 10 Yerg. 368; and Smith v. McCall's Heirs, 2 Humph. 163-166.

And as said by Mr. Justice Brown of the Supreme Court of the United States, in a celebrated case (Pollock v. Farmers' Loan & Trust Co., 158 U. S. 689, 15 Sup. Ct. 912, 39 L. Ed. 1108): "I have always entertained the view that in cases turning upon questions of jurisdiction, or involving only the rights of private parties, courts should feel at liberty to settle principles of law according to the opinion of then existing members, neither regardless of, nor implicitly bound by, prior decisions, subject only to the conditions that they do not require the disturbance of settled rules of property. There are a number of questions, however, which it is more important should be settled in some way than that they should be settled right, and, once settled by the solemn adjudication of the court of last resort, the Legislature and the people have a right to rely upon such settlement as forever fixing their rights in that connection. Even 'a century of error' may be less pregnant with evil to the state than a long-deferred discovery of the truth. I cannot reconcile myself to the idea that adjudications thus solemnly made, usually by a unanimous court, should now be set aside by reason of a doubt as to the correctness of those adjudications, or because we may suspect that possibly the cases would have been otherwise decided if the court had had before it the wealth of learning which has been brought to bear upon the consideration of this case."

We must therefore adhere to Mayor and Aldermen of Memphis v. Wright as establishing a rule of property controlling the strip of land in controversy. It follows that the city does not, in respect of that property, sustain toward the complainants the relation of trustee, as alleged in the bill, and that the complainants do not sustain the relation of beneficiaries in such special trust, and that they cannot maintain the bill on that theory; and, further, it must be held, under the authority of the case referred to, that the city is the owner of the property, and has the right to make any disposition of it authorized by its charter. This is true both as to the "public promenade," and the "public landing"; the principle being the same as to each piece of property.

The complainants' second contention is that the municipal authorities of the city of Memphis did not have the power under the new charter (chapter 11, p. 15, Acts 1879), and the amendments thereto, to make the contracts complained of in the bill. The powers given to the legislative council of the city under the acts referred to, so far as they bear upon the present case, are as follows: "To permit and regulate the laying of railroad tracks or iron, and the passage of railroad cars through the taxing district, and to remove such railroad tracks if they obstruct travel or do not con-

form to the laws of the taxing district; to make all suitable and proper regulations in regard to the use of the streets by street cars, and to regulate the running of the same so as to prevent injury or inconvenience to the public * * * to repair and keep in repair streets, sidewalks and other public grounds and places in the taxing district; to open and widen streets, to change the location or close the same, and to lay off new streets and alleys when necessary, and to have and exercise entire control over all streets and other public property of the taxing district; and they shall have power over all other affairs in the taxing district in which the peace, safety, or general welfare of the inhabitants are interested." Acts 1879, p. 16, c. 11, § 3, and page 98, c. 84, § 1.

It is insisted by the complainants that the contracts complained of are for too long a period, that they authorize the closing of certain streets, and the choking of others with railway lines to such an extent as to interfere with travel, and that by these contracts the city ties its hands for a period of years, so that it cannot control the streets left open, and prevent their being filled with tracks to such an extent as to unduly impede the passage of persons and vehicles.

We have examined all of the contracts of the defendant companies, so far as they are exhibited with the bill, and find in them nothing that authorizes them to so impede any open street with tracks as to prevent the passage of persons and vehicles; and, so far as the city's having surrendered its power to control such streets, we find, in each of the defendants' contracts filed with the bill, a careful reservation by the city of its police powers over the territory which forms the subject of the contract; nor could the city legally annul these powers which it possesses, or for any consideration agree to forego them. Moreover, the authority is ample for the removal of such obstructions, if there be any, to the extent indicated, on application of the state by bill in equity (*Metropolitan City R. Co. v. Chicago*, 96 Ill. 627; *Atty. Gen. v. London*, 8 Beav. 270; *Atty. Gen. v. Forbes*, 2 Myl. & C. 123; *Atty. Gen. v. Galway*, 1 Molloy, 103; *United States v. Duluth*, 1 Dill. 469, Fed. Cas. No. 15,001; *People v. St. Louis*, 10 Ill. 351, 48 Am. Dec. 339; *Newark Aqueduct Board v. Passaic*, 45 N. J. Eq. 393, 18 Atl. 106; *Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 9 L. Ed. 1012), or by indictment in the criminal court, for the punishment of the offender and the abatement of the nuisance.

As to the length of time the contracts have to run, this is a matter in which the present complainants have no special or peculiar interest different from that of any other of the inhabitants of the city of Memphis, and hence they have no right to present a bill upon the subject. *Patton v. Chattanooga*, 108 Tenn. 197, 65 S. W. 414. If the city has exceeded its corporate powers in this regard,

the matter is one for interference by the state upon a bill filed for that purpose by the Attorney General.

As to the closing of streets, this is likewise a matter in which complainants have shown no special or peculiar interest different from that of other inhabitants of the city, and, for the reasons above given, they have no right to maintain a bill based upon that feature of the case. *Patton v. Chattanooga*, supra. If the city has exceeded its powers, this is likewise a matter for correction upon a proceeding instituted in the name of the state. It is true that, where there is an obstruction put upon a street which unlawfully impairs the easement of access of an abutting owner to his property, he may have his action for damages (*Railroad v. Bingham*, 87 Tenn. 522, 11 S. W. 705), and, from time to time, continuous actions of this character, until the nuisance is abated (*Harmon v. Railroad*, 87 Tenn. 614, 11 S. W. 703); and if he own the fee to the center of the street, and a new or additional burden is put upon it, as the imposition of a steam railway, he may have compensation for the value of his property so taken. *Street Ry. Co. v. Doyle*, 88 Tenn. 747, 13 S. W. 936, 9 L. R. A. 100, 17 Am. St. Rep. 933. It is also true that the city has the right to abandon a street, that is, its easement of way which it holds in trust for the public, if for the public interests; and that upon such abandonment the fee reverts to the adjoining proprietors, if they own to the center of the street (*State v. Taylor*, 107 Tenn. 455, 64 S. W. 766), and that the city cannot sell the land covered by the street unless it owns the fee (*Id.*), and cannot even then do so in such way as to debar an adjoining owner from having access to his lot over the same, or at least over so much as leads from his lot to the next adjoining public street on each side. *Atty. Gen. v. Morris & E. R. Co.*, 19 N. J. Eq. 394. But in the present case the complainants do not show that they own property abutting upon any of the streets purporting to be closed, and hence they have shown no such special or peculiar interest as will enable them to maintain the bill. *Patton v. Chattanooga*, supra. And see *Brumit v. Railroad*, 106 Tenn. 124, 138, 60 S. W. 505, and cases cited.

It results that we sustain the second, third, and fourth grounds of demurrer.

Having thus held that the complainants do not sustain such a special or peculiar relation to the matters in controversy as that they can maintain the bill, we do not think it proper to pass directly upon the question of the validity of the contracts assailed. Having held that they can be questioned only by the public authorities, or, as respects the streets, by some abutting owner thereon, in so far as they unlawfully affect his rights. In respect of such street on which his property abuts, or by the public

authorities, it is manifestly improper that we should go into this matter any further without having before the court some party entitled to make the questions, if any there be, that may arise on that head, as to the existence of which, not having considered that matter, we intimate no opinion one way or the other. We have found it necessary to go into the question concerning the trust relation which the bill alleged that the city sustained towards the complainants, in order to ascertain and settle the status of the latter towards the matters in controversy, and in order to enable us to determine the second, third, and fourth grounds of demurrer. It is true that the discussion on that head bears to some extent upon the first ground of demurrer, but, for the reasons already stated, we do not pass upon that ground of demurrer. Nor do we pass upon the fifth and sixth grounds of demurrer.

It follows that, upon the grounds stated, the complainants' bill must be dismissed, with costs.

AMERICAN STEEL & WIRE CO. v. SPEED, Clerk.

(Supreme Court of Tennessee. June 10, 1903.)

TAXATION—MERCHANT'S TAX—CONSTRUCTION—CONSTITUTIONALITY—INTERSTATE COMMERCE—ORIGINAL PACKAGES—DISCRIMINATE TAX.

1. Act 1901, p. 329, c. 174, § 27, provides that merchants shall pay an ad valorem tax upon the capital invested in their business, equal to that levied on taxable property, the term "merchant," including all persons, co-partnerships, or corporations engaged in dealing in any kind of goods, whether kept on hand for sale, or purchased and delivered for profit, as ordered. A foreign corporation had an agent in Tennessee, to whom it shipped goods to be kept in stock, and used to fill contracts of sale made by the corporation's salesmen, or contracts made by intending purchasers depositing specifications of goods desired with the agent, who had no authority to fix prices. *Held*, that the corporation was a merchant within the meaning of the act.

2. An effort was generally made to get agreements from intending purchasers that they would take the output of the corporation's mills before the goods were manufactured, there being usually enough of such agreements in existence, and calling for a sufficient quantity of goods, to cover the expected output for 60 or 90 days, the time during which the agreements usually ran, the purchasers agreeing to take a certain quantity of the goods, the quality to be selected by them at any time within the 60 or 90 days covered by their contracts. The corporation took advantage of high stages of water in the rivers over which it shipped its goods to float down large quantities in anticipation of sales, and to have them ready against a time when the rivers were too low for such transportation. *Held*, the act taxing the goods while thus stored was not a violation of Const. U. S. art. 1, § 8, subsec. 3, empowering Congress "to regulate commerce with foreign nations, and among the several states, and among Indian tribes," as the goods had been sold to no one, and were not in transit from one state to another.

3. The goods were shipped in original packages to the agent, and delivered in that form by it to customers, and it appeared that about 90 per cent. of the goods kept on hand went

ultimately to jobbers beyond the limits of the state, the balance being sold to jobbers within the state. *Held* to show that they were so dealt with as to make them a part of the common mass of property within the state, and not exempt from taxation because sold in original packages.

4. The tax had no element of discrimination against the corporation as a foreign dealer, and could not be objected to as a discriminating tax.

Appeal from Chancery Court, Shelby County; F. H. Heiskell, Chancellor.

Action by the American Steel & Wire Company against R. A. Speed, clerk. Decree for complainant, and defendant appeals. Reversed.

The Attorney General, Greer & Greer, and Carroll McKellar & Bullington, for appellant. Patterson, Neely & Henderson, for appellee.

NEIL, J. This suit was instituted in the chancery court of Shelby county to recover \$1,031.44, a merchant's tax assessed against complainant by R. A. Speed, clerk of the county court of that county, and which was paid by complainant, under protest, on the 18th of October, 1902. The chancellor rendered a decree in favor of complainant, and the cause is now in this court on appeal of the defendant clerk.

The facts upon which the controversy arises are as follows: Complainant is a corporation created under the laws of New Jersey. Its situs is in the state of New Jersey, and its principal business office is situated at Chicago, Ill. It is engaged in the manufacture of nails, staples, barbed and smooth wire, at different points north of the Ohio river. None of its manufactories are situated in Tennessee, and all of its products consigned to Memphis are shipped from points beyond the limits of this state. Prior to the 1st of February, 1900, its manufactured products were sold and distributed throughout the Southwest, from Louisville, Ky., Memphis, Tenn., Greenville, Vicksburg, and Natchez, Miss., and New Orleans, La. About that time the Patterson Transfer Company, a corporation created under the laws of Tennessee, having its situs at Memphis, and doing business at Memphis, represented to appellee that Memphis was the most available point in the Southwest at which to mass and distribute its manufactured products to its customers in that section. At this time, and for many years prior thereto, the Patterson Transfer Company had been engaged in the business of transferring passengers and freights to and from the various depots at Memphis and from the landings on the Mississippi river. Appellee entered into an arrangement with the Patterson Transfer Company whereby said company was to receive its manufactured products at Memphis, assort them so as to separate the different kinds of nails, staples, and wire, and then to deliver them either to the job-

bers at Memphis, or to the jobbers beyond the limits of Tennessee, over the various lines of railroads and steamboats running into Memphis, as directed by complainants. None of complainant's products are ever sold to the Patterson Transfer Company, or are by it sold to others, and neither its officers nor employes have any knowledge whatever of the price at which goods are sold by complainant. Under the arrangement between them, the business of the Patterson Transfer Company, in connection with complainant's products, is confined to their transfer to the warehouses, their assortment in the warehouses, the keeping of them in storage, and their subsequent delivery to the customers of the complainant, under its general or special orders, as below indicated. The goods of complainant are manufactured at different points, and it is convenient and useful, from a business point of view, to mass them at some place at which they can be assorted, and from which they can be distributed to complainant's customers. It is impracticable to assort the goods either at the river landing or at the railroad depots when they reach Memphis, and, in order to facilitate the work, the Patterson Transfer Company has rented three warehouses, in which the goods are stored for the purpose of assortment and distribution, and for other purposes below indicated. These warehouses are rented exclusively for this purpose, and the manufactured products of complainant, and no other goods, are stored therein.

The evidence further shows that, as a general rule, prior to the time the goods are shipped to Memphis, sales agents of the complainant canvass the Southwestern country, and make contracts, exclusively with jobbers; and in each instance where a contract is made it is embodied in writing, on a form prepared by complainant, in which is set down the amount of goods which constitutes the subject of the contract, and the time agreed upon within which they are to be delivered. The goods so contracted for are described as so many kegs of nails, so many kegs of staples, so many reels of barbed wire, or so many coils of smooth wire, according to the terms of the contract, in respect of the quantity agreed upon. But the contract does not specify the grade and quality of the goods desired. The grade and quality are left open, to be subsequently specified when the customer desires a delivery, as below stated. The customer can, when he makes his specification, select any grade of goods he desires, and upon so selecting they will be delivered to him, up to the quantity contracted for, within the time agreed upon, at prices contracted for applicable to the several grades. In fixing the price of its goods, the complainant always, except when necessary to lower prices in order to meet competition, figures in the freight on the goods.

As above indicated, it is shown in the evidence that there are many different kinds of nails, as well as different kinds of barbed and smooth wire, and it is expressly stipulated in the contract that the customer shall have the privilege of specifying, during the life of the contract, the kind of wire, or kind of nails or staples, he desires delivered to him under the contract. These contracts also specify from 60 to 90 days as the time within which the products are to be delivered, and, at any time during the period prescribed in the contract, the customer may designate the kind of goods he desires delivered under it. These contracts are made, usually, before the goods arrive at Memphis, their point of destination, and generally the contracts are made in advance of the production of the goods at the complainant's factory. Usually the sales agents of the complainant, not only in advance of the shipment of the goods, but in advance of their production, canvass the Southwestern country in the manner above stated, visiting the various jobbers, ascertaining the amount of goods they will require within 60 or 90 days, and the contract is prepared, to the purport above indicated, in which the complainant obligates itself to deliver, at the prices stated, as above mentioned, the amount of goods contracted for therein, and the customer agrees to receive and pay for that quantity upon the goods being delivered to him after he shall have made, and according to, his specification, which he may make during the life of the contract, the customer reserving the right, in the face of the contract, to specify the exact grade or quality of goods he desires delivered under it. He does this after the making of the contract, and at any time he desires to do so, within the life of the contract, by writing out his specification showing precisely what grade of goods he desires, and forwards this specification to the office of complainant in Chicago, and then the goods, under an order from the Chicago office, addressed to the Patterson Transfer Company at Memphis, are selected by the latter out of the mass of goods belonging to the complainant in the aforesaid warehouses in Memphis, and are shipped by the said Patterson Transfer Company to the customer who has signed the specification. This order from the complainant to the Patterson Transfer Company is effected through the agency of a copy of the specification which is forwarded to the latter from complainant's central office at Chicago; it being understood, according to the course of business between the two companies, that the Patterson Transfer Company will select, out of the mass of goods, those set out in the specification, and will ship them to the customer whose name is signed to the specification, upon receiving such copy of the specification from the central office at Chicago.

This method of transacting the business is

modified, in practice, in so far as the fulfillment of the contracts made with the jobbers at Memphis is concerned. For the convenience of the Memphis trade, complainant advises the Patterson Transfer Company of the names of its customers at Memphis, and that company is instructed to deliver the goods embraced in the contracts with the Memphis jobbers, in the following manner: The Memphis jobber makes out his specification in duplicate, and addresses a letter to complainant, as in any other case; but, instead of forwarding this letter and his specification directly to complainant, he delivers the letter to the Patterson Transfer Company, and the Patterson Transfer Company at once delivers the goods so specified, attaching the dray receipt to a copy of the specification, and forwards the specification, letter, and dray receipt to the office of complainant in Chicago, and that office makes out an invoice and sends it directly to the jobber. Another variation is made, in the course of the business, in favor of the Memphis jobbers, to the following effect: Any jobber in Memphis who is a recognized customer of the complainant can, without any previous written contract or other special agreement, make out a specification of the goods he desires, and hand this, in duplicate form to the Patterson Transfer Company. Upon this being done, it is the duty of the Patterson Transfer Company, under its general instructions from the complainant, to select, out of the mass of goods in the warehouses, goods corresponding to those contained in the specification, and deliver them to such jobber, this delivery being usually made by the next day, or, at most, within two or three days. Other deliveries on specifications sent direct to the Chicago office are not usually made within less than six or eight days, and sometimes a longer period is required. When the Patterson Transfer Company receives from Memphis jobbers the specifications which are the special subject of this paragraph, one copy is kept by it, and the other copy is forwarded to the office at Chicago, where, upon its arrival and reception, the customer is charged with the goods specified, at current prices.

The testimony shows that, of the mass of goods kept on hand in Memphis in the above-mentioned warehouses, about 90 per cent. ultimately goes to jobbers who reside outside of Memphis and beyond the limits of this state. The remaining 10 per cent. goes to the Memphis jobbers in fulfillment of the general contracts previously referred to, pursuant to specifications thereunder made, and under specifications made without previous written contracts, the latter covering about 2½ per cent. of all the goods kept on hand. No one but an agreed or recognized customer of the complainant can make out a specification, or have goods delivered from the storehouses of the Patterson Transfer Company; and no goods are ever delivered or distributed to any one by the Patterson

Transfer Company except under the express directions of complainant, or under general directions given by complainant to the said Patterson Transfer Company in favor of recognized and approved customers of the complainant, whose names are furnished by it to the Patterson Transfer Company.

The testimony further shows that the quantity of goods which the complainant keeps on hand at Memphis fluctuates considerably, owing to the state of trade, from time to time. Sometimes the stock is as low in value as \$30,000, and sometimes the complainant has on hand a stock of the value of more than \$100,000. Some of the goods—a very small amount—are shipped to Memphis by rail. Nearly all of these goods which come to the hands of the Patterson Transfer Company from this complainant are transported to Memphis on barges belonging to transportation companies in which complainant has no interest, and which are engaged in the carrying trade. As a general rule, while the complainant endeavors to secure contracts covering its output before the goods are manufactured, yet it does not always do so, but, taking advantage of the seasons when there is a good stage of water in the rivers which must be used in floating its products from its mills to Memphis, it masses its goods at the latter point in anticipation of future sales.

The testimony shows that when goods are shipped from complainant's mills, consigned to Memphis, the Patterson Transfer Company is notified by the Chicago office that a certain quantity of complainant's products were shipped at a certain time on barges to the port at Memphis. These barges are met at the river landing by the Patterson Transfer Company, which receives the goods, transfers them to its warehouses, and asorts them. Then from time to time it ships the goods on specifications as before explained. On receiving the goods, they are credited to the complainant on the books of the Patterson Transfer Company, and, on being shipped out, they are charged on the same books to the complainant. When the goods reach Memphis they are always consigned to the complainant, in care of the Patterson Transfer Company.

All of the goods forwarded to Memphis are products of the factories of complainant. No part of them are ever purchased by it. Its sales agents are exclusively engaged in selling these products. They are produced by complainant beyond the limits of this state, and are made the subject of contracts by its sales agents throughout the Southwest in the manner before explained. These sales agents report all contracts effected by them directly to the office in Chicago, whether made with the jobbers at Memphis or elsewhere beyond the limits of this state. All invoices for goods, when sold by specifications in the manner above stated, are made out at the office at Chicago, and forwarded

directly to the customer, in the manner and under the circumstances previously stated. Some of complainant's goods are produced at one factory and some at another, and consequently, when a purchaser contracts for the delivery to him, within 60 to 90 days, of a certain number of packages, it frequently turns out that some of the goods desired are the product of one factory and some of another, and it is accordingly most convenient, in the conduct of complainant's business, that goods from complainant's various factories should be massed at some point where they can be dealt with in the manner before explained.

Complainant's goods are put up in the following original packages: The nails and staples are put up in kegs, each keg weighing 100 pounds; the smooth wire in coils tied by wires, and each coil weighing 100 pounds; the barbed wire on reels, the wire on each reel weighing 100 pounds. Each package is separately and distinctly made up at the factories for convenience of transportation, and is in this form delivered to the common carriers. In this form they are delivered at the initial point of transportation. In this form they are transported in barges or by railroads to Memphis, and received by the Patterson Transfer Company. In this form they are assorted at the warehouses by the Patterson Transfer Company, and delivered by it to the complainant's customers at Memphis, under the circumstances previously stated, or to the various lines of steamboats and railroads running out of Memphis, consigned, under circumstances previously stated, to customers beyond the limits of Tennessee, and in this form they ultimately come to the hands of complainant's customers in such foreign state. Each package is separate and distinct in itself, and, while no particular package is consigned to any special customer, each keg of nails and staples is marked so as to show exactly what the package contains, and each coil and reel of wire is marked with a tag showing what the coil or reel contains, and no package is ever changed, in any particular, from the time it leaves the factory until it ultimately reaches the hands of the customer.

The testimony shows that Memphis has within recent years become, by reason of its accessibility to railway and river transportation, a great distributing point, and it was selected as the basis of the operations which are the subject of the present controversy, by reason of these exceptional advantages.

Other facts proven by the complainant are as follows: The testimony of Mr. Young, the tax assessor, shows that none of the cotton shipped into Memphis from the surrounding states pays any tax whatever, and that the manufacturers of lumber in Memphis pay no tax on lumber made from logs which are produced from the soil of this state.

There is also an agreement of counsel to

the effect that there are large iron deposits in Tennessee, and a number of furnaces in this state engaged in the manufacture of iron from the iron ore deposits in this state.

The bill alleges, and the answer admits, that complainant was assessed by the defendant clerk as a merchant, and was required to pay to the state a merchant's tax for the years 1901 and 1902, amounting to \$1,031.44. On appeal to the state board of equalizers, this assessment was affirmed, and thereupon, within the time required by law, to wit, on the 18th day of October, 1902, complainant paid these taxes under protest. This suit was instituted by complainant, within the time prescribed by the statute, to recover the taxes so paid, on the ground that the assessment was illegal and void for the following reasons: (1) Because complainant was never at any time a merchant doing business at Memphis. (2) That the assessment was in violation of article 1, section 8, subsec. 3, of the Constitution of the United States, which empowers Congress "to regulate commerce with foreign nations, and among the several states, and among Indian tribes."

We shall now briefly consider the points raised in argument in this court. It is insisted that the complainant was not a merchant; but we think it was a merchant within the sense and meaning of our act of 1901, p. 329, c. 174, § 27. This section reads as follows: "The term 'merchant' as used in this act, includes all persons, co-partnerships, or corporations engaged in trading, or dealing in any kind of goods, wares or merchandise, * * * whether such goods, wares or merchandise be kept on hand for sale, or the same be purchased and delivered for profit as ordered." Under the facts proven in this case, the complainant was "dealing" in nails, staples, and wire, in the city of Memphis, at the time it was assessed for taxes, and had been since February, 1900, and for a short time prior thereto. It is immaterial that its agent at Memphis, the Patterson Transfer Company, had no authority to fix prices, but only kept the stock and delivered the goods on contracts made with the office at Chicago, said deliveries being made under orders issued from Chicago, either special, or to be inferred from the general course of business. The vital fact is that the goods were not sold from their place of manufacture, but were kept in stock at Memphis, and this stock was drawn on from time to time to fill contracts of sale made by the company's salesmen, or to fill contracts made by means of intending purchasers depositing specifications of goods desired with the Patterson Transfer Company, and in that manner obtaining the goods.

It is insisted that complainant was only a manufacturer selling its goods as any other manufacturer. In *Taylor v. Vincent*, 12 Lea, 284, 47 Am. Rep. 338, it is said that, if the manufacturer of an article be engaged in

selling it as a business, he may be taxed for the privilege of doing so, as a tax upon his occupation, or as a privilege; but that if he sells from his place of manufacture in unbroken packages, as a manufacturer, he cannot be taxed as a dealer. A later case (*Kurth v. The State*, 86 Tenn. 134, 5 S. W. 593) goes further and holds that a manufacturer of liquors cannot sell without taking out license as a dealer. This latter case had reference to sales at retail, but in another case (*Webb v. State*, 11 Lea, 662) the same rule was applied to manufacturers selling to wholesale liquor dealers. And in *Kurth v. State*, in referring to *Taylor v. Vincent*, it was said: "The case of *Taylor v. Vincent* is pressed upon us as determining that a dealer is one who buys to sell again. In this we do not concur. But this proposition is no part of the decision of the case, and was only used in argument by the judge delivering the opinion of the court. The decision in that case only goes to the point of deciding that, under the revenue laws of 1881 and 1883, a manufacturer of liquors from the produce of this state, who sold at his place of manufacture to dealers in unbroken packages, was not a wholesale dealer within the meaning of these acts." There is an earlier case (*State v. Smith*, 5 Humph. 394) construing Acts 1835-36, p. 61, c. 13, § 5, which takes the contrary view, but this is not controlling under the language of the act of 1901 and the later cases above referred to.

It is next insisted that the act taxing the goods was a violation of the provisions of the federal Constitution above referred to, because the goods were in course of transit from one state to another at the time the tax was levied. We do not think that this position is well taken. Under the method of business pursued by the complainant, these goods had been sold to no one, nor were they in course of transit for the purpose of being put directly upon the market. The warehouse of the Patterson Transfer Company was in the nature of a permanent place of deposit, where complainant's goods were gathered together and were left to await the orders of customers, and from the mass so created goods were from time to time drawn to meet the wants of customers, and as called for by them. It is true that an effort was generally made to get agreements from intending purchasers that they would take the output of complainant's mills before the goods were manufactured, and that usually enough of these contracts were in existence, and calling for a sufficient quantity of goods, to cover the expected output for 60 or 90 days, the time during which these contracts usually ran; but these contracts did not constitute sales. They were only agreements to the effect that, during the 60 or 90 days next ensuing their date, such intending purchasers would take such and such a quantity of complainant's goods, say 1,000 kegs of nails, or 1,000 kegs of staples, or 500 coils

of wire. But there were many kinds and grades of nails, and this class of goods varied very much in size, running from four-penny to twentypenny nails. There were also different grades of staples. And as to wire, there were several kinds: First, the two general classes of smooth wire and barbed wire, also wire galvanized, and wire not galvanized. And in barbed wire there were different grades, based on the number of points or barbs, as two-point and three-point wire, etc. Any customer of the complainant who had contracted to take a given quantity of complainant's nails, as 1,000 kegs, had the right to select, at any time within the 60 or 90 days covered by his contract, the kind of nails he would take. He might, if he chose, call for and receive all of one kind, or some of each kind, or in any proportion, as respects the several kinds, that he desired. So with the staples. And so of the wire. He might specify, during the 60 or 90 days, so many coils of smooth wire galvanized, so many coils not galvanized, so many reels of barbed wire two-point, and so many reels of barbed wire three-point. At the time these contracts or agreements were entered into, neither the complainant nor its customers knew how much of any kind of complainant's goods would be called for. Hence there was no meeting of the minds of the parties as to an essential term of the contract. These contracts were nothing more than options extended to complainant's customers to select from complainant's stock of goods, within a given time, such articles as they might desire, up to and not to exceed an agreed quantity, the price of each article (kegs of nails, kegs of staples, coils of wire, and reels of barbed wire) composing the mass being fixed for the time agreed upon, and the customer being allowed to select within the time such articles as he desired, with the understanding that they were to be charged to him at the price ruling, as per agreement, during the 60 days or other time agreed upon. Nor was the customer under the contract bound to take all of the goods at one time. He had the right, according to the contract and the usage of the business, to specify and select all at one time, or to specify and select different parts of the agreed aggregate, for the 60 or 90 days, at different periods, or on different days during that period. The substance of the contract, agreement, or arrangement between the complainant and any given customer may be thus expressed: On his part, the customer said: During the next 60 days, I will take from you 1,000 kegs of nails, or 1,000 kegs of staples, and 1,000 coils of wire, reserving to myself the right to select from the mass of your goods such and so much of the many different kinds of goods which you have of the classes referred to as I may desire, provided I do not go beyond the aggregate quantity of each general class (nails, staples, and wire) above indicated; the price

for each of the several grades and kinds of the several classes of goods to be thus and thus. Or, to state the matter from the complainant's point of view, the substance of the negotiation between the parties, in general, may be thus set down, viz.: During the next sixty days I will sell you my goods at the following schedule of prices (stating prices); what quantity will you take during that period? The customer replies, in substance, I will take 1,000 kegs of nails, 1,000 kegs of staples, and 1,000 coils or reels of wire, of such kinds as I may specify of the several kinds or grades of nails, and of the several kinds of staples, and of the several kinds of wire, during the next 60 days, at the prices offered. Here it is manifest that there being no agreement as to the amount of each kind or quality of goods in advance, and there being no means of making certain these matters, except through the uncontrolled choice of the customer, there can be no means of determining the sum due until there is a selection made by the customer in any given instance.

As appears from the statement of facts above, complainant has all the time a large number of such contracts running in this state, and in Arkansas, Texas, and other states in the Southwest, and keeps on hand its stock of goods to meet them, that is, to fill such orders or "specifications" as its customers may from time to time make, the orders, in general, being sent to complainant's Chicago office, and from that office the directions being sent, in the manner set forth in the statement of facts, to the Memphis branch, to fill the orders by shipping the goods to the customer so ordering or "specifying."

Likewise, as appears from the said statement of facts, complainant, from time to time, as occasion offers, has, through its agent, the Patterson Transfer Company, dealings with its recognized customers among the merchants of Memphis, without the formality of such previous written contracts, allowing these merchants to select or "specify" whenever they desire goods, and imposing upon the Patterson Transfer Company the duty to deliver promptly to such merchants, whenever calls are made, without any previous notification to the office at Chicago or negotiations therewith. The goods kept on hand at Memphis in the stock referred to must be regarded as kept on hand for this purpose also.

And it is important at this juncture to note, as shown in the statement of facts, that the fact last stated is not the only evidence that the goods are not massed at Memphis merely for the purpose of meeting the general contracts, above referred to, previously made in and through the Southwest; on the contrary, as previously stated, it appears that the complainant takes advantage of the stages of the water, in the rivers over which it ships its goods in barges, to float

down large quantities of its goods in anticipation of sales, and to have them ready against a time when the waters may be so low that shipments cannot be made by that means, but only by the more expensive method of railroad transportation.

We do not think that under these circumstances it can be justly said that the goods were in transit from one state to another when the tax was assessed.

It is next said that the complainant was not liable to taxation on its goods, because they were sold in the original packages. We do not think that this is a sound view, because the facts above stated show that complainant's goods were put up for sale in Memphis, and were so dealt with as to make them a part of the common mass of property in the state. *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257; *Pittsburgh, etc., Co. v. Bates*, 156 U. S. 577, 15 Sup. Ct. 415, 39 L. Ed. 538; *Woodruff v. Parham*, 8 Wall. 123, 19 L. Ed. 382; *Hinson v. Lott*, 8 Wall. 148, 19 L. Ed. 887; *Coe v. Town of Errol*, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715. And see *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430.

Much stress is laid by complainant's counsel upon *Brown v. Maryland*, 12 Wheat. 436, 6 L. Ed. 678; *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128; *Lyng v. State*, 136 U. S. 161, 10 Sup. Ct. 725, 34 L. Ed. 150; *Welton v. Missouri*, 91 U. S. 275, 23 L. Ed. 347; *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; *Leloup v. The Port of Mobile*, 127 U. S. 641, 8 Sup. Ct. 1380, 32 L. Ed. 311; and the case of *Asher v. Texas*, 129 U. S. 129, 9 Sup. Ct. 1, 32 L. Ed. 368. We do not think there is any real conflict between any of these cases and those which we have cited in support of our conclusion, nor have the cases which we have cited ever been overruled by the Supreme Court of the United States. We are also referred by counsel for complainant to several cases decided by the courts of other states upon the federal questions involved, but these are, of course, not controlling on such questions, and they need not be specially examined or commented upon.

From some of the evidence which was introduced by the complainant, and which we have referred to in the last part of the statement of facts, it would seem that the complainant intended to support the contention that the tax assessed against it was a discriminative one in favor of goods manufactured out of the produce of this state, and against those manufactured out of the produce of other states. There was such a contention made in the bill, but it is unnecessary now to go into this question at all, because the complainant concedes that if it is to be, or rather can lawfully be, treated as a merchant, then the objection could not apply, because there is no discrimination in this state in respect of the origin of goods when

they are in the hands of merchants. *Jenkins v. Ewin*, 8 Heisk. 456-484. Complainant concedes that such contention could be raised only against a direct tax, and there is no such tax involved in this case. The tax assessed must stand or fall as a merchant's tax. Hence the question of a discriminatory tax does not arise in this case, and need not be considered. The tax which is under consideration in the present case has no element of discrimination against the complainant as a foreign dealer or otherwise, and hence cannot be objected to on that ground.

It results that the decree of the chancellor must be reversed, and the bill dismissed, with costs.

DE SOTO LUMBER CO. v. LOEB.

(Supreme Court of Tennessee. May 16, 1903.)
MECHANIC'S LIEN — JUDGMENT — PRACTICE — ATTACHMENT — ISSUANCE BY CLERK.

1. Under Code 1858, § 3543, providing that a mechanic's lien is enforced by an action at law or in equity sued out upon bill or petition under oath setting forth the facts, etc., a proceeding to secure an attachment to enforce a mechanic's lien cannot be commenced by affidavit.

2. Attachment to enforce a mechanic's lien cannot be issued by the clerk without an order of court.

Appeal from Circuit Court, Shelby County; J. P. Young, Judge.

Suit by the De Soto Lumber Company against Henry Loeb. From a judgment for defendant, plaintiff appeals. Affirmed.

W. W. Goodwin, for appellant. L. & E. Lehman, for appellee.

NEIL, J. This suit was brought in the circuit court of Shelby county by the plaintiffs to enforce a lien for materials furnished to one M. J. Galliger, who was then under contract with defendant, Loeb, for the erection of a dwelling house upon a certain lot in the city of Memphis, the plaintiffs claiming that they had given due notice to the said Loeb, and that the materials were used in the erection of the house, and that there was due to them the sum of \$1,542, and that this was a lien upon the property. This was the substance of an affidavit made for the plaintiffs on the 24th day of October, 1902, through C. D. Walles, a member of the firm. This affidavit was sworn to before the clerk of the court, and upon the basis of this affidavit the clerk issued a writ of attachment directing the sheriff to attach the said land and house thereon for the above-mentioned claim of \$1,542, and the attachment was accordingly levied on the property. The clerk also issued a summons, which was served on the defendant. The plaintiffs filed their declaration, which contained, in substance, the same matter set out in the affidavit, and claimed a lien upon the property. Upon ob-

jection being made in the court below, the circuit judge quashed the attachment and dismissed the suit on the ground that the writ had been issued by the clerk of the court without the order or fiat of a judge or chancellor directing him to do so. From this judgment the plaintiff in error has appealed and assigned errors.

Several questions, based upon objections made in the court below, were argued in this court, but we need notice only two of them. The first concerns the form of the pleadings that should be used in proceedings to enforce mechanics' liens in courts of record, and the second the correctness of the action of the circuit judge in respect of the attachment. The first question must be determined by the language of section 3543 of the Code of 1858. That section reads as follows: "The mechanic's lien is enforced by attachment at law or in equity, sued out upon bill or petition under oath setting forth the facts and proceeded with under the provisions of the preceding chapter." The three sections immediately following the foregoing are these:

"3544. Where there are several parties entitled to the lien given by this article, all, or any number of them, may join in one attachment suit in equity, or upon the filing of the bill, the rest may come in by petition, without suing out a new attachment, by giving bond and security, as if the attachment had been taken out by the petitioner.

"3545. The court is authorized to adjust, in such suit, the conflicting rights of the parties, claiming liens, among themselves, and to enforce the same according to priorities.

"3546. If separate suits are brought in the same court, they shall be consolidated, and, if in different courts, the suits last brought may, upon application, be removed into the court in which the first suit was instituted, or vice versa, at the option of the parties."

It is clear from an examination of these sections of the Code, and construing them together, as should be done, that it was the purpose of the Legislature to provide a uniform method of enforcing mechanic's liens in the chancery and circuit courts by bill or petition; and that this suit, whether in the one court or in the other, should be in the nature of an equity suit, and conducted as such. We are not aware, and a very attentive examination does not disclose, that this precise question has ever arisen in any reported case since the passage of the Code of 1858. There are two cases, however, in which the practice above indicated is recognized. *McLeod and McGrath v. Capell*, 7 Baxt. 196-199; *Hillman v. Anthony*, 4 Baxt. 444-447. In the first mentioned of these cases, in response to a motion to quash the attachment for the reason that it was in the nature of an ancillary attachment, and failed to show upon its face the several recitals which have been repeatedly held by this court to be necessary to the validity of

¶ 1. See *Mechanics' Liens*, vol. 24, Cent. Dig. § 491.

an ancillary attachment, it was said: "We do not think there is anything in this objection. This lien is enforced by attachment sued out at law or in equity upon bill or petition under oath setting forth the facts, and proceeded with under the provisions of the preceding chapter"—citing section 3543, *supra*. In *Hillman v. Anthony*, after stating that the attachment in a mechanic's lien case is purely ancillary, and holding that there must be a bond, writ, and affidavit as in other attachment cases, the opinion proceeds: "Without the statute authorizing the attachment in favor of mechanics, it could not issue at all, except for certain enumerated causes. This proceeding may be by bill or petition setting forth the facts, and the facts to be set forth are those entitling him, under the statute, to the lien." Perhaps it cannot be said in strictness that these are adjudications of the point, inasmuch as the special point of practice was not in issue directly; yet, as stated, they amount to persuasive recognitions of the correctness of the practice referred to. It seems, however, that the language of section 3543 is in itself sufficiently explicit, and this is reinforced by the fact that this section is found in a chapter entitled "Of the Enforcement of Liens." The words, therefore, "sued out upon bill or petition under oath," were not idle ones, but intended to have the meaning which they so clearly express. Moreover, they are, if not an essential, yet a homogeneous, part of a comprehensive plan for administering the lien in question in the same manner in the two chief inferior courts of our system in such way as to be least expensive to litigants having causes of this character, enabling them to dispose of the whole matter in one general litigation. The method of single suits in the circuit court under the usual form of practice pertaining to that court, without the power to join other suits, would be necessarily inimical to the plan.

It is insisted by plaintiff's counsel that the construction which we have given to section 3543 is not the correct one, because it would necessitate the same method of practice before justices of the peace, inasmuch as in the same article of the Code, and in the section immediately following section 3546 (section 3547), it is laid down that "the lien of mechanics, foundry-men, and machinists may be enforced by suit before a justice of the peace, for all sums within a justice's jurisdiction; and, when an attachment has been levied on the land, and a judgment rendered, and execution issued thereon, the papers shall be returned to the circuit court, there to be proceeded upon as in other cases of levy of justice's execution on land." The next section (3548) provides: "No justice's execution in any such case shall be a lien on the land, unless, within twenty days after the rendition of the judgment, an abstract thereof, showing the name of the plaintiff and the

defendant, the date and the amount of the recovery, shall be registered in the office of the register of the county in which the judgment is rendered." Even if it should follow, as a necessary consequence of the construction which we have given to section 3543, that there would also have to be a bill or petition filed before a justice of the peace to enforce liens for sums within his jurisdiction, that would by no means invalidate the construction. Still, however, the conclusion insisted upon by plaintiff's counsel does not at all follow. The language used in sections 3543 to 3548, inclusive, is clearly applicable to previously recognized forms of pleadings in the circuit and chancery courts, and they are not applicable to any previously recognized method of procedure before justices of the peace. Indeed, the special directions given with reference to the return of the papers to the circuit court for condemnation of the land after the levy of the justice's execution, and the provision with reference to the registration of an abstract of the justice's judgment, marks proceedings before these officers as standing wholly apart from the provisions made for the circuit and chancery courts. As to the form of suing out the attachment before justices of the peace for the enforcement of mechanics' liens, we do not now consider, and, of course, cannot authoritatively determine. We are left to infer as to these proceedings the practice from other attachment proceedings before justices of the peace—that is, by affidavit, stating the grounds; inasmuch as unmistakable reference is made to the special practice obtaining in cases generally before justices of the peace where land is levied on under execution, the practice being assimilated in this particular, it would be reasonable to infer that it was the intention of the Legislature to, in the same manner, assimilate the practice before them in respect of attachments, no other express direction being given.

We are referred by counsel to *Brown v. Brown*, 2 Sneed, 431, as authority for the practice adopted by him in this case. That case does hold substantially as insisted upon, but it was decided at the December term, 1854, before the enactment of the Code of 1858, which introduced the special language under examination, and hence it is not authority for the construction of the section of the Code referred to; that section having introduced a provision which was not in existence in 1854, and hence was not before the mind of the court when that case was decided.

It was also said by plaintiff's counsel that in *Milliken & Vertrees' Compilation of Statutes*, commonly called "*Milliken & Vertrees' Code*," section 3543 (4286 of that compilation) was set down as follows: "The mechanic's lien shall be enforced by attachment at law or in equity, or by judgment at law and levy of the execution upon the property, subject to the lien." It is further said that the com-

pillers above referred to so rewrote that section because they conceived that chapter 19, p. 23, of the Acts of 1873, had made this change in the law, and that this court in the case of Phillips & Buttorff Mfg. Co. v. Campbell, 93 Tenn. 469, 25 S. W. 961, recognized that construction as the true one. The single question considered in that case may be thus stated: There was a suit brought in the circuit court to enforce a mechanic's lien for the sum of \$37.50. There was a demurrer to the jurisdiction on the ground that the circuit court had, by statute, jurisdiction of no case involving a less sum than \$50. To meet this contention, the plaintiff replied that there was no law authorizing the enforcement of mechanics' liens in any other than a court of record. The court considered this contention, and upon a thorough examination of our statutes upon the subject in the opinion referred to it was held that justices of the peace had jurisdiction to enforce the lien for the sum sued for. In the course of the discussion, and merely in passing, the justice who delivered the opinion made the following remark: "It may be well to note that Messrs. Milliken & Vertrees, in their compilation, treat the act of 1873 as having amended section 3543, as well as 1987, of the Code, and consequently omit from their corresponding sections (Mill. & V. Code, §§ 2747, 4286) the words introduced by the codifiers in 1858." As stated, this was merely a casual remark dropped out in the course of a general discussion, and was not intended to be an adjudication of the matter referred to, and, in view of the question then under examination, could not have been. The act of 1873 afforded an additional remedy, viz., "by judgment and execution at law, to be levied upon the property on which the lien is." It did not purport to amend section 3543, and did not amend it. Indeed, it does not cover the whole ground occupied by the attachment proceeding, inasmuch as it does not apply to subcontractors and materialmen who have no contractual relation with the owner of the property, as shown in Taylor v. Lumber Co., 107 Tenn. 41, 63 S. W. 1130.

We shall now briefly consider the second question. As previously stated, his honor the circuit judge quashed the attachment writ because it had been issued by the clerk of the court without the fiat of a judge or chancellor. It is conceded that the action of the circuit judge was in accord with the opinion of this court in the case of Lane & Bodley v. Wood & Trimble, decided at the December term, 1876, and reported in 1 Tenn. Cas. 648, a publication issued in 1898. We are asked to overrule that case, because it is said that it is unsound in principle, and is opposed to an earlier case—Brown v. Brown, 2 Sneed, 431—and because it remained unpublished so long that counsel and litigants were taken unawares.

As to the last point, we do not think this entitled to very great consideration, inasmuch

as the case was published more than four years ago, and has long been accessible to the profession.

As to the second point, it is true that Lane v. Wood is directly opposed to the previous case of Brown v. Brown. What was said in Brown v. Brown, however, upon the subject of the granting of the attachment by the clerk of the court was merely dictum.

With respect to the merits of the question, if it were res integra, it might well be decided either way. There is much force in the contention of counsel for plaintiff in error that the whole of the preceding chapter of the Code (chapter 10) was referred to, and therefore that all of the provisions concerning attachments sued out under section 3455, and especially section 3463, concerning the granting of attachments by clerks, would also apply to suits to enforce mechanics' liens; but there is also equal force in the suggestion made by counsel for defendant in error that the reference was really to article 6, only, of that chapter, entitled "Mode of Procedure in Attachment Cases." As stated, if the question were an open one, we think that either view of the case might be adopted with good reason. The question, then, being one of doubtful construction of our statutes, we do not feel at liberty to overrule the former decision Lane v. Wood, supra, which took the view, in substance, now insisted upon by defendant's counsel. This decision has been long in existence, and we do not think it should be overruled, involving as it does a mere point of practice; the point itself, on the merits of the inquiry, being a doubtful one at best.

Let the judgment be affirmed.

BARNUM v. LE MASTER et al.

(Supreme Court of Tennessee. June 16, 1903.)
HUSBAND AND WIFE—CONVEYANCE OF LAND—
TO WIFE—EFFECT.

1. A conveyance of land in the usual form from husband to wife in consideration of an antenuptial contract, and which recited a consideration of love and affection, passed the title to the land to the wife, and vested in her a separate estate therein, notwithstanding the absence of any words evincing an intention to create a separate estate in the wife.

Appeal from Chancery Court, Shelby County; F. H. Helskell, Chancellor.

Suit by J. H. Barnum against E. B. Le Master and others. From a decree for complainant, defendants appeal. Reversed.

Frank P. Poston and J. W. Cananda, for appellants. Smith & Trezdvant, for appellee.

SHIELDS, J. The question for determination in this case is whether a conveyance of lands made by a husband to his wife, in the usual form, without any words indicating an intention to do so, has the effect in law, ex proprio vigore, to create a technical separate estate in the wife. The facts necer

sary to be stated are these: Complainant, J. H. Barnum, and defendant Clara S. Barnum are husband and wife, without issue of their marriage. J. H. Barnum, on December 2, 1895, in consideration of an antenuptial contract, conveyed to his wife, Clara S. Barnum, certain valuable lands lying in Shelby county, near Memphis, the conveyance being in the usual form, without any words indicating an intention to create a separate estate, reciting a consideration of love and affection, and containing covenants of seisin and general warranty. Clara S. Barnum, without the consent or joinder of her husband, J. H. Barnum, November 7, 1902, conveyed by deed with proper privy examination, for a valuable consideration, a portion of these lands to the defendant E. B. Le Master. Complainant filed his bill November 14, 1902, charging that Mrs. Barnum had only a general estate in said lands, and could not sell and convey them without him joining in the conveyance, and that the deed made by her was void, and a cloud upon his marital rights in the premises. The prayer is that the conveyance be declared void, canceled, and surrendered, and E. B. Le Master be enjoined from taking possession of the property. This relief was granted by the chancellor, and a decree pronounced in accordance with the prayer of the bill, from which the defendants have appealed and assigned errors.

Complainant, as stated, contends that the defendant Clara S. Barnum had only a general estate in the lands; that by virtue of his marital rights he has the right to the possession of them during their joint lives, and that she cannot sell or convey them during that period without his joining in the conveyance, and therefore the sale and conveyance made by her to E. B. Le Master is a nullity, and a cloud upon his title. While the insistence of the defendant is that the conveyance to Mrs. Barnum, being one from husband to wife, by necessary implication and operation of law created and vested in her a separate estate in the lands conveyed, notwithstanding the entire absence of any words evidencing such intention, and which are necessary in transfers of personal and conveyances of real property by strangers to married women in order to create such an estate; and that the conveyance made to E. B. Le Master vests in him a valid title, free from any and all claims of her husband. It has long been the established rule in this state that transfers of personal property made by a husband to his wife without words to that effect, by implication and as a matter of law vests in the wife a technical separate estate in the thing transferred, but we have no reported case involving a conveyance of real estate in which the doctrine has been invoked. We, however, can see no reason why a distinction should be made in this respect between transfers of personal property and conveyances of real estate.

The reasons given in support of the rule as applied to personal property, the chief of which is that the transfer is without beneficial effect, and abortive, unless a separate estate is vested, apply with equal force to conveyances of lands. This fully appears from a review of our cases involving sales and gifts of personal property by husbands to their wives. The earliest of these cases is that of *Powell v. Powell*, 9 Humph. 486, where a sale of four slaves, made by Robt. Powell to his wife, Mary L. Powell, for a valuable consideration, was an issue. Judge Turley, for the court, in this case says: "We have seen that though, by the common law, a married woman could not have and hold property to her separate use, yet equity has so far qualified this as to permit her to take and enjoy property to her separate use, when it is given to her to that intent. But equity has done this with timidity, for it holds that each claim on the part of a married woman, being against common right, and it being a presumption of law that the property which she becomes the owner of is her husband's, a trust by which it is to be secured to her separate estate free from his marital rights should very distinctly express that intention. It, however, holds it to be immaterial in what form or phrase a trust of that nature is described, technical language not being deemed necessary, and it being only required that the intention of the gift shall appear manifestly to be for the wife's separate enjoyment, and in bar of the husband's rights. This is unquestionably the law in relation to gifts, devises, or settlements made in favor of married women by third persons, and gifts and voluntary settlements made after the marriage by the husband, though that is not so clear. But is this principle applicable to the cases of purchases made by the wife from the husband for a good and valuable consideration paid him by her out of her estate which has already been settled to her separate use and maintenance? I think not, because, in the first place, the reason why such direct expression is regarded when gifts are made to the wife, as we have just seen, is because, in contemplation of law, all gifts of property to the wife are gifts to the husband, and that any other intentment is in violation of his rights. But such is not the case when he himself sells and conveys property for a valuable consideration paid him out of her separate estate. In such case there is and can be no intentment in favor of his rights to the property thus conveyed, and it is absurd to talk about such a conveyance being against his common right; for it is impossible to hold, with regard to intention, that a sale of property by the husband to the wife for a valuable consideration, paid him out of her own private estate, can have any other design than the separate use and benefit of the wife. The husband parts from his interest by his conveyance, and, if the opera-

tion of the conveyance be to vest the property in the wife for his benefit and use, and he be immediately remitted to all of his original rights, then this whole transaction is a farce, and the law, in permitting such contracts, has placed itself in a very ridiculous position."

In *McCampbell v. McCampbell*, 2 Lea, 664, 31 Am. Rep. 623, the court, citing with approval the *Powell Case*, says: "A consideration passing from the wife will sustain a direct conveyance of the property by the husband to her, and the very nature of the transaction will fix the property, even if personally, with a trust for the separate use of the wife, without any words to that effect."

In *Sherron v. Hall*, 4 Lea, 500, it is said: "But the gift was, in effect, as if the husband, for a valuable consideration, had made the conveyance to the wife, in which case the transaction, from its very nature, would confer a separate estate, without express words."

In *Templeton v. Brown*, 86 Tenn. 55, 5 S. W. 441, the court says: "The intention to create a separate estate must clearly appear either by express terms or by necessary implication; otherwise the marital rights of the husband will attach. When the gift is from a stranger, the intention must usually appear from the express language of the donor in terms creating such an estate; otherwise the rights of the husband will not be excluded. But where the gift is from the husband, the intention to exclude himself is inferred from the circumstances of the case and the situation of the parties, without the use of the express words that would be required where a third person is the donor"—citing 1 *Bishop on Married Women*, § 119; *Story's Eq.* § 1373; *Perry on Trusts*, 639.

In *Carpenter v. Franklin*, 89 Tenn. 142, 14 S. W. 484, it is said: "An agreement that the gift of the husband to the wife shall be to her separate use arises from the very necessity of the case, else the gift would be ineffectual. A gift to the wife of her own earnings, either from her labor as for sewing, or from the profits of her boarders, or of her savings from money furnished her for her own personal expenses or her household expenses, may be made out by circumstances, and, when so made out, is as effectual as if proven by express contract. Especially does the implication of gift to her sole and separate use arise when, as in this case, the wife, with the assent of the husband, loaned out such earnings and savings in her own name, taking title to herself."

In *Snodgrass v. Hyder*, 95 Tenn. 575, 32 S. W. 764, the court again holds as follows: "A direct gift by the husband to the wife, during coverture, of money or other personalty, creates, by necessary implication, a separate estate in the wife, and likewise a gift of earnings or savings may be shown by cir-

cumstances, and, when so shown, is as effectual as if proven by express contract;" citing *Pomeroy's Equity*, § 1100. It seems to be taken for granted by the court in these and all other cases that the rule is the same in relation to both personal and real estate.

Some stress in the earlier cases appears to be laid upon the fact that a valuable consideration was paid by the wife to the husband, but in the later ones the doctrine is applied without question to gifts from the husband. This conveyance, however, was made in consideration of marriage, which is a valuable consideration, and held to be sufficient to support a settlement by the husband upon his wife by all the authorities. *Nelson v. Trigg*, 2 Tenn. Cas. 645; *Spurlock v. Brown*, 81 Tenn. 241, 257, 18 S. W. 868.

While as stated, this doctrine has not been heretofore applied in this state in any reported case to a conveyance of real estate made by a husband to his wife, it has been by the court of last resort in a number of other states, and an examination of the opinions of those courts will show that the same reasons advanced in our cases for the creation of a separate estate in transfers of personalty are there given to support the application of the rule to conveyances of land. The case of *McMillan v. Peacock*, 57 Ala. 127, is very much in point. In the opinion Chief Justice Brickell, speaking for the court, it is said: "To the creation of the equitable separate estate no particular form of words, no technical expressions, are necessary. A clear, unequivocal, intention to exclude all marital rights of the husband to secure to the wife the separate, exclusive enjoyment of the estate, manifested by the terms of legal operation, is sufficient. If the grant or conveyance is made by a stranger, the intent to exclude the right of the husband and vest in the wife the entire exclusive interest must be expressed in clear terms. It cannot rest on conjecture or implication. A conveyance by the husband to a trustee for the use of the wife is, necessarily, for the separate use of the wife; otherwise it would be vain and inoperative. A gift or conveyance made by the husband directly to the wife, during coverture, at common law is void, as are all contracts made between husband and wife. Courts of equity have long been accustomed to support and maintain such gifts and conveyances, when not fraudulent, as to creditors. The necessity for creating in the wife a separate estate, vesting in her the entire, exclusive interest, is apparent, since otherwise the transaction, which was intended to have some effect, can have none in law or equity. And, further, all that is necessary to the creation of an equitable separate estate is, as we have seen, a clear and unequivocal manifestation and declaration of the intention to relinquish his own rights, and to clothe the wife with them; and that intention a court of equity will carry into effect."

The case of *Helmetsg v. Frank*, 61 Ala. 69, in which the opinion was also delivered by Brickell, C. J., is to the same effect. It is there said: "We regard it as the settled law of this state that a gift by husband to the wife of property, real or personal, creates in the wife an equitable estate. Property thus acquired by the wife is not within the influence and operation of the statutory provisions which create separate estates."

In the case of *Kimbrough v. Kimbrough*, 99 Ga. 134, 25 S. E. 176, the Supreme Court of Georgia holds: "Where a husband, with his own money, purchased and paid for a home, and deliberately and intentionally had the same conveyed to his wife, with no understanding or agreement that he was, in any event, to have an interest in the title, the transaction amounted to a gift from the husband to the wife, and, as between them, the property became absolutely her separate estate. Where the husband and wife had joint possession of the property thus conveyed, and after they had lived together thereon for a time she was forced, by mistreatment and cruelty on his part, to leave the premises, and he remained in possession, he was, in law, her tenant at sufferance, and upon his refusing to surrender possession to her when demanded it was her right to sue out a dispossessory warrant for the purpose of ejecting him."

In the case of *Whitten v. Whitten*, 3 Cush. (Mass.) 199, which was the case where land was purchased by the husband with his money, and the title taken in his wife, the court says: "Where the husband himself makes a grant or gift to the wife, the intention to relinquish his own rights in favor of the wife, and thus to give her a separate property or interest, is necessarily and most clearly and unequivocally manifested and declared."

In the case of *Sayers v. Wall*, 26 Grat. 373, 21 Am. Rep. 303, the court says: "It seems to be well settled that express words are not necessary to create a separate estate in a deed from the husband to his wife. The law attaches to absolute deeds and transfers a full alienation of the entire interest of property, so far as the alienation is permitted by the principles of law and equity."

In *Garland v. Pamplin*, 32 Grat. 314, it is held: "The general rule is that a conveyance by the husband directly to his wife, although void at law, or to a third person for her benefit, is construed as operating to her separate use; and the reason assigned is that the conveyance otherwise would be wholly inoperative."

A case in point is *Leake v. Benson*, 29 Grat. 156, in which it is held: "Where the conveyance is by the husband to the wife, as a general rule it will be construed as operating to her separate use, although no such words are used as would be necessary to create a separate estate in conveyance by a

stranger. The reason is said to be that otherwise the conveyance would be wholly inoperative."

In *Deming v. Williams*, 26 Conn. 231, 68 Am. Dec. 386, the court discusses this question, and, citing a large number of authorities, thus lays down the rule: "Undoubtedly the cases all of them import that the wife is to take to the exclusion of the husband. But this is to be inferred from the fact that it is a bona fide gift from the husband to the wife. If this is not irrevocably to her separate estate, the transaction has no meaning, for no one pretends that a legal title passed to her. We cannot believe that the husband, in order to be irrevocably bound, must use language to that effect, or covenant that he will not resume or sell the thing that he has given to his wife. When a stranger gives to a wife, it is true that words of exclusiveness are necessary, for otherwise the unity of husband and wife would carry to the husband alone a gift of personal property to the wife; but when the husband himself gives to the wife it cannot be necessary, and we are confident that no case can be found which upholds such a doctrine."

The cases of *Steel v. Steel*, 36 N. C. 452; *Sims v. Rickets*, 35 Ind. 181, 9 Am. Rep. 679; *Haines v. Haines*, 54 Ill. 77; *Smith v. Seiberling* (C. C.) 35 Fed. 677; *Maraman v. Maraman*, 4 Metc. (Ky.) 84; *Callahan v. Houston*, 78 Tex. 494, 14 S. W. 1027; *Story v. Marshall*, 24 Tex. 305, 76 Am. Dec. 106; *Putnam v. Bicknell*, 18 Wis. 333—are in line with those from which we have quoted, and fully sustain the view we have taken of the question.

These are all cases decided by courts of the highest authority, and would seem to be conclusive of the matter. Counsel for the complainant rely upon the fact that we have no case in which this doctrine has been applied to conveyances of lands in Tennessee. But they have been unable to produce a case either in this or any other jurisdiction where a court has refused to apply it to such conveyances. In every case called to our attention, where it has been invoked, the rule has been applied and enforced. The question was not made or considered in the cases of *Murdock v. Railroad Co.*, 7 Baxt. 572, and *Vick v. Gower*, 92 Tenn. 391, 21 S. W. 677, and they do not support the contention of the complainant.

The reasons, we have said, given in the opinions of this court for holding that transfers of personal property by husbands to their wives create separate estate in the property without language expressing that intention, apply with the same force to the conveyances of real property, and there is no sound basis upon which a distinction can be made. It is a question of intention and effect. The law conclusively presumes that the husband intends that this act shall have the effect that it purports to have upon its face, that he part with all his interest in

the property conveyed. If a transfer of personal property to the wife by her husband did not, of its own force, vest in her a separate estate, the transfer would be a farce, and perhaps a fraud upon her, because the husband would immediately become again the owner of it by virtue of his marital rights, and the wife would take nothing. If the same result did not follow a conveyance of land by a husband to his wife, he would, by the same marital rights, become seised of an estate therein during their joint lives, and, if they have a child born alive, for his life if he survives her, as tenant by the curtesy, and entitled to receive and enjoy the rents and profits. The wife would not only be deprived of all the fruits of ownership during all this time, but she could not sell or convey it without his consent and joinder in the conveyance—a power in the husband over the disposition of the property that often enables him to control and reacquire title by reducing to possession the proceeds of the sale of it. The wife would acquire a bare right to sell with the concurrence of her husband while he lived, and only come into full ownership and enjoyment in the event she should survive him—an estate more in the nature of a remainder than the absolute one taking effect immediately which the deed purports to pass, and wholly inconsistent with the terms of the instrument. Beneficial results would be practically wanting in transfers of both species of property, and there would be a like conflict in both cases in the effect and the apparent object of the transaction and expressed purpose of the parties. It cannot be supposed that parties intend that contracts deliberately entered into, often supported by valuable consideration, should be so abortive and barren of results. It is more reasonable to treat the contract as having its plain and natural meaning, and effective to vest in the wife the absolute estate (a separate estate) which the language of the instrument indicates it was the intention of the conveyor to convey. This view is in harmony with our statute providing that a grant or conveyance of land is effective to pass all the title and interest of the grantee therein, unless the intent to convey a less estate appears by express words or necessary implication from the terms of the instrument. It is immaterial that the marital right of the husband attached to property conveyed to the wife by operation of the law, and without any affirmative action on his part. This is presumed to be known to and in contemplation of the parties when a contract of the character under consideration is made, and to be provided against so far as the creation of a separate estate can have that effect. When there is no reservation in a deed, it will be taken as passing to the vendee the highest estate that the vendor can convey, which in the case at bar is a separate estate in the land conveyed. It is clear upon principle and author-

ity that a conveyance of land by husband and wife in the usual form must be held by necessary implication and as a matter of law to vest in the wife a technical separate estate in the premises conveyed. No words expressive of such intention are necessary. It will be conclusively presumed from the relation of the parties and the nature of the transaction.

We are therefore of the opinion and hold that the chancellor was in error in decreeing that the conveyance made by Mr. Barnum to Mrs. Barnum did not pass to and vest in the latter a separate estate in the lands conveyed, and that she did not have the right to sell and convey the same, upon proper privy examination, without his consent and joinder in the deed. The deed made by Mrs. Barnum is valid and effective to vest in the purchaser a good title to the property free from all marital or other rights of her husband, and the decree adjudging to the contrary will be reversed, and one here entered in accordance with this opinion.

COOPER v. WRIGHT.

(Supreme Court of Tennessee. June 30, 1903.)

INSURANCE—DISPOSITION BY WILL—RIGHTS OF CREDITORS—EXEMPTION.

1. Shannon's Code, § 4030, provides that life insurance effected by a husband on his own life shall inure to the benefit of the widow and next of kin, to be distributed as personal property, free from the claims of the husband's creditors; and section 4231 declares that any life insurance effected on a husband's life shall inure to the benefit of his widow and children, to be divided according to the law of distributions, without being subject to the husband's debts. *Held*, that a will by which a husband merely directed prompt payment of all of his debts, and provided that after all his debts were paid all of his property should go to his wife, but failing in any manner to specifically refer to a policy on his life, payable to his executors, did not render such policy subject to the claims of testator's creditors.

Appeal from Chancery Court, Shelby County; F. H. Heiskell, Chancellor.

Action by T. Cooper against M. O. Wright. From a judgment in favor of defendant, complainant appeals. *Affirmed*.

Tim E. Cooper, for appellant. Turley & Turley, Thos. M. Scruggs, and Caruthers Ewing, for appellee.

McALISTER, J. The question presented for our determination upon this record is whether, under a proper construction of the will of T. W. White, deceased, the proceeds of a certain policy of life insurance, amounting to \$5,374.17, are subject to the claims of creditors of the decedent, or whether they belong to the widow and children, free from his debts. The will of the decedent is as follows:

"Memphis, Tenn., Jan'y 25, 1900. Knowing the uncertainty of life, and being anxious

that all my debts shall be paid promptly, I make this my last will and testament, revoking all others. After all my debts are paid, I will all that I have left to my wife, Marion C. White, as she has been all that a wife could be, and I know she will provide for the children. I appoint Dr. B. G. Henning executor of my estate without bond. This will is wholly written by myself. T. W. White."

The policy of insurance in question was issued on the life of the decedent, and is made payable on his death to his executors, administrators, or assigns. It is insisted on behalf of the executor that under the will of T. W. White said policy is a part of his estate, subject to administration and the claims of creditors. It is further insisted that the title to said fund vests in B. G. Henning, as executor of the will of T. W. White, regardless of the ultimate ownership and distribution thereof. Shannon's Code, § 4030, provides, viz.: "A life insurance effected by a husband on his own life shall enure to the benefit of the widow and next of kin, to be distributed as personal property free from the claims of his creditors." Section 4231: "Any life insurance effected by a husband on his own life, in case of his death, enures to the benefit of his widow and children; and the money thence arising shall be divided between them according to the law of distributions, without being in any manner subject to the debts of the husband, whether by attachment, execution or otherwise." It is conceded that, notwithstanding this statute, a husband, after taking out a policy of insurance on his own life, payable to his executors, administrators, or assigns, may dispose of the same by will, though, if it is made payable to his legal heirs, or any other person than the assured's executors, administrators, or assigns, it would not be subject to such disposition; citing *Williams v. Corson*, 2 Tenn. Ch. 269; *Id.*, 9 Baxt. 516; *Gosling v. Caldwell*, 1 Lea, 455, 27 Am. Rep. 774; *Life Asso. v. Winn*, 96 Tenn. 226, 33 S. W. 1045; *Handwerker v. Diermeyer*, 96 Tenn. 624, 36 S. W. 869; *Weil v. Trafford*, 3 Tenn. Ch. 108. It is claimed that this policy passed under the provisions of the testator's will, which has already been set out. In support of this contention counsel cite *Weil v. Trafford*, 3 Tenn. Ch. 108, in which the benefit certificate provided that "the sum of \$2,000 shall be paid as a benefit, upon due notice of death, to such person or persons as the assured may by will or entry on the record book of the lodge, or upon the face of the certificate, direct." It was held by Chancellor Cooper that such sum passed under the residuary clause of the testator's will disposing of the balance of "all of my property of every kind," without mentioning the certificate. The chancellor said: "It is clear, moreover, that Barker did not die intestate as to this fund, if it is constituted a part of his estate; for the words, 'all of my property of every

kind," are as broad as could possibly be used to pass the residuum of an estate. The only question, therefore, is, was this fund a part of the testator's estate when the will speaks of personalty? and of this there can be not a particle of doubt." This case, while supporting more or less distinctly the proposition to which it is cited, was not passed upon by this court, nor the principle stated affirmed in any reported decision of which we have any knowledge. It has been referred to by this court on the proposition that life insurance can be disposed of by will, but the general principle stated has not been recognized by this court. Moreover, the claims of creditors were not involved in that case, and the decision turned largely upon the constitution and by-laws of the Knights of Honor. The contest was entirely between members of decedent's family. Counsel also cite *Union Trust Co. v. Cox*, 108 Tenn. 316, 67 S. W. 814, as sustaining the contention of defendant. In that case the concluding clause of the will directing a disposition of testator's estate contained the following words, "including all insurance." It was held that creditors were entitled to be paid out of the life insurance to the exclusion of the widow and children. It is said that in the *Cox Case* the testator mentioned his insurance as a part of his estate, but not in connection with the payment of his debts. In that case the policy was issued on the life of the testator, payable to himself, his executors, administrators, or assigns. The executor was directed by the first clause of the will to pay "all just and honorable debts that may exist." The testator then divided his estate among his children and wife, the will concluding with these words, "My estate (as a whole, regardless of prior transfers) to be divided as above directed, each one-third of my estate effects, including all insurance." We think it clear that in the *Cox Case* the testator intended his insurance to be included as a part of his general estate for distribution, and, becoming a part of his estate for this purpose, it was necessarily charged with the payment of all the debts of the testator. The court in that case used this language: "That he [the testator] did have them [insurance policies] in mind as constituting part of his estate, and, as it proved in the end, its only substantial part, which was to pass into his executor's hands, subject to the terms enumerated, is not left to an inference alone from the general terms used. In the last clause the testator declares his intention, we think, in unmistakable terms." Hence we do not think the *Cox Case* an authority for defendant's contention in this case, since in the former case there was an express reference to the insurance, while in this case no mention whatever is made of the subject. Now, why should the insurance pass to the executor for the benefit of creditors in a will which does not undertake to dispose of it? It is exempt property, and inures to the ben-

est of the widow and the children for their immediate support and maintenance. It is true the testator might dispose of it, and defeat the just expectations of his family, as he might dispose of other property exempt by law. But the courts will not presume, from general terms employed in a will, that the testator intended to deprive his widow and children of a fund secured to their exclusive benefit by the statute, and give it to creditors who have no interest in it, and who could not have subjected it to the payment of their demands. *Harvey, Adm'r, v. Harrison*, 89 Tenn. 470, 477, 14 S. W. 1083. The Supreme Court of Maine, in considering the subject, through Barrons, J., said: "So with moneys accruing from life insurance policies after the death of the testator. If it be held that under the general statute authorizing the disposition of property by will a solvent testator, or one whose estate would be solvent with the addition of the fund thus created, may authorize his executor to use this fund for the payment of his debts, and otherwise dispose of it in a manner different from that which the law contemplates or will allow in the case of an insolvent estate, we think, in order to effect his object, the testator must use language directly significant of his intention in this respect; that, classed by the Legislature as this fund is, it is not to be appropriated to the payment of debts or of any pecuniary legacies couched in general terms merely, even to the widow or children, unless it is referred to as the fund from which such payment is to be made, and that it does not pass by any general residuary clause; in short, that the testator's intention to change the direction which the law gives to this very peculiar species of property is not to be inferred from general provisions in his will, the fulfillment of which might require the use of such money, but must be explicitly declared." In *Rose v. Wortham*, 95 Tenn. 506, 32 S. W. 458, 30 L. R. A. 609, it was said: "The evident object and purpose of the acts in controversy were to provide for the widow and children, and, in default of them, for the next of kin of the assured upon his death, in the event he did not direct in the policy, or by assignment, or by his will, or in some other mode, that other persons should be the beneficiaries thereunder;" citing *Harvey, Adm'r, v. Harrison*, 89 Tenn. 476, 14 S. W. 1083. It was further said: "That he might so direct cannot, under our decisions, be questioned; but, in order to do so in the policy, he must use apt words for that purpose indicating his intention that the proceeds shall be paid to parties other than the wife, children, or next of kin, or else the proceeds will pass under the statute."

The chancellor properly decreed that the proceeds of the insurance policies herein were not subject to the claims of creditors under the will of T. W. White, deceased, and the decree is affirmed.

BALLING v. MANHATTAN SAV. BANK & TRUST CO.

(Supreme Court of Tennessee. June 30, 1903.)

GIFTS—INTER VIVOS—CONTINGENCY.

1. A third person delivered to complainant his passbooks in defendant bank, stating that he was going away and wanted her to have the money to his credit in the bank as evidenced by said books, and that if he did not return he wanted her to understand that it was hers, and said books were delivered to her to enable her to collect the same if he did not return. *Held*, not a valid gift inter vivos, being dependent on a contingency.

Appeal from Chancery Court, Shelby County; F. H. Heiskill, Chancellor.

Suit by Rosina Balling against the Manhattan Savings Bank & Trust Company. Decree dismissing the bill, and complainant appeals. Affirmed.

G. T. Fitzhugh, for appellant. L. & E. Lehman, for appellee.

McALISTER, J. The question presented in this case is whether, upon the facts alleged in the bill, a valid gift inter vivos was made of a sum of money, amounting to \$586.54, from one George Volmer to the complainant, Rosina Balling. The chancellor sustained a demurrer interposed by the defendant, and dismissed complainant's bill.

The material allegations of the bill are that on the 12th day of May, 1890, the said George Volmer opened an account with the defendant, Manhattan Savings Bank & Trust Company, which delivered to the said Volmer a deposit book giving him credit for the amount deposited on that day. It is further alleged that, under the rule promulgated by the bank, all deposits were to be credited in said book, and all drafts drawn on account of deposits made with the bank had to be made by the depositor personally, or by his order in writing, on the production of the depositor's book. It is then alleged that deposits were made by the said George Volmer at various times, and entries made in said deposit book giving him credit therefor. The last deposit by said Volmer, as shown by said deposit book No. 5,604, was on November 19, 1891, and the total sum of said deposits, with interest thereon, credited to George Volmer in said bank, amounts to \$586.54. The bill then alleges that on the 19th day of January, 1895, the said George Volmer transferred and made actual delivery of said deposit books to complainant, at the same time saying to complainant that he was going away, and wanted her to have the money to his credit in said Manhattan Savings Bank & Trust Company as evidenced by said books, and that if he did not return he wanted complainant to understand that it was hers, and said books were delivered to her for the purpose of enabling her to collect the same in the event that he did not return.

¶ 1. See *Gifts*, vol. 24, Cent. Dig. §§ 21, 70.

It is then alleged that the said George Volmer did leave on said date, to wit, January 19, 1895, and has never been heard from since; that neither the complainant, nor any other person in said city or county who knew him (though his acquaintances, as stated, were few), has been able to obtain any information in regard to him, though diligent inquiry has been made for the purpose of ascertaining his whereabouts, etc. The bill further alleged that more than seven years had elapsed since Volmer left Memphis and Shelby county; that he has been continuously absent since then, and no information whatever in regard to him has been obtained; and complainant is advised that under these circumstances the law raises a presumption of the death of the said George Volmer, and that the transfer and delivery by him to complainant, more than seven years ago, of his deposit books, amounted to a gift of the money in bank to his credit evidenced by said books, and she is therefore legally entitled to the same. It is further alleged that his failure to return after an absence of more than seven years raises the legal presumption that he will not return at all, and under the law complainant is advised that she has been vested with an absolute title to the money credited to the account of George Volmer.

Three grounds of demurrer were assigned to the bill, to wit: (1) That the bill sets up title to certain moneys deposited with demurrant by George Volmer, upon the allegation that he delivered to complainant his bank deposit book, and that he was going away and wanted her to have the money to his credit with demurrant if he did not return, and this did not give the complainant any right or title to the money, for the reason that the alleged gift was unexecuted and incomplete, so that the title to said money never passed out of Volmer. (2) The said bill shows that the moneys on deposit with defendant bank to the credit of Volmer were subject only to draft or check accompanying the deposit book, and complainant does not show that she ever received any check or draft for said money, or any part thereof. (3) It is alleged in the said bill that Volmer is dead, and the complainant is not interested in his estate as a distributee, and no one is made a party to the suit as the administrator or personal representative of said decedent.

As already stated, the several demurrers were sustained, and complainant's bill dismissed.

The cardinal inquiry arising under the first assignment is whether the alleged gift was complete and executed. It is argued that, under the allegations of the bill, Volmer retained dominion and control over it, and the right to repossess himself of said fund at any time; that, if there was a delivery of said deposit book to appellant, it was not a present and irrevocable gift. It is insisted the bill in effect admits that at any time, up-

on the return of Volmer, he would have had the right to repossess himself of the books and the fund. It is insisted that complainant now seeks to have the absolute right to the fund adjudged to her upon the allegation of the nonreturn of Volmer, and the presumption of death arising from seven years of unexplained absence.

In the case of *Marshall v. Russell*, 83 Tenn. 265, 25 S. W. 1070, it is said: "The settled rule is that a parol gift of a chattel or chose in action, whether it be a gift *inter vivos* or *causa mortis*, does not pass title to the donee without delivery and transfer of possession. The effect of a valid delivery is to place the subject of the gift in the control and dominion of the donee, and his title and right of possession by said gift and delivery become absolute and irrevocable. *McEwen v. Troost*, 1 Sneed, 186. It is therefore essential to the validity of such a gift that the transaction be fully completed—that nothing essential remains to be done. If left incomplete, there exists a *locus penitentiae*, and what has been done may be revoked. An absolute gift which will divest the donor's title requires a complete renunciation on his part, and acquisition on the part of the donee, of all the title to and interest in the subject of the gift."

In the case of *Grover v. Grover*, 24 Pick. 261, 35 Am. Dec. 819, it is said: "To constitute a donation *inter vivos*, there must be a gift absolute and irrevocable, without any reference to its taking effect at some future time. The donor must deliver the property, and part with all present and future dominion over it"—citing *Dale v. Lincoln*, 62 Ill. 22.

In *Taylor v. Henry*, 48 Md. 550, 30 Am. Rep. 486, it appeared that Joseph Henry deposited certain moneys in a savings bank, so that the account stood: "Joseph Henry—Margaret Taylor, and the survivor of them, subject to the order of either." Joseph Henry retained possession of the bankbook, and after his death Margaret Taylor, who was his sister, obtained possession of the same, and claimed the fund as a gift by virtue of the deposit and the use of the aforesaid words. The court, through Mr. Justice Alvey, said "that they [the words] did not import a gift *inter vivos* would seem to be clear upon the most obvious construction. To make such gift perfect and complete, there must be an actual transfer of all right and dominion, over the thing given, by the donor, and acceptance by the donee or some competent person for him. And it is essential to the validity of such gift that it should go into effect, that is, transfer the property, at once and completely; for, if it has reference to a future time when it is to operate as a transfer, it is but a promise without a consideration, and could not be enforced either at law or in equity. Until a gift is thus made perfect the *locus penitentiae* remains, and the owner may make other disposition

of the property that he may think proper." See, also, *Walden's Adm'r v. Dixon*, 5 T. B. Mon. 170.

In the case of *Sheegog v. Perkins*, 4 Baxt. 273-281, the court said: "In order to make this gift complete, it must appear absolutely and beyond doubt that the donor intended to part with his dominion over the property. If the intention to give * * * be not clearly made out, it cannot be supported; and if, upon the facts, the matter be enveloped in doubt, that doubt must prevail against the hypothesis of the case."

Now, it will be observed in all of the cases cited, the principle is distinctly recognized that, so long as the donor retains control and dominion of the property, there is no gift *inter vivos*. In the present case the bill distinctly states that the complainant was to have the money in the event that George Volmer did not return, and hence it was within the power of George Volmer, upon his return, to revoke this gift at any time. The gift was not, therefore, complete and executed, and hence did not take effect in *præsent*. The donee's dominion and control over the gift was entirely dependent upon the contingency of the nonreturn of the donor, and that matter was left in uncertainty. The donee manifestly had no complete and executed title to the gift so long as there was a contingency dependent upon the return of the donor. It is well settled that stronger, more cogent, and stringent proof is required to establish a gift *causa mortis* than a gift *inter vivos*, because the former donations amount to a revocation *pro tanto* of written wills, and, not being subject to the forms prescribed for nuncupative wills, are of a dangerous nature, and open the door of fraud and perjury. *Sheegog v. Perkins*, 4 Baxt. 273-281; *Brunson v. Brunson*, Meigs, 630, 641. It is not seriously contended that a gift *causa mortis* could be made to arise upon the facts stated in the bill, but the contention of complainant's counsel is that the facts make out a gift *inter vivos*.

We have carefully reviewed the elaborate extracts from authorities found in the complainant's brief to sustain his contention, but are of opinion the principle announced in those cases is in harmony with the rule herein announced, and do not sustain the position of the complainant. It results that the decree of the chancellor must be affirmed.

HARRIS v. SECOND NAT. BANK.

(Supreme Court of Tennessee. June 30, 1903.)
BANKRUPTCY—PREFERENCES—KNOWLEDGE
OF CREDITOR—PAYMENT ON NOTE—SOL-
VENT INDORSERS—EFFECT—SET-OFF.

1. Evidence examined, and *held* to sufficiently show that defendant bank, receiving a payment from a bankrupt, had reasonable ground for believing that a preference was intended.

2. The trustee in bankruptcy is not precluded from recovering, from the payee in a note, mon-

ey paid by the bankrupt on the note within four months of his adjudication, by reason of the fact that there are solvent indorsers on the note.

3. Section 68 of the bankrupt law (Act July 1, 1898, 30 Stat. 565, c. 541 [U. S. Comp. St. 1901, p. 3450]), which provides that, "in all cases of mutual debts or mutual credits between the estate of the bankrupt and the creditor, an account shall be stated and one debt shall be set off against the other and the balance only shall be allowed or paid," etc., does not authorize the creditor, in a suit against him by the trustee to recover an unlawful preference, to set off the debt on which the alleged preferential payment was made.

4. Section 57g of the bankrupt act (Act July 1, 1898, 30 Stat. 560, c. 541 [U. S. Comp. St. 1901, p. 3443]), which provides that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preference," applies though the preference was innocently received.

Appeal from Chancery Court, Madison County; A. G. Hawkins, Chancellor.

Action by Charles G. Harris, trustee, against the Second National Bank. Decree for complainant, and defendant appeals. Affirmed.

Hays & Biggs, for appellant. Taylor & Biggs and Caruthers & Mallory, for appellee.

McALISTER, J. Harris, as trustee in bankruptcy of Rosa D. Prewitt, exhibited this bill against the Second National Bank of Jackson, to recover the sum of \$3,100 alleged to have been paid said bank by Mrs. Prewitt in discharge of a pre-existing debt, averring that said payment was an unlawful preference within the meaning of the bankrupt act. The chancellor pronounced a decree in favor of the complainant. Defendant appealed, and has assigned errors.

It appears from the record that prior to the 18th of September, 1900, Mrs. Rosa D. Prewitt had been conducting a dry goods business in the city of Jackson, under the firm name and style of J. J. Prewitt & Co. Mrs. Rosa D. Prewitt alone constituted the firm, although her husband, J. J. Prewitt, was her active business manager. The business had been carried on in Jackson for at least 2½ years before the firm was adjudged bankrupt. Mrs. Prewitt transacted her banking business with the Second National Bank, and became indebted to said bank in the sum of \$3,500 by note, of which J. T. Rushing, J. T. Jones, and R. E. Prewitt were sureties. Mrs. Prewitt was also allowed the privilege of overchecking her account to the amount of \$500 at the date of these transactions, and, in addition to the note already stated, she was indebted to the bank by overcheck in the sum of about \$600, and also by note for \$795, indorsed by J. T. Rushing. It appears that in the summer of 1900 a payment of \$1,000 was made on the \$3,500 note, reducing it to \$2,500. In July or August of that year Mrs. Prewitt, through her husband, made application to the bank to increase her line of overcheck to the amount of \$800, which request was granted, but very

soon thereafter (in August) this concession was withdrawn, and Mrs. Prewitt was requested by the cashier of the bank not to exceed the former limit of \$500. It appears at this time Mrs. Prewitt was largely indebted, and, being pressed by her creditors, was very anxious to obtain an additional line of overcheck, but the matter, after being submitted to the finance committee of the bank and investigated, was declined. Very soon thereafter Mrs. Prewitt, after consultation with Mr. Polk, cashier of the bank, sold her entire stock of merchandise, comprising her entire assets, to one R. E. McKinney, for the sum of \$3,100, and this money she turned over to the Second National Bank, paying off the overcheck of \$600, and the balance of \$2,500 on the note. Within a few days thereafter her creditors forced her into involuntary bankruptcy, and she was duly adjudged a bankrupt. The trustee appointed under said proceedings thereupon instituted this action to recover the sum of \$3,100 paid to the bank as an unlawful preference.

Section 60b of the bankrupt law (Act July 1, 1898, 30 Stat. 562, c. 541 [U. S. Comp. St. 1901, p. 3445]) provides if the bankrupt shall have given a preference within four months before the filing of the petition, or after the filing of the petition and before the adjudication, and the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. It is insisted on behalf of the bank that there is no evidence in the record showing that the bank or any of its officers knew or had reasonable cause to believe that Prewitt & Co. were insolvent at the time the note and overcheck were made. We are constrained to believe from the proof that the cashier, at the time he received the payment, was fully aware of the insolvency of this debtor, and that the money received from the sale of the stock of merchandise constituted the entire assets belonging to the bankrupt. The record shows that the cashier had been consulted by Prewitt with reference to obtaining an extension of time from the creditors of Prewitt & Co. living in St. Louis and Louisville. The cashier was also aware that Mrs. Prewitt had asked an extension of time and additional line of overcheck with the Second National Bank, which that bank, on instruction of the finance committee, had declined to grant. The proof further shows that, after Mrs. Prewitt had failed to get an additional line of credit from the bank, she offered to sell the stock of goods to the bank, but that it declined to buy, and the cashier admits that, when the bank declined to make a further advance, he said to Mr. Prewitt: "I believe it would be best to make a general assignment and get matters settled up." Surely, in view of all these facts, the bank had, in the language

of the bankrupt act, reasonable cause to believe a preference was intended.

It is argued, however, that the bank was constrained to accept payment of the balance due on the \$3,500 note, or thereby release the sureties. The argument is that, the note due the bank being amply secured by personal indorsers, the bank was not the party to be benefited within the meaning of said section, but that the trustee ought to have brought this suit against J. T. Jones, J. T. Rushing, and R. E. Prewitt, the sureties on said note, as the parties who had been benefited. Section 60b of the bankrupt law provides that a recovery may be had by the trustee from the party receiving the preference or to be benefited thereby. The question now made was before the Supreme Court of the United States, under the act of 1868 (15 Stat. 227, c. 258), in the case of *Bartholow v. Bean*, 18 Wall. 635, 21 L. Ed. 866. It was argued in that case that the bank was not benefited by the payment, because it was secured by a solvent indorser, and that it was constrained to receive the payment when tendered, else the sureties would have been discharged. Mr. Justice Miller, in delivering the opinion of the court, said, in part, as follows: "Does the fact that Wilcox, the indorser, was solvent, and was liable, change the rule as to payment as a preference? The statute in express terms forbids such preference, not only to an ordinary creditor of the bankrupt, but to any person who is under any liability for him; and it not only forbids payment, but it forbids any transfer or pledge of property as security to indemnify such persons. It is therefore very evident that the statute did not intend to place an indorser or other surety in any better position in this regard than the principal creditor, and, if the payment in the case before us had been made to the indorser, it would have been recoverable by the assignee. If the indorser had paid the note, as he was legally bound to do, when it fell due, or at any time afterwards, and then received the amount of the bankrupt, it could certainly have been recovered of him; or if the money had been paid to him directly instead of the holder of the note, it could have been recovered; or if the money or other property had been placed in his hands to meet the note or to secure him, instead of paying it to the bankers, he would have been liable. He would not, therefore, have been placed in any worse position than he already occupied, if the holders of the note had refused to receive the money of the bankrupt. It is very obvious that the statute intended, in pursuit of its policy of equal distribution, to exclude both the holder of the note and the surety or indorser from the right to receive payment from the insolvent bankrupt. It is forbidden. It is called a fraud upon the statute in one place, and an evasion of it in another. It is made by the statute equally the duty of the holder of the note and of the

indorser to refuse to receive such a payment. Under these circumstances, whatever might have been the right of the indorser, in the absence of the bankrupt law, to set up a tender by the debtor, and a refusal of the note holder to receive payment, as a defense to a suit against him as indorser, no court of law or equity could sustain such a defense, while that law furnishes the paramount rule of conduct for all the parties to the transaction, and when in obeying the mandates of that law the indorser is placed in no worse position than he was before; while by receiving the money the holder of the note makes himself liable to a judgment for the amount in favor of the bankrupt's assignee, and loses his right to recover either of the indorser or of the bankrupt's estate. We are of opinion, therefore, notwithstanding the hardship of the case, which is more apparent than real, that the payment must be held to be a preference within the bankrupt law, and that the judgment of the court below, that the assignee should recover it, must be affirmed."

The third assignment of error is that the court should also have adjudged that, inasmuch as Prewitt & Co. were insolvent, the bank had the equitable right of mutual offset, and the trustee could not recover this amount from the bank while the bankrupt was indebted to it for a larger amount. This assignment of error is based upon section 68 of the bankrupt law (30 Stat. 565, c. 541 [U. S. Comp. St. 1901, p. 3450]), as follows: "(a) In all cases of mutual debts or mutual credits between the estate of the bankrupt and the creditor, an account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid. (b) A set off or counter claim shall not be allowed in favor of any debtor of the bankrupt which is not provable against the estate or was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent or had committed an act of bankruptcy." We are of opinion, however, that this record does not present a case of mutual debts and credits, within the meaning of the sections referred to. The fact is the estate of the bankrupt herein is not indebted to the bank, that indebtedness having been paid off and discharged. As said in *Loveland on Bankruptcy*, § 127: "Under the mutual credit clause, a creditor having a preference cannot set off an individual debt in a suit by the trustee to set aside such preference. The reason is that the debts are not mutual nor in the same right. The preference which is being avoided is a debt between the preferred creditor and the general creditors—not the bankrupt. The individual debt is between the preferred creditor and the bankrupt. The trustee holds one of the debts as the representative of the general creditors,

and the other as the representative of the bankrupt." The only set-off provided by the bankrupt law in such cases is as follows: "If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which has become a part of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him." The mutual debit and credit clause invoked by defendant's counsel herein has reference to a case where the third party is indebted to the bankrupt, and the bankrupt is indebted to that third party. Now, before the third party can be called on to account for its indebtedness to the bankrupt, a balance of mutual debits and credits must be struck, and, if there is a balance due the bankrupt, then the third party becomes liable for its payment. The cases cited, *Re Little* (D. C.) 110 Fed. 621, and *Re Myers* (D. C.) 99 Fed. 691, are not applicable in the present instance. It appeared in each case that the bankrupt, at the time the petition was filed, had money on deposit in the bank. He was also indebted to the bank. It is well settled that the relation of the bank to the depositor is that of debtor and creditor, and the bank is the debtor of the depositor. In each case, the trustee undertook to recover from the bank the amount on deposit in the bankrupt's name as a debt owing by the bank to the bankrupt's estate, and the bank claimed the right to set off against the deposit the amount the bankrupt owed it, and it was allowed. This is not a case in which there were mutual debts and credits between the bankrupt and the bank. This is simply a case in which the bankrupt made a preferential payment to the bank, whereby the bank, in contravention of the bankrupt law, received a larger percentage on its debt than other creditors. Such a preference, under the bankrupt act, is voidable at the election of the trustee. If, as contended by learned counsel for the bank, the bank is now entitled to set off against the claim of the trustee the indebtedness of the bankrupt to the bank, it would virtually wipe out the section of the bankrupt act making unlawful preferential payments, and thereby defeat the object of the bankrupt law, which is to secure an equal distribution of the assets of the failing debtor. Moreover, debts or credits, in order to be set off, must be such claims as are provable in bankruptcy. The authorities are that the claim of a creditor who has received a preference is not provable in bankruptcy unless the preference be surrendered. Section 57g of the bankrupt act (30 Stat. 560, c. 541 [U. S. Comp. St. 1901, p. 3443]) provides as follows: "The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preference." The rule ap-

plies even though the preference was innocently received. *Pirie, Scott & Co. v. Chicago Title & Trust Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171.

The result is, the decree of the chancellor is affirmed.

READ v. CITIZENS' ST. R. CO. et al.

(Supreme Court of Tennessee. June 30, 1903.)

INTERPLEADER—OBJECTION NOT MADE BEFORE—BILL BY TRUSTEE FOR INSTRUCTIONS—ESTOPPEL—PLEADING—CORPORATIONS—CONSOLIDATION—AGREEMENT AS TO DISPOSITION OF PROPERTY—RIGHTS OF STOCKHOLDERS.

1. Objection to a bill of interpleader that it cannot be maintained because complainant asserts an interest in the fund to the extent of compensation for his services cannot be made for the first time on appeal.

2. A bill by a trustee for instructions may propound questions involving not only his duty, but also the determination as to the title of him and others.

3. An estoppel, to be available, must be pleaded.

4. The stockholders of two corporations agreed to a consolidation, one to take over all the property of the other, to issue stock and bonds in payment thereof, to assume all the debts of the other, and to issue and set aside \$100,000 of bonds for the purpose of retiring \$96,000 of outstanding bonds of the absorbed corporation, any surplus of the \$100,000 to be divided between the then stockholders of the two corporations. *Held*, that there was a valuable consideration for such disposition of the surplus, incorporated in a resolution of the absorbing corporation pursuant to the agreement.

5. A disposition of property of a corporation, not objected to by any stockholder or creditor, cannot be objected to by any, unless by the state in a proper proceeding.

6. A transfer of all the stock of a corporation formed by the consolidation of two corporations pursuant to an agreement of the stockholders, embodied in a resolution of the absorbing corporation, that it should issue and set aside \$100,000 of bonds to retire \$96,000 of bonds of the absorbed corporation, any surplus of the \$100,000 to be divided between the then stockholders of the two corporations, does not, by implication, pass the interest of the stockholders in the surplus as an incident to the stock, the right to participate in which was reserved to them as individuals.

7. The right of stockholders to a surplus under a resolution of a corporation purchasing the property of another that it should issue and set aside \$100,000 of bonds to retire \$96,000 of bonds of the other, any surplus of the \$100,000 to be divided between the then stockholders of the two corporations, was not abandoned because the mortgage executed by the absorbing corporation to secure its bonds, and which was approved and confirmed by the stockholders of both corporations, made no mention of the surplus.

8. The term "surplus" in the resolution of a corporation, on purchasing the property of another, that it should issue and set aside \$100,000 of bonds to retire \$96,000 of bonds of the absorbed corporations, refers only to the excess of four bonds, and does not include the subsequent appreciation in value of the other bonds before the old bonds were retired.

Appeal from Chancery Court, Shelby County; F. H. Heiskell, Chancellor.

Bill by S. P. Read, trustee, against the Citizens' Street Railroad Company and others. From the decree, or some part of it, all parties appeal. Modified.

Carroll, McKellar & Bullington, for complainant. Turley & Turley, H. D. Minor, Geo. H. Gillham, Jno. H. Watkins, S. M. Neely, Thos. M. Scruggs, and J. L. Goodloe, for defendants.

MCALISTER, J. The questions presented upon the record relate, first, to the right of a trustee to compensation, including reasonable counsel fees, and, second, the right of ownership in a certain surplus arising under the administration of a trust—whether it goes to defendant street railroad company or to the original stockholders in its predecessor companies. The facts necessary to be stated are that in 1886 two rival street railroad companies were being operated in the city of Memphis, one known as the Memphis City Railroad Company and the other the Citizens' Street Railroad Company. A consolidation of the two companies was agreed upon by the respective stockholders; that is to say, it was agreed that the Citizens' Street Railroad Company should purchase and take over the entire property and franchises of the Memphis City Railroad Company, excepting that the latter company should retain its corporate existence. The capital stock of the Memphis City Company was \$500,000, and that of the Citizens' Company \$250,000. Each company at the time had an outstanding bonded indebtedness. That of the Memphis City Company amounted to \$96,000, while that of the Citizens' Street Railroad Company was \$200,000. The stockholders of the Citizens' Company adopted resolutions, which were accepted by the Memphis City Company, providing that the Citizens' Company should increase its capital stock from \$250,000 to \$1,000,000, and issue \$1,000,000 of 6 per cent. bonds. One-half of the stock (\$500,000) and one-half of the new bonds (\$500,000) were to be given to the stockholders of the Memphis City Company in payment of the purchase price of its properties and franchises. The resolution then recited, viz.: "The remaining \$500,000 of bonds will be used as follows: \$200,000 will be placed in the hands of S. P. Read, of Memphis, Tennessee, as trustee, for the purpose of retiring the \$200,000 of first mortgage bonds of the Citizens' Company now outstanding, and \$100,000 for the purpose of retiring \$96,000 of first mortgage bonds of the Memphis City Railroad Company now outstanding, any surplus of the \$100,000, should there be a surplus, to be equally divided between the present stockholders of the Memphis City and the Citizens' Street Railroad Companies, and \$100,000 in payment of money and property advanced by the stockholders of the Citizens' Street Railroad Company, aforesaid, and \$100,000 to be retained in the treasury,

¶ 2. See *Estoppel*, vol. 19, Cent. Dig. § 300.

to be used for permanent improvements." It was then provided that the remainder of the new issue of stock, \$250,000, should be apportioned among the original stockholders of the Citizens' Company, in order to equalize the ownership of stock among the stockholders of each company. It appears that this contract was formally carried out, and a deed executed by the Memphis City Company conveying all its properties to the Citizens' Company. The Citizens' Company increased its capital stock to \$1,000,000, and issued the \$1,000,000 of bonds, in accordance with the provisions of the resolution, and the stock and bonds were distributed among the stockholders as stipulated. The \$200,000 of outstanding first mortgage bonds owing by the Citizens' Company were exchanged for new bonds. It appears, however, that the \$96,000 of first mortgage bonds owing by the Memphis City Company were not exchanged. Only six of said bonds were funded. It appears that this series of bonds were worth more on the market than the new bonds. Besides, they were inaccessible, and for these reasons were not retired. Hence it appears that \$94,000 of the new bonds were left in the hands of S. P. Read, trustee, for the purpose of funding or retiring \$90,000 of Memphis Company bonds, due September 1, 1901, and said trustee continued to hold said bonds up to the bringing of this suit. It appears that in December, 1888, the stockholders of the amalgamated companies sold all their stock to Holmes, Honore & Hinckley, of Chicago, for \$1,000,000, its par value. In the year 1897 the Citizens' Company (by their assignees, Holmes, Honore, & Hinckley) conveyed all its property to A. M. Billings, who organized the present company (the Memphis Street Railroad Company), for the consideration of \$200,000 and the assumption of all indebtedness. It now appears that the bonds left in the hands of S. P. Read are worth a premium of 25 cents on the dollar, and are more than sufficient to liquidate and retire the \$90,000 of underlying bonds of the Memphis City Company due September 1, 1901, and will leave a surplus of \$25,000. The principal controversy now presented is over this surplus.

The present bill is filed by S. P. Read, trustee, in which it is alleged that Mr. Jones, representing the Memphis Street Railway Company, the successor of the two old companies, had called upon him, and stated, in effect, that his company claimed the right, upon the maturity of the \$90,000 unpaid Memphis City bonds, to pay off said bonds, and then to take from him, the trustee, the \$94,000 of Citizens' bonds so held in trust; that shortly after this Mr. Napoleon Hill stated to him that, as one of the stockholders of the Citizens' Company, he (Hill) would insist upon his right to a pro rata of the surplus in the trustee's hands over and above what was required to retire the old Memphis

City bonds; that about the same time the attorney for the executrix of Col. Frayser's estate warned him (the trustee) that the executrix would look to him for the share of said surplus belonging to her decedent's estate. The bill then averred that the bonds in his hands, of the par value of \$94,000, were worth in the market a premium of about 25 per cent., so that the value of the bonds in his hands exceeded the amount necessary for the retirement of the underlying bonds by nearly \$25,000; that he was advised that this excess constituted a "surplus" within the meaning of the resolution of December 29, 1886, creating the trust in him; that he was advised that he was not bound to settle and decide upon the conflicting claims to said surplus already stated, but that he was entitled to file this bill, and have the court instruct him as to his duties under said trust. Accordingly the trustee presented the history of the trust and the facts connected with it, and asked that he be instructed as to the disposition of said surplus and as to his duties under the trust. All persons having an interest in the matter were made defendants, and the bill prayed that they be required to come in and propound their claims to the surplus. The trustee also averred that he was entitled to compensation as trustee and to counsel fees, and asked that the same be fixed, and made a charge upon the funds in his hands. The various stockholders of the two old companies, who were such at the time of the resolution of December 29, 1886, answered the bill, and set up their respective claims to the surplus. The defendant railway companies filed an elaborate joint and separate answer, in which it is claimed that the surplus in question belongs to the present company, the Memphis Street Railway Company. It avers that the intention of the parties, upon the deposit of the bonds with Mr. Read, was that the bonds should be exchanged bond for bond, and that this was done in the case of six of the bonds. It avers as to the remainder of said bonds deposited with Mr. Read (amounting to \$94,000 face value): "The same have never become, and are not now, outstanding obligations of the Citizens' Street Railroad Company, or of its successor, the Memphis Street Railway Company," and "that the outstanding bonds of the Memphis City Railroad Company, dated September 1, 1881, which were never retired, and which the holders thereof refused to retire by exchanging the same for a similar amount of bonds dated January 1, 1887, of the Citizens' Street Railroad Company, have become, by reason of the conveyances aforesaid and the facts in this answer set up, the obligations and indebtedness of the Memphis Street Railway Company. And this respondent, the Memphis Street Railway Company, alleges that it is ready and willing, and hereby offers, to pay said 90 bonds, aggregating the

sum of \$90,000, at the maturity thereof, and all accrued interest thereon, to wit, September 1, 1901."

It is conceded that the facts are practically undisputed, and are shown by the proof to be as above set out. The chancellor held that the trust in Mr. Read was a valid one; that the "surplus" mentioned in the resolution was the difference between the market value of the bonds in the trustee's hands on September 1, 1901, and the sum necessary on the day to pay off and retire the \$90,000 of underlying bonds; that this surplus belonged to those who were stockholders on December 29, 1886; and that a reference should be had to ascertain who were such stockholders, what the amount of surplus was on September 1, 1901, and what were the proper fees for the trustee and his counsel. There were no exceptions to the report, except as to the fees allowed. Upon the hearing of these exceptions, final decree was rendered, directing the trustee to sell the \$94,000 of bonds in his hands, and out of the proceeds to pay himself and counsel the fees allowed them (fixed at \$3,000 and \$1,000, respectively), to pay the costs of the cause, to pay the defendants who were stockholders of the two old companies on December 29, 1886, \$——, representing the surplus, with interest thereon from September 1, 1901, less the amount of costs and fees just named, and to pay the remainder to the Memphis Street Railway Company. Leave was given to the latter company, however, to deposit with the trustee a sum of money equal to the amount of said surplus and interest, and, upon doing so, to receive from him the \$94,000 of bonds. From so much of this decree as refused the trustee and his counsel the amount of fees claimed by him the trustee prayed an appeal. All the defendants appealed from that part of the decree allowing said fees. The Memphis Street Railway Company appealed from the entire decree.

It is strenuously insisted in this court by counsel for defendant company that the present bill is a bill of interpleader, and cannot be maintained, for the reason that complainant asserts on the face of the bill an interest in the fund in question, to wit, compensation for his services. It would be a sufficient answer to this objection to say that no demurrer was interposed to the bill upon the ground stated, and such objection could not be started for the first time in this court. But we think it quite clear that this bill is essentially a bill instituted by the trustee for instructions and directions in respect of the disposition of a trust fund in his hand. As stated in American & English Encl. of Law: "It is always the trustee's privilege to ask and receive of the court having proper jurisdiction directions as to the policy he shall pursue in the conduct of the trust, and as to the construction to be placed upon the instrument of trust on which he acts. And it added that in all questions of doubt

it is his duty to make this application to the court." 27 Amer. & Eng. Encl. Law (1st Ed.) 151. Again, in the case of Traphagen v. Levy, 45 N. J. Bq. 448, 18 Atl. 222, the rule is stated thus: "Where the duty of the trustee is involved in doubt, it is his right, and he should receive the aid and direction of a court of equity to the extent that his interests may require. The questions propounded may involve not only the duty of the trustee within the acknowledged limits of the trust, and with reference to the trust estate, but also the determination as to the title of the trustee and others to the property. In the latter case all persons interested in the several questions should be before the court, in order that they may be bound by the court's decree. In their absence the decree will serve only for the guidance and protection of the trustee in his relations to his trust. It is manifest that, unless such persons are before the court, the court should stay the case until they are brought in, or limit its determination of questions presented to the present need of the trustee." See, also, Daniel v. Fain, 5 Lea, 256. As already seen, the contention of the stockholders that this surplus belongs to them is based largely on the language of the resolution adopted by the Citizens' Company, which was the basis of the consolidation of the two companies. The language of the original resolution adopted December 28, 1886, was, viz.: "And the remaining \$100,000 (of new bonds) to be deposited with W. P. Read, trustee, for the purpose of retiring the \$96,000 of bonds outstanding against the Memphis Company; any surplus of this \$100,000, should there be a surplus, to be equally divided between the present stockholders of the parties of the first and second parts." It appears that, as originally drafted, the contract provided that the surplus of the \$100,000 should go entirely to the Citizens' stockholders, but the Memphis Company stockholders added this provision, viz.: "It is understood that we sign with the agreement that, if there is anything left of the \$100,000 set aside to take up the \$96,000 of bonds as mentioned, then this to be equally divided between the parties of the first and second parts." As amended, the contract was then signed. The phraseology was afterwards slightly changed in the resolution adopted by the Citizens' stockholders embodying the above contract, so as to read: "Any surplus of this \$100,000, should there be a surplus, to be equally divided among the present stockholders of the first and second parts." But this change was immaterial, and did not affect the substance of the transaction. The insistence now made on behalf of the stockholders is that this surplus belongs to them. It is insisted, however, on behalf of appellant railroad company, that in December, 1886, all of the stockholders of the consolidated corporation, comprising all those persons who had been stockholders both of the Memphis City and the

Citizens' Street Railroad Companies at the time the latter purchased the property of the former, executed a power of attorney to Messrs. R. Dudley Frayser and Sam Tate, Jr., authorizing said attorneys to sell the entire capital stock of the Citizens' Company, and in pursuance of said authority the sale thereof was duly made to Messrs. Holmes, Honore & Hinckley, of Chicago, for the consideration of \$1,000,000 in cash. Said contract of sale, amongst other things, contains the following stipulation: "It is further understood that said Citizens' Street Railroad Company has a nominal bonded indebtedness of \$1,000,000; that \$800,000 of said bonds have been issued, and are in the hands of the holders for value. It is further understood and stated as a fact that of a former issue of the Memphis Railroad Company \$96,000 of bonds are now outstanding in the hands of holders for value as a lien upon the property of the Memphis City Railroad; that, to secure the payment of the last named \$96,000 of bonds, \$100,000 of bonds of the Citizens' Street Railroad Company have been deposited with S. P. Read, trustee, and \$100,000 of bonds of the Citizens' Street Railroad Company remain in the treasury of said company as an asset, so that the real amount of liability of said Citizens' Street Railroad Company is \$896,000; that said Street Railroad Company has got no other mortgage bond, note, or other evidence of liability against said property outstanding, and that it has no floating debt, except current operating expenses." On this branch of the case it is insisted on behalf of the defendant street railroad company that the stockholders are estopped from setting up any claims to said surplus by their contract, conduct, and representations at the time they and their associates sold the \$1,000,000 of stock in the new Citizens' Street Railroad Company to Holmes, Honore & Hinckley.

It is a sufficient answer to this position to say that no estoppel was pleaded by the defendants in their answers. The law is well settled in this state that an estoppel, in order to be available, must be pleaded. The rule is founded upon the doctrine that evidence relating to matters not stated in the pleadings cannot be made the foundation of a decree. It is necessary, therefore, to introduce in the bill every material fact which complainant intends to prove. *Turley v. Turley*, 85 Tenn. 260, 1 S. W. 891; *Natl. Bank v. Insurance Co.*, 85 Tenn. 87, 1 S. W. 689, 4 Am. St. Rep. 744; *Daniel's Chancery Practice* (5th Ed.) 583.

The contention now made on behalf of the Memphis Street Railway Company is that it is the successor of the defendants the Memphis City Railroad Company and the Citizens' Street Railroad Company, and is thereby authorized to discharge the outstanding bonds of the old Memphis City Railroad Company which matured on September 1, 1901, and to receive from the complainant, as trustee,

the \$94,000 of bonds of the Citizens' Street Railroad Company, now in his hands, for the reasons: (1) That the provision made in the resolution December 29, 1886, for the distribution of the surplus, was an attempt by the stockholders and directors of said two corporations, and especially the Citizens' Street Railroad Company, to issue mortgage bonds, and to divide a portion of them, or the proceeds of a portion of them, among the stockholders as a gratuity, and without receiving anything as a consideration therefor. It is insisted that said arrangement was ultra vires, contrary to public policy, and will not be enforced by a court of chancery. (2) It is insisted that the said provision for the distribution of surplus contained in the resolution of December 29, 1886, even if originally valid, was promptly abandoned, as far as said surplus was concerned, by all the stockholders in the said Memphis City Railroad Company and the said Citizens' Railroad Company. It is insisted that this is shown affirmatively from the mortgage executed by the Citizens' Street Railroad Company to secure said bonds, in which no mention whatever is made of said surplus, and the said mortgage was then approved and confirmed by a unanimous vote of all the stockholders in both of said companies. (3) It is insisted that, if said trust as to the surplus was originally valid, and if the individuals who, on the 29th day of December, 1886, were the owners of the capital stock of the said two companies, were entitled to said surplus, then all their rights thereto passed from them to Messrs. Holmes, Honore & Hinckley (under whom the stockholders of the defendant Memphis City Railway Company now claim) by a sale to the latter by the former of the \$1,000,000 of the capital stock of the Citizens' Street Railroad Company in December, 1888. It is insisted that when this sale was made it was upon the positive statement, which was made a part of the contract of sale, that no surplus existed, and that the entire bonded indebtedness of said Citizens' Street Railroad Company was \$896,000. It is then averred that the old stockholders would, by said representations, which they made a part of the contract, be estopped from now setting up any claim or title thereto. (4) It is insisted that, if the alleged trust as to said surplus claimed to have been created in said resolution of December 29, 1886, was valid, the court below erred in holding that the surplus referred to was the difference between the value on September 1, 1901, of the \$94,000 of bonds of the said Citizens' Street Railroad Company in complainant's hands and the \$90,000 in money, the amount which it required to pay off the old Memphis City Railroad bonds which matured on September 1, 1901. It is insisted that the chancellor should have held that said surplus consisted solely of the excess of the four bonds placed in complainant's hands over and above the number of

outstanding bonds of the Memphis City Railroad Company.

In answer to the proposition that the reservation of the surplus to the stockholders was in the nature of a gratuity, and therefore contrary to law, it suffices to say:

First. That upon the consolidation of the two companies the Memphis Company stockholders transferred most of their stock to the Citizens' Company, and they may rightfully claim that their interest in the surplus belonged to them as a definite part of the purchase money due them for the transfer of their stock and said corporate property of the Memphis City Company.

Second. It was a matter as to which all the stockholders in both companies fully agreed, and the validity of the transaction cannot be impeached by the present defendants. No objection is made by a dissenting stockholder nor by an existing creditor, nor by a subsequent creditor, and we know of no other authority who may object to the disposition of the corporate property, unless it be the state in some proper proceeding.

Third. The assumption by stockholders of all the debts by both companies, and the mutual consent of the parties to a union of interest, would also furnish a valuable consideration to support the resolution disposing of the surplus.

In respect of the second proposition above, it must be conceded there was no express transfer of the surplus in the sale made in December, 1888, and we are of opinion the interest of the stockholders in the surplus did not, by implication, pass with the transfer of the stock. As to the Memphis City stockholders it was part of the purchase money, and as to both it was part of the consideration of the trade upon which the two companies were consolidated. If the transfer of stock operated to pass this part of the consideration of the original trade, it could with equal propriety be argued that it operated a transfer of all the purchase money; that is, the \$500,000 of bonds and the \$500,000 of stock. All that the transfer of stock carries with it is the right to receive dividends, and to participate in corporate meetings, and the remote right to share in the assets on hand at the dissolution of the corporation.

We are further of opinion the right to participate in this surplus was reserved to the original stockholders as individuals, and that when they parted with their stock to the assignors of defendant company the right to the surplus did not pass to the transferee as an incident to the stock.

We are further of opinion that none of the parties to the contract of December 6, 1888, intended thereby to change the ownership of the surplus, or had such matter in contemplation. Nor do we think that the right to the surplus was abandoned simply from the fact

the mortgage executed to secure the bonds in question made no mention of the surplus.

The next question presented for our determination is, what was meant by the term "surplus," employed in the resolution of December 29, 1886? We are of opinion that the chancellor erred in holding that the surplus referred to was the difference between the value on December 1, 1901, of the \$94,000 of the bonds of the said Citizens' Street Railroad Company in complainant's hands and the \$90,000 in money, the amount which it would require to pay off the old Memphis City Railroad bonds, which matured on September 1, 1901. We are of opinion that the surplus within the contemplation of the parties comprised alone the excess of the four bonds deposited with complainant over and above the number of underlying bonds of the Memphis City Railroad Company. We think that the purpose was to exchange bond for bond, and that the only surplus in the minds of the parties at that time was the excess of four bonds. We cannot think that the market appreciation of the collateral bonds that would mature on September 1, 1901, was ever within the contemplation of the parties in providing for the disposition of the surplus when the resolution of December 29, 1886, was adopted. The record discloses that the collateral bonds at the time were below par, and hence the surplus of four bonds was deposited with the trustee so as to insure the exchange with the old bonds. If this excess of bonds was not needed to effect the exchange, it was contemplated by the parties that they should be returned to the original stockholders. In our opinion, the parties at the time had in mind no other surplus.

The remaining question is in respect of the compensation of the trustee and his counsel. As already stated, the chancellor allowed the trustee the sum of \$3,000 as compensation and \$1,000 to his counsel for filing this bill. We have carefully considered all the testimony on this subject, and have reached the conclusion that \$2,000 would be a reasonable compensation to the trustee for his services, and in this particular the decree of the chancellor is modified. While we think the amount allowed his counsel is full compensation, we cannot say that it is excessive.

The result is that the defendant Memphis Street Railway Company, having paid off and discharged the underlying bonds of the Memphis Street Railroad Company, is entitled to take down the collateral bonds of the Citizens' Street Railroad Company deposited with S. P. Read as security. The costs of the case, compensation of the trustee, and his counsel fees will first be paid out of the entire trust fund, and the balance of the surplus of the four bonds will be paid over to the original stockholders or their counsel.

COLBERT et al. v. BOND, Chairman.

GLISSON v. CALLOWAY et al.

(Supreme Court of Tennessee. June 30, 1903.)

COURTS—JUDGES—SALARY—CONSTITUTIONAL LAW.

1. Act April 16, 1901 (Acts 1901, p. 247, c. 140), authorizing the county courts of counties having a certain population to appropriate such amount as may be just and equitable, not exceeding a certain sum, to the judges of the circuit, chancery, and criminal courts, as additional compensation, violates Const. art. 6, § 7, providing that the salary of the judges of the state shall be ascertained by law; this requiring the Legislature to fix their salaries.

2. Such act also violates Const. art. 2, § 29, providing that the Legislature may authorize the counties to impose taxes for county purposes; this restricting their power to tax to such purposes, and such judges being state officers, so that the county may not impose taxes for their salary.

3. The Second circuit court of Shelby county, created by Act April, 1893, p. 205, c. 99, which vested it with exclusive jurisdiction over all appeals and certiorari and supersedeas from judgments of justices of the peace of the county, and gave it concurrent jurisdiction with other courts in divorce cases, and attached it to and made it a part of the Fifteenth judicial circuit of the state, is a state court, so that the part of the act providing that the compensation of the judge shall be paid out of the county treasury violates Const. art. 2, § 29.

4. The probate court of Shelby county, created by Act June 24, 1870 (Acts 1870, p. 135, c. 86), transferring to and vesting in it all the judicial powers of the county court, is a county court, so that the provision of the act that the salary of the judge be paid out of the county treasury is valid.

Appeal from Chancery Court, Shelby County; L. Lehman, Special Chancellor.

Suits by John Colbert and others against W. T. Bond, chairman of the county court of Shelby county, and by W. B. Glisson against J. S. Calloway and others. Bills dismissed, and complainants appeal. Reversed.

W. B. Glisson and T. D. Eldridge, for appellants. Geo. B. Peters, Carroll, McKellar & Bullington, and W. W. McDowell, for appellees.

SHIELDS, J. The courts for Shelby county, as now constituted, consist of one chancery court, two circuit courts, a criminal court, and a probate court; the county being in itself a chancery division, a judicial circuit, and a criminal circuit. The probate court was created by an act of the General Assembly passed June 24, 1870 (Acts 1870, p. 135, c. 86), and is vested with jurisdiction over all probate matters, administration of estates of decedents, infants, idiots, and lunatics, proceedings for the allotment of dower, and all other jurisdiction with which the quarterly and quorum courts of Shelby county were theretofore vested. In short, all the judicial powers of the county court of the county were transferred to and vested in this court. The judges of this court are also vested with all the powers conferred by law upon the judges of the inferior courts of the

state, and appeals from it are allowed directly to the Supreme Court of the state. The judge is allowed the same salary as the chancellors and the circuit judges, but to be paid out of the treasury of Shelby county, and it is made the duty of the county court of that county to make the necessary appropriation therefor. The Second circuit court of Shelby county was created by an act of the General Assembly passed April 1, 1893 (Acts 1893, p. 205, c. 99), and vested with exclusive jurisdiction over all appeals and certiorari and supersedeas from judgments of justices of the peace of the county, and concurrent jurisdiction with other courts in divorce cases, and it is attached to and made a part of the Fifteenth judicial circuit of the state. The salary or compensation of the judge who shall hold the court is required to be paid out of the county treasury, as then provided in reference to the judge of the probate court of the county. The clerk of the circuit court of Shelby county (and his successors in office) is made ex officio clerk of this court. By an act passed at the same session of the General Assembly, the judge of the probate court of Shelby county (and his successors in office) is made the judge of the Second circuit court, and vested with all the powers conferred by law upon other circuit judges of the state. This has been the judicial organization of Shelby county since the enactment of these statutes, and the chancellor, circuit judge, and criminal judge holding these courts have received salaries of \$2,500 per annum, paid all other judges holding similar courts throughout the state, out of the State Treasury. The judge of the probate court has received a salary of \$2,500 as such judge, and the further sum of \$1,000, compensation for services rendered in holding the Second circuit court, paid out of the treasury of the county. The General Assembly, for the purpose of supplementing the salary of the judges holding the courts in counties having a population of more than 153,000, April 16, 1901 (Acts Tenn. 1901, p. 247, c. 140), enacted a statute in these words: "Be it enacted by the General Assembly of the state of Tennessee, that the county courts of the counties in Tennessee having a population of more than 153,000 inhabitants, by the federal census of 1900, or any subsequent federal census, are hereby authorized and empowered to appropriate such additional compensation in addition to that now received by them, as may be just and equitable to the judges of the circuit, chancery and criminal courts, and judges of special courts of such counties: provided, that in no event shall the county courts in counties affected by this act appropriate for the purpose of paying such judges additional salaries more than one thousand dollars for any one year." Shelby county falls within this statute, and is the only county in the state that does. The county court of this county on July 28, 1902, just before the general election had

in that year, at which all the judges of the state were elected, under the authority supposed to be vested in it by the above statute, passed and made an order and an appropriation allowing each of the judges to be elected to hold said courts for the county, in addition to the salaries allowed them by law, and paid to the chancellor and judges of the circuit and criminal courts out of the Treasury of the state, the sum of \$1,000 annually, to be paid quarterly out of the treasury of Shelby county. The judge of the probate court was also allowed a like sum for his services in holding the Second circuit court, in addition to his regular salary of \$2,500 paid by the county to him as probate judge. The order made is as follows: "It is ordered by the court, in pursuance of the authority conferred by chapter 140, of the Acts of 1901, passed April 16, 1901, that during the judicial term to begin the first Monday of September, 1902, the county of Shelby pay, in quarterly payments, an additional salary of (\$1,000) one thousand dollars per annum for the said term of eight years to each judge of this county, viz., chancellor, judge of the criminal court, judge of the circuit court, the judge holding both the probate and Second circuit court. This allowance to the latter shall be in lieu of the special allowance of \$1,000 heretofore allowed, so that his salary altogether shall be \$3,500, and no more." These bills were brought August 28, 1902, by complainants, Colbert et al., claiming to be citizens, property owners, and taxpayers of Shelby county, charging that the statute under which this order was made is unconstitutional and void, and the order of appropriation unauthorized and without authority of law, because in contravention of the Constitution (article 6, § 7), providing that the salary of the judges of the state shall be ascertained by law, and of article 2, § 29, prohibiting the delegation to counties of the power to impose and collect taxes for other than county purposes, and praying that the defendant W. T. Bond, as chairman of the county court, and financial agent of Shelby county, be enjoined from issuing his warrant for said increase of salaries allowed said judges. The defendant demurred to this bill, directly raising and presenting these questions, among others. The demurrers were sustained by the special chancellor elected to hear the cases, and, upon decrees being entered dismissing the bills, complainants have appealed and assigned errors. The two cases were heard together.

The only questions which we will consider (as they are determinative of the case) are whether the General Assembly can delegate to the county court the power to increase the salaries of judges of the chancery, circuit, and criminal courts of the state, and whether the payment of these salaries is a state or county purpose. If this power cannot be delegated, and payment of the compensation of these judges is a state purpose, the act of

1901, p. 247, c. 140, under which the county court of Shelby county undertook to act, is unconstitutional and void, and vested in that court no power to make the appropriation attacked, because it had no jurisdiction over the subject-matter, or power to appropriate county revenues for any purpose other than such as it is lawfully authorized to do by the General Assembly, and that body has no power to authorize it to make one for any other than a county purpose. The provisions of the Constitution, or so much of them as bear upon the questions under consideration, are the clause in relation to the ascertainment of the salaries of judges, which is as follows: "The judges of the supreme or inferior courts shall at stated times receive a compensation for their services, to be ascertained by law, which shall not be increased or diminished during the time for which they are elected. They shall not be allowed any fees or perquisites of office, nor hold any office of trust or profit under this state or the United States." Const. art. 6, § 7. And that authorizing the taxing power to be delegated to the several counties of the state (Const. art. 2, § 29), in these words: "The General Assembly shall have power to authorize the several counties and incorporated towns in the state to impose taxes for county and corporation purposes, respectively, in such manner as shall be prescribed by law; and all property shall be taxed accordingly to its value upon the principles established in regard to state taxation." This authority to delegate power to counties and municipal corporations to assess, levy, and collect taxes for certain purposes is restricted to the purposes there stated, and excludes all others, and any statute authorizing these subdivisions of the state to exercise the taxing power for any other purpose is unauthorized and void.

These are not new questions in this state. They were directly presented in *Shelby County v. The Six Judges*, 3 Tenn. Cas. 509, determined by this court at the September term, 1875. The General Assembly had passed an act in 1869 (Acts 1869, p. 28, c. 28) almost identical with the one here involved, authorizing the county court of Shelby county to supplement the salaries of the judges holding the chancery, circuit, and criminal courts of that county, in sums not exceeding \$2,000 per annum; and the county court had made an order allowing each one of these judges the sum of \$2,000 paid annually by the county, in addition to the salaries paid them out of the State Treasury, and afterwards vacated the order and refused to make further provision for that purpose, and the judges then in office instituted proceedings to compel the payment of the salaries allowed them out of the county treasury. Upon a full consideration of the case, it was held (Judges McFarland and Freeman both delivering opinions for the court) that the chancellor and the judges of the chancery, circuit, and criminal courts of Tennessee, not-

withstanding their divisions and circuits might be limited to one county, were state officers, whose salaries must, under the Constitution (Const. art. 6, § 7) be fixed by law, enacted by the General Assembly, not to be increased or diminished during the term of office to which they were elected, and paid out of the State Treasury; that they were not county officers, and the payment of their salaries not a county purpose, and the statute authorizing the county court to supplement such salaries was in contravention of the Constitution and invalid. In the opinion of Judge McFarland it is said: "Is the eleventh section of the act of 1869, in regard to allowing the county court to appropriate a sum not exceeding two thousand dollars to increase the salaries, in violation of the Constitution? Did the Legislature have the authority to delegate to the county court the power to increase the salaries of the judges, and to levy a tax to pay the appropriation? We think not. By the provisions of the Constitution, judges are to receive compensation for their services, ascertained by law. Const. art. 6, § 7. The law ascertaining this compensation must be enacted by the Legislature, the only lawmaking power. This lawmaking power cannot be delegated to any other body. Nor do we think this result can be avoided by assuming that this part of the act of 1869 was in the nature of a conditional law, to take effect upon the happening of the contingency (that is, upon the appropriation being made by the county court), and then stand as if the act had definitely fixed the salaries at the sum of \$4,500 (that is, the regular salary of \$2,500, and the \$2,000 allowed by the county court). This proposition, we think, is wholly untenable. The act does not assume to make these salaries different from the regular salaries allowed other judges, but it simply leaves it to the county court to say whether they ought to have more, or how much more, not exceeding \$2,000, and to tax the people within the county to pay it. If the question, as to any part of the salary, could be left to the discretion of the county court, it might all be left to that body, and the judge thus left at the mercy of the court, so far as the question of salary is concerned. If the salary is to be ascertained by law, then, in our opinion, the Legislature must enact a law, and it cannot delegate the power to any other body, and this was what was attempted to be done by this provision of the act. We are of opinion that the county court had no power to levy a tax to pay the sums appropriated. This power of taxation is the legislative power, and this, by the Constitution, is vested in the General Assembly. They can delegate this power only to the extent authorized by the twenty-ninth section, art. 2. This is: The Legislature 'shall have power to authorize the several counties and incorporated towns to impose taxes for county and corporation purposes * * * in such manner as

shall be prescribed by law.' We are of opinion that the courts must determine whether or not the purpose for which the county may be directed by the Legislature to levy a tax is a county purpose; and, if it be not a county purpose, the law, to that extent, must be declared void. If we hold that the Legislature is the exclusive judge of whether or not the purpose be a county purpose, this restriction of the Constitution might as well have been omitted, and the power given to the Legislature to authorize the counties to impose the taxes without limit. It is the province of the court to decide when the legislative department has violated constitutional restrictions." The language of Judge Freeman in the same case is equally as strong. He says: "The question which I propose to examine in this case is whether the county court is authorized to levy a tax on the people of Shelby to pay or increase the salary of the judges of these courts. If paid at all, it must be paid by taxation, and therefore the right to lay such tax is necessarily involved. By the Constitution the judicial power of the state is vested in one Supreme Court, and such other courts as the Legislature shall from time to time ordain or establish. Article 6, § 1. By section 7 of said article it is provided: 'The judges of the supreme or inferior courts shall, at stated times, receive a compensation for their services, to be ascertained by law, which shall not be increased or diminished during the time for which they are elected. They shall not be allowed any fees or perquisites of office, nor hold any office of trust or profit under this state or the United States.' By article 2, § 1, the powers of the state government are divided between the three departments—the legislative, the executive, and the judicial. The officer in any one of the offices created or recognized or provided for in these departments is a state officer, and his salary a charge on the Treasury of the state, where a salary is provided by the Constitution. That a broad distinction is made in the Constitution between state and county officers is shown by article 7, § 1, entitled 'State and County Officers,' providing that 'there shall be elected in each county, one register, the sheriff and trustee for two years, and the register for four years'; also for the election of the justices of the peace, a coroner, and a ranger. Article 7, § 3, provides for the election of a Treasurer or Treasurers and a Comptroller for the state, thus showing the distinction of these two classes of officers—one county and the other state. In fact, this idea is found all through the Constitution, and has been uniformly, we believe, acted on since the organization of the state. We deem this distinction one of some importance in the solution of the question before us. By article 2, § 29: 'The General Assembly shall have power to authorize the several counties and incorporated towns in the state to impose taxes for county and cor-

poration purposes, respectively, in such manner as shall be prescribed by law, and all property shall be taxed according to its value upon the principles established in regard to state taxation.' The question turns mainly to this clause of the Constitution. It clearly defines the powers of the Legislature to authorize taxation by counties and incorporated towns—that is, for county and corporation purposes—and in this evidently recognizes these principles as distinguished from other purposes of taxation, not county and corporation, but for the purpose of that large corporation, the state. This was made clear by the requirement that 'all property, when so taxed for these purposes, shall be taxed according to its value upon the same principles established in regard to state taxation'—that is, taxes to be levied by the state for state purposes, as contradistinguished from county and corporation or local purposes. The state tax for the state purposes is provided for in the previous section (28), which provided that 'all property, real, personal, or mixed, shall be taxed, but the Legislature may except such,' among other things, as shall be held by counties, towns and cities, for 'public or corporation purposes'; thus keeping up the idea of the two kinds of purposes for which property may be held and taxed—the one a state, and the other a county or corporation. These taxes, being for general state purposes, are directed to be levied directly by the Legislature, and the mode in which it is to be done prescribed by the Constitution. In the other case the Legislature is authorized to delegate a taxing power to the county and corporation, but is restrained in its authority thus to delegate, except for county and corporation purposes, as distinguished from the larger or general purposes of the state, as contradistinguished from the local purposes of the county or corporation of a town. This, we think, is clear and beyond question. It is maintained that counties are but local divisions of the state—parts of its political divisions—and as such their purposes are in fact state purposes. But is this what is meant by the language of the Constitution? We think not. For if this be so, the Legislature had all the power necessary conferred by the twenty-eighth section, and the clause giving power to authorize counties and corporations to tax for county and corporation purposes was unnecessary."

We have quoted from these opinions at unusual length on account of the identity of the case in all particulars with these, and the ability and force of discussion of the questions involved. There is much more said in both opinions covering every phase of the questions, and meeting and disposing of all arguments advanced to sustain the contention of the defendants, which we will not here repeat. We are now asked to overrule this case upon practically the same arguments that were made against the conclusions of the court therein when it was heard

and determined. We cannot do so. The construction of the clauses of the Constitution which are there and here considered, which are of vital importance, have too long been recognized and followed as sound and correct, to be now departed from. Further, we concur fully in the conclusions of the court in that case, and give them our entire approval. The opinions of the eminent judges from which we have quoted are full and clear, and able discussions of the questions and their conclusions are well supported by reason and authority. The case has never been overruled, or its soundness doubted or shaken, but, from the time it was decided, has been recognized and followed as the proper construction of the clauses of the Constitution under consideration. We can add but little to what is there said, but are content to concur in and follow the conclusions there reached.

The several judges of the chancery, circuit, and criminal courts which may from time to time be created by the General Assembly are unquestionably state officers, elected and commissioned for state purposes; and their salaries must be wholly and entirely fixed by the General Assembly, and paid out of the State Treasury. The payment of these salaries is not a county purpose, and no authority can be delegated to any county court of the state, authorizing it to increase them, or to make any appropriation of county revenue for their payment. The act of 1901, c. 140, p. 247, and all proceedings under it, are in violation of the Constitution, and are clearly void. County courts of this state have no inherent power to so dispose of the revenues of the county. They were created by the General Assembly under the authority given it in the Constitution to ordain and establish such inferior courts from time to time as might be necessary, and have only such jurisdiction and power as has been expressly vested in them by enactments of the Legislature, and it cannot vest in them the authority here sought to be exercised. *Railway v. Willson County*, 39 Tenn. 600, 15 S. W. 446. It is well that such is the law. If the county courts could be vested with such power as was attempted in this statute, the door to great evils would be opened, and opportunities and temptations furnished for improper practices, which would tend to greatly confuse and demoralize the public service in every department of the state. To hold that the payment of a salary of a judge is a county purpose would be to hold it a municipal purpose, for the General Assembly has the same power in relation to both classes of public corporations. To hold that a judge's salary is a county or municipal purpose would be to hold that the payments of salaries of all state officers in all three of the co-ordinate departments of the government are county and municipal purposes. Every county and municipality in the state could be authorized by the General

Assembly to supplement the salaries of the state officers whose official duties call them within their territorial boundaries. There would no longer be any uniformity or certainty in the salaries of these officers. Such a state of affairs would have a most hurtful tendency upon the public service. The compensation of state officers, to a large extent, would be subject to the discretion, whims, and caprice of county courts and city councils within their respective jurisdictions; and the independence of the judiciary, so much to be desired, and which every effort should be used to protect and maintain, would be imperilled. It is said by Mr. Story (quoting from the *Federalist*) that, next to permanency in office, nothing could contribute more to the independence of the judges than a fixed appropriation for their support. In the general course of nature, a power over a man's subsistence means a power over his will. Story on Const. § 1629.

The statement in the opinion of Judge Freeman that nothing can be both a state and county purpose is criticised by counsel for defendants, and several matters are referred to, such as public schools and public roads, which are treated by law as purposes common to the state, county, and municipalities, as militating against the soundness of his position. It is true that there are a number of matters, including those that are mentioned, and others of minor importance, that are common purposes of both state, county, and municipal governments; but they are entirely different in their nature from the one under consideration, and present no analogy for its determination, and the fact that these purposes are common is no argument that this is so as to all purposes. Judges of the chancery, circuit, and other courts of equal dignity created by the Legislature, such as the criminal court of Shelby county, are officers elected and commissioned as constituent parts of one of the three co-ordinate departments of the state government, and in discharge of the duty and obligation of that government to furnish courts at its expense for the determination of controversies between its inhabitants, and are state officers, holding state offices created and existing for distinctive and essentially state purposes. Counties are not charged with the governmental duties of establishing and maintaining these courts, and have no power to assume them. They are foreign to the objects and purposes of their creation and existence.

The conclusion we have reached in relation to the act of 1901, c. 140, p. 247, will apply to that clause of the statute creating the Second circuit court for Shelby county, requiring the judge of the probate court for that county to be paid for his services in holding it out of the county treasury. We cannot yield to the able argument made in behalf of the judge of the probate court in support of his contention that this court is,

in substance and effect, a county court. The statute creating it provides that it shall be known as the "Second Circuit Court of Shelby County," and attaches to it the Fifteenth judicial circuit court of the state. It is given jurisdiction inherent in all circuit courts. There can be no mistake that it is a circuit court of the state, within the meaning of the Constitution, although its jurisdiction may be limited, and the compensation or salary of the judge who may preside over it cannot be paid out of the county treasury. The probate court of Shelby county, as it now exists, is unquestionably a county court, created for well-recognized and established county purposes, and the provision that the judge of it shall be paid out of the treasury of the county is valid. It is immaterial that its jurisdiction has been extended to other matters than those generally intrusted to county courts in other counties of the state, and its judge is given the powers usually conferred by law upon judges of other inferior courts. It is none the less—having the jurisdiction that is vested in it—a county court. No elaborate discussion of this matter is necessary.

The decree of the chancellor must be reversed, and the payment of the allowances made the judges of Shelby county out of the treasury of that county perpetually enjoined.

MEMPHIS CITY BANK v. SMITH et al.

(Supreme Court of Tennessee. May 11, 1903.)

PLEDGES — CONVERSION — SALE — BANKS — AUTHORITY OF PRESIDENT — CONTRACTS — BREACH — TENDER — ACTION — INSTRUCTIONS — MODIFICATION — JUDGMENT — RES JUDICATA.

1. Where, in an action against a bank for conversion of certain property pledged, plaintiff claimed that the president of the bank had agreed to sell the property to plaintiff for the price bid therefor at a sale, which the bank subsequently refused to do, and there was evidence that in making the agreement with plaintiff the president purported to act as president of the bank, and that he owned a controlling interest therein, and that the property, which was worth \$50,000, was purchased by the bank for \$31,700, it was proper for the court to modify a requested instruction that, in the absence of authority, the president of the bank was not authorized to dispose of the bank's property, or release claims of the bank, so as to charge that it was without the general scope of a bank president's authority to make such an agreement as plaintiff contended, and unless plaintiff showed authority by the bank to the president to make the same, or the bank accepted the benefit of the agreement, the contract would not be binding on the bank.

2. Where a bank held property as security for a debt for which plaintiff was liable as surety, and, before selling the same, agreed to reconvey the property to plaintiff for the amount bid at the sale, which was much less than the value of the property, the bank was not justified in subsequently refusing to comply with the contract on the ground that the amount bid was insufficient to pay the debt for which the property was pledged, since the bank still retained a claim against plaintiff for such unpaid balance.

3. Where a bank asserted a right to hold

¶ 3. See Pledges, vol. 40, Cent. Dig. §§ 584, 112.

property pledged to it as security for debts for which the property had not been pledged, and refused to deliver the property except on payment of such debts in addition to those secured, such refusal constituted a conversion of the property.

4. Where a bank refused to deliver property pledged to it, except on payment by the pledgor and his surety of other debts for which the property had not been pledged, and the surety was ready, willing, and able to pay the bank's claim and the debts secured by the pledge, a tender of the amount due on the debts so secured was waived.

5. In a prior action by defendant bank against plaintiff as indorser of certain notes, plaintiff pleaded that the notes had been secured by property which the bank had sold, worth twice the value of the notes, and that before the sale plaintiff tendered the bank the amount due on the notes, and demanded a release of the security, which the bank refused, but plaintiff, by express averment, declined to litigate the validity of such sale. A cross-bill was filed in such action by plaintiff, to which the pledgor was joined as party, to recover usury charged by the bank, and a judgment was rendered against plaintiff for the balance due on the notes, after deducting the usury and the proceeds of the sale of the property. *Held*, that such judgment was not res judicata in a subsequent action by plaintiff and the pledgor, as partners, against the bank, to recover in assumption for the bank's alleged conversion of the property pledged.

Error to Circuit Court, Shelby County; L. H. Estes, Judge.

Action by W. J. Smith and another against the Memphis City Bank. From a judgment in favor of plaintiffs, defendant brings error. Affirmed.

Thos. M. Scruggs, T. B. Turley, and M. G. Evans, for plaintiff in error. Malone & Malone and T. K. Riddick, for defendants in error.

NEIL, J. The declaration alleges, in substance, that the defendant below (plaintiff in error here) had converted certain property belonging to the plaintiffs below, consisting of the following, viz.: Many lists, files, maps, plats, and books of reference, containing an abstract or history of all real estate titles, tax liens, and judgments in Shelby county, from which were prepared and sold abstracts of title to the public, and from which the plaintiff derived great gains and profits; also 370 shares of stock, being the entire capital stock in a Tennessee corporation known as the Memphis & Shelby County Abstract Company; that the value of the property so converted was \$50,000; and that the plaintiffs, waiving the tort, were entitled to recover of the defendant, as upon an implied assumption, the aforesaid value. The defendant pleaded non assumption, res adjudicata, and also a general plea of not guilty. There was a verdict in the court below for \$23,875.40, on which judgment was rendered. The plaintiff in error has appealed and assigned errors.

The first error assigned is that the circuit judge declined to give in charge to the jury the following instruction, which the defendant below (plaintiff in error here) requested

should be given, viz.: "Proof has been introduced in this court—the probative force of which, however, I do not undertake to determine—tending to show that some time in the early part of 1897, prior to March 13th Thomas Barrett agreed with W. J. Smith that he would purchase the properties called the 'abstract properties,' then advertised for sale March 13, 1897, and that he would resell the same to W. J. Smith for the price bid therefor. If you find this to be a fact, I charge you that this agreement would impose no liability upon the defendant bank, of which Thomas Barrett was president, unless you are satisfied from the proof that Thomas Barrett was authorized by the bank to make such an agreement. It is without the scope of the general authority of a bank president to make such agreement, and, unless the plaintiff show authority from the bank to Barrett to make the same, the contract in this respect would not be binding on the bank, and would impose no liability upon it. The liability, if any, would be his personal liability, and not that of the bank. In the absence of authority the president of a bank cannot dispose of the cash or credits of the bank, and he cannot, by virtue of his office, surrender or release claims of the bank against any one. I charge you that, if you should find that such an agreement was had, it was without the general scope of the powers of the president of the bank, and, in order to make it valid and binding upon the bank, the plaintiff must show authority therefor." The circuit judge did not give this in charge to the jury as it stands above, but did give it after making the following additions, viz.: He changed the third sentence so as to read: "It is without the general scope of the general authority of a bank president to make such agreement, and unless the plaintiff show authorization by the bank to Barrett to make the same, or the bank accepted the benefit of the agreement as made by Mr. Barrett, the contract in this respect would not be binding on the bank, and would impose no liability upon it, except as before stated." He also added at the close of the instruction, immediately following "therefor," the following clause: "or that the bank acted upon or got the benefit of the agreement as made by Barrett." After thus modifying the instruction, his honor gave it in charge. No objection is made to the first alteration, further than this necessity, of course, is implied in the first assignment, to the effect that the instruction was not given as handed in, unaltered. Specific objection, however, is made to the second alteration, and that is made the third assignment of error.

The first and third assignments we shall consider together. There was testimony tending to show that Thomas Barrett was president of the bank, and as such was actively engaged in the management of its affairs; that he owned, in his own right, a controlling interest in the stock of the corporation; and

that in fact he controlled its acts and contracts as he saw proper. There was also evidence tending to show that, in making the arrangement with defendant in error Smith, he purported to act in the capacity of president of the bank, or at least that Smith was warranted in believing that he was acting in that capacity; that is, so warranted from the conduct of Barrett and the surroundings of the parties at the time. There was also evidence tending to show that at the sale the property was bid off by the bank; that it subsequently claimed the property as its own, and sold it as such owner. There was also evidence tending to show that, although Smith was present at the sale, he made no bid, because he relied upon the agreement which he had made with the bank's president, Mr. Barrett. There was also evidence tending to show that, within a very short time after the sale, Smith called at the bank for the purpose of appropriating the benefits of the agreement, but that, upon this fact being made known to Mr. Barrett, he, as president of the bank, repudiated the agreement, and, as such president, asserted the bank's ownership of the property, and offered to sell it to Smith only on the condition that he would pay more for it than any one else. There was evidence also tending to show that the property brought at the sale so made only the sum of \$31,700, and that it was worth \$50,000. The legal results to be deduced from the facts, so far as necessary to be stated here, are these: All of Mr. Barrett's knowledge in respect of the agreement became the knowledge of the bank. *Tagg v. Tennessee National Bank*, 9 Helsk. 479; *Union Bank v. Campbell*, 4 Humph. 394; *Winslow v. Harri-man Iron Co.* (Tenn. Ch. App.) 42 S. W. 698. Thus having knowledge of Mr. Barrett's fraud, and buying the property and keeping it with that knowledge, the bank became a party to the fraud, and responsible therefor. *Franklin v. Ezell*, 1 Sneed, 497, 500; *Barnard v. Roan Iron Co.*, 85 Tenn. 139, 148, 149, 2 S. W. 21. And further, by so buying the property and keeping it, the bank may be said to have "acted upon" or to have taken "the benefit of the agreement as made by Mr. Barrett"; that is, that the bank was enabled to reap the result of the fraud which Barrett practiced upon Smith under the deceptive guise of the agreement, whereby Smith was thrown off his guard, and so deprived of the property. In view of these facts, and the true legal interpretation of them as given above, it is perceived that the circuit judge was not in error in modifying the instruction offered, in the manner in which he did modify it. There being testimony tending to show the facts referred to, it also follows that the circuit judge was not bound to give the instruction without taking note of them, because to have done so could not have failed to mislead the jury by drawing their attention away from

the real case presented by the evidence. The instruction as offered was largely an abstraction. As given, it was brought close to the real case. It is said that if there was any fraud it was harmless, because the bank was not benefited by the purchase, and likewise the defendants in error were not injured, in view of the large debts which they (Smith and Eaton) owed the bank, because, it is said, the bank could have continued to bid up to the full amount of the debt, more than \$59,000, and would have gotten the property in any event. We think this consideration is beside the question. Assuming the facts previously stated to be true, then the bank got property worth \$50,000 for the sum of \$31,700, and still retained against defendant in error the balance of the indebtedness for which the securities had been deposited, such balance being a large sum. For the reasons given, we are of the opinion that the first and third assignments should be overruled.

The second assignment of error is based upon the refusal of the circuit judge to give in charge to the jury, unchanged, the following instruction submitted by the plaintiff in error, viz: "The conversion of the property of another is the appropriation of it to one's own use, or its destruction, or exercising dominion over it, in exclusion and in defiance of the owner's rights. If you find that on January 5, 1895, the plaintiffs in this cause borrowed from the Memphis City Bank the sum of \$16,100, and deposited as collateral security with said note 260 shares of the Memphis & Shelby County Abstract Company, and also certain properties set out in the trust deed of that date, which has been read to you; that in January 15, 1896, the plaintiffs borrowed the further sum of \$5,100 from the Memphis National Bank, and deposited with said note, as collateral thereto, certain certificates of stock in the Memphis & Shelby County Abstract Company, which are set out in the face of said note, which was read to you, which said note was by agreement taken up by the Memphis City Bank; and that later said indebtedness was extended by agreement to February 1, 1897, which said agreement has been read to you in evidence—I charge you as a matter of law, that there could be no conversion on the part of the defendant bank of the properties so pledged, in the sale thereof according to the terms of said instrument under which they were pledged; that under the terms of said note for \$16,100, dated January 9, 1895, the collateral pledged was applicable to the payment of said note, and any surplus remaining was applicable to the payment of any other note or claim held by the bank against plaintiffs Smith and Eaton, whether matured or not; that under the terms of said note the bank had the right, upon its non-payment at maturity, to sell said collateral; and that a sale thereof would be no conversion. I further charge you that the proper-

ties pledged by the instrument dated January 9, 1895, being a trust deed by L. B. Eaton and W. J. Smith to James Frost, trustee, are also applicable to the payment of said note of \$16,100, and upon the nonpayment of said debt, with interest, at maturity, the bank had the right to have the properties pledged therein to be sold, and the proceeds thereof applied first to the costs of such sale, then to the payment of said note for \$16,100; and that, if it did so, such sale would be no conversion. I further charge you that upon the nonpayment of said note for \$5,100 according to the terms of said agreement, commonly called the 'extension agreement,' and which has been read to you, the defendant, of right, was entitled to sell the certificates of stock pledged in said note, together with two other certificates mentioned in said extension agreement, and apply the proceeds thereof to the payment primarily of said note of \$5,100, and the excess that should be realized to the payment of any debt due to the Memphis City Bank by L. B. Eaton and W. J. Smith; that according to the terms of said agreement and of said note of January 9, 1895, for \$16,100, the collaterals therein mentioned were liable not only for the specific debts set out, but for any debt due the bank by L. B. Eaton and W. J. Smith; the language of said extension agreement in this respect being as follows: "The said L. B. Eaton and W. J. Smith, in further consideration of said extension, hereby pledge to said Memphis City Bank 110 shares of the capital stock of the Memphis & Shelby County Abstract Co. The certificate for two shares, being No. 40, is now delivered to said bank, and the certificates for 108 shares, being numbers 52, 53, 54, 55, and 44, held by the Memphis National Bank to secure a loan of \$5,000; and the said Memphis City Bank may at any time take up said loan at the Memphis National bank and receive said certificates, so pledged to the Memphis National Bank, and hold the same subject to this agreement. Upon the nonpayment of said notes by the said L. B. Eaton, which are set out in said extension agreement, or any of them, or any part of them, or any one of them, with interest thereon, on February 1, 1897, the said Memphis City Bank may sell at public sale said 110 shares of Memphis and Shelby County Abstract Co. stock, and apply the proceeds of such sale, first to all costs thereof including all commissions and attorney's fees; second, to reimburse itself for the expense of taking up said certificates and paying off the debts for which they are pledged to the Memphis National Bank; third, to the payment of the notes above set out, made by L. B. Eaton and endorsed by W. J. Smith, for the payment of which the said 110 shares of Abstract Co. stock are here pledged." I charge you, as a matter of law, that said W. J. Smith was not entitled to demand of the Memphis City Bank said 110 shares of stock

mentioned above, until he paid in full, according to their terms, said notes made by L. B. Eaton and indorsed by W. J. Smith, or made tender of payment in full, which said notes are specified in said extension agreement as follows: (a) Note \$4,000, January 4, 1895, at 1 year, with interest, indorsed by W. J. Smith; (b) note \$4,500, January 4, 1895, at 1 year, indorsed by W. J. Smith; (c) note \$15,502.30, January 4, 1895, at 1 year, indorsed by W. J. Smith; (d) note \$4,200, January 4, 1895, at 1 year, indorsed by W. J. Smith; (e) note \$5,000, January 4, 1895, at 1 year, indorsed by W. J. Smith; (f) note \$4,000, January 4, 1895, at 1 year, indorsed by W. J. Smith." The circuit judge modified the language just preceding the list of notes by striking out the words "or made tender of payment in full," and substituting therefor the following: "Or made an offer to pay in full, and was able to pay." With this modification, he gave the whole instruction to the jury as requested; that is, gave the instruction as modified. This modification is made the subject of the fourth assignment of error. The second and fourth assignments will therefore be considered together.

There was evidence tending to show the existence of all the facts referred to and indicated in the instruction as originally presented to the court, except the making of an actual tender. There was also evidence tending to show that the whole amount of indebtedness for which collaterals were bound was \$59,002.30, consisting of the two notes of \$16,100 and \$5,100 made by Smith to Eaton, and the six notes above tabulated, for which W. J. Smith was L. B. Eaton's indorser. There was also evidence tending to show, as appears from the testimony of the defendant in error Smith, that a short time before the property was sold, and after it had been advertised for sale, said defendant in error Smith, in company with his attorney, H. F. Dix, went down to the Memphis City Bank to see what could be done about the debts, and with a view of finding out the exact amount due, and that he was prepared to pay whatever might be due, or, as he expresses it, to "redeem the property"; that he made an effort to ascertain from the bank what his whole indebtedness was, including the indorsements for Eaton, with a view to settling the whole, but that the bank, instead of indicating to him the amount he owed personally and as indorser for Eaton, separately and distinct from Eaton's individual debts on which he was in no wise bound, said that Eaton owed so much, and just to pay the whole thing and take it (the property), meaning the property which he and Eaton had pledged, and which is the subject of the present suit, and that by the "whole thing" was meant all the indebtedness, including about \$40,000 that Eaton owed, upon which he (Smith) was in no way bound: that Mr. Jno. Frost, speaking for the bank, de-

manded that he pay the "whole thing," meaning by the "whole thing" what has just been stated.

In order to properly understand the question made in the assignment now under examination, and to appreciate the bearing of the change which was made by the circuit judge in the instruction above mentioned, it will be necessary to consider almost the whole of the charge in connection with it. It must be premised that the instruction above referred to was presented to the circuit judge before his charge was delivered to the jury. However, in order to comply with the rule applicable to requests, the same request was offered to the circuit judge after he had delivered his charge, and he then declined to give it in the exact form in which it was presented. But he had already incorporated the whole of it in the body of his charge, word for word, with the exception of the change above mentioned, whereby he left out the words "or made tender of payment in full," and substituted therefor the words "or made an offer to pay in full, and was able to pay." In the opening of the charge the circuit judge stated the contention of the defendant in error (plaintiff below) on this branch of the case as follows: "In their declaration, plaintiffs claim that, being possessed of the abstract property and stock set forth and described with particularity in the declaration, they pledged the same by way of security to the defendant, the Memphis City Bank, to secure certain debts which the plaintiffs owed said bank, and that, upon the maturity of the debts for which said properties were pledged, they (the plaintiffs) went to the proper officers of the defendant for the purpose of understanding definitely the exact amount due the bank, and for which said collaterals had been pledged, with the view of paying whatever amounts were secured by the pledge of said properties and stock, so as to release the collateral security. The plaintiffs further claim that the defendant, through its officers, refused and declined to make any statement as to the amount due by Eaton and Smith, and the amount due by W. J. Smith as indorser for L. B. Eaton, and, on the other hand, stated, in substance, that the bank would not release said collaterals and turn the same over to Eaton and Smith unless they (Eaton and Smith) would not only pay all the indebtedness of Eaton and Smith for which said collaterals were pledged, and the notes of L. B. Eaton indorsed by W. J. Smith, but in addition would also pay the individual notes of L. B. Eaton which were not indorsed by W. J. Smith." After advertising to some other matters, the court returned to the same subject, and continued as follows: "The court charges you that the bank had the right to demand of General Smith the payment of every dollar due on the joint notes of Eaton and Smith, and the notes of Eaton indorsed by Smith. It had no right to demand of Smith the payment of the paper

due by L. B. Eaton alone, or to hold the securities deposited for the payment of the joint notes of Eaton and Smith, and notes of Eaton indorsed by Smith. To refuse to deliver the collaterals upon an offer, covered with an ability, to pay the joint notes of Eaton and Smith, and the paper of L. B. Eaton indorsed by Smith, unless the individual notes of L. B. Eaton were paid, would be such an act of conversion as would make the bank liable to the extent of the market value of the collaterals held by the bank at the time." Then followed, in the body of the charge, word for word, with the modifications above mentioned, the request of the plaintiff in error above set out, and which the court below adopted, and, as stated, imbedded it in the body of the charge. After referring to another branch of the case, the court then continued on the same subject as follows: "The court charges you that if you find from the evidence that W. J. Smith went to the defendant bank prior to March 13, 1897, for the purpose of ascertaining the exact amount necessary to redeem the collaterals set forth and described in the declaration, and prepared to then pay such indebtedness and redeem said collaterals, and the bank declined to consider his offer unless he would not only pay the sum for which said collaterals were pledged, but would also pay the individual debts of L. B. Eaton, for which said collaterals were not pledged, and declined to release said collaterals unless the undorsed notes of L. B. Eaton were also paid, then the court charges you that this was, in law, a conversion of said collaterals by the bank, and entitled the owners of the collaterals, at their election, to sue for the value of the same."

When the whole charge upon the special subject under examination is considered together, it is perceived that the alteration which the plaintiff in error now complains of, in the matter which its counsel had formulated for use by the circuit judge in the preparation of his charge, could not have been misunderstood by the jury, and was in harmony with the general trend of the charge upon that subject. It is also perceived that all the instructions, as given to the jury upon the subject, were based upon evidence in the record, which had been submitted to the jury. So the real question is whether the whole instruction given to the jury upon this subject was correct. This in turn resolves itself into the question whether, under the facts assumed or indicated, the defendant below would be guilty of conversion. We think it would be. The assertion of a right to hold the property as security for debts for which it had not been pledged, and the refusal to deliver it up except upon payment of those debts, was an unwarrantable assumption of authority over the property of defendants in error, and amounted to a conversion. *Gillet v. Bank of America*, 160 N. Y. 549-559, 55 N. E. 292; *Adams v.*

Clark, 9 Cush. 215, 57 Am. Dec. 41. Under the facts stated, an actual tender was not necessary. In 25 Am. Enc. Law, at page 904, it is said: "The actual production of the money is not required, where the party is ready and willing to pay it, but is prevented by the creditors declaring that he will not receive it, or by his making any declaration equivalent to a refusal to accept if tendered." In *Lamar v. Sheppard*, 84 Ga. 531, 10 S. E. 1084, it was held that, where the purchaser at a tax sale named as a sum he was willing to receive an amount larger than he was entitled to by law, this would relieve the owner from the necessity of producing the money at the time of making the tender, but it would not dispense with the necessity of his being fully ready to pay at the time of his offering to redeem. In *United States v. Lee*, 106 U. S. 196, 202, 1 Sup. Ct. 240, 27 L. Ed. 171, it was said: "It is a general rule that, when the tender of performance of an act is necessary to the establishment of a right against another party, this tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused." See, also, our own cases of *Bradford v. Foster*, 87 Tenn. 11, 9 S. W. 195; *Pearson v. Douglass*, 1 Bart. 151; *Rogers v. Tindall*, 99 Tenn. 356-363, 42 S. W. 86; *Jones on Pledges & Collateral Securities*, 563-573. There is nothing in *Ball v. Stanley*, 5 Yerg. 199, 26 Am. Dec. 263, to the contrary. See, also, *Schayer v. Com. Loan Co.*, 163 Mass. 322, 89 N. E. 1110; *Ratcliff v. Vance*, 2 Mill. Const. 239.

Numerous authorities are cited by plaintiff in error to the effect that a mere offer by a party is not a valid tender, but that the money should be produced with the offer. As a general proposition, this is, no doubt, true. But the defendants in error do not claim to have made an actual tender, nor did they introduce any proof tending to show such fact. Their contention is that they introduced proof tending to show the facts above referred to; that the question as to whether these facts were established was for the jury, and that, if these facts were true, they were excused from making an actual tender, and that they were entitled to an instruction from the circuit judge to the jury to that effect; and that, upon a finding of those facts, the plaintiff in error would be guilty of conversion.

It is insisted by plaintiff in error that the proof tended to show, in any event, that there was an offer to pay only \$17,500. Probably this is the effect of Mr. Dix's testimony, but the testimony of Smith himself, which we have already referred to, does tend to show that he was ready, able, and willing to take up the whole amount.

Now, to recur to the special point on which the fourth assignment is made to turn: It is observed from the foregoing discussion—indeed, we have already held—that this was proper direction, when taken in connec-

tion with the rest of the charge upon the subject. It would not have been correct to charge, as requested by plaintiff in error, that there must be an actual tender, in the face of facts which, if proven, would excuse an actual tender, and when there was no proof in the record tending to show that there was an actual tender.

The second and fourth assignments of error must therefore be overruled.

The fifth assignment of error is based upon the following excerpt from the judge's charge: "The court charges you that the chancery record offered in evidence in this case is not an adjudication of the questions involved in this case, and cannot be considered as having settled same." In order to properly understand this assignment, the following facts must be stated: On the 25th of August, 1897, the defendant in error W. J. Smith was sued in the chancery court of Shelby county upon an original bill filed by the present plaintiff in error against him as indorser for L. B. Eaton on sundry notes. These notes were some of the same notes for which the bank held the collateral, the conversion of which is the subject of the present controversy, and which collateral had already been sold at the time the bill in that case was filed. In his answer to this bill, W. J. Smith, after setting out various defenses, proceeded as follows: "Defendant would further show that on the 1st day of March, 1897, the complainant held two notes made by said L. B. Eaton and defendant—one for the sum of \$16,100, dated January 9, 1895, and due thirty days after date; the other for the sum of \$5,100, dated January 5, 1896, and due six months after date. On these two notes there was due complainant on March 1, 1897, the sum of about \$21,000. These notes were secured by trust deed upon personal property, and a pledge, as collateral security, of stock in the Memphis & Shelby County Abstract Company, worth more than twice the amount due on said notes. Defendant would show that on March 13, 1897, complainant caused all of said property to be sold, and the sum of \$31,700 in cash was realized therefor. Before said sale, defendant tendered to complainant the amount due on said notes, and demanded the release of the security, which was refused by complainant. Complainant claims that, under a certain contract which it had, the said property and collateral security were held not only to secure said sum of \$21,000 due on said two notes, but also any other sums that were due from said Eaton and defendant to said bank. Defendant wants it distinctly understood that he does not intend, by anything stated here, to estop himself from claiming hereafter that said sale of the personal property and collateral securities above described was void, or that he has the right to have said sale set aside. Defendant was ready before sale, at the time of the sale, and now is ready, to pay complainant the amount due on said

notes of said complainant, if said complainant will release said property and security, all of which were at said sale purchased by complainant, and are still by complainant owned. He reserves the right to take such action as may be to his best interests, and so securing all his rights. Defendant would show that after sale complainant applied the amount in excess of \$21,000 which satisfied said notes, not to the payment of the indebtedness of said Eaton and defendant to complainant, as, under complainant's claim, should have been done. The said notes were both made by Eaton and defendant jointly. The property conveyed and the stock pledged were all the joint property of Eaton and the defendant. Complainant knew this fact, and yet, instead of applying said surplus to the payment of the notes of said Eaton indorsed by defendant, complainant applied only the sum of \$3,197.95 on said notes, and the balance (\$7,502.75) is unaccounted for to defendant. This amount, if complainant's claim made when the defendant tendered the amount of said two notes was correct, should have been credited on the notes of Eaton indorsed by defendant; and thus it is defendant says that all said notes have been paid by said L. B. Eaton." A cross-bill was filed by Smith for the purpose of securing credit for usury which had been charged to Eaton by the bank for money which the bank had lent to Eaton on the notes on which Smith was sued, and on other notes which Eaton had executed to the bank. Eaton was made a defendant to this cross-bill, along with the bank, and filed an answer, in which he responded concerning the said matter of usury. Such proceedings were had in the chancery case referred to as that the amount of usury referred was ascertained, and credit allowed therefor, and also credit was allowed on the notes sued on in that case for their proper proportion of the \$31,700, proceeds of the collaterals and abstract property above referred to, with the result that there was found due against Smith on the said notes the sum of \$9,988.75, for which a decree was entered against him. In the present case, Smith and Eaton brought suit, as partners, for the conversion of the collaterals and abstract property referred to in the foregoing answer in chancery. The question to be determined is whether the decree in the chancery cause amounted to an adjudication of the matters complained of in the present case.

In the brief for plaintiff in error it is insisted that an adjudication is final and conclusive not only as to the matters actually determined, but as to every other matter which the parties might have litigated and have had decided as essentially connected with the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect of matters of claim and of defense; citing *Knight v. Atkisson*, 2 Tenn. Ch. 284; *Bur-*

ford v. Kersey, 48 Miss. 643; *Bates v. Spooner*, 45 Ind. 489; *Estill v. Taul*, 2 Yerg. 467, 24 Am. Dec. 498; *Cromwell v. County of Sac*, 94 U. S. 851, 24 L. Ed. 195; *Case v. Beauregard*, 101 U. S. 688, 25 L. Ed. 1004. It is also insisted that the defendant must bring forward all defenses which he had to the cause of action asserted in the plaintiff's pleadings at the time they were filed; citing *Glenn v. Savage*, 14 Or. 537, 13 Pac. 442; *Woodhouse v. Duncan*, 106 N. Y. 527, 13 N. E. 834; *Ellis v. Clarke*, 19 Ark. 420, 70 Am. Dec. 603; *Sauls v. Freeman*, 24 Fla. 209, 4 South. 525, 12 Am. St. Rep. 190. It is also said that the record of the former judgment is competent evidence in the second action when the point in issue is the same in both, or when the question raised and to be passed upon in the last case has already been determined in the first (*Sage v. McAlpin*, 11 Oush. 165); that it is not the object of the suit, the recovery, or result of the litigation, alone, that constitutes the estoppel, but the facts put in issue and found, and upon which the recovery is based -- the facts in issue, as distinguished from the evidence in the controversy (*Caperton v. Schmidt*, 20 Cal. 479, 85 Am. Dec. 187); that it is not necessary to the conclusiveness of the former judgment that issue should have been taken upon the precise point which it is proposed to controvert in the collateral action, but it is sufficient if that point was essential to the former judgment (*Lee v. Kingsbury*, 13 Tex. 68, 62 Am. Dec. 546); that every point which has been either expressly or by necessary implication in issue, which must necessarily have been decided in order to support the judgment or decree, is concluded (*Board of S. v. R. Co.*, 24 Wis. 124); that it is allowable to reason back from a judgment to the basis on which it stands, upon the obvious principle that where a conclusion is indisputable, and could have been drawn only from certain premises, the premises are equally conclusive and indisputable with the conclusion, and, if a judgment necessarily determines a particular fact, that determination is conclusive, and requires the same fact to be determined in the same way in all subsequent actions between the same parties, and that a fact is necessarily determined to exist or not to exist if its existence or nonexistence is required to support the judgment rendered (*Duncan v. Bancroft*, 110 Mass. 267; *Davis v. Demming*, 12 W. Va. 246; *Dorris v. Erwin*, 101 Pa. 239). We have no fault to find with the general principles thus announced. It has been held, however, that, in order that a judgment may be effective as *res adjudicata*, it is essential that the party sought to be precluded thereby should have sued or been sued in both cases in the same capacity or character, and to enforce the same right. *Melton v. Pace*, 103 Tenn. 484, 53 S. W. 939. It was accordingly held in that case that children inheriting from both father and mother were not estopped to set up title to the whole of a tract

of land inherited from the mother, by reason of the fact that a part of it had been, by inadvertence, embraced in the description of a tract which they, as heirs of their father, had brought to sale by decree for foreclosure of a mortgage, especially where the purchaser had the fullest notice of the state of the title. It has also been held that, to make a judgment or decree in one suit a bar to another suit between the same parties, it must appear not only that the subject-matter of the two suits is the same, but that the proceedings were for the same object and purpose, the same point being directly in issue. *Coulter v. Davis*, 13 Lea, 451. It was accordingly held in that case that a decree in chancery, on final hearing, in dismissing a bill to perpetually enjoin a nuisance (the flow of water over the complainant's land by reason of a milldam), was no defense to an action at law brought by the same party against the same defendant to recover damages for the overflow. It was also held that a judgment in favor of the defendant, brought by the husband and wife, is ordinarily no bar to a suit brought by the husband alone. *Railroad v. Adkins*, 2 Lea, 248. It has also been held that, in an action of ejectment, a decree of partition between the parties to the bill filed for that purpose is not conclusive of the right; the title not being involved in a suit for partition, nor in fact adjudicated by the court. *Nicely v. Boyles*, 4 Humph. 177, 40 Am. Dec. 638. See, also, *Swaggerty v. Neilson*, 8 Baxt. 32; *Walker v. Day, Griswold & Co.*, Id. 77; *Shannon v. Woollard*, 12 Lea, 663; *McKissick v. McKissick*, 6 Humph. 75; *Hurst v. Means*, 2 Sneed, 546.

To briefly apply these principles to the present case: The chancery cause was really between the bank and Smith alone. The present suit is one brought by Smith & Eaton, as partners, against the bank. It is true that in the chancery case Eaton was made a defendant to the cross-bill, but the only issue made in that proceeding was as to usury. In the chancery case Smith was sued as indorser of Eaton's notes. In the present proceeding Smith & Eaton appear in a different capacity—as pledgors of personal property, seeking to hold the pledgee liable for conversion. In the chancery case the question of conversion was mentioned, but the defendant clearly indicated that he did not desire or intend to present that matter for adjudication. His attitude was that, whereas the property was worth a great deal more than it sold for, yet, upon the complainants' own contention, and treating it as accountable in that case only for the sum of \$31,700, that sum had not been correctly credited. There is no real antagonism between the former case and the present. We do not hold that the defendant in the chancery cause could, by mere reservation, in terms, in his pleadings, hold back matters for future litigation that should, under the rules applicable to the subject, and which we are now considering, be

brought forward for adjudication; but, where there is no real inconsistency between the attitude occupied in the former litigation and that occupied in subsequent litigation, we do not think that the former should be held a bar to the latter.

For the reasons stated, we think this assignment should be overruled.

There are numerous other assignments of error, all of which have been considered and overruled, and need not be specially mentioned here.

It results that there is no error in the judgment of the court below, and it must be affirmed.

LIGON v. HAWKES et al.

(Supreme Court of Tennessee. June 16, 1903.)

WILLS—CONTEST—PERSONS ENTITLED TO CONTEST.

1. Where testatrix devised her property to her granddaughter, with remainder to another in event of the granddaughter's death before majority, after the death of the granddaughter, who had taken under the will, and who died before majority, the son-in-law of testatrix, who was the father of the granddaughter, had no such interest as to entitle him to contest the will.

Appeal from Circuit Court, Obion County; R. E. Malden, Judge.

Suit by E. H. Ligon against Henrietta McMurray Hawkes and another. From a judgment for plaintiff, defendants appeal. Reversed.

J. G. Smith & Son and Rice A. Pierce & Son, for appellants. Swiggart & Spradlin and Moore & Wells, for appellee.

SHIELDS, J. Mrs. Sallie McMurray died March 5, 1889, in Obion county, leaving a will devising her entire estate, consisting of an undivided one-half interest in a valuable tract of land in that county, owned by her and plaintiff, E. H. Ligon, as tenants in common, to her granddaughter, Sallie Henrietta Ligon, and her issue, with remainder in fee to Henrietta McMurray Hawkes, in the event the said Sallie Henrietta Ligon should die without issue before she arrived at the age of 21 years. Sallie Henrietta Ligon was then about four years old, and the only child of E. H. Ligon by the only daughter and child of Mrs. McMurray; and Henrietta McMurray Hawkes was then about five years of age. The will of Mrs. McMurray was admitted to probate in April, 1899, and the executor named therein declining to qualify, R. M. Morris was appointed administrator of her estate with the will annexed at the instance of E. H. Ligon, who became his surety upon his bond as administrator. Some weeks after the probate of the will, E. H. Ligon filed his petition in the county court of Obion county against Sallie Henrietta Ligon and Henrietta McMurray Hawkes, for the purpose of having the land owned by them and himself partitioned. The partition

was made, title divested and vested, and writs of possession awarded to place the plaintiff and Sallie Henrietta Ligon in possession of their respective shares. E. H. Ligon was afterwards appointed guardian for his daughter, and managed and controlled her share until March, 1902, when she died unmarried and without issue, leaving her father, E. H. Ligon, her sole heir at law. Thereupon the petition in the case was filed by E. H. Ligon against Henrietta McMurray Hawkes and R. M. Morris, administrator of Mrs. McMurray, in the county court of Obion county, stating the death of Mrs. McMurray, and the probate in common form of her will; that Sallie Henrietta Ligon was her only heir at law and distributee, and inherited all the property of which her grandmother died seised and possessed, and had died without issue, and that petitioner, E. H. Ligon, was her father and only heir at law and distributee, and entitled to all the property which she inherited from her grandmother. It is further charged that Mrs. McMurray, at the time she made the will admitted to probate, was of unsound mind, and without testamentary capacity, and that for this reason said will was void. The prayer of the petition is for process, and that probate of the said will be set aside, and the original certified to the circuit court of Obion county that an issue may there be made and tried to test its validity. The defendants R. M. Morris, in proper person, and Henrietta McMurray Hawkes, by her guardian ad litem, answered, admitting the relationship of the parties, the death of Mrs. McMurray, and the probate of her will, and the death of Sallie Henrietta Ligon, without issue, but denying the right of the plaintiff to have the probate of the will set aside for the purpose of a contest on the ground that he was not interested in the estate of the testatrix. They also charge that the object and purpose of the petitioner, E. H. Ligon, in contesting the will of Mrs. McMurray is to recover for himself, as heir at law of his daughter, the land partitioned to her and the defendant Henrietta McMurray Hawkes in the suit in the county court. The case was decided adversely to the defendants by the county court and the circuit court of Obion county upon an appeal to the latter, and is now before this court upon an appeal in the nature of a writ of error.

We are of opinion that the defense interposed in behalf of the defendants should have been sustained, and the petition dismissed. No one except those directly interested in the estate of a decedent has the right to call in question the validity of his or her will. E. H. Ligon was not related to Mrs. McMurray any other way than as a son-in-law, and this relation was dissolved before her death by the death of the daughter and wife. When Mrs. McMurray died he had no interest in her estate as heir or distributee. At no time could he have inherited anything from her in his own right. He

was a stranger in blood and estate. The general rule in Tennessee is that only those will be allowed to contest the validity of a will who are directly interested as heir or distributee in the estate, and they must show their interest when appearing to contest the probate when the will is first presented for that purpose, or when appearing afterwards to have the probate in common form set aside, and the will certified to the circuit court for an issue of *devisavit vel non*. In an early case, it was said by this court: "It is well settled that it is not a matter of course to set aside the probate and re-probate a will. It would be of most mischievous consequences if it were so. A stranger will not be permitted to disturb the existing probate. A kinsman, who is not the nearest of kin, and who could take nothing under the statute of distribution, if there were no will, shall not disturb it." *Wynne v. Spiers*, 7 Humph. 407. In another case, in which the petitioner merely stated that the deceased was his grandfather, without showing that his own father was not living, it was held that the petitioner failed to present a case entitling him to have the probate of the will in common form set aside for the purpose of a contest, and his petition was dismissed upon the ground that he did not appear, upon his own showing, to be interested in the estate of the testator. *Cornwell v. Cornwell*, 11 Humph. 485. It has also been held by this court that the creditor of a son of the decedent cannot contest the will of the father. In that case it is said: "We think the complainant does not occupy a position to question the validity of the probate on the ground assumed. The will has been proved in a court of general jurisdiction of these subjects. No one, without an interest in the estate, can contest the will or call for a re-probate. The complainant is only a creditor of one of the devisees, and can only act upon his rights. The debtor is content with the will, chooses to avail himself of no objection to it that may exist, although it reduces a fee in the land to which he would be entitled by law to a remainder interest. If he acquiesces in its validity by waiving his right to object and contest it for the incompetency of objecting witnesses, or on any ground, how can his creditor, who has to pass through him to reach the property, make the objection for him?" *Bank of Tenn. v. Nelson*, 3 Head, 637. An Alabama case is cited as holding otherwise. We have not been furnished with this case, but from a reference to it in a textbook examined we infer it is based upon a statute of that state. The Supreme Court of Illinois has taken the same view of this question as this court. In a late case decided by that court, citing several previously determined, it is said: "The right to file a bill which existed in Geo. M. Storrs did not descend to the appellant, Emory A. Storrs. Geo. M. Storrs had the bare right to establish title by successfully contesting

the will. That right was not assignable. If it was not assignable by a conveyance or written transfer, it could not pass by inheritance or descent." *Storrs v. St. Luke's Hosp.* (Ill.) 54 N. E. 185, 72 Am. St. Rep. 215. The right of Sallie Henrietta Ligon to contest the will of her grandmother for want of testamentary capacity was not a property right. It was a mere right of action, in which nothing could or can be directly recovered. It could not be assigned by her when in life, because the assignee would not, by virtue of the assignment, take or acquire title to anything; and it would also partake of champerty and maintenance, and be contrary to public policy. For the same reasons it is not a right that could be inherited. It is not land, and did not descend to her father under the statutes of descent. It is not personal property, and, if it were, the title would be in her administrator, and not her distributee, and the latter could not maintain this action in his own name. The policy of the law is against the transfer of mere rights of action. In the case of *Morrison v. Deaderick*, 10 Humph. 343, Judge McKinney, announcing the opinion of this court, said: "It is laid down (Story on Eq. § 1040) that an assignment of a bare right to file a will in equity for fraud committed upon the assignor will be held void as contrary to public policy, and as savoring of the character of maintenance. In the case cited in the note (*Prosser v. Edmonds*) Lord Abinger says that, where an equitable interest is assigned in order to give the assignee a locus standi in a court of equity, the party assigning said right must have some substantial interest, some capability of personal enjoyment, and not a mere right to overset a legal instrument, or to maintain a suit." It is not necessary to here decide whether a grandson or lineal descendant would be entitled to contest the will of his grandfather or ancestor, where the son of the testator, through whom claim is made, survived him, but died before the contest to be or was begun, although we would be inclined to hold that they could, since the grandson or other descendant would have taken as heir and distributee from the ancestor, but the father or party under whom claim is made died first. This would be reasonable and just, and tend to preserve the inheritance to the heir, and the natural order of things. But there is no reason for holding that one who never could at any time inherit from the testator should have the right to institute an action to contest his will. We know of no rule of common law which secures to him such right, and we have no statute upon the subject. To so hold would be to open the door to fraud, and subject devisees to the danger of loss of their estates at the suit of strangers, whom the testators never contemplated as objects of their bounty. In the present case, if E. H. Ligon's right to contest this will could be sustained, and he should die, his heirs at law and their

heirs at law, to the remotest generation, would have the same right, and thus interminable confusion and uncertainty of titles and intolerable injustice would follow. We are therefore of opinion that one who is not an heir or distributee of the testator at the time of his death, and would not have been if those under whom he claims had died before the testator, has no standing in court to resist the probate of a will, or to have the contest in common form set aside for the purpose of a contest, and therefore E. H. Ligon cannot maintain this petition.

The judgment of the circuit court is reversed, and the petition dismissed.

TAYLOR v. SLEDGE et al.

(Supreme Court of Tennessee. May 21, 1903.)

LANDLORD AND TENANT — COLLAPSE OF BUILDING — DAMAGES — JURISDICTION — APPEARANCE BY APPEAL — DEFAULT JUDGMENTS — RES JUDICATA.

1. Where, after default judgment, defendant sued out a writ of error and supersedeas to review the judgment, which was subsequently affirmed, the Supreme Court thereby acquired jurisdiction of defendant's person, which cured any defect in the service of the original summons.

2. A judgment by default is conclusive against the parties as to all matters properly pleaded and averred in the declaration.

3. Complainant rented a building to defendant, and during defendant's occupancy the floors of the second, third, and fourth stories fell—defendants claiming, by reason of defective construction; and plaintiff, by reason of defendant's wrongfully overloading the upper floor. Defendant sued plaintiff for damages sustained, and recovered judgment by default, which was thereafter affirmed on error. Plaintiff then sued to recover damages from defendant for the alleged wrongful overloading of the building. *Held*, that the issue in both actions was the cause of the falling of the floors, and hence the judgment in the prior action was a bar to the maintenance of the second.

Appeal from Chancery Court, Shelby County; F. H. Heiskell, Chancellor.

Action by Emmett Taylor against R. M. Sledge and others. From a judgment in favor of defendants, plaintiff appeals. Modified.

Smith & Trezevant, for appellant. Caruthers Ewing, for appellees.

SHIELDS, J. Complainant rented to the defendants a house in Memphis, to be occupied by them as brokers and commission merchants. Some time after defendants took possession and moved their stock of merchandise into the house, the floors of the second, third, and fourth stories gave way and fell; and a controversy arose between the parties as to whether the catastrophe was caused by the defective construction and want of repairs of the house, or by the wrongful and negligent action of the defendants in overloading the upper floor. The defendants sued the complainant, Taylor, in

¶ 2. See Judgment, vol. 30, Cent. Dig. § 1184.

the circuit court of Shelby county, to recover the damages sustained by them by the falling of the floors; and, no defense being made, judgment by default was taken, and upon writ of inquiry the damages of the plaintiffs were found to be \$1,148.50, for which a final judgment was entered. Complainant then brought the case before this court by writs of error and supersedeas, and assigned as error the action of the circuit judge in executing the writ of inquiry without the intervention of a jury—one having been demanded in the declaration—which assignment was overruled, and the judgment affirmed against him and his surety upon his supersedeas bond. This case is reported in 108 Tenn. 719, 69 S. W. 266. Thereupon this bill was brought, charging that the summons in the action of Sledge, Wells & Co. against Taylor was not served upon complainant Taylor; that the circuit court did not have any jurisdiction of his person, and that the judgment recovered against him was for this reason absolutely void; also that the collapse and falling in of the floors of the house rented defendants was caused by the negligence of the defendants in overloading the upper floor, and that they were liable to complainant for \$465.46, the cost of repairs—with a prayer that the collection of said judgment be enjoined, and that complainant have a decree against defendants for \$465.46, damages alleged to have been sustained by him. Other relief was prayed, but need not be noticed here. The defendants, answering, say that the complainant was served with process in the original case, but that the question is not now an open one, as he entered his appearance and submitted to the jurisdiction of the court when he sued out writs of error and supersedeas and had the case reviewed by this court, and that the former case involved the same subject-matter as this one, so far as the complainant seeks to recover damages for injuries done his house; and they plead the judgment in that case in bar of this part of the relief sought by them. Thus two questions of law are presented, the determination of which must be conclusive in this cause.

1. Did the complainant, by suing out the writs of error and supersedeas in the case of Sledge, Wells & Co. against Taylor, enter his appearance in that case, and submit to the jurisdiction of the court? We hold that he did. He had the election of two remedies to correct any error committed against him. If there was error in the face of the record, he could have the judgment reversed upon writ of error from this court. If there was no jurisdiction of his person, the judgment was absolutely void, and he could have had it so decreed, and its collection enjoined, by proper proceedings in the chancery court. It was his right and his duty to choose between these two remedies. He could not have both, because a party is entitled to only one trial in court; the policy

of the law being to prevent multiplicity of suits and to put an end to litigation. It is immaterial that the two remedies are not equally broad, as the defendant is not bound to adopt the one that is less effectual. A writ of error will not reach all errors that may be committed against a defendant in such cases, because, in the absence of a bill of exceptions, they may not appear in the record. Yet he must, when he elects to pursue this remedy, take the chances of the soundness of his judgment, and abide the consequences. We are therefore in the opinion that the complainant entered his appearance in the former case when he sued out the writs of error and supersedeas; that this court thereby obtained jurisdiction of his person, and its judgment against him is valid and conclusive of the matters therein adjudged, although the original summons may not have been served upon him. There does not seem to be any reported case of this court deciding this precise question, but there are some involving analogous questions which support this decision, so far as they bear upon this case. *Palmer v. Malone*, 1 Heisk. 549; *Woolridge v. Boyd*, 13 Lea, 151; *Hurt v. Long*, 90 Tenn. 448, 16 S. W. 968. The chancellor also found, and we think correctly, that process in the original case was served upon complainant, and that he was properly before the court.

2. The second question to be determined is whether the case of Sledge, Wells & Co. against Emmett Taylor involved the same subject-matter as this case, so far as complainant seeks to recover damages against the defendants for injuries to his storehouse, and, if so, whether the judgment in the former case is res adjudicata of these matters, and a bar to such relief. There can be no doubt but that the same facts and questions involved in the former case must be the subject of adjudication in this one; but the complainant insists that the judgment in that case, being by default in the circuit court, is not res adjudicata of any claim and rights he may have, growing out of such matters, and does not bar him from a recovery on account of the same against the defendants. The case of *Sale v. Eichberg*, 105 Tenn. 333, 59 S. W. 1020, 52 L. R. A. 894, is relied upon to support this contention. A judgment by default is as conclusive against the parties as one rendered in a case where the defendant appears and makes defense of all material matters that are properly pleaded and averred in the declaration. The rule is clearly stated by an eminent author in these words: "A judgment taken by default is conclusive by way of estoppel in respect to all such matters and facts as are well pleaded and properly raised, and material to the case made by declaration or other pleadings, and such issues cannot be re-litigated in any subsequent action between the parties or their privies. 1 Black on Judg. § 87. The facts to be ascertained and the

questions to be determined in the former case and in this are clearly the same. The question in both is, what caused the floors in the storehouse to give way and fall, injuring the stock of goods of the one party, and the building of the other? In the former case *Sledge, Wells & Co.* averred that it was the fault of construction and want of repair. In this complainant claims that the floors were properly constructed and in good repair, and were caused to fall by the negligence of the defendants in overloading them. Necessarily the claims of both parties must be determined in the decision of both suits. We are clearly of the opinion, and so hold, that the judgment in the former case of *Sledge, Wells & Co.* against *Taylor* is *res adjudicata* and conclusive against the complainant in his action against them in this case. The case of *Sale v. Eichberg*, *supra*, is not in conflict with our holding that a judgment by default is conclusive of all material questions arising in the pleadings. The judgment which was relied upon in that case as *res adjudicata* of the complainant's claim for damages was one by confession required to be made by *Eichberg* upon his application for a fiat for an injunction enjoining an action at law which *Sale* had brought against him, and not a judgment by default negligently suffered to be entered. While the general rule upon the subject is discussed in that opinion, it was not intended to hold, and was not held, that the judgment by default is not conclusive of all matters properly pleaded and involved in the pleadings in the case in which the judgment is entered.

The other assignments of error were disposed of orally. The decree of the chancellor will be modified to conform to this opinion.

**FIRST NAT. BANK OF NASHVILLE v.
UNITED STATES FIDELITY &
GUARANTY CO.**

(Supreme Court of Tennessee. July 6, 1903.)

**FIDELITY BONDS — REPRESENTATIONS OF
PARTY INSURED — STATUTES — APPLICABILITY
— RENEWAL BOND — LIABILITY OF INSURER —
FINDINGS OF FACT — CONCLUSIVENESS ON
SUPREME COURT.**

1. Shannon's Code, § 3306, which provides that no representation or warranty made in negotiations for a contract or policy of insurance, or in any application therefor, shall be deemed material or defeat the policy unless the misrepresentation is made with actual intent to deceive, or unless it increases the risk of the loss, applies to fidelity bonds given to an employer to indemnify him for losses occasioned by the fraud of an employé.

2. The question whether statements of a bank cashier made to a fidelity company during the negotiations for the issuance of a bond insuring the fidelity of an employé of the bank were true was for the jury.

3. The finding of the Court of Chancery Appeals that the statements made by a bank cashier to a fidelity company previous to the issuance by it of a bond to indemnify the bank for loss occasioned by the fraud or dishonesty of a bookkeeper were material and substan-

tially true is a finding of fact, and conclusive on the Supreme Court on appeal.

4. A fidelity bond given to reimburse a bank for loss occasioned by the fraud or dishonesty of its bookkeeper recited that the insurer would make good to the employer, to the extent of \$7,000, all pecuniary loss occasioned by the dishonesty of the employé occurring during the continuance of the bond or any renewal thereof. The liability of the bond was limited to default occurring during one year. A renewal bond guarantying the fidelity of the employé for the following year was given. It recited that it was a renewal bond, subject to the conditions of the original bond. *Held*, that the renewal bond was a new contract only so far as it extended the indemnity of the original bond to another year, but there was in effect one bond, with one penalty.

Appeal from Chancery Court, Davidson County; H. H. Cook, Chancellor.

Suit by the First National Bank of Nashville against the United States Fidelity & Guaranty Company. From a decree for complainant, defendant appeals. Modified.

Boyd & McNelly, for appellant. Stokes & Stokes, for appellee.

McALISTER, J. This bill was preferred by complainant bank against the guaranty company to recover the penalty of a bond executed by the guaranty company to the bank as indemnity against all or any pecuniary loss sustained by the bank, occasioned by the fraud or dishonesty of one W. W. Lea, an individual bookkeeper in said bank, and occurring during the continuance of the bond or of any renewal thereof, and discovered during such continuance or renewal, or any time thereafter. The bond was in the penalty of \$7,000, and covered any losses occurring between May 1, 1898, and May 1, 1899. This bond was renewed on the 4th of May, 1899, so as to guaranty the fidelity of said W. W. Lea in the sum of \$7,000 from the 1st of May, 1899, to May 1, 1900, subject to all the amounts and conditions set forth and expressed in the original bond. The Court of Chancery Appeals find that during the period from May 1, 1898, to May 1, 1899, and during the currency of the original bond, complainant bank sustained a pecuniary loss of \$7,217.50, occasioned by the fraud and dishonesty of the said W. W. Lea while acting as individual bookkeeper for the bank, and that during the currency of the renewal bond, from May 1, 1899, to May 1, 1900, the bank sustained a pecuniary loss of \$18,157.20. Proofs of loss were furnished the fidelity and guaranty company as required by the bond, but the defendant company declined to pay upon the following grounds set up in its answer, namely: First, that at the time the bond was executed and delivered by the defendant guaranty company to the bank, and as a condition precedent to the execution of the bond, the defendant sent the complainant bank, for proper execution, an employer's statement, in which, among other questions propounded to the bank, were the following, *vis.*: (1)

Whether Mr. Lea's accounts had been audited, and, if so, when, and by whom; (2) whether all the accounts of his office were found in every respect correct; (3) whether he had been or was then in arrears, default, or with unsettled balance. The cashier of the bank replied to these questions, viz.: "When last examined or audited by complainant, on the 22d April, 1898, all the accounts of his office [referring to W. W. Lea] were found in every respect correct up to April 22, 1898." It is further averred in the answer that when the renewal bond was executed, May 4, 1899, a similar statement was made by the bank's cashier in reply to the defendant's question, viz.: "This is to certify that on the — day of — the books and accounts of Mr. Lea, in our employ as —, were examined by us, and we found them correct in every respect, and all moneys handled by him accounted for. He has performed his duties in an acceptable and satisfactory manner, and we know of no reason why the guaranty bond should not be continued." The answer then proceeds to aver that these statements were untrue and false, and that the defendant's officers and agents knew them to be untrue and false, or with the least diligence could have ascertained them to be untrue. It is then averred that, as a matter of fact, at the date of the execution of the first bond, and at the time said statement was made, to wit, on the 28th May, 1898, the defendant Lea was a defaulter to the complainant bank in a sum not less than \$700, and that said defalcation had existed for a long time prior to May 1, 1898. It is further averred that at the time of the renewal of the bond on the 4th May, 1899, said Lea was a defaulter in a sum not less than \$800, and that these facts were known to the bank, or by the exercise of ordinary diligence could have been known. The answer further avers that the statement made by the officers of the bank in respect of the correctness of the accounts of W. W. Lea were warranties to the defendant and inducements for making such bonds, and that said bonds were therefore void because of the breach of said warranties, and because of these untrue and false statements.

The Court of Chancery Appeals find that there is no controversy in respect of the execution of the bonds, and it is conceded that the premiums were paid. That court further finds there is no question as to the default of the defendant Lea. It also finds that Mr. Watts, cashier of the bank, in reply to questions asked by the guaranty company, made the following statement, viz.: "The replies of the applicant herein are, to the best of my knowledge and belief, correct. He has been in the service of the undersigned employer since March, 1875, filling positions of various —, and has continuously filled the position for which this bond is required since —, 18—. He has always, to the best of my knowledge and

belief, given satisfaction in his personal conduct and performance of duties, and kept his accounts faithfully and without default. When last examined or audited by committee, on the 22d day of April, 1898, all the accounts of his office were found in every respect correct up to April 22, 1898. He has not been, nor is he at present, so far as I know or believe, in arrears, default, or with unsettled balance in this or any previous service. I know of nothing concerning his habits or antecedents affecting his title to confidence, and I know of no reason why the guaranty hereby applied for should not be granted." When the renewal bond was executed the cashier of the bank, in reply to questions submitted by the guaranty company, filled out the following statement, viz.: "The United States Fidelity and Guaranty Co.: This is to certify that on the — day of —, 189—, the books and accounts of Mr. Lea, in our employ as —, were examined by us, and we found them correct in every respect, and all moneys handled by him accounted for. He has performed his duties in an acceptable and satisfactory manner, and we know of no reason why the guaranty bond should not be continued. His salary is now \$1,300, and he is employed as book-keeper."

The Court of Chancery Appeals find, as a matter of fact, that on the 1st of May, 1898, when the original bond was executed, Lea was a defaulter in excess of \$480, \$280 of which occurred in one account. When the renewal bond was executed, about the 1st of May, 1899, Lea was a defaulter to an amount aggregating about \$800. The Court of Chancery Appeals further finds that the books and accounts of Lea had been examined by a committee of the directors on the 22d April, 1898, who reported in writing as follows, viz.: "On the 18th April, 1898, we, your examining committee, began, and continued until completed, an examination of the affairs of the bank. We find the cash in the hands of the receiving and paying tellers to agree with the amounts shown by the books; the time and demand loans, notes in attorney's hands, bills of exchange, and funds in transit, under charge of the assistant cashier, to balance with the general books. The general accounts balance. The individual accounts were checked and proved to be correct, as shown by the general ledger, except that the bookkeeper from A to K [referring to Lea] was out of balance about \$400, and the bookkeeper from L to Z about \$150. The committee thinks that these discrepancies will be found by the respective bookkeepers, as they were hurried in going over their books, that the committee might begin their work. We believe that the books are correctly kept, and that the affairs of the bank are in satisfactory condition." It appears that after the report was made Lea claimed that he had discovered an error of \$400, which left the books within \$21 of a bal-

ance. Lea reported this to the committee, and satisfied them and the cashier, Mr. Watts, that his books were out of balance only \$21. The Court of Chancery Appeals finds that when Mr. Watts, the cashier, made the statement to the guaranty company, he knew what the committee had reported, and knew of the subsequent correction of the item of \$400, but that court finds that the statement was made by him in good faith, and without any knowledge or thought that Lea was a defaulter, and he (Watts) believed, as did the other officers of the bank, that Lea's accounts were substantially correct. The Court of Chancery Appeals also found that twice each year the United States sent one of its bank examiners to examine the condition of complainant bank, and that during the period when there were six or eight thousand dollars of false entries in the books kept by Lea, but unknown to the bank, the complainant employed E. P. Maxey, who is shown to be an expert bank accountant, to examine the bank's affairs. He spent 30 days in making the examination, for which he was paid \$750, but he discovered no false entries made by Lea. As already stated, the special committee appointed by the board of directors in April, 1898, examined all the affairs of the bank, including the books kept by Lea, but without discovering any false entries. It appears, says the court, that in some way the committee were deceived by a manipulation of the adding machine by Lea, who obtained and gave them a false addition. But after the committee wrote its report, finding the books out of balance to the amount of \$421, Lea convinced the committee that he had discovered an error of \$400, which brought the books within \$21 of an absolutely correct balance with the general bookkeeper's books. It is shown that Lea had in his charge about 1,000 accounts. The Court of Chancery Appeals concludes on this branch of the case that the committee were justified, on account of the long service of Lea, his good character, and the examination of Mr. Maxey and other bank examiners, in concluding that his accounts were substantially correct. The Court of Chancery Appeals also finds that the officers and directors of the bank had perfect confidence in Lea, as did Mr. Watts, the cashier, and that when the statement was made to defendant company it was made in good faith, and without any suspicion that there was anything wrong with Lea's books and accounts, or that he was a defaulter in any respect or for any amount. That court also finds as a fact that nothing had occurred up to the time of Lea's vacation in 1900 to put the complainant on notice of any wrongdoing by Lea. The question then presented is, was there such a false representation in the statement made by the bank's cashier to the defendant company as will exonerate it from liability on this bond, and

were the statements made material, and did they increase the risk? The committee which made the examination in April, 1898, wound up its report as follows: "We believe that the books are properly and correctly kept, and that the affairs of the bank are in a satisfactory condition."

Section 3306, Shannon's Code, which applies to a case like this, provides that no written or oral misrepresentation or warranty therein made, in negotiations for a contract or a policy of insurance, or any application thereof by the assured, or in his behalf, shall be deemed material, or defeat or void the policy, or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter represented increases the risk of the loss. The Court of Chancery Appeals finds as a fact that the statement of Mr. Watts was not fraudulent, but made in the utmost good faith. Further, it is claimed, under the authorities, that the statement of Mr. Watts is not a warranty, but a representation. Says Mr. May, in his work on Insurance (volume 1, § 184): "Representations need not, like warranties, be strictly and literally complied with, but only substantially, and in those particulars which are material to be disclosed to the means to enable them to determine whether they will enter into the contract, and upon what terms." The same author, at section 186, says: "Representations of this kind, however, are not strictly warranties, and differ from warranties in that a substantial compliance with them is sufficient to answer their terms. Whether there has been such substantial compliance (that is, whether the representation is in every material respect true) is a question of fact for the jury. In the case of *Missouri, K. & T. Trust Co. v. German National Bank* (decided by the Court of Appeals for the Eighth Circuit) 77 Fed. 117, 23 C. C. A. 65, the defense interposed by the guaranty company was that, in answer to an inquiry, the indebtedness of the risk (one Goldman) had been placed at \$4,000, when, as a matter of fact, it was some \$3,800 additional. Judge Thayer, in delivering the opinion of the court, wrote, viz.: "In the present case it appears that the statement made by Goldman of his indebtedness to his employer, the bank, is found in the application only. No reference whatever is made to the application in the bond. It is obvious that the statement in question must be treated as a representation." He further says: "Counsel for the trust company insist, however, that, even if the statement be regarded as a representation, it nevertheless related to a subject concerning which the trust company, in its printed form of application, has seen fit to make special inquiry, and it was therefore a material representation, and that the court erred in permitting the jury to determine whether it was material or otherwise. This contention," said the court, "rests upon a misconception of

the charge. The trial court did not allow the jury to determine whether the representation related to a material matter. It held, as a matter of law, that the representation was material, but directed the jury to ascertain whether it was so far false and misleading as to render it substantially untrue." The court further said, viz.: "If a representation relating to a material matter is substantially true—that is to say, if it is so far true that the conduct of the insurer would not have been different if it had known the exact truth—it will not vitiate the policy, and whether it was substantially true or substantially false is the question for the jury." Applying these principles, the Court of Chancery Appeals held that, as a matter of law, the statements made by Mr. Watts were material, but found, from the facts and circumstances set out in the record, that Mr. Watts' statements were substantially true. This was a finding of fact which is conclusive upon this court. That court further said: "We are satisfied that, if Mr. Watts had fully stated all the facts within his knowledge at that time, the course of the defendant company would not have been different. He (Watts) was reporting and stating with substantial accuracy the report made by the auditing committee, and this was all that he was purporting to do. The committee had found and reported substantially that the books were properly kept. He himself did not undertake to state how the books were kept." These are all findings of fact, which it is not within the province of this court to review. It is also well settled, as matter of law, that it makes no difference that a "risk" is at the time a defaulter, and the officers and directors may have negligently failed to ascertain the fact. The obligor must know and conceal the facts in order to relieve the insurer from liability. *Guarantee Co. of North America v. Mechanics' Savings Bank & Trust Co.*, 80 Fed. 766, 26 C. C. A. 146, and many authorities; *Tapley v. Martin*, 116 Mass. 275.

It is next assigned as error that the court of Chancery Appeals failed to find that the following condition of the bond was not breached, viz.: "That, in the discovery of any act capable of giving rise to a claim thereunder, the employer shall at the earliest practicable moment give notice thereof to the company." The contention of defendant company under this stipulation of the bond was that the bond was executed June 6, 1898, and on the 28th June, 1898, only 22 days thereafter, the report of the auditing committee, which showed Lea's books out of balance \$400 was turned over to the directors and formally entered on the books of the bank, and that the directors did not communicate anything with respect thereto to the defendant company. The argument is that these facts bring this case within the *Schardt Case* [*Guarantee Co. of North America v. Mechanics' Savings Bank & Trust Co.*], reported in 183 U. S. 402, 22 Sup.

Ct. 124, 46 L. Ed. 253. The court of Chancery Appeals finds that the officers and directors of the bank had not discovered "any act capable of giving rise to a claim" within the meaning of the clause just quoted. The argument of that court is that there might have been clerical errors of thousands of dollars in the accounts, without the fact being capable of giving rise to any claim under the bond. We think this assignment is virtually disposed of by the finding on the first assignment. Moreover, the Court of Chancery Appeals finds that notice was given, and that it was sufficiently prompt.

The seventh assignment is that the Court of Chancery Appeals erred in holding that defendant company was liable for two penalties of \$7,000 each. It is insisted by defendant that there was in effect but one bond, and that the maximum liability was only \$7,000, the penalty of the bond; that the last bond was simply a renewal of the first, and was not intended to create a new liability; and that, in legal effect, the two bonds constitute but one contract, with a single penalty. It will be observed that the word "renewal" is written in the second bond, and the certificate refers by number to the original bond, and provides that it is subject to all the covenants and conditions set forth and expressed in the original bond. The period covered by the renewal certificate is that intervening between May 1, 1899, and May 1, 1900. The penalty prescribed in the renewal certificate is \$7,000. The original bond expressly provides for a maximum penalty in these words, viz.: "Make good and reimburse to the employer to the extent of \$7,000, and no further, all and any pecuniary loss sustained by the employer, occasioned by the fraud or dishonesty on the part of the employee in the employer's service, and occurring during the continuance of this bond or any renewal thereof, and discovered during such continuance or renewal, or any time thereafter," etc. The Court of Chancery Appeals held that the original bond and renewal certificate are separate and independent contracts, covering different periods of time. It was held by that court that under the first bond the company was only liable for a default occurring between the 1st May, 1898, and 1st May, 1899, and under the last bond for a default occurring between the 1st May, 1899, and 1st May, 1900. It was further held that, if the default occurred during the first bond or renewal, under the express language of the bond the liability attached when the default was discovered, whether occurring during continuance of first bond or renewal, and discovered during continuance or renewal or any time thereafter. The court accordingly pronounced a decree for complainants for \$14,000, penalties of both bonds. We are of opinion the Court of Chancery Appeals was in error in this position. The new bond expressly recites on its face that it is a renewal, subject to all the covenants and conditions set forth and

expressed in the bond of this company, No. 23,717, heretofore issued on the 1st May, 1898. Referring to the original bond, we find it stipulated that the guaranty company will make good and reimburse to the employer to the extent of \$7,000, and no further, all and any pecuniary loss sustained by the employer, occasioned by the fraud and dishonesty on the part of the employé in the employer's service, and occurring during the continuance of the bond or of any renewal thereof, etc. So that, under the plain terms of the bond, the maximum liability is \$7,000, and no further, whether the default occurred during the currency of the original bond or during the renewal thereof. Now it is true that the renewal certificate is a new contract, but it is only a new contract as respects time; that is to say, it extends the indemnity provided by the old contract to a new period of time—May 1, 1899, to May 1, 1900. The parties themselves understood there was only one bond and one penalty. Mr. Watts, cashier of the bank, in the first letter written by him to the company, notifying it of Lea's defalcation, said, viz.: "We hold your indemnity bond in the sum of \$7,000.00 on William W. Lea, who was one of our bookkeepers. Said bond is number 23,717, dated May 1, 1898, and expired May 1, 1900." This letter, the record shows, was dictated by the counsel for the bank, and shows how the contract was understood and interpreted by the bank before this litigation arose. The officers of defendant company and officers of other similar companies so understood it. We are all of opinion the decree of the Court of Chancery Appeals in this respect was erroneous, and that defendant company is liable in this bond for only one penalty, to wit, \$7,000; and for this amount, with interest from date of filing the bill, a decree will be entered in this court in favor of complainant bank.

BRUCE v. STATE.

(Supreme Court of Arkansas. July 6, 1903.)
CRIMINAL LAW—INSTRUCTIONS—REASONABLE DOUBT.

1. Instructions in a criminal case which fail to require the jury to find defendant guilty beyond a reasonable doubt are erroneous.

Appeal from Circuit Court, Conway County; Jephtha H. Evans, Judge.

Chester Bruce was convicted of manslaughter, and appeals. Reversed.

Appellant, Chester Bruce, was tried in the Conway circuit court upon an indictment charging him with manslaughter, by stabbing and cutting one Millage Gordon. Hon. J. H. Evans, judge of another circuit, presided at the trial. Appellant interposed two defenses at the trial: That he acted in self-defense; and that the wounds inflicted by him did not cause Gordon's death.

Sellers & Sellers, for appellant. Geo. W. Murphy, Atty. Gen., for the State.

HUGHES, J. In this case the appellant was tried upon a plea of not guilty, for manslaughter alleged to have been committed by stabbing and cutting one Millage Gordon. The defendant interposed the plea of self-defense, and also that the wounds inflicted by him did not cause Gordon's death. He was convicted of manslaughter, and sentenced to two years' confinement at hard labor in the penitentiary. He excepted and appealed, and brings up the record by bill of exceptions.

The defendant contended that the death of Gordon was caused by pneumonia. There was some evidence tending to show that the deceased had pneumonia at the time of his death. The court gave to the jury eight instructions as to the law in the case, among them the following: "If defendant inflicted a dangerous knife wound on the body of Gordon, and such knife wound caused the death of Gordon, defendant is said in law to have killed Gordon, and in such case it would make no difference that by proper care and treatment of physicians and nurses he would have recovered, and that such treatment was wanting." "If the jury find from the evidence that the defendant willfully and unlawfully inflicted upon Gordon a mortal or dangerous wound, and from that wound and other aggravating causes, operating upon or caused by said wound, Gordon died, they should find defendant guilty of manslaughter; and in such case the defendant cannot, under the law, shelter himself by a plea of erroneous treatment of said Gordon, either from his physicians or nurses." "If the wound inflicted by defendant on Gordon, if he did inflict one, caused or aggravated pneumonia, and pneumonia caused Gordon's death, then the wound, in law, caused the death of Gordon." Though otherwise unobjectionable, they are obnoxious to the objection that the jury are not instructed to find beyond a reasonable doubt. In none of the instructions given by the court is there any instruction upon reasonable doubt. The defendant asked the court to give instructions upon reasonable doubt, which was sufficient to call the court's attention to the necessity of some instruction upon reasonable doubt. The court's failure to instruct on reasonable doubt was error.

Though these instructions asked by the defendant were not entirely correct, in that they might have misled the jury, yet we think that under the circumstances in this case there was error in the instructions given, in that they failed to include that the jury must find beyond a reasonable doubt. Section 2228, Sand. & H. Dig., provides that, "when the evidence is concluded, the court shall, on motion of either party, instruct the jury on the law applicable to the case." Section 2233, Id., provides that "where there is a reasonable doubt of the defendant's guilt, upon the testimony in the whole case, he is entitled to an acquittal."

For the error indicated, the judgment is reversed, and the cause is remanded for a new trial.

STATE v. SMITH.

(Supreme Court of Arkansas. July 6, 1903.)
CONSTITUTIONAL LAW—PRIVILEGES AND IMMUNITIES.

1. Sand. & H. Dig. § 7234, which provides that it shall be unlawful for persons not residents of the state to herd or permit to run at large any stock whatever in any county or counties of the state, does not violate section 2 of article 4 of the federal Constitution, which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Appeal from Circuit Court, Baxter County; Charles A. Phillips, Special Judge.

Will Smith was indicted for unlawfully permitting stock to run at large. Judgment discharging him was entered, and the state appeals. Reversed.

At the September term, 1902, of the Baxter circuit court, the grand jury returned against appellee and Polk Hall the following indictment, omitting the caption: "The grand jury of Baxter county, in the name and by the authority of the state of Arkansas, accuse Will Smith and Polk Hall of the crime of violating the stock laws, committed as follows, to wit: The said Will Smith and Polk Hall, in the county and state aforesaid, on the 4th day of July, 1901, did then and there unlawfully permit a large number of stock, to wit, twenty-five head of cattle, to herd, graze, and run at large in said county, the said Will Smith and Polk Hall being nonresidents of this state and residents of the state of Missouri, against the peace and dignity of the state of Arkansas. P. H. Crenshaw, Prosecuting Attorney."

Appellee demurred to the indictment on the grounds: (1) That it did not state facts sufficient to constitute a public offense. (2) That it did not conform to the statute. The court sustained the demurrer, holding the law unconstitutional, and entered judgment discharging appellee, to which the state, by her prosecuting attorney, excepted. The state, by her prosecuting attorney, filed a motion for a new trial, and, on its being overruled, excepted and prayed an appeal, which was granted.

Geo. W. Murphy, Atty. Gen., for the State.

HUGHES, J. (after stating the facts). The indictment in this case charges a violation of section 7234, Sand. & H. Dig., by the herding and grazing of cattle, and permitting them to run at large, upon the lands in this state, by a nonresident, a citizen of the state of Missouri. The defendant demurred to the indictment upon the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was sustained by the court, over the objections of the defendant, to which he excepted, filed a motion for a new trial, which the court overruled, to which the defendant excepted and prayed an appeal to this court, which was granted.

Section 7234, Sand. & H. Dig., a violation of which the indictment charges, is as follows: "It shall be unlawful for a person or

persons, not residents of this state, owning in part or in whole any stock whatever, to herd, graze, or permit to run at large any stock whatever in any county or counties of this state; provided this section shall not be so construed as to prevent stock buyers from gathering up and driving such stock through any counties in this state to market."

The contention of the appellee is that this act is unconstitutional, in that it is in violation of section 2, art. 4, of the Constitution of the United States.

In the case of *McCready v. Virginia*, 94 U. S. 391, 24 L. Ed. 248, it is said (I quote from the syllabus) that, "subject to the paramount right of navigation, the regulation of which, in relation to foreign and interstate commerce, has been granted to the United States, each state owns the bed of all tide waters within its jurisdiction, and may appropriate them to be used by its citizens as a common for taking and cultivating fish, if navigation be not thereby obstructed," and that "the right which the citizens of the state thus acquired is a property right, and not a mere privilege or immunity of citizenship"; that "the second section of the fourth article of the Constitution, which declares that 'the citizens of each state shall be entitled to all privileges and immunities of citizens in the state,' does not vest the citizens of one state with any interest in the common property of the citizens of another state"; and "that a law of Virginia, by which only such persons as are not citizens of that state are prohibited from planting oysters in the soil covered by her tide waters, is neither a regulation of commerce, nor a violation of any privilege or immunity of interstate citizenship."

The principle of this case is applicable to the case at bar. The state had the right to protect the lands of its citizens against trespass by citizens of another state by this act. This was but the exercise of the police power. We are of the opinion that there is in the act referred to (section 7234, Sand. & H. Dig.) no violation of the constitutional provision in section 2, art. 4, of the Constitution of the United States. The citizens of one state have no privilege or immunity that will protect them in herding, grazing, or permitting stock to run at large upon lands of another of which they are nonresidents, and in which lands they claim no interest, when the exercise of any such privilege is prohibited by law. "Privileges and immunities" protected by section 2, art. 4, of the Constitution of the United States do not in our opinion include the privilege of herding, grazing, or permitting stock to run at large by a citizen of another state, in whose lands he claims no interest, it being protected by the statute of the latter state.

There is error in the judgment of the court in sustaining the demurrer to the indictment, for which the judgment is reversed, and the cause is remanded, with directions to the court below to proceed with the cause.

NEAL et al. v. YOUNG et al.

(Court of Appeals of Kentucky. June 20, 1903.)

ELECTIONS—PRIMARIES—LOCAL COMMITTEE—
AUTHORITY—RIGHTS OF STATE CENTRAL
COMMITTEE—INJUNCTION—COURTS—JU-
RISDICTION.

1. Where, pursuant to a primary election called by the Democratic committee of a county, candidates had been elected and incurred expenses, and ballots printed, and the officers of election appointed, the state central committee had no authority to forbid the holding of the primary.

2. The action of the chairman of the state central Democratic committee in attempting to remove a county committee and appoint a new one was void for lack of any authority on his part.

3. Equity has jurisdiction to restrain by injunction the chairman of the state Democratic central committee from removing a county Democratic committee and appointing a new one, and to restrain such state central committee from unauthorized conduct in attempting to prevent the holding of a primary election at the time regularly fixed by the county committee.

Appeal from Circuit Court, Jefferson County.

"Not to be officially reported."

Suit by one Neal and others against one Young and others, constituting the state central Democratic committee, to restrain defendants from interfering with a primary election. Injunction granted. Motion to dissolve injunction denied.

Jno. L. Dodd, J. T. O'Neal, D. W. Baird, and Chas. F. Taylor, for Neal and others. Humphrey, Burnett & Humphrey, for Young. Geo. Alexander, for Whallen. Wallace & Miller, for Grubert.

PAYNTER, J. All the defendants, pursuant to notices, appeared before me as one of the judges of the court of appeals, and moved to dissolve the injunction granted by Judge Caruth. A primary election had been called for May 26, 1903, by the regularly constituted Democratic committee of Jefferson county and of the city of Louisville and the Thirtieth Judicial District to nominate circuit judges, circuit clerk, and other officers. The committee had made all the necessary arrangements for holding the primary election. The candidates had been assessed amounts aggregating over \$4,000 to pay the expenses of the primary. The ballots had been printed, and the election officers appointed and sworn. The Democratic state central committee, without giving notice of a purpose to do so, on the 23d day of May passed a resolution declaring the primary thus called should not be held on the date named, and, in addition to that declaration, the resolution concluded in the following language, namely: "The chairman of this committee is directed to take all steps to see that this order is fully carried out, and, if the committee which now exists in the said city of Louisville should fail or refuse on or before next Tuesday to comply with this order, then said chairman is empowered to take such steps as are necessary to see that this order is carried out; and his acts are hereby approved, and he will report at the next

meeting of this committee his acts in the premises." The local committee charged with the responsibility of conducting the primary election refused to obey the order of the state central committee, and announced its purpose to proceed with the primary election. The defendant Allie W. Young, being chairman of the committee, proceeded to make an order removing the principal part of the old committee, and appointed others in their places as members of the committee. The local committee denied the right of the state central committee to prevent the holding of the primary and the right of Young to remove members of the local committee and appoint others in their stead. This action was instituted by the members of the local committee and certain of the candidates who had complied with the rules for the conduct of the primary and had their names printed upon the ballots as candidates for certain offices; and an order of injunction was obtained restraining Young, his associates and appointees, from interfering with the holding of the primary election and the removal of the committee.

The following questions are to be determined: First. Did the state central committee have the authority to prevent the holding of the primary election? Second. Did Young, by virtue of the resolution, have the right to remove members of the local committee? Third. Did the court have the jurisdiction to restrain Young and his associates from interfering with the local committee in the conduct of the primary election?

The committee named was the governing authority of the Democratic party in Jefferson county, and as such was authorized to call and conduct a primary election for nominating candidates for judges of the circuit courts of the Thirtieth Judicial District and candidates for other offices. The committee was not required to call a primary election, but when it did so it subjected itself to the operation of the primary election law. The General Assembly thought it wise to require all primary elections to be held under the law, and for the violation of its provisions prescribed penalties of the same character as are inflicted upon wrongdoers for the violation of the general election law. The primary election law is a statute law, the same as is the law for the regulation of general elections; the difference in purpose being that the former is to regulate the nomination of candidates for offices, the latter to regulate the election at which they are chosen by the electors to fill the offices. In *Eagan v. Gerwe*, 65 S. W. 437, this court said, "It seems reasonably clear from these provisions that the legislative intent was to place primary elections on the same plane as the regular elections." When a primary election has been called in the manner prescribed by the statutes, the members of the committee who called and are required by the law to conduct it became officers of the law, and are required to respect and enforce the statutes enact-

ed for the regulation of primary elections. If they refuse to perform a duty imposed by law—for instance, refuse to place the name of a candidate on the ballot—a mandamus will lie to compel them to do so. *Young v. Beckham* (Ky.) 72 S. W. 1092. In *Eagan v. Gerwe* the court held that any candidate had the right to have his name placed upon the ballot not later than 15 days next preceding the holding of the primary election by complying with its rules; and that the committee did not have the right to fix as a limit a day more than 15 days before the primary election when entries of names shall close. In that case the court held that a mandatory injunction would lie to enforce the rights of the party who desired to be a candidate. The relief sought in *Brown v. Republican County Committee* (Ky.) 68 S. W. 622, was more comprehensive than that adjudged in *Eagan v. Gerwe* and *Young v. Beckham*, and the court decided that the action could be maintained. The whole court considered the *Brown Case* and the *Young v. Beckham Case*, and the opinions were unanimous. The court of appeals has not only stated that a primary election is placed upon the plane of a general election, but that individual rights may be acquired, which will be enforced by the extraordinary remedies of mandamus and injunction. If courts should compel the committee having charge of a primary to place the names of candidates on the ballots, it necessarily follows they should compel the committee to have the ballots printed; hence have them distributed for use. Suppose a case where the court has been compelled to take the steps mentioned above successively. Should the committee be allowed, by calling off the primary election, to defeat the enforcement of the mandates of the court, and destroy legal rights adjudged? We think not. If the local committee whose duty it is to call and conduct a primary cannot do so, certainly the state central committee, with certain supervisory authority over the local committee, cannot destroy the rights acquired by candidates in the primary. The preservation of the individual and legal rights does not depend upon the fact whether they are attacked by persons exercising inferior or superior authority. They exist independent of, and are beyond the reach of, arbitrary power. The candidates had incurred a large expense connected with the holding of the primary election. Twelve days had elapsed after the close of entries of candidates. No candidates, except those who had complied with the regulations of the committee 15 days before the primary, were entitled to have their names printed on the ballots as candidates. Thus under the statute the number of their competitors (where opposition existed) for the nominations were limited. In addition to this, the ballots were printed, the officers of election were appointed, and almost everything had been done except the casting of the ballots. If it could be called

off under the circumstances, it could likewise be done after the ballots had been cast, but before the result was certified. I am of the opinion that the candidates had acquired rights which were beyond the power of party authority to destroy "by calling off the primary election."

The state central committee, by its resolution, did not, nor did it attempt to, remove the committee in Jefferson county and the city of Louisville. If it had the authority to do so (which I do not decide), it did not exercise it. If it had such authority, it was delegated to it by the Democratic state convention. That authority could not be delegated to any one, be he the chairman or member of the committee. To remove a committee, if the authority existed, necessitated the exercise of judgment and discretion of the committee, not of some one else. If the state central committee had intended that such judgment or discretion and authority should be exercised by the chairman, it would have given it to him. He is not even given a vote at a committee meeting, except in case of a tie. It therefore follows that the action of the chairman of the state central committee in his attempted removal of the old and the appointment of a new committee was without authority, and his action was void. It is proper to express this view, because the committee conducting the primary became officers under the primary election law, and are entitled to protection in discharge of their duties without interruption or hindrance by the unauthorized body which was sought to be constituted for that purpose because the committee disregarded the attempt to call off the primary.

It was urged in argument that the question here involved is purely a political one, and that the courts should not take jurisdiction of it. My answer is that the court of appeals has a contrary opinion, and in *Eagan v. Gerwe*, *Brown v. Republican County Committee*, and *Young v. Beckham* has held that it had jurisdiction to enforce individual and legal rights. If it were a controversy between the old committee and the members claiming to be, under the appointment of the chairman, as to which was the regular committee, and no other rights were dependent upon the controversy, then it would be a purely political question, to settle which the courts would not take jurisdiction. When elections were conducted under the *viva voce* system, or by ballots furnished the electors by the candidates or their friends, no such question as is involved could arise. Since the adoption of the official ballot system by the Constitutional Convention, since the legislative branch of the state government provided for the regulation of primary elections by law, questions involving the legal rights of individuals will arise for the determination of the courts. The necessity for such adjudications has been placed upon the courts by the changes which have been made

by the organic and statutory law of the state. However much the courts desired to do so, they could not avoid the responsibility of deciding such questions, even if perchance some one should fail to discriminate between political rights and those legal rights which arise under the law, and declare the court was adjudicating purely political questions. The Democratic committee of Jefferson county and the city of Louisville, being officers in virtue of the primary election law, were entitled to conduct the primary election, and to ascertain and certify the result of it without any interference or hindrance of the defendants. To protect them in the exercise of this right, injunction was the proper remedy. *Poyntz v. Shackelford*, 107 Ky. 555, 54 S. W. 855.

The motion to dissolve the injunction is overruled.

I invited the whole court to sit with me on the hearing of the motion, which it did. A majority of the court concurs with me in this opinion.

CAROTHERS v. HOLLOMAN.

(Court of Civil Appeals of Texas. June 25, 1903.)

JUSTICE OF THE PEACE—FINAL JUDGMENT—DETERMINATION OF CROSS-ACTION—APPEAL.

1. Where an appeal was taken to the county court from a justice's judgment which was not final, the Court of Civil Appeals, on a further appeal from the county court, will take notice of the county court's want of jurisdiction, and reverse its judgment, though no objection for want of jurisdiction was made in the county court.

2. Where, in an action for rent before a justice of the peace, the tenant filed a cross-action for damages for breach of contract, a judgment of the justice sustaining defendant's demurrer to the evidence and rendering judgment for the defendant for costs, without making any determination of the cross-action, was not a final judgment sufficient to support an appeal to the county court.

Error from Calhoun County Court; M. S. Mahon, Judge.

Action by W. F. Holloman against J. O. Carothers. From a judgment in favor of plaintiff on appeal from a justice's judgment in favor of defendant, defendant brings error. Reversed.

Dabney & Lockett, for plaintiff in error.

GARRETT, C. J. Holloman brought suit in a justice's court against Carothers on a claim for \$115 rent, and took out a distress warrant, which was levied on cotton and corn grown on the rented premises. The defendant replevied the property, and filed a cross-action for damages for \$150 for a breach of the contract. The result of the trial in the justice's court is shown by the following entry upon the docket of the justice of the peace: "On this the 17th day of

November, 1902, came on to be heard this cause, when both plaintiff and defendant appeared in person and by attorneys, and announced ready for trial, a jury having been waived in said cause, when defendant entered a demurrer to said evidence, which said demurrer was sustained by the court, and judgment entered in favor of defendant for all costs in this behalf expended; for which execution may issue." The plaintiff appealed to the county court, and a trial there resulted in favor of the plaintiff against the defendant for the sum of \$84.68, from which the defendant has come to this court by writ of error, and asks that the judgment of the court be reversed and the cause dismissed, because there was no final judgment in the justice's court from which an appeal could be had to the county court.

If there was no final judgment in the justice's court, the appeal to the county court was a nullity, and the county court did not acquire jurisdiction of the cause, and this court will take notice of the want of jurisdiction without the necessity of objection in the county court. *Hancock v. Metz*, 7 Tex. 177; 13 Am. & Eng. Ency. Law, 26. The judgment of the justice's court sustained the demurrer to the evidence, and adjudged the costs in favor of the defendant. This would probably have been a good final judgment disposing of the plaintiff's cause of action but for the plea in reconvention. The judgment did not dispose of the cross-action except that in general terms it adjudged the costs to the defendant. It has been held that a judgment is not final which does not dispose of a cross-action or plea in reconvention. *Am. Road-Machine Co. v. City of Crockett* (Tex. Civ. App.) 49 S. W. 251; *Clopton v. Herring* (Tex. Civ. App.) 26 S. W. 1104; *Tex. & Pac. Ry. Co. v. Ft. Worth Street Ry. Co.*, 75 Tex. 83, 12 S. W. 977.

The judgment of the court below is reversed, and the cause will be remanded to the county court of Calhoun county, with instructions to dismiss the appeal. Reversed and remanded.

TEXAS & N. O. R. CO. v. PULLEN.

(Court of Civil Appeals of Texas. June 26, 1903.)

JURY—SPECIAL VENIRE—COMPELLING SELECTION FROM—POWER OF COURT—CHALLENGES.

1. It was error for the court, after defendant had at the proper time demanded a jury and deposited the fee therefor as required by law, to, without defendant's consent or knowledge, discharge the regular jury for the term, and when the case was called for trial, two days later, require defendant to take a jury from a venire selected by the sheriff under the direction of the court, or else waive its right to a jury trial; none of the contingencies mentioned in Rev. St. 1895, art. 3150, having occurred.

2. Rev. St. 1895, art. 3202, which only recognizes as a ground for challenge to the array of jurors that the officer summoning the same acted corruptly and summoned jurors

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 1172.

known to be prejudiced, does not restrict the right of a litigant to question the power of the court to order a venire to be summoned by the sheriff, and to substitute such venire for one regularly drawn by the jury commissioners, and which has been duly sworn and impaneled.

Appeal from District Court, Cherokee County; Tom C. Davis, Judge.

Action by W. B. Pullen against the Texas & New Orleans Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

Baker, Botta, Baker & Lovett and Willson, Box & Watkins, for appellant. Campbell & McMeans and Guinn, Norman & Guinn, for appellee.

PLEASANTS, J. This suit was brought by appellee to recover damages for injury to his property alleged to have been caused by the construction and operation by appellant of its railroad over and along its right of way and across Bolton street, in the town of Jacksonville, in Cherokee county; said right of way and street being adjacent to appellee's property. By agreement of the parties, and with the consent of the judge, the case was set for trial in the court below on Thursday of the second week of the term of court. For this week of the term a venire had been regularly drawn by jury commissioners, and on Monday of said week appeared and were sworn and impaneled as the regular venire for said week. Appellant had at the proper time demanded a jury and deposited the fee therefor as required by law. On Tuesday of said week, without the consent or knowledge of appellant, the court discharged said jury for the term, and, when this case was called for trial on Thursday, required the appellant to take a jury from a venire selected by the sheriff under the direction of the court, or else waive its right to a trial by jury. The appellant objected to this action of the court, moved to quash the venire summoned by the sheriff, and, said motion having been overruled, tendered a proper bill of exceptions to said proceedings, which was allowed and signed by the trial judge.

One of the objects sought to be attained by our statutes directing the manner in which juries shall be selected is to secure jurors who are free from local prejudice and influence; and, as conducive to this result, the statutes provide that jurors shall be selected by jury commissioners appointed by the court, and taken from different portions of the county, and that the commissioners thus appointed shall select citizens of different portions of the county to serve as jurors. From the very nature of things, this result cannot be so easily obtained when the selection of jurors is left to the sheriff or other officer appointed by the court. The time usually allowed such officer to select and summon a venire is not sufficient to enable him to select them from different portions

of the county. In addition to this, he has not the means and opportunity of ascertaining the persons best qualified to serve as jurors that are afforded jury commissioners appointed under the provisions of the jury law. The right thus conferred upon litigants to have their cases tried by juries selected in the manner directed by law is a substantial, valuable right, of which they cannot be arbitrarily deprived. The statute does not wholly deprive courts of the power to cause jurors to be selected and summoned by its officers, but, recognizing the evils which result from the selection of juries in this way, it provides for their selection by jury commissioners, and only authorizes courts to have juries selected otherwise than by commissioners appointed for that purpose when from any cause such commissioners have not been appointed at the time prescribed by law, or have failed to select jurors as required, or the panels selected have been set aside, or the list of jurors so selected has been lost or destroyed. Rev. St. 1895, art. 3150. None of the contingencies mentioned in this statute having occurred, we think the court below had no power to force the appellant to try its case before a jury not selected in the manner prescribed by the statute.

Appellee contends that appellant's motion to quash the venire summoned by the sheriff was properly overruled, because the only ground recognized in the statute for a challenge to the array of jurors is that the officer summoning same acted corruptly, and willfully summoned jurors known to be prejudiced, and the motion to quash made by appellant was not based on this ground. Rev. St. 1895, art. 3202. This article of the statute only applies to venires which have been summoned by the sheriff under a valid order of the court, and does not restrict the right of the litigant to question the power of the court to order a venire to be summoned by the sheriff, and to substitute such venire for one regularly drawn by jury commissioners, and which had been duly sworn and impaneled. Except in the contingencies mentioned in article 3150, or when the parties to a suit have knowingly agreed to set their case for trial at a day of the term when no regular venire drawn by jury commissioners is present, and have thus waived their right to a trial by such venire, such right cannot be disregarded by the courts.

In his qualification of the bill of exceptions, the trial court states as his reason for the discharge of the regular venire that the business of the court did not require the attendance of said venire on Tuesday and Wednesday, and, this case being set for Thursday, he did not desire to keep the jury in attendance during the two days in which their services were not needed. We think it clear that, upon the facts shown in the bill of exceptions, the action of the court in forcing appellant to a trial by a jury selected

by the sheriff was unauthorized, and requires a reversal of the judgment.

The question presented in the second, third, and fourth assignments of error has been determined adversely to appellant's contention in the case of *Railroad Co. v. Eddings*, 70 S. W. 98, decided by this court. In accordance with the doctrine announced in that case, none of these assignments can be sustained. The remaining assignments will not be considered, as they raise only the question of excessiveness in the verdict; and, in view of another trial of the case, it is not proper for us to discuss or pass on the evidence upon this issue.

For the error of the court in depriving appellant of the right to a trial by a jury selected in the manner prescribed by law, the judgment is reversed and the cause remanded. Reversed and remanded.

BISHOP v. GULF, COLORADO & S. F. RY. CO.

(Court of Civil Appeals of Texas. June 19, 1903.)

RAILROADS—FENCES—INJURY TO TRAVELER—LIABILITY—PLEADING.

1. In an action against a railroad for injuries sustained by plaintiff owing to his having accidentally ridden into a barbed-wire fence erected by defendant, an averment in the petition that it was built within 50 feet of defendant's track warranted an inference that it inclosed the right of way.

2. The construction of a barbed-wire fence by a railroad on its own land near a road was not unlawful, and hence it was not liable for injuries sustained by one accidentally riding into it.

3. A railroad which has erected a barbed-wire fence on its right of way is not required to clear underbrush, etc., from along the line of the fence, in order that it may be readily seen by travelers on an adjacent highway.

4. Where the course of a road has been changed so that the old road at the point of divergence leads within a railroad's right of way, and there is a fence erected by the railroad on its right of way between the two roads, the railroad is not liable to one injured by following the old road and accidentally riding into the fence, on the theory that it should have erected a barrier to prevent access to the right of way.

5. In an action against a railroad for injuries sustained by traveler on a road owing to his having ridden into a barbed-wire fence, an allegation of the petition that the land had been for a long time uninclosed, and entered by the public generally, showed no prescriptive right of way in the public.

Appeal from District Court, Montgomery County; L. B. Hightower, Judge.

Action by W. H. Bishop against the Gulf, Colorado & Santa Fé Railway Company. From a judgment for defendant sustaining a demurrer to the petition, plaintiff appeals. Affirmed.

C. M. McKinnon and J. Llewellyn, for appellant. F. J. & R. C. Duff and J. W. Terry, for appellee.

GARRETT, C. J. This action was brought by W. H. Bishop against the Gulf, Colorado

& Santa Fé Railway Company to recover damages for personal injuries received by the plaintiff from coming in contact with a barbed-wire fence constructed by the defendant along its right of way. When the cause came up for trial, a general demurrer to the petition was sustained by the court, and judgment was rendered in favor of the defendant.

The fence was alleged to be five yards south of and parallel with the public road running from near the San Jacinto river to Campbell's Mill, and to have come to an abrupt end near the mill in a thicket of trees and underbrush, which obscured it from the view of persons traveling alongside thereof; that it crossed and changed the public road so that the road branched off from the direction it had formerly run at a point 25 yards from the end of the fence, and ran alongside of, parallel to, and south of, and five yards distant therefrom. It was shown that near the other end towards the river the fence was built across the road, and connected with a cattle guard; that the public road south of the fence was new and indistinct, and the old road north of the fence was plain and distinct; that while plaintiff was riding with a companion from the direction of Campbell's Mill going east, he, being unacquainted with the roads, by mistake followed the old road, and passed the end of the fence to the north thereof, when he observed the companion with whom he was traveling in another road, and, turning sharply to the right, endeavored to join him, but rode against the fence in the underbrush, which, by the use of reasonable care, he could not discover, and was injured. It was alleged that the defendant negligently failed to mark the change of location of the road by the use of brush or otherwise, or to clear the undergrowth away from the fence so that it could be seen, or to erect the fence with a plank so that it could be seen by persons approaching; that the land upon which the fence was built had been for a long time prior to the time of the injury open and uninclosed, and frequently entered upon by the public generally, which fact, together with use of part of the same as a public road, was known to the defendant, its servants and agents. The fence was not built upon the public road. The petition alleges that it was built along, and five yards south of, the public road. There is an averment in the petition that the fence was built within 50 feet of the defendant's railroad track, from which it may be inferred that the fence complained of inclosed the defendant's right of way. There is no averment that the road followed by the plaintiff when he went to the north of the fence inside the right of way was ever the public road, or that, if it ever was, that it had not been changed. The construction of the fence was not unlawful. *Worthington v. Wade*, 82 Tex. 28, 17 S. W. 520; *Galveston Land Co. v. Levy* (Tex. Civ.

App.) 80 S. W. 504. The fence was on the defendant's own land, and it was not required to clear the line so that the fence could readily be discovered. Nor was the defendant required to erect a brush or other barrier to prevent the plaintiff and others from going inside the right of way. It could not anticipate that the plaintiff, when he discovered that he was off the road, would ride into the fence and be injured. No prescriptive right of way is shown by the averment as to the use of the road by the public, even if the plaintiff had been going along the road when injured. *Cunningham v. San Saba Co.* (Tex. Civ. App.) 20 S. W. 941. No cause of action was alleged, and the judgment will be affirmed.

Affirmed.

FIRST NAT. BANK OF FLATONIA v. VALENTA et al.

(Court of Civil Appeals of Texas. June 18, 1903.)

VENUE—JOINDER OF CAUSES OF ACTION—INDIVIDUAL AND FIDUCIARY CAPACITY.

1. When there are distinct causes of action of such a nature that they may be joined in the same suit, venue as to one of them will confer venue as to the other.

2. The payee of notes given by a firm, and secured by liens on the firm property and by certain stock belonging to one of the partners, after the death of the latter partner sued the surviving partner and the widow of the deceased partner to foreclose the liens, and sought to subject to payment of the claim the proceeds of policies on the life of the deceased partner collected by his widow, which policies, it was alleged, had been secured with moneys belonging to the firm, on the understanding between the partners that they should stand as security for the debts in question. The surviving partner joined in a cross-bill asking the same relief as to the policies. *Held*, that the action against the widow of the surviving partner to recover the insurance could not be joined in the suit to foreclose the liens.

Appeal from District Court, Fayette County; L. W. Moore, Judge.

Action by the First National Bank of Flatonia against Caroline Valenta and another. From a judgment sustaining Caroline Valenta's plea of privilege, and dismissing so much of plaintiff's cause of action and the cross-bill of defendant Kubiana as sought recovery from Caroline Valenta, plaintiff appeals. Affirmed.

Brown, Lane & Garwood, for appellant. Robson & Duncan, for appellees.

GARRETT, C. J. This was an action of debt and foreclosure, as well as to subject to plaintiff's demand the proceeds of certain life insurance policies. It was brought in the district court of Fayette county by the First National Bank of Flatonia against Albert Kubiana, who was alleged to be a resident of Fayette county, and Caroline Valenta, who was alleged to be a resident of the county of Lavaca. The petition alleged that on

or about May 6, 1899, the defendant Albert Kubiana and John Valenta, then deceased, formed a copartnership under the firm name of J. Valenta & Co. for the purpose of conducting a cotton seed oil mill business at Flatonia, a town in Fayette county, and that the said John Valenta died about June 1, 1902, and left the said Caroline Valenta as his surviving wife; that during the continuance of such partnership the said firm of J. Valenta & Co. made, executed, and delivered to plaintiff several notes, described in its petition, for the aggregate sum of \$34,281.70, principal and interest. Said petition alleges that plaintiff holds and owns liens on certain property of J. Valenta & Co., situated in Fayette county, Tex., given to secure the payment of said notes, and that J. Valenta deposited with and placed in possession of plaintiff at its office in Fayette county certain shares of stock of the Shiner Oil Mill Company, for the purpose of further securing the payment of said notes. Plaintiff prayed for judgment against A. Kubiana, as the sole survivor of the firm of J. Valenta & Co. for the sum found to be due on said notes, for judgment against both defendants, A. Kubiana and Caroline Valenta foreclosing its lien on the property of J. Valenta & Co. upon which it held liens, as aforesaid, for judgment against defendant Caroline Valenta foreclosing its lien on the shares of stock of the Shiner Oil Mill Company, placed with plaintiff by her deceased husband, J. Valenta, as aforesaid. The petition further alleged that on the 1st of January, 1900, J. Valenta & Co. and both the members of said firm were insolvent, and that the property owned by all of them was insufficient to pay plaintiff's debt, and that they remained in such insolvent condition up to the date of the death of the said J. Valenta, and that while in such insolvent condition, which said conditions were known to both J. Valenta and his wife, defendant Caroline Valenta, he, the said J. Valenta, took possession of large sums of money, the funds of the firm of J. Valenta & Co., with the understanding and agreement with A. Kubiana, his partner, that the same was to be used in the payment of premiums on certain insurance policies, which he was to cause to be issued upon his life for the use and benefit of the firm of J. Valenta & Co. in the payment of the debts due by said firm; that he did cause the three policies described in said petition to be issued on his life, and that he did pay the premiums due thereon out of the funds of said firm of J. Valenta & Co. so obtained by him as aforesaid, but, instead of causing said policies to be made payable to said firm, he, the said J. Valenta, acting with knowledge and advice of his wife, the defendant Caroline Valenta, for the purpose of diverting the funds so taken and used in paying the premiums on said policies, and the proceeds which would arise from said policies, from the assets of the firm of J. Valenta & Co., and to fraudulently make

them the property of the said Caroline Valenta, caused said policies to be made payable to the defendant Caroline Valenta; that the said Caroline Valenta collected the money due on said policies, and is claiming the same as her own property, and refuses to pay the same, or any portion thereof, over to J. Valenta & Co. or to plaintiff; that said money arising from the collection of said policies is and was the property of J. Valenta & Co.; and that since the death of the said J. Valenta the defendant A. Kubiana has assigned and transferred said proceeds to this plaintiff, it being the sole and only creditor of the firm of J. Valenta & Co. Plaintiff, in its petition, prays for judgment against the defendant Caroline Valenta for the proceeds of said policies, which it alleges was the property and funds of J. Valenta & Co., and which was transferred to it by the said A. Kubiana, to be applied as a payment on the debt due to it by J. Valenta & Co. On the 12th day of November, 1902, the defendant A. Kubiana filed his original answer in said cause, and confessed and asserted that the matters and things alleged in plaintiff's petition were in every way true, and prayed that the moneys collected by the defendant Caroline Valenta on said insurance policies be decreed to be partnership assets of the firm of J. Valenta & Co., and that the judgment in said cause be so framed that it will require that such assets be first collected and applied as a payment upon the debt due plaintiff by J. Valenta & Co., before the real property belonging to said firm should be sold to satisfy said judgment. On the 8th day of November, 1902, defendant Caroline Valenta filed her plea of personal privilege to be sued in the county of her residence, as to so much of plaintiff's cause as sought to recover a judgment against her individually. Both the plaintiff and the defendant Kubiana resisted the defendant Caroline Valenta's plea of privilege. When the cause was called for trial it was admitted that the defendant Caroline Valenta resided in Lavaca county, and had resided in said county continuously since 1896, and that she had not during said time resided in Fayette county. The court sustained the plea of privilege, and dismissed so much of the plaintiff's cause of action and the cross-bill of the defendant Kubiana as sought a recovery from the defendant Caroline Valenta of the money collected by her upon the insurance policies. Upon evidence the court rendered judgment in favor of plaintiff against both of the defendants upon the other issues.

In order to avoid a multiplicity of suits, causes of action in favor of the same plaintiff against the same defendant in the same capacity may be joined so as to confer venue, for a cause not otherwise suable in the county where the suit is brought, when one of such causes may be sued in that county. Thus it has been held that in a suit upon a note made payable in a county other than

the county of the defendant's residence there may be joined another note, not made payable in that county, or an open account, or other causes of action that may be joined with the cause that gives venue. *McKaughan v. Kellett-Chatham Mach. Co.* (Tex. Civ. App.) 67 S. W. 908; *Middlebrook v. Mfg. Co.*, 86 Tex. 706, 26 S. W. 935; *Townes on Texas Pleading*, 147 et seq. When there are two or more distinct causes of action, of such a nature as that they may be joined together in the same suit, venue as to one of them will confer venue as to the other causes. The right to sue Caroline Valenta in the district court of Fayette county for the recovery of the money collected on the insurance policies depends upon the right to join such cause of action with the cause of action for the foreclosure of the liens by which the notes of the plaintiff against the firm of J. Valenta & Co. were secured. Venue of the suit as to Caroline Valenta was obtained in the cause of action against her, in her capacity as the surviving wife of John Valenta, to foreclose the vendor's lien of the notes given by John Valenta and Albert Kubiana for the land and improvements conveyed to them by the plaintiff, and made payable at Flatonia, in Fayette county, and to foreclose the lien upon the Shiner Oilmill stock belonging to John Valenta, and attached as security to other notes executed to the plaintiff by J. Valenta & Co., also payable at Flatonia, in Fayette county. To these causes of action, in her capacity as the surviving wife of John Valenta, she was a proper party; and venue was conferred, as to her, both by the fact that the notes were payable in Fayette county, and that her codefendant, Kubiana, resided in said county. But with these causes of action against Albert Kubiana, for a personal judgment and foreclosure, and Caroline Valenta, as the surviving wife of John Valenta, to foreclose her interest as such in the property to which the liens attached, and not to obtain any personal judgment against her, the plaintiff and her codefendant, Kubiana, who turns against her and joins it, seek to join a personal action against Caroline Valenta for the conversion of the proceeds of certain insurance policies, which it was alleged were made payable to her in fraud of the rights of Albert Kubiana and of the plaintiff, as the sole creditor of the firm of J. Valenta & Co. A cause of action against a party in his individual capacity cannot be joined with one against him in a fiduciary capacity. *Thompson v. Bohannon*, 38 Tex. 241; *Townes on Tex. Pleading*, supra. It is sought to join with causes of action for debt and foreclosure of liens by a plaintiff against two parties, one of whom is sued in her capacity as surviving wife, and against whom no judgment is sought in her individual capacity, an action of tort by the plaintiff joined, by one of the defendants, who becomes plaintiff by a cross-bill, against the other defendant in her individual capacity.

for the alleged fraudulent conversion of the proceeds of insurance policies upon the life of the deceased husband of the remaining defendant. Such causes of action cannot be joined. From the allegations of the petition setting out the several causes of action, and the admitted facts as to the residence of the defendant Caroline Valenta, it appears that the district court of Fayette county did not have jurisdiction over her person in the cause sought to be set up against her individually for the recovery of the proceeds of the insurance policies, and the court did not err in sustaining the plea of privilege. It is not necessary to inquire whether under the facts alleged a cause of action was shown against Caroline Valenta for the recovery of the money.

The judgment of the court below will be affirmed. Affirmed.

COLYAR v. WHEELER et al.

(Supreme Court of Tennessee. July 24, 1903.)

HUSBAND AND WIFE—POST-NUPTIAL SETTLEMENT—ACTIVE TRUST—WIFE'S SEPARATE ESTATE—MORTGAGES—JOINDER BY TRUSTEE.

1. Where, by a post-nuptial settlement, a husband and wife conveyed to a trustee all of the wife's property, reciting that the purpose of the deed was that the trustee might hold the legal title for the wife's sole and separate use, with the absolute right of disposition as she might choose on consultation with said trustee, such conveyance created an active trust, and imposed on the trustee the duty of preserving the property for the wife's separate use during coverture.

2. Where a married woman's property was conveyed to a trustee to hold the legal title for her sole and separate use, with the absolute right of disposition as she might choose on consultation with said trustee, the provision requiring consultation was equivalent to a requirement of the consent of the trustee, to be evidenced by his signature to the conveyance, and hence mortgages executed by the wife and her husband without the trustee's consent, and in which he did not join, were void.

Appeal from Chancery Court, Wilson County; J. S. Gribble, Chancellor.

Suit by Sallie S. Colyar, by her next friend, against T. C. Wheeler and others, to set aside a conveyance of certain land. From a judgment in favor of defendants, affirmed by the Court of Chancery Appeals, complainant appeals. Reversed.

McClain & McClain, for appellant Colyar. N. G. Robertson and J. C. Sanders, for appellee Wheeler and others.

McALISTER, J. The validity of defendants' title to the real estate in controversy depends upon the character of the following post-nuptial settlement, namely:

"We, A. S. Colyar, Jr., and his wife, Sallie S. Scoby, both of the County of Wilson and State of Tennessee, in consideration of a marriage between them, celebrated on the 29th April, 1891, and in consideration of ante-nuptial agreement entered into verbally and

by correspondence, do now make and enter into this mutual contract, to wit:

"We appoint Daniel J. Burton, trustee for the said Sallie S. Colyar, and hereby convey to him in trust for the purposes of this deed, all of the following described property, none of which has been reduced to the possession of the said A. S. Colyar, Jr., to-wit:

"The said Sallie S. Colyar's (interest) in what is known as the home place in Wilson County, Tennessee, on which her mother lives, and on which she now resides, together with all the stock on the farm that belongs to the said Sallie S. Colyar; also any other personal property which she now has or may have in the future. The purpose and intent of this deed is that said property is invested in said trustee that he may hold the legal title for the sole and separate use, with the absolute right of disposition as she may choose upon consultation and getting advice from said trustee.

"[Signed]

Sallie S. Colyar.

"A. S. Colyar, Jr."

It appears from the record that at the date of her marriage with A. S. Colyar, Jr., Mrs. Colyar was the owner of two shares, or two-sixths, in remainder of a valuable tract of land in Wilson county, Tenn., containing about 175 acres, comprising her mother's homestead and dower interest in the lands of her deceased husband. The mother of Mrs. Colyar died since the latter's marriage with A. S. Colyar, Jr. It further appears that on the 11th of October, 1897, Mrs. Colyar and her husband, A. S. Colyar, Jr., executed to A. M. Colyar, now deceased, a mortgage, conveying her interest in such realty in Wilson county to secure a debt in favor of A. D. Marks for ——— dollars, and also an indebtedness due O. S. Briggs, amounting to \$65. It also appears that on the 20th October, 1897, Mrs. Colyar and her husband executed a second mortgage on her interests in said land to A. D. Marks, trustee, to secure two notes in favor of Hamilton Parks for \$250 each. A. D. Marks joined in this trust deed, waiving his prior lien secured in the trust deed of October 11, 1897. It is also shown that default was made in paying the notes for \$500 due Hamilton Parks, and thereupon the trustee, Marks, in conformity with the terms of the trust deed, advertised said property, and sold it at public vendue to the defendants T. C. Wheeler and N. G. Robertson. The trustee, Marks, executed to said purchasers a deed, which is duly recorded in the register's office of Wilson county. Complainant's position is that the mortgages and the deeds to Wheeler and Robertson were void, for the reason that the legal title to the property was in D. J. Burton, her trustee, under the post-nuptial settlement, and could not be conveyed without her consent, and that said trustee had at no time been consulted in respect of said trust deeds or other conveyances. It is stated in the opinion of the Court

of Chancery Appeals that this post-nuptial settlement was entered into the day after complainant's marriage, at the instance of the father of the husband, Col. A. S. Colyar, who told his daughter-in-law that his son would squander all her property unless the same was properly protected. It is obvious that the only duty imposed on the trustee is to hold and preserve the property for the sole and separate use of this married woman during coverture, and ordinarily this duty creates an active trust. Says Mr. Perry, in his work on Trusts, 310: "If an estate be given to trustees upon a trust for a married woman 'for her sole and separate use,' and 'her receipts alone to be sufficient discharge,' or if the trust be to 'permit and suffer a feme covert to receive the rents to her separate use,' the legal estate will vest in the trustees, and the statute will not execute it in the cestui que trust. * * * Any words that show an intent to create an estate or a trust for the sole and separate use of a married woman will have the same effect." In *Jourolmon v. Massengill*, 86 Tenn. 100, 5 S. W. 719, it was said, viz.: "That the trust would be voted by common consent, if the object of the trust was the protection of the estate of a married woman, or other person not sui juris. So it has been said that a trust in fee, created to protect the estate for a given time, and to preserve contingent remainders, is a special or active trust, not within the statute of uses, nor executed in the beneficiaries under the law as settled in this state." *Henderson v. Hill*, 9 Lea, 32. In the case of *P. J. O'Brien v. Mrs. Margaret O'Keefe* (MSS. opinion, Nashville, Dec. Term, 1901), in considering this subject it was said, viz.: "The court is of opinion that in the case of a married woman, when the conveyance is made to a trustee for her benefit, a necessary implication arises that it was the intention of the grantor to create a separate estate, and that the trustee should hold the estate for the benefit of the married woman; and this constitutes in itself an active trust, so as to prevent the operation of the statute." Again, in the same case it was said, viz.: "It is true the interposition of a trustee is not absolutely necessary under our authorities to create a separate estate in a married woman, but it is a proper method of doing so, and, when a trustee is thus interposed and provided by the conveyance, it is an indication that it was the intention of the grantor in that way and by that means to preserve the estate, and that in the case of a conveyance for the benefit of a married woman this imposes an active duty upon the trustee, and makes an active trust outside of the statute." Conceding, then, that an active trust was created by the conveyance of the title to Mrs. Colyar's property to a trustee for her sole and separate use, how is this language affected by the provision granting to Mrs. Colyar "the absolute right of disposition as she may choose upon consultation

and getting advice from said trustee"? The Court of Chancery Appeals was of opinion that this last clause, giving to Mrs. Colyar the absolute right of disposition, destroyed the trust, and that the words "upon consultation and getting advice from the trustee" were merely directory. The argument is that the trustee is not required to join in a conveyance by the wife, and hence, after consultation and advice with the trustee, she may convey independent of the trustee's concurrence or signature.

It is argued that when Mrs. Colyar exercises the right of disposition the trust is ended. The trustee has no power except to counsel and advise. In the case of *Deadrick v. Armour*, 10 Humph. 588, it appeared that an antenuptial settlement was made, in which the prospective wife conveyed to a trustee, to her sole and separate use, all her property, real and personal, with the right to sell, use, and dispose of any or all of the aforesaid property, or her interest therein, as she may think fit, "by and with the consent of the trustee." The settlement then provided for the disposition of certain remainders, but it was contended that the remainders were void because the wife was given absolute disposition of the property, which would be inconsistent with the idea of a gift in remainder. The court said: "Where the consent of any person is required, it is evident the principal object is to protect the person to whom the power is given from a hasty and unadvised disposition of the property; and, where trustees have a discretionary power to consent or not, a court of equity has no power to control or enforce them. Now," continued the court, "in the deed before us it is very evident it was the intention that Eliza G. should have the sole and separate use of the property as against her intended husband, and, by and with the consent of the trustee, power is given to sell and dispose of the property or her interest therein as she might think fit. The intention was to secure said Eliza by deed, whilst she had the power to make a deed, against the power and influence of her husband, and to interpose for her protection the sound discretion and prudence of a trustee to be exercised against any rash or ill-advised disposition of her property. The reason, of course, for this rule is that it is necessary to the valid execution of a power that the mode of circumstances prescribed in the deed or will shall be strictly pursued, and therefore, if it be required to be executed by writing, a parol disposition will be invalid; if by deed, a disposition by will is invalid; if by the consent of particular persons, a disposition without such consent is void." 2 Sugden on Powers, 334-341; *Pooley v. Webb*, 3 Cold. 599.

The question, then, for our determination is whether Mrs. Colyar, by virtue of the post-nuptial settlement, has an absolute or a restricted and qualified power of disposition

of the property. The language is that the trustee may hold the legal title for the sole and separate use, with the absolute right of disposition as she may choose, upon "consultation and getting advice from the trustee." We are of opinion there can be no exercise of this power of disposition unless it appears that the conveyance was made upon consultation with and advice of the trustee. In our opinion, these words are equivalent to "consent of the trustee," and his consent must be attested by his signature to the instrument. These trusts are created for the protection of married women, who are incapable of protecting themselves against the domination and improvidence of their husbands. The words of the trust will be strictly construed, and given such meaning as will accomplish the purpose for which it was created. The construction given this instrument by the chancellor and Court of Chancery Appeals destroys its entire efficacy, and renders it nugatory.

We are of opinion both courts were in error. Their decrees will be reversed, the demurrers overruled, and the cause remanded.

SCOTT v. WILSON et al.

(Supreme Court of Tennessee. July 24, 1903.)

BASTARDS—LEGITIMATION—PROPERTY OF BASTARD—INHERITANCE.

1. An illegitimate child, legitimated by decree of the county court on application of its natural father, as authorized by Acts 1805, c. 2, is capable of inheriting realty as an heir, and receiving personality as next of kin, both lineally and collaterally, in the same manner as if born in lawful wedlock.

2. Shannon's Code, § 4166, provides that when an illegitimate child dies intestate, without child or children, husband or wife, his real and personal estate shall go to his mother. Held that, where an illegitimate child was legitimated by his father on an application to the county court, such proceedings did not change his relation to his mother, and hence on his death intestate, without child or children, husband or wife, property inherited by him from his father descended to his mother, and not to the heirs at law of his father.

Appeal from Chancery Court, Coffee County; Walter S. Bearden, Chancellor.

Action by John Scott against Blanch Wilson and others. From a judgment overruling demurrers to the complaint, affirmed by the Court of Chancery Appeals, defendants appeal. Reversed.

J. L. Ewell and B. P. Bashaw, for appellants Wilson and others. R. M. Vannoy, for appellant guardian ad litem. R. W. Green and J. E. Willis, for appellee.

McALISTER, J. This record presents a question in respect of the right of inheritance from a bastard who had been duly legitimated. The bill alleges that complainant, John Scott, is the brother of one Andrew J. Scott, who died in Coffee county, Tenn., in

August, 1900, unmarried and intestate. He left an estate comprising 240 acres of land and some personality, altogether estimated to be worth \$5,000. The decedent left surviving him one child, Andrew Edwin Scott, born out of lawful wedlock, but duly legitimated by the Coffee county court at its April term, 1888. This legitimated son went into possession of his father's estate, and became the absolute owner thereof. Andrew Edwin Scott died in 1901, when about 14 years of age, unmarried and intestate, but leaving three half-brothers, Arthur Bywater, Allen Jordan, and Frank Wilson, sons of his mother, who had been three times married. It is alleged that Andrew Edwin Scott was begotten by Andrew J. Scott upon the body of the widow Bywater. Her second husband was one John B. Jordan; and her third, one Frank Wilson. Mrs. Blanch Wilson and her husband Frank Wilson were made parties defendant to this bill. The present bill was filed by John Scott, in his own behalf and in behalf of the other brothers and sisters of Andrew J. Scott, deceased, against Blanch Wilson and her three legitimate children, Arthur Bywater, Allen Jordan, and Frank Wilson, for the purpose of asserting title to the estate of Andrew Edwin Scott, deceased. A demurrer on behalf of Blanch Wilson and husband was interposed to the bill, assigning for cause, viz.: (1) That Andrew Edwin Scott was the illegitimate son of the defendant Blanch E. Wilson. (2) That he was the owner of the property described in the bill. (3) That he died intestate, unmarried, and without issue. It follows, under the laws of Tennessee, that his mother, Blanch Wilson, inherits his estate, both personal and real, and that the complainant and his brothers and sisters have no interest therein. The guardian ad litem for the three legitimate sons of Mrs. Blanch Wilson also demurred, assigning the following causes, to wit: (1) That Andrew Edwin Scott was the owner of the land described in the bill. (2) That he died intestate, without wife or child. (3) That he had been legitimated. (4) That he left no brothers nor sisters of the whole or half blood of the paternal line. It therefore follows, under the laws of Tennessee, that the half-brothers inherit his realty, and that they, with their mother, said Blanch Wilson, inherit jointly the personal estate, and that the complainant, John Scott, and his brothers and sisters named in the bill, have no interest in the estate of Andrew Edwin Scott—neither in the real nor personal property, etc. The Court of Chancery Appeals affirmed the decree of the chancellor in overruling the demurrer, virtually holding that the brothers and sisters of Andrew J. Scott, the father of Andrew Edwin Scott, were entitled to the property.

The demurrants appealed to this court, and the question for our decision, upon the facts stated in the bill, is, who are entitled to the estate of Andrew Edwin Scott? The

¶ 1. See Bastards, vol. 6, Cent. Dig. § 284.

contention is that neither the mother, Blanch Wilson, nor her legitimate children, are entitled to any part of the estate, because the said Andrew Edwin Scott was legitimated by his father, Andrew J. Scott, and that complainants are his next of kin.

The first question for determination is, what was the status of Andrew Edwin Scott at his death, with respect to legitimacy? It is conceded that in 1888 the said bastard, upon the petition of his putative father, Andrew J. Scott, was legitimated by the county court of Coffee county. The statute provides that the effect of the legitimation is to create the relation of parent and child between the petitioner and the person legitimated, as if the latter had been born to the former in lawful wedlock. It is the settled law that illegitimate children, legitimated as provided by statute, are capable of inheriting realty as heirs, and of receiving personalty as next of kin, both lineally and collaterally, in the same manner as if they had been born in lawful wedlock. The legitimation removes the taint of bastardy, and gives such children the same inheritable blood as if they had been born legitimately. *Swanson v. Swanson*, 2 Swan, 446; *McKamie v. Baskerville*, 86 Tenn. 459, 7 S. W. 194.

But the question remains, how is the estate of a legitimated bastard transmitted? Section 4166, Shannon's Code, provides, viz.: "When an illegitimate child dies intestate without child or children, husband or wife, his real and personal estate shall go to his mother, and if there be no mother living, then equally to his brothers and sisters by his mother, or the descendants of such." Acts 1851-52, c. 39. The Court of Chancery Appeals was of opinion that this statute was rendered nugatory by the decree of legitimation. Said that court, viz.: "By virtue of the decree, he (Edwin Scott) ceased to be a bastard, and became a legitimate child of Andrew J. Scott, and is therefore not an illegitimate child. He cannot be half legitimate and half illegitimate, under the law, but becomes by the decree legitimating him a full-fledged legitimate child of Andrew J. Scott; and to this extent the legal status existing between him and his mother and half-brothers has been wiped out or cured by statute, and in a legal sense he becomes a stranger to them, so far as inheritable blood from him is concerned. He could inherit from the brothers and sisters of his father. Why not they from him?" It was upon this line of reasoning that the Court of Chancery Appeals held that the brothers and sisters of the putative father of the illegitimate took the property to the exclusion of the natural mother. We think the Court of Chancery Appeals was in error in its decree. The status of this illegitimate son towards his mother was not changed or in any way affected by the legitimation proceedings in the county court. The statute expressly declares that the effect of the legitimation is to create

the relation of parent and child between the petitioner and the person legitimated, as if the latter had been born to the former in lawful wedlock. Shannon's Code, § 5408. The mother was not a party to the proceeding and hence as to her the child was not legitimated, as if the latter had been born to the former in lawful wedlock. It is very clear that the statute does not create this relation, except between the petitioner and the person legitimated. We think the primary object of this statute was to benefit the child, and to enable him to inherit, and not to change the statute so as to prevent the operation of the statute giving his estate to his mother. As illustrating the idea that the decree of legitimacy does not change the status of the legitimated child to his mother, several cases in our Reports are in point. In the case of *Lawson v. Scott*, 1 Yerg. 92, it was held by this court that the county court, in a decree legitimating a child, had no power to decree the custody of the child to the legitimating father against the consent of the mother. Judge Catron used this language: "The reputed father of an illegitimate child, who has legitimated it by virtue of the Acts of 1805, c. 2, is not, in consequence thereof, entitled to its custody. The county court has no power to put such child in his custody or to bind it out contrary to the wishes of the mother, unless the child is a pauper." *McCormick v. Cantrell*, 7 Yerg. 615. The effect of the construction of the legitimation statute contended for by complainant's counsel not only compels the return of the putative father's estate to his brothers and sisters, but transmits to the relatives of the legitimating parent all of the legitimated son's property acquired by his own efforts, as well as that derived from his mother or from other sources. It also prevents the legitimated bastard from inheriting from his own mother. If this construction of the statute is correct, then a father has it in his power, by legitimating his natural offspring, to make himself and his relatives heirs of the legitimated bastard, and to defeat a statute enacted for the exclusive benefit of the mother and her children. The rule is that such statutes conferring inheritable blood upon illegimates must be strictly construed, and "are to be confined to their proper purpose, namely, the legitimation of the bastard so far as to render him capable of inheriting." We are therefore of opinion that the mother's right to inherit the real and personal estate of an illegitimate child is not at all affected by the legitimation of the child upon the petition of the putative father, but that as to his mother he is still an illegitimate, and her right to inherit his estate is absolute. Shannon's Code, § 4166.

The decrees of the chancellor and Court of Chancery Appeals are reversed, the demurrer of Mrs. Blanch Wilson is sustained, the demurrer of the guardian ad litem is overruled, and the bill is dismissed.

BOWERMAN v. POPE et al.

(Court of Civil Appeals of Texas. Jan. 26, 1901.)

SCHOOL LANDS—REAPPRAISEMENT—EVIDENCE.

1. Evidence in a suit for land which each party claimed by purchase from the state as school land held sufficient to go to the jury on the question whether it had not been reappraised, and was on the market at the time of the second award by the commissioner to plaintiff, which was prior to defendant's application.

On rehearing. Denied.

For former report, see 61 S. W. 330.

CONNOR, C. J. We think appellees have misconstrued our original opinion. We did not find as a fact that the east one-half of section 100 had been reclassified and placed on the market after its original classification and appraisal in 1887, or that appellant acquired title by virtue of his application of date September 3, 1897. We merely adverted to circumstances shown by the record tending to this conclusion, which, in our judgment, rendered it improper for the court to take the case from the jury. We supposed, also, this case easily distinguishable from the cases of Willoughby v. Townsend, 93 Tex. 80, 53 S. W. 581, and Coates v. Bush, 23 Tex. Civ. App. 139, 56 S. W. 617. In the Townsend Case it affirmatively appeared that there had been a former sale and a judicial forfeiture. The former sale had the effect of withdrawing the land from the market, and the court, construing sections 2, 6, and 9 of the act of 1895 (Laws 1895, pp. 63-65), held that Townsend, who was the plaintiff in the action, showed no right of recovery by virtue of application—which had been rejected by the commissioner—made after the forfeiture, and before the land had been again put on the market in the manner directed in said section 6. The court, *inter alia*, said that section 2 empowered the commissioner to make such regulation as had been adopted in that case, and it hence followed that the act of the commissioner in rejecting the application under consideration was sustained. In the case of Coates v. Bush the point is not directly involved, for we there held that the evidence was sufficient to establish that the commissioner had reappraised the land and notified the clerk. In the case now before us, however, the land was duly appraised and classified in 1887, no former sale and forfeiture appearing; both parties hereto made application to purchase; the commissioner has twice awarded the land to appellant; his purchase has been treated as valid by the officers of the state, in the receipt of his obligations and payments of principal and interest; reappraisal at \$1 per acre appears on the books of the General Land Office, as stated in the original opinion; and hence, under the circumstances of the case, we were and are now unwilling to hold that, as a matter of law, the land

involved has not been reappraised, and was not on the market at the time of the second award to appellant. See *Scott v. Blackburn* (Tex. Civ. App.) 47 S. W. 480.

The motion for rehearing is overruled. Overruled.

EAGLE v. FRANKLIN.

(Supreme Court of Arkansas. July 15, 1903.)
PARTITION—DEFENSES—ADVERSE POSSESSION—PLEADING—ESTABLISHMENT OF TITLE AT LAW.

1. In an action for partition, plaintiff claimed that she and defendant were tenants in common, as heirs of their brother. The brother died, leaving his mother and plaintiff and defendant as his heirs at law. The mother took possession of the land, and afterwards conveyed it to defendant, who answered, alleging actual possession adverse to plaintiff under the deed from his mother. *Held*, that such adverse possession, if proved, constituted a defense to the action, and hence the answer was not demurrable.

2. Where, in partition, defendant proved possession adverse to plaintiff, the court, in its discretion, was entitled to retain the cause on its docket, and allow plaintiff time in which to establish her title by an action at law.

Bunn, C. J., dissenting.

Appeal from Circuit Court, Nevada County, in Chancery; Joel D. Conway, Chancellor.

Action by Barbara A. Franklin against John L. Eagle. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Barbara Franklin brought this action in the circuit court to obtain a decree for partition of certain lands described in the complaint, and which the complaint alleged were owned by the plaintiff and defendant as tenants in common. The answer of the defendant set up that he was in the actual possession of the land under claim of title to the whole tract. From the facts stated in the pleadings in the complaint, it appears that the land in question was purchased from the state by Julius Eagle, brother of the plaintiff and defendant. This brother afterwards died, leaving surviving him a mother and the parties to this suit as his heirs at law. The mother took possession of the land, and afterwards sold and conveyed it by warranty deed for valuable consideration to the defendant in this action. The defendant, in his answer, alleges that he is in actual possession of the land, holding it adversely under the deed from his mother, and that he is the sole owner of the land. The court sustained a demurrer to this answer, and gave judgment in favor of plaintiff, and defendant appealed.

C. C. Hamby, for appellant. Geo. R. Hanley, for appellee.

RIDDICK, J. (after stating the facts). To entitle one to have partition of lands, he must not only have title, but must have possession, either actual or constructive, of the

¶ 1. See *Partition*, vol. 38, Cent. Dig. §§ 53, 64.

lands which he asks to have partitioned. If there be no dispute about the title, the possession of one tenant in common will be deemed for the benefit of all his co-tenants; but, if the allegations of the answer in this case are true, the defendant is in the exclusive possession of the premises which plaintiff seeks to have partitioned, holding them adversely under color of title. The answer, therefore, if we follow our former decisions, sets up a good defense to the action of partition, and we are of the opinion that the court erred in sustaining a demurrer to it. *Ashley v. Little Rock*, 56 Ark. 391, 19 S. W. 1058; *Criscoe v. Hambrick*, 47 Ark. 235, 1 S. W. 150; *Moore v. Gordon*, 44 Ark. 334; *London v. Overby*, 40 Ark. 155. The adverse possession of the defendant, if proved, will defeat the action for partition, but the court may, if it sees proper to do so, retain the cause on its docket, and allow plaintiff time in which to establish her title by an action at law. *London v. Overby*, 40 Ark. 155.

Reversed and remanded, with an order to overrule the demurrer and for further proceedings.

BUNN, C. J. (dissenting). This is a bill in chancery to partition certain lands between the heirs at law of Julius A. Eagle, deceased, including a claim of \$150 rents, in the hands of one of them, who is in possession, to wit, the appellant, John L. Eagle. The complaint states that on or about the — day of —, 18—, one Jno. A. Eagle and one Barbara — were lawfully married, and that the fruits of this wedlock were five children, to wit, Julius A. Eagle, Don. M. Eagle, John L. Eagle, Joseph Eagle, and the plaintiff, Barbara A. Franklin, née Eagle; that the said Julius A. Eagle purchased from the state of Arkansas the northeast quarter of section 36, in township 11 south, of range 21 west, lying and being situate in Nevada county, Ark., and received his deed from the commissioner of state lands, dated 13th day of August, 1884. That the said Julius A. Eagle departed this life on the 26th day of August, 1890, without issue, unmarried, and intestate, the father, the said John A. Eagle, having previously departed this life, to wit, on the 26th day of October, 1886; that the lands, being a new acquisition by the said Julius A. Eagle, ascended to the mother, Barbara A. Eagle, to be held by her for and during her natural life, by the law of descent and distribution; that on the 17th day of September, 1898, the said Barbara A. Eagle, the mother, departed this life, leaving the parties hereto. D. M. Eagle, John L. Eagle, and Barbara A. Franklin, the only surviving heirs of the said Julius A. Eagle, the said Joseph Eagle having previously died without issue, unmarried, and intestate. The prayer of the petition was that a partition of said lands be made between these remaining heirs, and that John L. Eagle account for rents as aforesaid, he being in possession.

To the petition the said John L. Eagle made answer, setting up that he had purchased a title in fee from the mother, Barbara A. Eagle, to the land in question, in her lifetime, to wit, on the 21st day of June, 1895, and received his deed of that date from her accordingly. And he further alleged that he claimed under said deed, and not as an heir of his brother Julius A. Eagle, deceased. He also denied that the court trying the cause had jurisdiction thereof, or to partition said lands. But in his answer he fails to controvert the averment of the complaint that the mother, under whom he claimed, held under her deceased son by inheritance; and thus the statement of that fact was also admitted to be true, and the issue thus made was only a conclusion of law, to wit, whether the mother held an estate in fee, or only a life estate, for her deed to him carried no greater estate than she held. This was the sole question raised by the demurrer of plaintiff to defendant's answer—a question of law, of course, which could only be raised by the demurrer, or some other plea in the nature of a demurrer. "Neither presumption of law, nor matter of which judicial notice is taken, need be stated in a pleading." *Sand. & H. Dig. § 5751.*

Julius A. Eagle died on the 26th August, 1890, and the father died on 26th October, 1886, four years prior to the death of the son. Section 2479, *Sand. & H. Dig.*, reads: "In cases when the intestate shall die without descendants, if the estate came by the father, then it shall ascend to the father and his heirs; if by the mother, the estate or so much thereof as came by the mother, shall ascend to the mother, and her heirs; but if the estate be a new acquisition it shall ascend to the father for his lifetime, and then descend in remainder to the collateral kindred of the intestate in the manner provided in this act; and in default of a father, then to the mother for her lifetime; then to descend to the collateral heirs as before provided." This section was construed in *Kelly's Heirs et al. v. McGuire et al.*, 15 Ark. 555. The estate of Julius A. Eagle was a new acquisition. He died without issue, unmarried, and intestate. There was a default of a father living, the father having previously departed this life. The mother was living at the time of the death of Julius, and she inherited his lands, but only to the extent of a life estate therein. When the mother died, the fee descended to the surviving brothers and sister of Julius A. Eagle. The mother could only carry a life estate to the appellant, John L. Eagle. Taking the facts set up in the complaint as true, the mother held only an estate in her deceased son's land for and during her natural life, and on her death the same fell to the two surviving brothers and the one sister of the intestate.

The answer of the defendant John L. Eagle, failing to deny any of the facts alleged in the complaint, thereby admits them

to be true. He sets up no contradictory facts in support of his claim to be the owner in fee by reason of a deed in fee from his mother; that is, sets up no other facts in respect to the title of his mother than those contained in the complaint. He therefore makes no issue of fact with the plaintiff. He fails to comply with the statutory rule of pleading if he would controvert the statements of fact of the complaint. *Sand. & H. Dig. § 5722; also section 5761, Id.* It is true, he sets out in the beginning of his answer that he is the owner in fee. Whether that claim be true or false depends, of course, upon the facts set up or admitted in his answer. His claim is a mere conclusion of law upon the facts set up and admitted in the pleadings.

The plaintiff demurred to the answer. She could do nothing more, as there was no issue of fact. This demurrer directly raised the only question in the case—a legal question—whether, upon the facts thus appearing, the claim of the defendant to be the owner in fee, by reason of his deed from his mother, is sound and correct as a legal proposition. To settle such questions is purely and solely the object of a general demurrer. It is the same as if the demurrant would say to the defendant, "Granting that what you say as matter of fact in your answer is true, in connection with what you admit to be true in my complaint, by your failure and refusal to deny the facts therein contained I deny that your theory of the law, to the effect that you hold the fee, is true, and the court is called upon to decide this legal proposition." In this case the court did so, and held the demurrer of the plaintiff well taken. That it was correct in its holding does not and cannot admit of a doubt—not even in the mind of the defendant. If this be true, then the claim of the defendant that he holds adversely by reason of his claim under the fee-simple deed of his mother must also fall to the ground, for the land having reverted back to the estate of the deceased brother, and become the property of his surviving heirs, they all held as tenants in common; and whichever of them occupied the land after the death of the mother and the termination of her life estate did so not adversely, but as a tenant in common.

The effect of the decision of the majority of the court in the case is to dismiss the partition proceedings, and relegate the plaintiff back to the court of original jurisdiction to try title between plaintiff and defendant; and that can only be by a suit in ejectment, in which the plaintiff must allege and show that she is one of the three surviving heirs of the deceased brother, Julius A. Eagle—all estate less than the fee having passed out on the death of the mother—and that the defendant brother, John L. Eagle, is also one of the three, and is therefore a tenant in common with herself and the third one, and as such is in the actual occupancy of the

property involved. She cannot, therefore, say in her complaint that she has title superior to the defendant, nor the right of possession as against him, and cannot say, therefore, that he has possession without right. Being unable to make these essential allegations, she cannot institute an action of ejectment. Where else can she go for the enforcement of her rights (for there is no question of her rights), or for the redress of her wrongs, which it is equally sure she has or will suffer if this decree of dismissal is to prevail? The defendant has but to lie in ambush and interpose a general demurrer to any complaint she can present, upon the facts in the case, and it can but be sustained in ejectment. Thus it is that the plaintiff, who has a clear right of action, as all must concede, would be deprived of all remedy by reason of an undue latitude given to the rules of pleading, as I look at it. This being true, we are made to set at naught an important constitutional provision, to wit, section 13, art. 2, Const. 1874—a provision first found, I believe, in the Constitution of 1868.

I am of the opinion that the decree should be affirmed.

GEORGE B. LOVING CO. v. HESPERIAN CATTLE CO. et al.

(Supreme Court of Missouri, Division No. 2.
June 30, 1903.)

REAL ESTATE AGENT—COMMISSION—REVOCA- TION OF AUTHORITY—EVIDENCE —RATIFICATION.

1. Defendants engaged plaintiff to procure a purchaser for a ranch, and later wrote plaintiff that they had concluded to withdraw the ranch from sale for a while, and were thinking of making some changes, after which they would again offer it for sale and place it in plaintiff's hands, but that the price might be changed. Plaintiff replied acknowledging the letter, and there was some subsequent correspondence, in all of which defendant stated that the land was not on the market. *Held*, that plaintiff's agency was terminated by the first letter, withdrawing the ranch from sale.

2. Defendants had a right to revoke the agency.

3. An equitable estoppel is not available, unless pleaded.

4. Defendants employed plaintiff to procure a purchaser for a ranch, but subsequently revoked the agency, and in the course of subsequent correspondence continually insisted that the ranch was not for sale, and that, if defendants should subsequently sell the ranch, they would not recognize any claim for commissions which plaintiff might make. *Held*, that a subsequent sale of the land by defendants to a purchaser with whom plaintiff had negotiated without authority was not a ratification of that unauthorized act, so as to entitle plaintiff to commissions.

5. Defendant engaged plaintiff to procure a purchaser for land, but subsequently revoked the agency, and withdrew the land from sale, notwithstanding which plaintiff subsequently interviewed a purchaser, who afterwards bought the land from defendant. *Held*, in an action for commissions, that evidence of a conversation

¶ 2. See *Brokers*, vol. 3, Cent. Dig. §§ 11, 22.

between plaintiff and the purchaser, occurring subsequent to the revocation of plaintiff's authority, was inadmissible.

Appeal from Circuit Court, Jackson County; J. A. Slover, Judge.

Action by the George B. Loving Company against the Hesperian Cattle Company and others. From an order denying a motion to set aside a nonsuit, plaintiff appeals. Affirmed.

J. D. McCue, F. D. Mills, Geo. E. Miller, and A. L. Matlock, for appellant. Scarritt, Griffith & Jones, for respondents.

GANTT, P. J. This is an appeal from the circuit court of Jackson county, Mo. At the close of plaintiff's case, the defendants, by way of demurrer to the evidence, asked the court to instruct the jury that under the pleadings and evidence the plaintiff was not entitled to recover, and thereupon, and before the court had sustained said demurrer, plaintiff took a nonsuit, with leave to move to set the same aside, and afterwards, and within four days, moved the court to set aside said nonsuit; and, the court declining to do so, plaintiff appealed.

The pleadings, omitting caption, are as follows:

"Petition.

"The George B. Loving Company, plaintiff, complaining of the Hesperian Cattle Company, Phil E. Chappell, J. L. Smith, H. Clay Ewing, and G. H. Brandt, defendants, for its cause of action says: Plaintiff is a private corporation duly organized and existing under and by virtue of the laws of the state of Texas, and is, and at all times hereinafter mentioned was, engaged in business as a broker in the sale and purchase of ranches and cattle in the state of Texas, and has its principal office in the city of Ft. Worth, in said state. Defendant Hesperian Cattle Company is a corporation duly organized under the laws of the state of Missouri, and has its principal place of business in Jefferson City, Mo., and defendants Phil E. Chappell, J. L. Smith, H. Clay Ewing, and G. H. Brandt are the owners of the capital stock of said defendant corporation and comprise its board of directors, and defendant Phil E. Chappell is its president and active manager. Herefore, to wit, on and about the 1st day of December, 1897, defendant Hesperian Cattle Company owned and was in possession of a large ranch, consisting of about 90,000 acres of land in Cottle and Foard counties, in the state of Texas, together with the cattle therein, of all classes, consisting of about 8,000 head. In the month of December, 1897, said Hesperian Cattle Company, being desirous of selling its said ranch and cattle above mentioned, employed the plaintiff to find for said company defendant a purchaser for said properties, with the purpose and intent that such purchaser should negotiate directly with the defendant com-

pany, and said defendant company promised and agreed to pay the plaintiff the sum of \$5,000 for obtaining such purchaser, provided such negotiations resulted in a sale of said property. * * * Thereafter and before the month of September, 1898, plaintiff procured one W. Q. Richards, who was ready, willing, and able to purchase said properties of the defendant company on terms satisfactory to said defendants, and put said Richards in communication with the said defendant company, and afterwards in the month of November, 1898, said defendant company sold to said W. Q. Richards all of its said ranch and cattle at a price and on terms satisfactory to said defendant, and received the purchase price therefor, and thereby became liable and promised to pay to plaintiff the sum of \$5,000 at the time of said sale; and, though often requested, said defendant has heretofore failed and refused, and still fails and refuses, to pay the same or any part thereof. Immediately after the sale above mentioned, and the payment of the purchase price for said ranch and cattle, defendants Phil E. Chappell, J. L. Smith, H. Clay Ewing, and G. H. Brandt divided all of the assets of the Hesperian Cattle Company among themselves, and each of them received from said company, in said division of property, of value greater than \$5,000, and became severally liable for all the debts of said defendant company, and severally became liable to this plaintiff for the sum of \$5,000; and since said distribution said defendant company has abandoned its business.

"As a further cause of action, by way of second count, plaintiff says: [This count is a reiteration of the first, except the following allegations:] In the month of December, 1897, said defendant Hesperian Cattle Company, being desirous of selling its said ranch and cattle above mentioned, employed the plaintiff to find for defendant company a purchaser for said properties, with the purpose and intent that such purchaser should negotiate directly with the defendant company, and said defendant company promised and agreed to pay the plaintiff the usual and customary price for such services in the state of Texas, which plaintiff avers to be the sum of \$5,000, for obtaining such purchaser, providing such negotiation resulted in the sale of such properties. * * * Thereafter, and before the month of September, 1898, plaintiff procured one W. Q. Richards, who was ready, willing, and able to purchase said properties of the defendant company on terms satisfactory to said defendant, and put said Richards in communication with the defendant company, and afterwards in the month of November, 1898, said defendant company sold to said W. Q. Richards all of its said ranch and cattle at a price and on terms satisfactory to said defendant, and received the purchase price therefor, and thereby became liable and promised to pay to plaintiff the sum of \$5,

000 at the time of said sale; and, though often requested, said defendant has heretofore failed and refused, and still fails and refuses, to pay the same or any part thereof. * * *

"As a further cause of action, by way of third count, plaintiff says: [This count is a reiteration of the first and second, except the following allegations:] Plaintiff is a private corporation, duly organized and existing under and by virtue of the laws of the state of Texas, and is, and was at all times hereinafter mentioned, engaged in business as a broker in the sale and purchase of ranches in the state of Texas, and has its principal office in the city of Ft. Worth, Texas, and as a means of advancing the business of its patrons and clients publishes and distributes, and at all times hereinafter mentioned did publish and distribute, a weekly newspaper in which it advertised ranches and cattle placed with it for sale, and for which it was employed to find purchasers. * * * In the month of December, 1897, said defendant Hesperian Cattle Company, being desirous of selling its said ranch and cattle above mentioned, and knowing the business in which plaintiff was engaged, and plaintiff's methods and manner of transacting said business, and knowing that plaintiff published and distributed said weekly newspaper, and advertised therein all ranches and cattle placed with plaintiff for sale, or for which plaintiff was employed to procure a purchaser, employed plaintiff to advertise said properties for sale, and to find for defendant company a purchaser for said properties, with the purpose and intent that such purchaser should negotiate directly with the defendant company, and said defendant company promised and agreed to pay the plaintiff the usual and customary price for such services in the state of Texas, which plaintiff avers to be not less than the sum of \$5,000, for obtaining such purchaser, provided that such negotiations resulted in the sale of such properties. * * * Thereafter, and before the month of September, 1898, plaintiff, by means of the advertisements in its said newspaper, and by other means used by plaintiff to advance the interests of its clients and patrons, procured one W. Q. Richards, who was ready, willing, and able to purchase said properties of the defendant company on terms satisfactory to said defendant, and put said Richards in communication with the said defendant company, and afterwards, in the month of November, 1898, said defendant company sold to said W. Q. Richards all of its said ranch and cattle at a price and on terms satisfactory to said defendant, and received the purchase price therefor, and thereby became liable and promised to pay the plaintiff the sum of \$5,000 at time of said sale; and, though often requested, said defendant has heretofore failed and refused to, and still fails and refuses to, pay the same or any part thereof. * * *

"Wherefore plaintiff brings this suit, and prays that defendants each be cited to answer this petition, and that upon the trial hereof plaintiff have judgment against the defendants for the sum of \$5,000, with legal interest thereon from the month of November, 1898, to the present, and, duty bound, will ever pray," etc.

"Answer.

"Now come the defendants, and for their answer to plaintiff's petition in the above-entitled cause, deny each and every allegation in said petition contained.

"Wherefore defendants pray to be discharged, with judgment for their costs."

The following evidence will sufficiently indicate the nature of the questions presented in this court:

George B. Loving, called as a witness on the part of plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Miller: "Q. What is your name? A. George B. Loving. Q. Where do you reside? A. Ft. Worth, Texas. * * * Q. When did you next have any conversation with him [Mr. Ohappell] with reference to selling this property? A. I do not remember to have had any other conversation with him until the latter part of November, 1897, when I met him at my office, and we had quite a long talk about it then. * * * Q. Now state what conversation you had in your office that evening. A. Well, he told me that he still wanted to sell the ranch and cattle, and we had quite a discussion as to the outlook in the cattle business as to values, and he wanted my opinion as to what I thought I could sell the property for, and I gave him my ideas as to the value of the cattle and the land, and the result of the conversation was that he told me he was on his way to the ranch, and would return in about a week, and that he would go up and look the property over, and that on his return he hoped to make some arrangement with me to handle the property for him. About a week after that— * * * Q. Proceed. A. We talked the business over, and he wanted to know what I thought the property was worth—what I thought I could get for it; and I told him I thought I could sell the cattle for \$20 a head, and possibly the land for as much as \$1.50 an acre. Of course, I cannot give all of the conversation, because we talked for probably an hour. He gave me a very full description of what he had, and he said that those prices would be satisfactory to him, and that he was satisfied they would be to the other members of the company; but he would not say definitely about that until after he had come home and consulted them, and as soon as he came home he would write me. He did not—from his conversation—he did not expect me to sell the property— (Objected to as stating a conclusion.) Q. Just state what he said. A. Well, he wanted me to find a buyer

for the property, some one who wanted to buy property of that kind, and show it to them, and then send them to him for the arrangement of details. It was understood that there would have to be some terms given on it, part cash and part on time, and wanted to know about the commission, and I told him the commission at the regular rates would be more, but that I would make it a fixed commission of \$5,000. We talked about advertising the property. He thought it ought to be advertised, but he wanted it advertised in such a way that other people would not recognize that it was his ranch. I told him I would do that. He promised me that he would give me the exclusive agency for the sale of the property at Ft. Worth. He impressed that on me—that he didn't want to put it into the hands of a number of other agents, especially at Ft. Worth. That is about the substance of the conversation between us. * * * A. On December 6, 1897, he wrote me a letter from Kansas City. Q. Read that letter. A. The letter is as follows: 'Kansas City, Mo., Dec. 6th, 1897. George B. Loving, Esq., Ft. Worth, Texas—Dear Sir: Referring to the conversation I had with you recently, I wish to say that we will sell our ranch in Cottle and Foard counties at about the price we mentioned. We have about 68,000 acres of land, of which about 50,000 are patented lands. Of the remainder we own about 13,000 acres, bought from the state under the act of '83, but not paid for, and about 5,000 acres of leased lands. The leased lands are on the outskirts of the pasture, so that our lands are practically sold. There is not a 'nester' in the pasture, and no land for them to settle on. Our lands are in two pastures, as shown by a plat on this sheet—one of about 50,000 acres, and the other 20,000. They are all newly fenced, with cedar and bois d'arc posts and five wires. They are well watered with springs, creeks, and tanks. The grass is mostly mesquite, and we have good protection. In fact, it is one of the best cattle ranches of its size in Texas; for, as you know, we selected the land and bought it in 1882, when we had choice of the country. There are about 6,000 cattle in the pasture, and are, as near as I can determine, of the following ages and classes: 2,400 cows, none over eight years old; 800 two year old heifers, age in spring of '98; 800 two year old steers, age in spring of '98; 100 three year old steers, age in spring of '98; 900 one year old steers, age in spring of '98; 900 one year old steers, age in spring of '98; 150 Hereford bulls, young—6,050. Of course, this is simply an estimate, based on our branding in 1896 and 1897. We branded 1,800 calves each year, but in case of a sale we would count the cattle. I simply give you an outline of the property, and write you that you may know the property is for sale and to look out for a buyer. While I would not fix a

definite price now, there being no necessity for that until we find a prospective buyer, I believe our company would take about the price you told me you thought you could get for it, if you found parties that wanted to buy, viz., \$1.50 per acre for the land and \$20 per head for the cattle. The details of the price and trade can be definitely made, also an agreement as to your commission, at any time that you think you have found a prospective buyer, or sooner if you desire it. You know the location of the ranch, it is in Cottle and Foard counties, 30 miles due south of Quanah. Hoping to hear from you as to the prospect of making a sale, I am yours truly, Phil E. Chappell.' Q. Now, did you reply to that letter? A. Yes, sir. Q. Read your reply. A. 'Ft. Worth, Texas, Dec. 29, 1897. Phil E. Chappell, Esq., Kansas City, Mo.—Dear Sir: When your letter of the 6th was received I was absent in southern Texas. On the 20th, almost immediately after my return, I met with an accident that has confined me to my room with a very painful and badly crippled arm; hence the delay in answering you. As soon as I am on my feet again, which I suppose will be within a week or ten days, I will submit your ranch proposition to two or three different parties that I have in view, and advise you as to the result. In the meantime, if you have one, I will thank you to furnish me a map of the property. If you haven't but one, send it to me long enough to have it copied, and I will return the original promptly. Awaiting your further favors, and wishing you a happy and prosperous New Year, I am yours truly, George B. Loving, Manager.' * * * After some correspondence about a Mr. Hudson as a purchaser, Mr. Chappell wrote the following letter to the plaintiff: 'Kansas City, Mo., March 12th, 1898. Geo. B. Loving, Esq., Prest., Ft. Worth, Texas—Dear Sir: Not having heard anything further from Mr. Hudson, and there being but little prospect of a trade with him, we have concluded to withdraw our ranch from sale for a while. This course is rendered advisable from the fact that we are making some changes in the affairs of the company which will be consummated in 60 days. When these arrangements are made, we will again offer our ranch for sale and place it in your hands. The prices, however, may be changed and readjusted to suit the changes we contemplate making. Please hold the map of the ranch and other papers until we put it on the market again. We shall still want to sell the property. Yours truly, Phil E. Chappell.' Q. Did you reply to that letter? A. Yes, sir. Q. When? A. On the 14th, as soon as I received it. Q. Read that letter. A. 'Ft. Worth, Texas, March 14th, 1898. Phil E. Chappell, Prest. Hesperian Cattle Co., Kansas City, Mo.—Dear Sir: I have yours of the 12th, advising the withdrawal of your ranch and cattle from the market, and will govern myself accord-

ingly. I felt considerably disappointed at the weakness shown by Mr. Hudson. At the time he looked at the cattle I felt sure that we had a bona fide customer, one who meant business, and one to whom we could make sale. It seems, however, that he has decided not to even make a proposition, proving very conclusively that you sized him up about right, and that I was mistaken in my man. When you are again ready to offer your property, I will be very glad to hear from you, and will at any and all times be ready to give the matter prompt and personal attention. Very truly yours, George B. Loving.

Q. Now, did Mr. Chappell reply to that letter? A. No, sir. Q. When did you write him again? A. On the 31st of March. Q. Now, had you exhibited the ranch to any other person up to that time, except Mr. Hudson? A. No, sir; no one that had considered it. * * *

Q. Now, prior to the time that you wrote Mr. Chappell on the 31st of March, did you have any prospective purchaser for the ranch? A. Well, as I said awhile ago, I hadn't got any one to consider it except Mr. Hudson. * * *

Q. When was it that you saw Mr. Richards, out of which that letter grew? A. On the 31st of March. Q. Where did you see him? A. In my office. * * *

Q. When Mr. Richards came into the office, where did you see him? A. In my room, the back one. Q. How did he enter your room, from the hall or from the stenographer's room? A. He entered it from the front. Q. He went through the suit of rooms to yours? A. Yes, sir; he went through three rooms before he got to mine. Q. What did he say when he came in there? Mr. Scarritt: We object to any conversation that occurred there as incompetent, irrelevant, and immaterial, and because it is already shown that the property was not in the hands of the plaintiff at that time for sale, but had been withdrawn. Mr. Miller: We claim that it is a conversation which led up to negotiations between Richards and Chappell which resulted in the purchase of the property by Richards. We expect to follow this up by other testimony showing that it was through the efforts of Loving that Richards was put in communication with Chappell, and the land sold, and we claim that that was a ratification of the work done by plaintiff, even if the authority had been previously withdrawn. Q. By Mr. Scarritt (to witness). You had not seen Mr. Chappell after that letter of March 12th was written you by him? A. No, sir. Q. There was no further communication between you, except your letter of the 14th to him, up to the 31st of March? A. No. Q. In the meantime you had not seen Mr. Chappell, nor received any communication from him? A. No. Q. You never had any talk with him afterward? A. No talk, but correspondence—I did, after the 31st. Q. But not between the 12th and 31st of March? A. No. The Court: I think that

letter of March 12th is an absolute withdrawal of the power of sale. Mr. Miller: The plaintiff never had any power to sell. It was employed to procure a purchaser and put him in communication with the defendant, and we seek to show that we did that. The Court: I don't think there is any question that that is an unconditional withdrawal of the agency. They both recognize that in their letters. I do not think the testimony offered is competent, and the objection is sustained. Q. (Mr. Miller to witness). Now, after the date of your letter of March 31st to Mr. Chappell, when did you next hear from him? A. April 2d is the date of his letter. Q. Do you know about when you received that letter? A. About the 4th. Q. Read that letter. Mr. Scarritt: We object to that letter, because it is subsequent to the withdrawal of the agency, and as incompetent, irrelevant, and immaterial, I want to make that objection to all the letters after March 31st. The Court: The stenographer will note your objections to each of them. I will hear it [them]. * * *

After reading all of the subsequent correspondence, over the objections of defendant's counsel, Mr. Miller says: "We now desire to return to the question which was before the court at adjournment last evening, and we offer to prove by Mr. Loving what occurred between him and Mr. Richards at the interview in his office in Ft. Worth on the 31st of March, 1898, and which led up to the writing of the letter of the 31st of March to Mr. Chappell. Mr. Scarritt: We object to it for the reasons, already stated, that the agency of Mr. Loving had been revoked, and he at that time had no authority to act for the defendant. The Court: I do not see anything in this subsequent correspondence that even suggests a re-employment of the plaintiff. The objection will be sustained. * * *

The plaintiff here rested its case. The motion for new trial was based on the exclusion of evidence offered by plaintiff, the particulars of which will be noted in the course of the opinion.

1. The cause of action stated in the petition in the three different counts is that the Hesperian Cattle Company employed the plaintiff company in the month of December, 1897, as its agent to procure a purchaser for its ranch and cattle in Texas, and promised and agreed to pay a commission of \$5,000 for so doing. The first count alleges an express promise to pay the \$5,000 for said services, and the other two are in assumpsit for that sum on a quantum meruit. The propriety of the action of the circuit court in excluding the evidence of plaintiff as to a conversation had by plaintiff with W. Q. Richards, who subsequently purchased defendant's ranch and cattle, depends upon the state of the evidence when that conversation was excluded. The original employment of the appellant by respondents as its agent is found in certain les-

ters which passed between them in December, 1897, as follows:

"Kansas City, Mo., Dec. 6, 1897.

"Geo. B. Loving, Esq., Ft. Worth, Texas—Dear Sir: Referring to the conversation I had with you recently, I wish to say that we still want to sell our ranch in Cottle and Foard counties at about the price we mentioned. * * * The details of the price and trade can be definitely made, and also the agreement as to your commission, at any time that you may think you have found a prospective buyer, or sooner if you desire it. You know the location of the ranch. It is in Cottle and Foard counties, 30 miles due south of Quanah. Hoping to hear from you as to the prospect of making a sale, I am,

"Yours truly,

"Phil E. Chappell."

To this letter Mr. Loving replied as follows:

"Ft. Worth, Texas, Dec. 29, 1897.

"Phil E. Chappell, Esq., Kansas City, Mo.—Dear Sir: When your letter of the 6th was received, I was absent in southern Texas. On the 20th of this month, after my return, I met with an accident which has confined me to my room with a very painful and badly crippled arm; hence the delay in answering you. As soon as I am on my feet again, which I suppose will be within a week or ten days, I will submit your ranch proposition to two or three different parties that I have in view, and will advise you as to the result. In the meantime, if you have one, I will thank you to furnish me with a map of the property. If you have but one, send it to me long enough to have it copied, and I will return the original promptly. Awaiting your further favors, and wishing you a happy and prosperous New Year, I am,

"Yours truly,

"Geo. B. Loving, Mgr."

This appointment of the appellant by the respondent continued until March 12, 1898, during which time appellant procured a Mr. Hudson to visit the property and dickered about it a little, but nothing resulted from the negotiations. On March 12th Mr. Chappell, president of the defendant, wrote the appellant the following letter withdrawing the property from the hands of his agent:

"Kansas City, Mo., March 12, 1898.

"George B. Loving, Esq., President, Ft. Worth, Texas—Dear Sir: Not having heard anything further from Mr. Hudson, and there being little prospect of a trade with him, we have concluded to withdraw our ranch from sale for a while. This course is rendered advisable from the fact that we are making some changes in the plans of the company, which will be consummated in sixty days. When these arrangements are made, we will again offer our ranch for sale and place it in your hands. The price, however, may be changed and readjusted to suit the changes

we contemplate making. Please hold the map of the ranch and other papers until we put it on the market again. We shall still want to sell the property.

"Yours truly,

"Phil E. Chappell."

To this the plaintiff assented in the following letter:

"Ft. Worth, Texas, March 14, 1898.

"Phil. E. Chappell, Prest. Hesperian Cattle Co., Kansas City, Mo.—Dear Sir: I have yours of the 12th advising the withdrawal of your ranch and cattle from the market, and will govern myself accordingly. I was considerably disappointed by the weakness shown by Mr. Hudson. At the time he looked at the cattle I felt sure that we had a bona fide customer, one who meant business, and one to whom we could make a sale. It seems, however, that he decided not to even make a proposition, proving very conclusively that you sized him up about right, and that I was mistaken in my man. When you are again ready to offer your property, I will be very glad to hear from you, and will at any and all times give the matter prompt and personal attention.

"Very truly yours,

"Geo. B. Loving."

Mr. Chappell did not reply to the letter of March 14th. The Hesperian Company insisted, and the court so held, that these letters distinctly show that the agency which had been created was terminated, but plaintiff insists it was not. How the parties themselves regarded this matter after Chappell's letter of March 12, 1898, will best appear from extracts of their subsequent correspondence. Thus, on March 31, 1898, Mr. Loving wrote Chappell: "We have just had a long talk with Mr. W. Q. Richards, who owns a ranch adjoining yours, and notwithstanding the fact that you advised us some time ago not to offer your property until you had made some changes, yet when we found Mr. Richards was on the market for a herd and ranch, we took the responsibility of presenting your ranch to him in the best light possible, and strongly urged a favorable consideration at Mr. Richards' hands. * * *" In his answer to this letter written on April 7, 1898, Mr. Chappell reiterates the statement that the land is not on the market. He says: "Your favor of 31st ult. received. Mr. William Richards called to see me about buying our land and cattle; but I told him, as I had already advised you, that we had temporarily withdrawn our ranch from the market, but would probably offer it for sale again in a short time, as soon as some contemplated changes were consummated." Again, on May 20th, appellant wrote Mr. Chappell as follows: "My recollection is that when you wrote me some time ago, suggesting that your property be withdrawn from the market for

the time being, that you would probably be ready to again offer it about this time. * * * To which Mr. Chappell replied on May 23d, again reiterating that the property was not on the market, and that when it should be it would be an entirely different proposition. He says: "Your favor of 20th received. At the time of withdrawing our ranch from the market, we were negotiating for the purchase of 25,000 acres of additional land, adjoining our ranch in a solid body on the south. * * * It has been our purpose, when this deal was entirely closed, and which adds very greatly to the value of the ranch, to again offer the property for sale. We are not quite ready to offer it, however, advantageously; but, as soon as matters are entirely closed, I will again write you, and give you a full description of the property as it now is." Another soliciting letter was written by appellant on July 20, 1898, as follows: "If you will put a reasonable figure on your ranch and cattle, and will give us the exclusive agency, as Mr. Wilson did, we believe we can make a reasonably speedy sale." To which Mr. Chappell replied on July 22d, as follows: "We are not yet prepared or in a condition to offer our ranch for sale. * * * And again, on July 25th, appellant solicited the respondent as follows: "When you are ready to offer the 3D ranch and cattle, would be glad to hear from you, and, if you will put the sale of the property in our hands exclusively at reasonable figures, believe we can make a reasonably quick sale." Again, on August 19, 1898, appellant solicited the agency for the sale of the land, to which Mr. Chappell replied on the 24th: "As I have already heretofore advised you, we are not offering our ranch for sale."

We think that the fair and reasonable interpretation of these writings can lead to one conclusion only, and that is that, if the Hesperian Company had the right to revoke plaintiff's agency, the letter of March 12, 1898, did so, and that plaintiff so understood it, as shown by his reply thereto and his subsequent correspondence. The letters need only to be read to convince the impartial mind that such was the intention of defendant, and such was plaintiff's judgment. That, in general, a principal may determine or revoke the authority given to his agent at his own pleasure seems too plain for discussion. Since the authority is conferred by the principal of his own will, and is to be executed for his own benefit, the agent cannot insist upon acting when the principal has withdrawn his confidence. *State ex rel. Walker v. Walker*, 88 Mo., loc. cit. 283, 284. There are exceptions to the rule, but this case does not fall within any of them. Here the agency was not coupled with an interest, nor given as a part of a security or for a valuable consideration. *Hartley's Appeal*, 53 Pa. 212, 91 Am. Dec. 207; *State ex rel. Walker v. Walker*, supra.

When, as in this case, a principal employs an agent or broker to sell his property for him, and then withdraws his property from sale before a purchaser is found or any negotiations are productive of a contract, a subsequent sale by the owner does not entitle the agent to commissions. *Levy v. Coogan*, 16 Daly, 141, 9 N. Y. Supp. 534. And when no time is definitely agreed upon within which the sale must be made, either party is at liberty to withdraw from the arrangement prior to the procuring of a purchaser ready and willing to enter into a contract on the principal's terms. *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441; *Neal v. Lehman*, 11 Tex. Civ. App. 461, 34 S. W. 153; *Bailey et al. v. Smith*, 103 Ala. 641, 15 South. 900. The defendant, then, having the right to revoke plaintiff's agency and, as we hold, by the letter of Mr. Chappell, of March 12, 1898, did revoke it, what, if anything, is there to indicate any bad faith? The only person whom plaintiff claims it had interested in the sale of the ranch was Hudson and both plaintiff and defendant concurred that Hudson never made an offer for it. There is not the slightest pretense that plaintiff had ever seen or spoken to Richards, who subsequently bought, prior to March 31, 1898. By no sort of reasoning can it be maintained that defendant had the purpose of defeating plaintiff's commission on a sale to Richards when it revoked plaintiff's agency March 12th, as defendant had never heard of Richards in connection with the sale of the ranch, and plaintiff, in its letter of March 31, 1898, admits that its agency had terminated when it learned of Richards' desire to purchase. Indeed, it is difficult to resist the conclusion that plaintiff recognizes that it cannot recover on the original employment, because counsel, in urging the alleged error in excluding the conversation between Loving and Richards on March 31, 1898, says: "We claim that that was a ratification of the work done by plaintiff, even if the authority had previously been withdrawn."

It is not insisted that, if the agency was revoked on March 12, 1898, there was ever any subsequent express agency created; but the claim is made that defendant is estopped, by its action subsequent to the 12th of March, 1898, from asserting that said original agency was revoked and terminated. This claim of estoppel is untenable on two grounds: First, no such issue is tendered by the pleadings. As asserted, it could at most have only amounted to an estoppel in pais, and was not pleaded, and there is nothing in the conduct of the case to show that the case was tried on that theory. *Price v. Hallett*, 138 Mo. 573, 38 S. W. 451; *Chance v. Jennings*, 159 Mo. 558, 61 S. W. 177. Moreover, we think the letter of September 24, 1898, does not support such contention. At that time the agency had been revoked, but the plaintiff continued to write defendant, or Mr.

Chappell, its president, indicating a desire to open negotiations with Richards; and it seems obvious that it occurred to Mr. Chappell that if, later on, when defendant had perfected its purchase of some additional 25,000 acres, if it should sell to Mr. Richards, plaintiff might claim a commission, and hence he advised defendant that it was best for each to understand that defendant would not recognize such a claim, and that plaintiff had no authority to represent defendant. Plaintiff now says it is entitled to try the issue as to what Richards said to defendant, and that, if it really sent Richards to defendant, it is entitled to recover. We think there is no foundation whatever for an estoppel in the case. On the contrary, it is apparent that defendant had consistently and at all times denied there was any agency after March 12, 1898, and at no time did plaintiff assert that its contract of agency had been not revoked until after the letter of September 24, 1898, when plaintiff seems to have discovered something in the letter of defendant that indicated it was not quite certain the agency had been revoked, when defendant for the first time began to assert that the letter of March 12th did not amount to a revocation, although its letter of March 14, 1898, plainly says it was.

Another claim is advanced, to wit, that even if the letter of March 12th was a revocation of the agency, and plaintiff did not have authority to procure and introduce Richards to defendant as a purchaser, still the acceptance by defendant of Richards as a prospective buyer with knowledge that plaintiff had sent him operated as a ratification, and rendered defendant liable for plaintiff's commission. This claim, like that of estoppel, is de hors the pleadings in the case. No such issue is raised. *Wade v. Hardy*, 75 Mo. 399. Moreover, with defendant constantly repudiating plaintiff's right to sell its ranch, and advising it all the time, and long before it entered into negotiations with Richards, that it would not recognize its claim for a commission, we think that it is plain that, even if pleaded, the facts would not have amounted to a ratification, so as to render defendant liable to plaintiff. One cannot make another his debtor in this manner. As a matter of fact, the properties which defendant finally sold to Richards were so radically increased and changed that it is plain they never were in plaintiff's hands for sale.

After all, the real point in the motion for new trial, and the one on which this appeal is really founded, is that the circuit court erred in not permitting plaintiff to prove the conversation which occurred between plaintiff and Richards March 31, 1898. At that time the agency had been revoked, and plaintiff had written its letter acknowledging the withdrawal, and Mr. Loving testified positively that from the 14th of March until the alleged conversation there had been

no further communication, either written or verbal, between him and Mr. Chappell or the defendant. Richards had never met Chappell at that time. How, then, could a conversation between Loving, who was not an agent of defendant, and Richards, a perfect stranger, at Ft. Worth, Tex., in any manner affect the Hesperian Cattle Company, all of whose officers were then in Missouri? It was so clearly inadmissible that the circuit court could not have done otherwise than to exclude it, and in so doing it obviously committed no error.

The circuit court properly refused to take off the nonsuit, and its judgment is affirmed. All concur.

DEZELL v. FIDELITY & CASUALTY CO.

(Supreme Court of Missouri. June 30, 1903.)

INSURANCE—ACCIDENTS INSURED AGAINST—ADMINISTRATION OF MEDICINE—PROOF OF LOSS—NECESSITY—WAIVER BY PLEADING—ANSWER—SUFFICIENCY OF ALLEGATIONS.

1. A petition alleged a compliance with all the conditions of a policy of accident insurance, and the immediate giving of written notice of death as required thereby. The defendant first answered by general denial, but afterwards filed an amended answer specifically denying that insured died of an accident within the meaning of the policy, and further stated that no immediate notice of the accident or proof of loss was given, as alleged in the petition. *Held*, that defendant did not, either by its general denial, which included a denial of the specific allegations of the complaint that notice of accident and proofs of loss were furnished or by its amended answer, denying liability for the accident, waive the defense based on the neglect to give notice of accident and proofs of loss.

2. An answer denying "each and every other allegation in said petition not specifically admitted" is neither the general nor special denial called for by the statute and amounts to nothing.

3. An allegation in an answer that insured "did not die of any bodily injuries sustained through external, violent, or accidental means" states a mere conclusion of the pleader.

4. In an action on a policy of accident insurance which provided that immediate notice of accident and proof of loss must be furnished, but which did not stipulate for a forfeiture in case of neglect so to do, where the answer, by admission of allegations of the complaint, showed that the insurer was fully cognizant of the facts, it must be conclusively presumed that it had notice thereof in due time, and failure of plaintiff to give such notice was no defense to the action.

5. Where there is no controversy as to the means by which insured came to his death, it is purely a question of law whether death resulted from a cause insured against by the policy.

6. A policy insured against bodily injuries sustained through external, violent, or accidental means, but provided that it did not cover injuries resulting from anything accidentally or otherwise taken, administered, absorbed, or inhaled. *Held*, that the exception did not preclude a recovery for unintentional death caused by medicine, even though containing poison, taken or administered in good faith to alleviate physical pain.

Robinson, C. J., and Marshall and Burgess, JJ., dissenting in part.

In Banc. Appeal from Circuit Court, Jackson County; J. H. Slover, Judge.

Action by Mary E. Dezell against the Fidelity & Casualty Company. From a judgment for defendant, plaintiff appeals. Reversed.

The following is the opinion in Division No. 1:

MARSHALL, J. This is a suit upon an accident policy for \$5,000. James Dezell was the insured, and the plaintiff, his wife, the beneficiary. He died on September 23, 1896, while the policy was in full force, from the effects of an overdose of morphine, taken upon the prescription of a doctor, to relieve the pain of neuralgia. There was no intention to commit suicide. The answer admits the issuance of the policy and that it was in force at the time of the death, and avers that it was issued to indemnify the insured "against bodily injuries sustained through external, violent, and accidental means," etc., and that by its express terms it was provided: "This insurance does not cover disappearance, nor war risk, nor voluntary exposure to unnecessary danger, nor injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled"—and then avers that the insured did not die of any bodily injuries sustained through any external, violent, or accidental means, but, upon the contrary, died from the result of a medicine, commonly called "morphine," intentionally and knowingly taken by said deceased without expecting or intending the same should produce death. The answer further pleads that the policy provided: "Immediate written notice of accident must be given to the company. Affirmative proof of loss must be furnished as soon as the nature and extent of the same can be determined"—and then pleads that no such notice or proof was ever made. The reply is a general denial.

Upon the trial the plaintiff proved that the insured was not addicted to the use of morphine, and had only taken it two or three times in his life, under the advice of a doctor, to allay the pain of neuralgia; that on Saturday and Sunday before his death he was suffering with neuralgia; and that on Sunday evening he had the prescription for neuralgia which his physician had given refilled, and then took the medicine and went to bed. About midnight his wife went to his room to inquire about him, and he said he felt some better, and told her to go to bed, which she did. About 7 o'clock on Monday morning she went to his room again, and found him unconscious, and he died about 11 o'clock on Monday morning. The doctor testified that he died from the effects of morphine. The plaintiff also introduced evidence tending to show that after the death this policy, with three life policies, were found among the insured's papers in the bank, and that the plaintiff's attorney wrote to all of the companies, notifying them of the death,

and asking for proper forms upon which to make out proofs of loss; that all the other companies paid, but that no answer was made by the defendant. The defendant introduced evidence tending to show that no notice or proof of loss was ever received by it, and that it never knew of the loss until the institution of the suit, which was about 3½ years after the death. This last, however, must be a mistake, for the policy was issued only for a year from March 24, 1891, and was kept alive only by the payment of an annual premium of \$21, and it nowhere appears, and manifestly could not be the fact, that any such premium was paid after the death, which occurred on Sept. 23, 1896, and therefore the company must have known that there had been a loss, or, at any rate, that no annual premium was paid on March 24, 1897, or thereafter.

The defendant asked a peremptory instruction, which the court refused, and the case went to the jury upon two instructions, asked by the plaintiff, to the effect that if the death occurred from morphine taken to allay the pain of neuralgia, without any intention of committing suicide, and if the plaintiff gave immediate written notice of loss by a letter written by her attorney to the defendant, and mailed to it in New York, with a request for blank forms upon which to make proofs of loss, and if the defendant ignored the letter, the verdict should be for the plaintiff. The jury found for the defendant. In due time the plaintiff filed motions for new trial and in arrest, and also a motion for judgment non obstante, upon the ground that the plaintiff was entitled to a judgment as a matter of law, because the death was for a cause covered by the policy, and because, by denying in its answer all liability under the policy, and claiming that the policy did not cover a death under the circumstances stated, the defendant was precluded from pleading or showing that no notice or proof of loss had been given, and by so pleading it had waived the right to plead and prove that no notice and proof of loss had been given or made. The court overruled all of said motions, and in so doing entered the following order: "Now, on this day, the court doth take up the plaintiff's motions for a new trial, in arrest of judgment, and for judgment notwithstanding the verdict, filed herein, and, being duly advised in the premises, doth overrule the same, for the reason that the defendant did not, in the opinion of the court, as a matter of law, undertake to insure against death by poison, accidentally or otherwise taken; that the undisputed evidence shows that the deceased took an overdose of morphine, from the effects of which he died, and thus his death was due to a cause not covered by the policy; that where, as a matter of law, plaintiff is not entitled to recover, as in this case, a motion for a new trial will be overruled, notwithstanding there may have been errors in the trial of the case that

under other circumstances would require the motion for a new trial to be sustained—to which actions and ruling of the court the plaintiff then and there duly excepted." In other words, the court held that it had erred in giving the instructions asked by the plaintiff, and should have given a peremptory instruction to the jury to find for the defendant, because the policy did not cover a death under the circumstances of this case. After proper steps the plaintiff appealed.

1. The policy insured "against bodily injuries sustained through external, violent, and accidental means," and provided that "this insurance does not cover * * * injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled"; and the answer pleads that the insured "did not die of any bodily injuries sustained through any external, violent, or accidental means, but, upon the contrary, died from the result of a medicine, commonly called 'morphine,' intentionally and knowingly taken by said deceased, without expecting or intending the same should produce death." And there is no controversy in the case that such was the fact; for the plaintiff proved it, and the defendant admitted it in its answer, and offered no testimony on the question. It is therefore purely a question of law whether the death resulted from a cause insured against.

The case of *Renn v. Supreme Lodge, K. of P.*, 83 Mo. App. 442, was an action on a fraternal beneficial certificate which provided, *inter alia*, that it should be void if the death was caused or superinduced by drunkenness, or by the use of narcotics or opiates; and the answer pleaded that the death was caused or superinduced by the use of narcotics or opiates. The evidence showed that he died from an overdose of morphine; that some time before his death he had suffered a sunstroke, and had taken morphine, under the advice of a physician, to allay pain in the head, and that at and some time prior to his death he had a sore leg, which gave him considerable pain and required the treatment of a physician; that he was confined to his bed for the five days preceding his death, and that the effect of morphine is to quiet pain and promote sleep; that a few hours before his death he was visited, at the house of his sister, where he was sick, by his fiancée, with whom he discussed and arranged for their marriage, soon thereafter to take place. The Kansas City Court of Appeals, speaking through Smith, P. J., said: "The point thus presented for our consideration is whether or not the exception contained in the certificate already quoted includes a case where the assured is suffering from a physical ailment, and takes morphine solely to lessen pain, and in doing so unintentionally and accidentally takes an excessive quantity, which causes his death." After referring to the case of *McGlother v.*

Ins. Co., 89 Fed. 685, 32 C. C. A. 818, where the assured, a doctor, had died from a poison unintentionally, voluntarily, and unconsciously taken, without knowing it was poison, and believing it to be a harmless medicine, which he had prescribed as a drink for his patients, and in which it was held there could be no recovery, the learned judge said: "In *Insurance Co. v. Davey*, 123 U. S. 739 [8 Sup. Ct. 331, 31 L. Ed. 315], where it is said that the insurer undertook to protect itself against the improper use in the future by the insured of alcoholic stimulants, and to that end it provided in the policy that, if the assured should become so far intemperate as to impair his health or induce delirium tremens, the policy should become void, it was in effect there declared that the excessive use of alcoholic stimulants by the insured, if taken in good faith, for medical purposes, or by medical advice, was not within the exception and would not avoid the policy. And so it may, with equal propriety, be said that, where death, as here, is caused or superinduced by the intentional taking of a narcotic for medical purposes, or, which is the same thing, to lessen pain, or by the advice of a physician, is not a death caused by narcotics, within the exception contained in the policy sued on. It seems to us that this qualification is reasonable and fairly implied, and should be interpolated into the exception, in order to give effect to what must have been the intention of the parties. It would, we think, be most unreasonable to suppose that by the introduction into the policy of the qualifying words, 'if such death shall be caused or superinduced by the use of narcotics or opiates,' that the parties thereby intended to prohibit the use by the assured of such narcotics under any and all conditions, or that if he should use narcotics under the advice of a physician, or solely to lessen pain occasioned by a physical infirmity, and if death should result therefrom, he should thereby forfeit the indemnity provided in the certificate. Morphine is both an opiate and a narcotic, which is so extensively and beneficially used in the modern practice of medicine and surgery, for the alleviation of pain and suffering in so many of the ills to which flesh is heir, that it would not be reasonable to suppose that any one of average intelligence would enter into a contract of life insurance containing a stipulation providing, in effect, that if he use this valuable remedial agent, either where prescribed for him by a physician or surgeon or where he is suffering pain from a physical ailment, and death result therefrom, the indemnity provided shall be in whole or in part forfeited, unless his intention to do so is manifested by the clear and unambiguous terms of the instrument. If the insurer had intended to exempt himself from liability, where death results from the use of narcotics under the conditions just referred to, it should have introduced into the exception

terms clearly expressing such intention. In view of the ruling made by the Supreme Court of the United States in *Insurance Co. v. Davey*, supra, and of the fact that the law disfavors the forfeiture of life insurance policies of every kind, we feel authorized to interpolate into the exemption clause of the present certificate the qualification asserted in plaintiff's instruction."

In *Healy v. Mutual Acc. Ass'n*, 133 Ill. 556, 25 N. E. 52, 9 L. R. A. 371, 23 Am. St. Rep. 637, the petition alleged that the death was from an overdose of chloral. The policy insured against death by external, violent, and accidental means, with an exception in case of death from taking poison. There was a demurrer to the petition, which was overruled, and the plaintiff held to be entitled to recover.

Omberg v. U. S. Mut. Acc. Ass'n, 101 Ky. 303, 40 S. W. 909, 72 Am. St. Rep. 413, was an action on an accident policy insuring against death from external, violent, and accidental causes, with an exception if the death was the result of poison in any form or manner, or from contact with any poisonous substance. The death was caused by blood-poisoning, resulting from the bite of a mosquito, and it was held that the death did not come within the exceptions noted, and the plaintiff was entitled to recover.

The American & English Enc. Law (2d Ed.) vol. 1, p. 294, says: "Accident policies usually restrict the liability of the insured to injuries effected through external, violent, and accidental means. This provision is construed beneficially for the insured. The term 'external' refers to the means of the injury, and not the injury itself, and the fact that an injury is accidental and unnatural imports an external and violent agency as its cause." The cases supporting the text are collated in the notes, and it is pointed out that the cases of *Pollock v. Accident Ass'n*, 102 Pa. 230, 48 Am. Rep. 204, and *Bayless v. Insurance Co.*, 14 Blatchf. 144, Fed. Cas. No. 1,138, which hold that death from accidental poisoning is not within the meaning of external, violent, and accidental means "are opposed to the weight of authority."

In *Barry v. U. S. Mut. Acc. Ass'n (C. C.)* 23 Fed. 712 (affirmed U. S. Mut. Acc. Ass'n v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60), speaking of the meaning of "external, violent, and accidental means," the court instructed the jury as follows: "There must be an external and visible sign of the injury, but it does not necessarily follow from that that the injury must be external. * * * Visible signs of injury, within the meaning of this policy, are not to be confined to broken limbs or bruises on the surface of the body. There may be other external indications or evidences of an injury. Complaint of pain is not a visible sign, because pain you cannot see. Complaint of internal soreness is not such a sign, for that

you cannot see. But if the internal injury produces, for example, a pale and sickly look in the face; if it causes vomiting and retching, or bloody and unnatural discharges from the bowels; if, in short, it sends forth to the observation of the eye, in the struggle of nature, any sign of injury—then those are external and visible signs, provided they are the direct result of the injury."

In *Am. Acc. Co. v. Reigart*, 94 Ky. 547, 23 S. W. 191, 21 L. R. A. 651, 42 Am. St. Rep. 374, death was caused by a piece of beefsteak, which the insured was attempting to swallow, going into his windpipe and choking him to death in a few moments, and it was held to be within the meaning of the term "external, violent, and accidental means."

1 Am. & Eng. Enc. Law (2d Ed.) p. 314, speaking of the exceptions usually specified in accident policies, says: "The policy frequently exempts injury or death 'from taking poison.' The authorities are not in accord whether the exception extends to all cases of poison, whether accidental or intentional." And the cases of *Hill v. Hartford Acc. Ins. Co.*, 22 Hun (N. Y.) 187, *Pollock v. U. S. Mut. Acc. Ass'n*, 102 Pa. 230, 48 Am. Rep. 204, and *Cole v. Accidental Ins. Co.*, 61 L. T. (N. S.) 227, and *Bayless v. Travellers' Ins. Co.*, 14 Blatchf. 143, Fed. Cas. No. 1,138, are cited as holding that no recovery is permissible, while *Healy v. Mut. Acc. Ass'n*, 133 Ill. 556, 25 N. E. 52, 9 L. R. A. 371, 23 Am. St. Rep. 637, and *Mut. Acc. Ass'n v. Tuggle*, 39 Ill. App. 509, are cited as holding that a recovery can be had. The case of *Renn v. K. of P.*, 83 Mo. App. 442, above quoted, is not referred to by the writer of the article in the Encyclopædia.

The case of *Higbee v. Guardian Mut. Life Ins. Co.*, 66 Barb. 462, while not a perfect precedent, is yet valuable by analogy. It was a suit on a policy of life insurance. The insured died from an overdose of laudanum, taken to cure a severe headache. The policy provided that it should be void if the insured did not make truthful answers to the questions propounded in the application, among which was, "To what extent does the party use tobacco, ales, or alcoholic stimulants?" To which he answered, "I never used tobacco in my life, or liquor in any form, and I have never used opium." It appeared he had used laudanum on several occasions to relieve headache, and had also taken Dover's powders, which contain opium. The court said: "Upon the assumption that the insured guaranteed the entire scientific accuracy of the oral statements made by him to the examining physician, we must ascertain the sense in which the inquiry was put, and what was intended and understood by the parties to the conversation. Tobacco, alcoholic stimulants, and opium are all narcotic stimulants. Each is occasionally resorted to as a remedy in disease, for the purpose of obtaining the benefit of the narcotic, or stimulating or other properties.

Each is also used by numerous persons as a habit, when in health, with the purpose of obtaining the narcotic and stimulating effects of the drug, when the person using it supposes himself to be in ordinary and normal condition. The use first above described, where practiced habitually and to any considerable extent, is considered to be injurious to the health and system, and to have a tendency, therefore, to shorten life; while the proper administration of either as a medical remedy, in case of disease, so far from being injurious and tending to shorten life, is used for the very opposite purpose, and is supposed to be curative in its effects. There can be no doubt in which sense this inquiry was intended, or as to which description of use was inquired for. * * *

To hold that a policy would be avoided, where this usual and proper question had been answered negatively, by proof that the party had occasionally used alcoholic stimulents, or something in which opium was contained, as a mere medical remedy, when suffering from some paroxysms of pain, would render those supposed securities, so much relied upon as provisions for widows, orphans, and creditors, extremely illusory on the principle of 'noscitur a sociis.' Harper's *Adm'r v. Phoenix Ins. Co.*, 19 Mo. 506; *Chattock v. Shane*, 1 Moody & Rob. 498."

This, then, is the result of the authorities bearing upon this proposition. The case is one of first impression in this court. The policy insured "against bodily injuries sustained through external, violent, and accidental means." The exception was: "This insurance does not cover * * * injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled." It will be observed that it is not limited to poison, but extends to "anything," and is not confined to poison or anything taken, but includes poison or anything not only taken, but also such as may be administered, absorbed, or inhaled, and that it applies whether the same be accidentally or intentionally done. Literally construed, it would cover everything known to man that would injure or kill, whether taken by the assured himself, or administered to him by a physician, or whether absorbed or inhaled without and in spite of himself, or with the aid of any one else, or as the result of natural laws. It would also cut off a recovery where the poison or anything was taken or administered to save life, and was given for the best and most scientific reasons, as fully and completely as if it was taken with suicidal intent. If this was the true meaning and intent of the insured, it ought to have been expressed in such unequivocal and plain words that there could be no misunderstanding its meaning. Instead of employing the negative form of expression, and clothing the intention in such general terms, it should have been affirmatively stated that the policy

meant that no recovery could be had, unless the physical evidences of the cause of the injury were apparent to the naked eye, and that the company would not pay for any injury unless the gaping wound told its own tale. The better reason supports the rule that such exceptions in such policies do not cover medicine (even though it contain poison) or anything taken or administered in good faith to alleviate physical pain, even though it results in unexpected and unintentional death. The plaintiff was, therefore, entitled to a verdict as a matter of law, unless the defendant was entitled to rely upon want of notice and proof of loss. Under the evidence and instructions, the jury must have found for the defendant, on the ground that no notice or proof of loss was given; for there was no other question of fact for the jury to find.

2. The plaintiff insists that, by pleading that the company was not liable because death by poison exempted it from liability under the terms of the policy, the defendant waived, and was estopped and disabled to plead, the issue as to notice and proof of loss. On the other hand, the defendant controverts this contention, and, in addition, claims that the plaintiff tried the case upon both issues, submitted both issues to the jury, took her chances of winning before the jury, lost, and therefore, if it was error to take this issue into account, it was an error invited by the plaintiff, and hence the plaintiff cannot complain, and, furthermore, that contention comes too late. The error, if it be an error, was not invited by the plaintiff. The issue was raised by the defendant. The plaintiff, therefore, had two remedies open to her to meet the issue: First, to take the chance of defeating the defendant on the issue as a question of fact before the jury; and, if she lost, second, to defeat the defendant before the court as a matter of law by a motion in arrest or any known method of reaching the law question. Every defendant avails himself of the double method of defeating a plaintiff by taking issue and trying the facts before the jury, and, if he loses, by filing a motion in arrest and contending that the petition is wholly bad in law, and the verdict based upon it is without support or authority of law; and the same is true of the plaintiff as to the special defenses or answer of the defendant. So the plaintiff has lost no right to have this question of law passed upon, because she took the chance of winning on the facts pleaded by the defendant.

It has already been pointed out that the answer consists of two special defenses: First, that the death was not caused by means within the terms of the policy, but fell within the exception from liability; and, second, want of notice and proof of loss. The first special defense has been adjudged insufficient. If the defendant cannot be allowed to plead the second defense, because

of the character of the first defense pleaded, then there was, as a matter of law, nothing for the jury to pass upon, but only a question of law for the court to settle, and therefore a false issue, or rather a matter not properly in the case at all, was submitted to the jury, and the verdict, therefore, rests upon no valid foundation in law, and cannot stand. The defendant contends that a waiver of notice and proof of loss must occur before the expiration of the time limited for giving the notice and furnishing the proofs of loss, because a waiver implies that the company is estopped by its acts to plead want of notice in consequence of throwing the plaintiff off his guard, when he would otherwise have given the notice before the time expired. On the other hand, the plaintiff contends that notice and proof of loss is for the benefit of the company, and not for that of the assured, and, this being so, the company can waive it at any time, either before or after the time limited for giving it, either expressly or by its acts and conduct, or by the mode of pleading, just as any party litigant may do by uniting inconsistent and contradictory defenses in the same answer.

The Kansas City Court of Appeals, in *Bolan v. Fire Ass'n*, 58 Mo. App. 225, held that the waiver must be before the time for giving the notice and proof of loss expired. But that same court, in *Crenshaw v. Insurance Co.*, 71 Mo. App., loc. cit. 48, held that the right to defend on the ground that no notice or proof of loss was given was waived by the character of the other defenses interposed; that court very forcibly and persuasively disposing of the question as follows: "The defendant next contends there was no compliance on the part of the plaintiff with that provision of the policy which provides that 'the company shall have immediate written notice, with full particulars, of any accident.' It does not appear from the evidence contained in the record that the plaintiff gave any such notice. But was this necessary to enable the plaintiff to maintain his action? We think not, for the reasons we shall now proceed to state. While it is true that this action was commenced before a justice of the peace, where the defendant was not obliged to plead its defense by answer, yet the evidence and instructions sufficiently inform us of what was the nature of the defense relied upon by it. From this it appears that the defendant denied all liability to the plaintiff on two distinct grounds, one of which was that the accident which gave rise to the plaintiff's action on the policy resulted from the violation by him of the rules of the Armour Packing Company, a corporation in whose employ he was at the time of the happening of the same; and the other was that he was not injured at all. There was considerable evidence adduced having a tendency to both prove and disprove the first of these defenses, and to sustain the latter the defendant's general agent

testified that 20 weeks after the accident the plaintiff called at his office and informed him of the same, and that plaintiff wanted him to advance the money on his claim. This the former declined to do, but stated to the latter that he would call up Dr. Jones, the defendant's examining physician and surgeon, and ask him for the particulars of his case, which he accordingly did, and that the doctor replied that 'the man has no claim. He has never been injured.' The doctor himself testified for the defendant that he examined the plaintiff and that he had sustained no injury. The court, under appropriate instructions for defendant, submitted these two defenses to the jury. It was, therefore, clear that the defendant in its defense denied all responsibility. In *McComas v. Insurance Co.*, 56 Mo. 573, it was ruled that in a suit on a policy of life insurance, where the company in its defense denies all responsibility and refuses to pay anything, such defense amounts to a waiver of notice and proof of death. And to the same effect are *Equitable Life Ins. Co. v. Hiett's Adm'r*, 19 U. S. App. 173, 58 Fed. 541, 7 C. C. A. 359; *Norwich & New York Transportation Co. v. Insurance Co.*, 34 Conn. 561, Fed. Cas. No. 10,363; *Insurance Co. v. Coates*, 14 Md. 285. The adjudged cases are all in accord to the effect that the refusal to recognize the existence of any claim, or a refusal to pay, renders the delivery of notice and proofs of loss a needless ceremony, and is treated as a waiving of a strict compliance with the conditions as to a preliminary notice and proofs in respect to form and time. *La Force v. Insurance Co.*, 43 Mo. App. 518, and authorities there cited. In 19 U. S. App., 58 Fed., 7 C. C. A. supra, it was said that 'it is invariably held that a refusal by an insurer to pay a claim after a loss has occurred, because of a breach of any of the substantial provisions of the policy, or because the policy was not in force, or because a loss has occurred in consequence of a risk not covered by the policy, is in itself a waiver of the provision requiring notice and proofs of loss to be submitted within a specified number of days after the loss occurs'—citing *Tayloe v. Insurance Co.*, 9 How. 391, 13 L. Ed. 187; *Norwich & N. Y. Transp. Co. v. Insurance Co.*, supra; *Thwing v. Ins. Co.*, 111 Mass. 93, 110. Accordingly we think that, in view of the defenses interposed by the defendant, denying all responsibility, the court was warranted as a matter of law in declaring to the jury that the defendant had waived a compliance on the part of the plaintiff with the condition of the policy in respect to notice of the accident and the production of satisfactory proofs of disability."

The St. Louis Court of Appeals in *Fink v. Insurance Co.*, 60 Mo. App. 673, 66 Mo. App. 513, held that: "Waiver may be made after the lapse of the stipulated time for the delivery of proofs of loss, and need not combine the elements of estoppel. The question of waiver is one of intention."

The same rule obtains in the United States Circuit Court of Appeals. *Equitable Life Society v. Winning*, 58 Fed., loc. cit. 546, 7 C. C. A. 359, where it is said: "It is invariably held that a refusal by an insurer to pay a claim, after a loss has occurred, because of a breach of any of the substantive provisions of the policy, or because the policy was not in force, or because the loss occurred in consequence of a risk not covered by the policy, is in itself a waiver of the provision requiring notice and proofs of loss to be submitted within a specified number of days after the loss occurs. The cases to this effect are almost too numerous for citation, and only a few will be referred to. *Taylor v. Insurance Co.*, 9 How. 391, 396, 397, 13 L. Ed. 187; *Norwich & N. Y. Transp. Co. v. West Mass. Ins. Co.*, 34 Conn. 561, 570, Fed. Cas. No. 10,363, and citations; *Thwing v. Insurance Co.*, 111 Mass. 93, 110. In some of the more recent cases it has also been ruled that the provision in question may be waived by acts done by the insurer after the time has expired within which notice and proofs are required to be submitted, and that no new consideration is necessary to support a waiver of that character. In the case of *Prentice v. Insurance Co.*, 77 N. Y. 483, 489, 33 Am. Rep. 651, where the policy required notice of death to be forthwith given, and full proofs to be submitted within 12 months, and no notice or proofs were submitted for more than 2 years after the death occurred, *Andrews, J.*, said, in affirming the judgment against the insurer: 'It is now understood to be the doctrine of this court that no new consideration is required to support a waiver by an insurance company of a condition in respect to the time of serving proofs of loss, and that it may be done by acts or conduct occurring subsequently to the breach of the condition, indicating an intention to waive such condition, although there is no new consideration, and although there may be no technical estoppel.' The same remark was repeated by *Church, C. J.*, in *Brink v. Insurance Co.*, 80 N. Y. 108, 112, and it was further said that 'the filing of proofs of loss by a specified time is a condition made for the benefit of the company, which it may avail itself of or not; and, if it determine to waive it, it cannot afterwards recall the waiver, and insist upon the forfeiture.' In the case of *Goodwin v. Insurance Co.*, 73 N. Y. 480, 496, the Court of Appeals of that state further declared that 'when an insurance company, by means of its officers or agents, in response to a claim for a loss, fails to say anything about the time of presenting the proofs after it has expired, but claims some other defense, the presumption is that it does not intend to interpose any other besides that named, and it is a fair inference, to be derived from the fact that it was silent on the subject, that it designed to waive the violation of such condition.' We find nothing in other decisions from that state to which we have been referred (to wit, *Devens*

v. Insurance Co., 83 N. Y. 168, and *Armstrong v. Insurance Co.*, 130 N. Y. 560, 29 N. E. 991) which works any sensible modification of the law of waiver in its application to such provisions of insurance policies as are now under consideration. It seems to be the well-settled doctrine in that state, as it is elsewhere, that an insurance company must promptly disclose its purpose, if it intends to rest its defense to a claim for insurance on the technical ground that notice and proofs of death were not submitted within the time specified in its policy. If it treats with the assured on other grounds, and asserts that the policy has become forfeited, or that other substantive conditions of the contract have been broken, it must assume the risk of having its conduct in that behalf construed as a voluntary abandonment of other less meritorious defenses."

The briefs of counsel contain references to cases pro and con decided elsewhere and to the views of text writers; but it would take a volume to review them, and even then they could not be harmonized. It is, however, conceded by every one that such notice, being solely for the benefit of the company, can be waived. It can be expressly waived before or after the time for giving it has expired. It may be waived by the acts and conduct of the company before the time expires for giving it. It may be waived by the company by failing to plead it as a matter of defense. It may be passed over *sub silentio* by the company at any time. If it be a waiver of notice for the company, before the limited time expires, to refuse to pay because of a breach of any of the substantive provisions of the policy, why is it not also a waiver if the company, when sued, comes into court and defends because of a breach of such substantive provisions? There can be no logical or valid distinction between the two.

R. J. Ingraham and J. C. Rosenberger, for appellant. Harkless, O'Grady & Crysler, for respondent.

MARSHALL, J. Since writing the foregoing opinion, this case has been reargued in banc, and the defendant's principal contention is that the whole question is a matter of pleading, and not of waiver; that is, that the law is that a defendant may interpose as many defenses as he has provided they are consistent, and that defenses are consistent so long as the proof of one will not necessarily disprove the other, and that the defenses pleaded in this case are consistent, because proof that the death was caused by a risk not insured against does not necessarily disprove the defense that no notice and proof of loss was given. The defendant correctly states the rule of pleading, and if the first premise, to wit, that the whole matter is a question of pleading, was true, the conclusion drawn by the defendant would be ir-

resistible and inevitable. The infirmity underlying the contention, however, is that it is not a matter of pleading at all. It is a matter of waiver. This is capable of mathematical demonstration. If it was simply a question of pleading, then the two pleas could be properly joined, whether the waiver of notice and proof of loss occurred before the expiration of the time limited for giving notice and proof of loss, or after the expiration of such time and before the institution of the suit, as well as after the institution of the suit; for, as a matter of pleading, the two defenses would be just as consistent, whether the waiver occurred at any one of the three specified stages of the proceedings. Yet all authorities and all cases hold that, if the waiver occurred before the expiration of the time limited for giving notice and proof of loss, the defendant may plead that no notice or proof of loss was given; but such a plea will be unavailing, because he has waived the right to defend on that ground by reason of denying all liability or by refusing to pay for any substantial reason. So, too, the great weight of modern authority, and the rule adopted by both the Courts of Appeals in this state, is that if the demand of payment is made after the expiration of the time for giving notice and proof of loss and before the institution of the suit, and if the defendant refuses to pay because of a substantive reason, such refusal is a waiver of notice and proof of loss. The defendant may plead both the substantive reason and the failure to give notice and proof of loss, but such a plea will be unavailing as to notice and proof of loss, because he has waived notice and proof of loss. These two propositions being true, it demonstrates the proposition that it is not a matter of pleading at all, but a question of waiver. And, if a waiver may occur by the defendant refusing to pay for a substantive reason after the time for giving notice and proof of loss has expired, and before the suit is brought, then it necessarily and logically follows that the time at which the waiver occurred is immaterial, and that it may occur after the suit is brought, as well as before it is brought, or before the expiration of the time for giving notice and proof of loss; for a waiver may be either express or implied, and the latter is just as good as the former. The defendant may waive notice and proof of loss by expressly alleging that it was not given, but that the defendant waives that requirement of the policy. So, too, the defendant may waive notice and proof of loss by implication; that is, he may defend on a substantive ground, which is an implied waiver in law. This is no new doctrine in this state. The case of *McComas v. Insurance Co.*, 56 Mo. 573, was decided by this court at the March term, 1874. The pleadings are not set out in full, nor is there a full statement of them. But it does appear from the report that the defendant defended on the grounds, first, that the plain-

tiff had no interest in the policy, and therefore had no right to maintain the action; second, that the defendant was not liable at all because the insured committed suicide while sane, while the plaintiff admitted that he committed suicide, but claimed that he was insane when he did so; and, third, that the policy provided that it should be payable 60 days after due notice and proof of loss, and that no notice or proof of loss had been given. As to the last, this court said: "As the defendant denied all responsibility, and refused to pay anything, this amounted to a waiver of the notice and proof of death, and therefore the sum assured was due 60 days after the death of the plaintiff's husband."

In *Equitable Life Assur. Soc. v. Winning*, 58 Fed. 541, 7 C. C. A. 359, the sole defense interposed by the defendant was that notice and proof of loss was not given within 90 days after the death, as the policy required. It appeared that the insured died on August 13, 1890, and that nothing was done looking toward giving notice and proof of loss, until December 18, 1890, when an agent of the plaintiff wrote to the defendant, asking for blank forms of notice and proof of loss, in order to make proof of the death. After much correspondence the defendant took the position that the policy was forfeited before the death by the failure to pay an annual premium due on April 5, 1889, and that the Missouri statute in reference to extended insurance did not apply, because the insured waived the benefit of the statute. The United States Circuit Court of Appeals held that by denying all liability the defendant waived the right to defend for failure to give notice and proof of loss.

The case of *Omaha Fire Ins. Co. v. Hildebrand*, 54 Neb. 306, 74 N. W. 589, is so apposite that a full excerpt therefrom is permissible. The Supreme Court of that state states the case and its conclusion, as to the point here under discussion, as follows: "The insurance company had insured against loss or damage by fire, to the extent of \$1,000, certain real estate belonging to Mrs. Hildebrand and occupied by her as a dwelling house and hotel. She brought this suit on that insurance contract, making the insurance policy a part of her petition, and alleging that the insured property was wholly destroyed by fire January 13, 1895, while the policy was in force; that she furnished the insurer proofs of loss under the policy as required thereby; and that the insurance company had refused to pay the loss, or any part of it. The insurer by its answer admitted the execution and delivery of the policy sued on and the destruction of the insured property by fire January 13, 1895, denied all other allegations of the petition, and interposed as an affirmative defense to the action that at the time of the fire the insured property was, and had for some time been, vacant and unoccupied, contrary to the provisions of the insurance contract. On the trial Mrs.

Hildebrand did not prove that she had ever furnished the insurance company any 'proof of loss,' or proof of the destruction by fire of the insured property. The insurer, to sustain its defense that the property was vacant and unoccupied at the date of the fire, called as its only witness Mrs. Hildebrand, who testified positively that the insured property was at the date of the fire occupied by herself as a residence and for hotel purposes, or, in other words, Mrs. Hildebrand's testimony entirely disproved the defense interposed to the action by the insurer. The district court directed the jury to return a verdict in favor of the insured. This was correct. The provision of an insurance policy which requires the insured to furnish the insurer proofs of loss is one inserted in the policy for the benefit of the insurer, to enable it to ascertain the cause of the fire and the extent of the damages, and it is a provision which the insurer may waive; and, where it denies that the policy was in force at the time of the loss of the insured property, it will be conclusively presumed to have waived the furnishing to it of proofs of loss. If the policy was not in force at the date of the fire, the furnishing by the insured of proofs of loss would be an entirely useless proceeding. This waiver of furnishing proofs of loss may be made before suit is brought by the insurer's unconditional denial of its liability for the loss, or it may be waived after the suit is brought by interposing to the action a defense that the policy was not in force at the time of the loss. In *Phenix Ins. Co. v. Bachelder*, 32 Neb. 490, 49 N. W. 217, 29 Am. St. Rep. 443, it was held: 'The absolute denial by the insurer of all liability, on the ground that the policy was not in force at the time of the loss, is a waiver of the preliminary proofs of loss required by the policy.' To the same effect are *St. Paul Fire & Marine Ins. Co. v. Gotthelf*, 35 Neb. 351, 53 N. W. 137; *Western Home Ins. Co. v. Richardson*, 40 Neb. 1, 58 N. W. 597; *Omaha Fire Ins. Co. v. Dierks*, 43 Neb. 478, 61 N. W. 740; *Id.*, 43 Neb. 560, 61 N. W. 745; *Dwelling House Ins. Co. v. Brewster*, 43 Neb. 528, 61 N. W. 746; *German Ins. & Savings Institution v. Kline*, 44 Neb. 395, 62 N. W. 857; *Home Fire Ins. Co. v. Hammang*, 44 Neb. 566, 62 N. W. 883; *Rochester Loan & Banking Co. v. Liberty Ins. Co.*, 44 Neb. 537, 62 N. W. 877, 48 Am. St. Rep. 745; *Ætna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N. W. 125; *Home Fire Ins. Co. v. Fallon*, 45 Neb. 554, 63 N. W. 860. The defense interposed by the insurer, that the policy was not in force at the time of the fire because the insured property was vacant and unoccupied, contrary to the provisions of the policy, rendered it unnecessary for the insured to prove the allegation of her petition that prior to the bringing of the suit she had furnished the insured with proofs of loss."

In *McBryde v. Insurance Co.*, 55 S. C. 589, 38 S. E. 729, 74 Am. St. Rep. 769, the assured furnished proof of loss, but did not accom-

pany it with a certificate of the nearest magistrate as to its correctness, as the policy required. For this reason, *inter alia*, the trial court nonsuited the plaintiff. The Supreme Court reversed the judgment of the trial court, and after holding that, as the company did not object to the proof of loss because it was not accompanied by the certificate of the magistrate at the time it was served, it could not be heard to raise such an objection afterwards, said: "Furthermore, the defendant, by contesting the case on the merits, waived the right to object to the proofs of loss."

But it is said in this case that the defendant objected that no proof of loss had been made at the very first moment it was called upon to speak or define its position, or that it was made aware that any claim was asserted against it, and hence it has never, either expressly or by acts or conduct, waived, or indicated any intention to waive, the proof of loss. This is true. But it does not make the case any different from what it would have been if the demand of payment had been made before the expiration of the time limited for making proof of loss, or after the expiration of the time limited for making proof of loss and before the suit was brought, and if, upon such a demand at either of said times, the defendant had refused to pay because the loss occurred from a risk not insured against, and also because no proof of loss had been made; for in both of such instances there would have been no express waiver, and, instead of an intention to waive proof of loss, there would be the express intention not to waive the proof of loss, but to insist upon it. Yet in both such cases the defendant would be cut off from defending on the ground that no proof of loss had been made, because it defended upon the substantive ground that the loss did not occur from a risk assured against. In cases where the demand is made before the expiration of the time limited for making proof of loss, and the refusal is based upon a substantive ground, and also upon the ground that no proof of loss has been made, all the authorities hold that it is not necessary for the assured to make proof of loss, because to make proof of loss would be a perfectly idle thing to do, for the reason that, even if properly made, the company would not pay. Therefore the law says such a refusal amounts to a waiver of proof of loss. It is not exactly accurate, perhaps, to call it a waiver, or an estoppel, either; but it is so called for the sake of brevity. Really it means that the law never requires a useless thing to be done. Hence, if the demand is made before the expiration of the time limited for making proof of loss, and the refusal is based upon a substantive ground, and also because no proof of loss has been made, the law excuses the insured from making proof of loss, because it would do no one any good to make such proof. At first, the courts put

it upon the ground of estoppel; that is, that the company had thrown the insured off of his guard, and led him to believe proof of loss would not be required. But afterwards it was seen that this was not the true reason of the rule; for it could not be said that the company had led the insured to believe that it would not insist upon proof of loss, for the reason that it did insist upon proof of loss, and did refuse to pay partly because no proof of loss had been made. Therefore the doctrine of estoppel had to be abandoned. Then the courts put it on the ground that a refusal for such a double reason amounted to a waiver. By this is really meant that it would have been perfectly useless for the assured to make proof of loss, for the company would not have paid if it had been made, and therefore the insured will not be required to do a perfectly useless and unnecessary thing. If such demand and refusal for such double reason occurs before the expiration of the time limited for making proof of loss, it cannot be said there was any inconsistency in the position taken by the company, and it cannot be said that the assured had any right to assume or believe that the company would not insist upon proof of loss. Yet in all such cases it is held that a refusal to pay for a substantive reason dispenses with the necessity for making proof of loss. In cases where the demand and the refusal for such double reason occurs after the expiration of the time limited for making proof of loss, it cannot be said the company has taken inconsistent positions, nor that it has shown any intention to waive proof of loss. Yet in such cases it is held that a refusal to pay for a substantive reason dispenses with the necessity for making proof of loss, because it would not have paid, even if proof of loss had been made, and therefore it would have been an idle thing for the assured to have done to have made proof of loss.

If these two postulates are true, then the conclusion follows, as surely as the shadow follows the substance, that if the demand is made by a suit, and the refusal to pay for a substantive reason, and also because no proof of loss has been made, takes the shape and form of an answer, the law dispenses with proof of loss, not because the defendant is estopped to defend on that ground, not because the two reasons on grounds are inconsistent, not because the defendant has shown any intention to waive proof of loss (for in none of the three cases illustrated was there any such intention, but quite the reverse), but because the defendant has waived proof of loss; that is, it has demonstrated that, if proof of loss had been made, it would have still refused to pay, and therefore it would have been a perfectly useless thing for the assured to have done, and hence the law dispenses with it. It will be noted that in all three cases there was a refusal to pay because no proof of loss had been made, and therefore, as here, the de-

fendant set up this claim at the very first moment it was informed that any demand was asserted against it. There is, therefore, no possible difference between the defendant in this case and the company in either of the two cases illustrated. The courts have therefore either been wholly and fundamentally wrong in everything that has been said or written as to waiver, either before the expiration of the time for making proof of loss, or after the expiration of such time and before the suit was begun, or else the same principle must apply if such demand and refusal for such double reason occurs by the institution of a suit and the interposition of such a double defense. The underlying reason of the rule is that proof of loss is required solely by contract, and that it was inserted in the contract for the benefit of the company; that is, it was intended to give the company prompt notice of the loss, so that it could investigate and ascertain the cause of the death, and learn all the facts that might throw light upon the bona fides of the claim of the assured to the indemnity for which he had been paying. It was to enable the company to be put into a position to ascertain the truth, before the evidences of the truth became buried or extinct. If, therefore, it appears at any time that the company had knowledge of the case, so as to be able to defend on the ground that the loss occurred from a risk not insured against, it had all the information it could have obtained if proof of loss had been promptly made, and therefore it would be unconscionable to allow the company to avoid payment or evade liability for the failure of the assured to do a thing that would subserve no useful purpose and would have been an idle and meaningless ceremony.

But it is said such is the contract of the parties, and, as they had a right to make such a contract, they must abide by it, and the courts are powerless to relieve them. If this be true, then how happens it that the courts relieve them at all? By what right or logic can it be said that the courts can and will relieve the assured if the waiver occurs before the expiration of the time limited for making proof of loss? It is not because there is any express waiver, or any intention to waive proof of loss; for the company refused to pay partly on the ground that no proof of loss had been made. If the contract is absolute and imperative, then the courts have no right to dispense with performance by both parties of all the conditions and terms of the contract. If it is a matter of contractual right, the courts have no power to imply a waiver, and therefore everything that has ever been written is wrong; for, if it is a contractual right, the company has a right to insist upon it at all times, and it is then wholly immaterial at what time the company refused to pay because proof of loss had not been made, and equally immaterial that the company at the

same time also refused to pay for a substantive reason. Either all the adjudicated cases are wrong, and the company has a right to refuse to pay for a substantive reason, and also because no proof of loss has been made, or else a refusal to pay for a substantive reason waives, or dispenses with, or makes wholly useless, proof of loss; and this is true, no matter at what time or in what way the question arises, whether before the expiration of the time limited for making proof of loss, or after the expiration of such time and before suit is brought, or after the suit is brought. There is no middle ground, and no room for differentiation. Consistency, logic, reason, and common sense put the rights of the parties in the same boat under all circumstances. And there is no hardship upon an insurance company to adopt the rule announced herein; for there is here no pretense that the company did not learn the truth about the death, there is no pretense of any fraud perpetrated upon the company, nor of any concealment of facts, nor yet that the company could have been put in any better position if proof of loss had been made. On the contrary, the company itself sets up the facts as to the death, and then asserts as a matter of law that the policy did not cover such a risk. The plaintiff admits the facts and contests the defendant's claim as to the law. Therefore the defendant is not damaged a particle by the failure to make proof of loss. The defendant would not have paid if proof of loss had been made. The defendant is clearly liable for the loss, and for it to keep all the premiums it collected as payment for this indemnity, and then to evade or avoid its just liability because the plaintiff did not do a thing that would have been perfectly useless, an idle ceremony, and in this case a mere formal act, would be unconscionable and against good morals.

Without further elaboration, it results that by pleading that the death ensued from a cause not insured against, but from one of the causes excepted in the policy, the company waived the right to plead want of notice and proofs of loss. This being true, there was no fact for the jury to find. The whole case was one of law for the court. The plaintiff was entitled to raise these questions of law by a motion in arrest, as she did, and the trial court erred in overruling the motion, and in holding, when overruling that motion, that the plaintiff was not entitled to recover as a matter of law. For these reasons I think the judgment of the circuit court should be reversed, and the cause remanded, with directions to sustain the plaintiff's motion non obstante, and to enter a judgment for the plaintiff for the amount specified in the policy, with interest thereon from the date of the institution of this action.

All except ROBINSON, C. J., concur as to paragraph 1 of the opinion in division, and

all except ROBINSON, C. J., also concur as to the result reached herein, but do not otherwise agree to the reasoning employed in paragraph 2. BURGESS, J., concurs in toto.

VALLIANT, J. Defendant, an accident insurance company, issued its policy March 24, 1891, insuring the life of James Dezell against "bodily injuries sustained through external, violent, and accidental means" in the sum of \$5,000, payable to his wife, the plaintiff in this suit. It was stipulated in the policy that the insurance did not cover "injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled," and, further, that "this policy is issued subject to the conditions on the back hereof." Among the conditions on the back were the following: "Immediate written notice of accident must be given to the company, affirmative proof of loss must be furnished as soon as the nature of and the extent of same can be determined, and any legal proceedings for recovery must be commenced within six months in cases of death." The petition states that the insured paid the premiums annually as they became due, and that the policy was in full force on September 28, 1896, when "the said James Dezell was suffering from neuralgia or other physical ailment, for which said affliction, to allay the pain thereof, his attending physician had prescribed and was then prescribing the use of a certain remedial agent and sedative known as 'morphine,' and that upon said last-mentioned date said James Dezell took said morphine for the purpose of allaying the pain occasioned by the disease from which he was suffering as aforesaid, in accordance with the advice as aforesaid of his said physician, and that death resulted thereafter upon said date accidentally in consequence thereof." The petition also states that after the death of her husband the plaintiff immediately gave written notice to the defendant, and in all other respects complied with the terms of the policy. The first answer filed was a general denial; but afterwards defendant filed an amended answer, in which it admitted the issuance of the policy and that the same was in full force at the date of the death of plaintiff's husband, then denied all allegations of the petition "not hereinafter specifically admitted." Then the amended answer went on to state the provisions of the policy as hereinafter quoted, and averred that the insured "did not die of any bodily injuries sustained through any external, violent, or accidental means, but, upon the contrary, died from the result of a medicine, commonly called 'morphine,' intentionally and knowingly taken by said deceased without expecting or intending the same should produce death," and it concluded with this paragraph: "And, further answering herein, the defendant states that no immediate written notice of said claimed accident charged in plaintiff's petition was

ever given to the defendant herein, and that no affirmative proof of loss or death, or of a claimed accident, as alleged in plaintiff's petition, was ever furnished to this defendant, nor did defendant ever know thereof, or ascertain that any claim was ever made that said deceased died from an accident, within the meaning of the policy sued upon, until three and one-half years after the death of deceased, to wit, until March 23, 1900, the date of the institution of this suit." Reply, general denial.

Upon the trial the evidence for the plaintiff tended to prove the allegations of the petition. The evidence on the part of the defendant tended to prove that no notice of the accident or death was ever given, and that the first information thereof defendant had was through the institution of this suit, March 23, 1900, more than three years after the death of the insured. The only conflict in the evidence was on the question whether notice of the death had been given. On that point the testimony for the plaintiff was that of a lawyer to whom she had given this, with three ordinary life policies on the life of her husband, to collect. He testified that he had no distinct recollection of having given the notice, but he thinks he must have done so, for the reason that he recollects writing to the three other companies for blanks on which to make out proofs of loss, received the blanks, made the proof, and collected the policies. His letter book, in which copies of these letters would have been kept, was lost. He kept this policy about two years, and then returned it to the plaintiff. The evidence for the defendant tended to show that no notice was ever given, and that the first information the defendant had of the death was through the institution of this suit.

The court, at the request of plaintiff, gave two instructions, which were to the effect that if the insured took the morphine only to relieve the pain of neuralgia, and unintentionally and accidentally took an overdose, which caused his death, and the plaintiff immediately gave notice of the death by letter addressed to the company in New York, duly stamped and mailed, and in the letter requested the usual blank forms for making proof of loss, to which defendant made no reply, the verdict should be for the plaintiff. Defendant asked only a peremptory instruction that the verdict should be for defendant, which the court refused. The case was given to the jury under the instructions asked by the plaintiff, and there was a verdict for the defendant. Plaintiff filed motions for a new trial, in arrest of judgment, and for judgment non obstante veredicto. The court overruled the motions, and the plaintiff appealed.

1. In the opinion in this case filed in Division No. 1 by MARSHALL, J., it is shown that under the averments in the petition and the admissions in the answer, to say nothing

of the evidence adduced, the plaintiff was entitled to a judgment, unless she was precluded by the failure to give the notice required by the policy. What the learned judge in that opinion on that subject has said leaves nothing more to be said. But if, under the terms of this policy relating to the notice, and under the facts relating to the death of the insured, as declared and admitted by the pleadings, the defendant would have been discharged from its liability for failure of the plaintiff to give the notice, then we have to decide whether the defendant, by answering as it has, has waived its right to defend on the ground of want of notice. The position taken by appellant is that the defendant has waived its right to defend on this ground, first, because it first filed a general denial for its answer; and, second, because in its amended answer it takes the ground that the death of the insured was from a cause not covered by the policy, and that the denial of liability on the merits of the case is a waiver of a defense based on a less meritorious ground. There is no difference, so far as this point is concerned, in the position of the defendant in its original answer and that in its amended answer. The petition anticipated the defense of want of notice, and advanced to meet it by the affirmative statement that the written notice required by the policy had been given. The general denial joined that issue, as well as all others tendered by the petition. The defendant only met the case in the form in which it came.

Appellant's proposition is that defendant, by the act of denying in its answer that the policy covered the loss, waived the defense of want of notice, notwithstanding that defense was expressly pleaded also. Some of the cases cited by the learned counsel for appellant lead in that direction, but none of them go to that extent. Courts do not favor forfeitures. Courts do not favor the defeat of a meritorious cause on any purely technical ground. Insurance companies have probably realized that fact more clearly than any other class of business concerns. The business of life insurance requires of its followers peculiar technical knowledge. The expert in the business knows a great deal more about it than the man of average intelligence who takes out a policy on his own life. The Legislatures in most of the states have recognized that in the act of making a contract for life insurance the company, by its peculiar technical knowledge, has an advantage over a man of ordinary business capacity not trained in that art, and have imposed certain conditions upon such contracts for the protection of the insured, which will be enforced even against the express terms of the policy; and not only have the Legislatures exerted their authority in such matters, but the courts of the country also have strained the discretion that lies in the scope of judicial interpretation to pre-

vent a forfeiture of the insurance. Sometimes the reasoning of the court in such case is so technical that to the mind of the layman it but thinly disguises the praiseworthy motive to do justice in that particular case in spite of the letter of the contract.

Clauses requiring prompt notice and proof of loss are to be found in perhaps all policies of insurance, and the courts have never said of them that they were unreasonable, but have said of them that the companies were estopped from claiming the benefit of them, or that a defense on that ground was waived, under circumstances in which all doubts would have to be resolved against the company in order to reach that conclusion. In the earlier cases, when defense under such a clause was denied, the decision was put on the ground of estoppel. That had reference to refusal to pay before the period in which proof of loss was required had expired. Afterwards cases arose in which the defense was denied on account of the conduct of the insurer after that period had expired, and then it was put on the ground of waiver. But to create an estoppel there must have been conduct on the part of the insurer which induced, or might have induced, the holder of the policy to refrain from furnishing the proof of loss; and to create a waiver there must have been an intention to waive. If we should now go a step farther than any court has yet gone, and say that an insurer has no right to make a defense under this clause, although he may have done nothing to induce the insured to refrain from making his proof of loss, or nothing to indicate an intention to waive his right, we would have to invent some other reason to sustain that doctrine.

Before going through some of the cases (for they are too numerous to go through all of them) to which we are referred in the briefs of counsel, let us recall the facts touching this point in this case. The insured died September 28, 1896. The testimony for defendant tended to show that the defendant had no notice of the death until this suit was filed March 23, 1900, three years and a half thereafter. No negotiations, no correspondence, no discussion passed between the parties relating to the matter. When the defendant was called into court to answer the suit, it answered, and said (or attempted, at least, to say) that the death was from a cause not covered by the policy, and, besides, no notice of the death was given, as required by the contract. Appellant asks us now to say that the answer means that the defendant waives the notice. No greater violence could be done to the letter and spirit of the answer than to give it that meaning. No case cited by appellant would justify such an interpretation. There is no necessity for looking into the cases which hold that when an insurance company informs the holder of the policy, before the period prescribed for making the proof of

loss has expired, that it has resolved not to pay the insurance, the policy holder is excused from the duty of furnishing such proof to the company. The justice and sound logic of those decisions are not questioned. And no one will dispute the proposition that the company may, if it so wills, waive its right to notice and proof of loss after, as well as before, the expiration of the period for furnishing the same. But waiver, unconnected with estoppel, is an act of the will and the result of an intention.

The case first on appellant's list in support of the proposition contended for is *Crenshaw v. Insurance Co.*, 71 Mo. App. 42. There is language in that opinion which, separated from the facts of the case, gives countenance to appellant's position. It is there said: "The adjudicated cases are all in accord to the effect that the refusal to recognize the existence of any claim, or a refusal to pay, renders the delivery of notice and proof of loss a needless ceremony, and is treated as a waiver of a strict compliance with the conditions as to preliminary notice and proofs in respect to form and time." The court does not there say when such refusal must occur in order to have the effect of the waiver mentioned. It says that the adjudicated cases are all in accord with the proposition, by which expression we understand the court to mean that it announces no new doctrine, nor takes any advanced position, but cites adjudicated cases which it says announces the same principle. That case arose in a justice's court, where there were no pleadings, and the only means the appellate court had of ascertaining what the issues were that had been tried in the court were the instructions given. From these it appeared that the defendant placed its defense on two grounds only, one of which was that the accident in which the plaintiff claimed to have been injured resulted from a violation by him of the rules of the Armour Packing Company, in whose service he was at the time; and the other was that he was not injured at all. From aught that appears of the report in that case, the defense of want of notice was raised for the first time in the Court of Appeals. The court held that the defense was waived. In its opinion the court says: "In *McComas v. Insurance Co.*, 56 Mo. 573, it was ruled that in a suit on a policy of life insurance, when the company in its defense denies all responsibility and refuses to pay anything, such defense amounts to a waiver of notice and proof of death." So this court in that case did say, but that language must be understood as referring to the facts of the case. It does not appear, from the report of the case, that the defendant made any defense in the trial court on that ground, and the point only arose incidentally in the appellate court. The trial court had instructed the jury that plaintiff was entitled to interest on the amount of the insurance from a certain date. The de-

defendant made the point in the appellate court that interest should run only from the date the money was due, which by the terms of the policy was 60 days after the notice and proof of loss. The court ruled that, as the defense had been made on the ground that the deceased had committed suicide (which was a cause of death the policy did not cover) the plaintiff was entitled to interest beginning 60 days after the death of her husband. That is as far as the *McComas* Case goes in support of the waiver theory.

In *Rippstein v. Insurance Co.*, 57 Mo. 86, we gather from the report that the proofs of loss were furnished the company, but it refused to pay on the ground that the death occurred from a cause excepted from the insurance. The answer put the defense on two grounds—one that the loss was not covered by the policy, the other that in making the proofs of loss the plaintiff did not comply with the forms prescribed by the terms of the policy. The court said that the defendant had made no objection to the form of the proofs as furnished, but refused to pay on other grounds, and it thereby waived its right to object to the character of the proofs at the trial.

In *Tayloe v. Insurance Co.*, 50 U. S. 390, 13 L. Ed. 187, negotiations for the insurance were conducted through letter correspondence, the fire occurred before a policy was delivered, and after it occurred the company refused to issue a policy; and the question was, had the negotiations at the time of the fire reached the stage when they amounted to a contract of insurance? The company contended they did not. The defense was there was no contract of insurance, and, besides, there had been no notice and proof of loss, as policies issued by the company required. The court held that proof of loss that would have been called for by a policy, if one had been issued, was no defense in the case when none was issued. Any language in the opinion that may seem to sustain the appellant's view on this point must be understood as intended to apply to the facts of that case.

Norwich, etc., v. Insurance Co., 84 Conn. 561, Fed. Cas. No. 10,363, is relied on by appellant and is cited in the *Crenshaw* Case, above referred to. That was a suit on a fire insurance policy on a steamboat. As soon as the loss occurred the owners gave written notice to the insurer, who investigated it and notified the owners that it refused to pay on the ground that it was a marine, and not a fire, loss. The court said: "The motion also finds, in strict accordance with the fact, that this was all done before the time within which the plaintiff by the terms of the policy was bound to present the formal proofs had expired. The court charged the jury that this denial of all liability whatever by the defendants was, in judgment of law, a waiver of any further proofs of loss. On this point the authorities are unanimous and decisive,

and fully maintain the rule laid down by the court."

In *Thwing v. Insurance Co.*, 111 Mass. 83, loc. cit. 110, the court uses this language: "When an insurer, with knowledge of a claim under a policy, rests his defense exclusively on other grounds, he is deemed to have waived all objections to the reasonableness and sufficiency of the notice and proofs of loss." That language was used concerning the application of an insurer who was seeking the aid of a court of equity to relieve him of the effects of a judgment at law in which he had submitted his case to the jury on an agreed statement and had lost. The court held that, having submitted his case for the verdict of the jury on issues agreed upon, and not including the question of lack of notice and proofs of loss in the agreed statement, he waived the defense.

Equitable Life Ins. Co. v. Hiett's Adm'r, 19 U. S. App. 173, 58 Fed. 541, 7 C. C. A. 359, is also cited, and language used in the opinion is quoted, as sustaining appellant's theory. In that case this language is used: "It is invariably held that a refusal by an insurer to pay a claim after a loss has occurred, because of a breach of any of the substantial provisions of the policy, is in itself a waiver of the provision requiring notice and proofs of loss to be submitted within a specified number of days after the loss occurs. The cases to this effect are almost too numerous for citation, and only a few will be referred to." Then the court refers to *Tayloe v. Insurance Co.*, *Norwich, etc., v. Insurance Co.*, and *Thwing v. Insurance Co.*, which we have above analyzed. The citing of those cases as supporting the principle there announced shows that the learned judge intended by what he said to confine the language used to a case falling within the principles declared in those cases and to the facts of the case he was then deciding. Now, what were the facts in that case? The company had issued a policy to Hiett under a contract in which it was agreed that Hiett would waive the benefit of the Missouri statute in reference to nonforfeiture for nonpayment of premiums, and the policy should be forfeited if the premiums were not paid as therein agreed. Hiett had paid the annual premiums to keep the policy in full force up to April 5, 1889, but failed to pay the premium due on that date. The company by a resolution of date May 31, 1889, declared the policy forfeited for nonpayment of the premium due April 5, 1889, and it was so entered on the company's books. Hiett died August 13, 1890. The administrator found among Hiett's papers a notice given by the company to him before April 5, 1889, that his premium was due at that date, and unless it was then paid the policy would be forfeited. The administrator, not finding any receipt for that premium, relied on the statement contained in the notice, concluded the policy was forfeited, and for that reason did

not send to the company proofs of loss. In December, 1890, however, the administrator was advised that under the law of Missouri the policy was not forfeited, but was carried by force of the statute as temporary insurance to a date beyond that of the death of the insured. Then the administrator applied to the company for blanks on which to make out the proofs of loss, and the company refused, on the ground that the policy was forfeited, but in a letter by its attorneys to the attorneys of the administrator stated that the question of the validity of a similar clause in the contract by which Hiett essayed to waive the provisions of the statute was then pending in a suit before the Supreme Court of the United States, and a decision was soon expected, "and that the decision thereof will be conclusive of the claim made by you." The decision in the case referred to in the letter was rendered in May, 1891, and was adverse to the insurance company. Then the correspondence between the attorneys was renewed, in which the attorneys for the company stated that they had advised the company to furnish blanks for the proofs of loss, and concluded by saying: "Upon receipt of your proofs, I do not doubt they will promptly act in the matter." But the company at last refused to furnish the blanks, and when the suit followed the only defense made was that proofs of loss had not been furnished as the policy required. The point decided in that case was that evidence of those facts was sufficient on which to submit to the jury the question of whether the defendant had intended to waive the requirement in the policy as to proofs of loss. There we see that the company repudiated the liability, not only before the period for making proofs had elapsed, but before the death of the insured had notified him that it would do so, and had so entered it on its books. What Judge Thayer said in that case was in reference to those facts.

We are referred, also, to some New York cases. In *Prentice v. Insurance Co.*, 77 N. Y. 483, loc. cit. 489, 33 Am. Rep. 651, the court said: "It is now understood to be the doctrine of this court that no new consideration is required to support a waiver by an insurance company of a condition in respect to the time of serving proofs of loss, and that it may be done by acts or conduct, occurring subsequent to the breach of the condition, indicating an intention to waive such condition, although there is no new consideration, and although there may be no technical estoppel." Without pausing to investigate the soundness of the proposition that the insurance company may be held as obligated by a waiver of a valuable right when there is neither a consideration to support it as a contract, nor an element of estoppel in it, it is sufficient for our present purpose to see what the facts of the case were in which the court used that language. The case there was a life insurance policy which had

been assigned to a third party with the consent of the company. The policy required immediate notice of the death of the insured, and full proofs to be furnished within 12 months, "or all claims will be forfeited." The insured was dead two years before the assignee of the policy heard of it, and in those two years he had paid the premiums, on receipt of notice which the company sent him; he and the company supposing the man was still alive. Immediately after hearing of the death of the insured, the holder of the policy notified the company, and requested blanks for making out proofs of loss, which blanks the company furnished. The proofs were made in due form, and delivered to the company, who received them without objection and retained them three months, then refused to pay on the sole ground that proofs had not been furnished within the time prescribed, but made no offer to return the premiums for the two years paid under mistake. The court held that the defendant had waived the right to declare the forfeiture on that ground. It was in reference to those facts that the court used the language quoted.

Brink v. Fire Ins. Co., 80 N. Y. 108, was a suit on a fire policy, which required proof of loss to be furnished as soon after the fire as possible. The circumstances of the case rendered some delay unavoidable, but the proofs were furnished within what the court concluded was a reasonable time under the conditions. The company received the proofs, retained them, examined the plaintiffs in respect to them, and then decided not to pay on the ground of fraud, and so notified the plaintiffs. The court held that the defendant was estopped from claiming a forfeiture, saying: "Every consideration of public policy demands that insurance companies should be required to deal with their customers with entire fairness and frankness. They may refuse to pay without specifying any ground, and insist upon any available ground; but if they plant themselves upon any specified defense, and so notify the assured, they should not be permitted to retract, after the latter has acted upon their position as announced, and incurred expenses in consequence of it."

The same court afterwards, in *Devens v. Insurance Co.*, 83 N. Y. 168, loc. cit. 173, referred to the *Brink Case*, and said: "The doctrine of waiver was, we think, properly applied in that case; but it should not be extended, so as to deprive a party of his defense, merely because he negligently, or incautiously, when a claim is first presented, while denying its liability, omits to disclose the ground of his defense, or states another ground than that upon which he finally relies. There must, in addition, be evidence from which the jury would be justified in finding that with full knowledge of the facts there was an intention to abandon, or not to insist upon, the particular defense relied

upon, or that it was purposely concealed under circumstances calculated to, and which actually did, mislead the other party to his injury."

And later the same court, in *Armstrong v. Insurance Co.*, 130 N. Y. 560, 29 N. E. 991, discussing the same subject and referring to its former decisions, above quoted, said (loc. cit. 565, 130 N. Y., page 992, 29 N. E.). "While the later decisions all hold that such waiver need not be based upon a technical estoppel, in all the cases where this question is presented, where there has been no express waiver, the fact is recognized that there exists the elements of an estoppel."

The language used in the Nebraska cases cited goes farther in the direction of appellant's position than any other to which our attention has been called; but when we interpret that language, as we must, in the light of the facts of the cases to which it applies, it falls short of saying that where an insurance company, speaking for the first time on the subject in its answer to the plaintiff's petition, says, "Actio non," because the insured died of a cause not covered by the policy, and, besides, the plaintiff failed to give the notice which the policy required, the company by that plea intends to say, or must be construed as intending thereby to say, that it waives the right to defend on that ground. In *Omaha Fire Ins. Co. v. Dierks*, 43 Neb. 473, loc. cit. 483, 61 N. W. 740, 743, the court says: "All the authorities agree that the provisions of an insurance policy requiring the insured to give notice of the destruction of the insured property and to furnish the insurer proof of loss may be waived by the conduct of the insured; and in this case we think that the insurance company, by placing its defense to this action on the ground that the policy sued upon was not in force at the time of the destruction of the property, waived the provision of the policy which required the insured to give it notice of the loss, and made that issue in this case wholly immaterial." The court does not intend by what it there says to announce any new or advanced doctrine, or to make a precedent. On the contrary, it says that the principle it announces is one in which "all the authorities agree," and among the numerous cases referred to as announcing the same doctrine is *Phillips v. Insurance Co.*, 14 Mo. 221. The Nebraska court was dealing with a case in which the plaintiffs in their petition had stated that they had given the notice required. The answer of the defendant is not copied in full in the opinion, and therefore we may be excused if we mistake its purport; but we gather, from what is said of it, that it denied all the allegations of the petition, and advanced the affirmative plea that the plaintiffs, in violation of the terms of the policy, had placed a mortgage on the property insured. The court said that the evidence showed that whilst the plaintiffs themselves had not given the defendant

notice, yet the defendant had actual knowledge of the fire through its agent, who was himself at the fire, and who gave immediate notice of it to defendant. Then the court goes on to judge the answer of the defendant under the rules of pleading, and says: "This defense, set up in the answer of the insurance company, was, in effect, a plea of confession and avoidance. It in effect admitted the execution and delivery of the policy, the receipt of the premiums, the destruction of the insured property by fire, and the receipt by it of notice of the fire. This defense that the policy was not in force at the time the loss occurred is utterly inconsistent with the defense of want of notice of the loss." Thus we see that the court, after finding that the defendant had actual notice of the fire, disposes of the case on an interpretation of the pleadings, and under that interpretation it holds that, not only was the fact of notice admitted, but all the other affirmative statements in the petition were likewise admitted, and the case was reduced alone to the question of the mortgage. We infer, therefore, that under the rules of pleading in that state, if a plaintiff sues an insurance company, alleging in his petition that the defendant issued the fire policy, that the goods were destroyed by fire, and other allegations necessary to make out his case, and if the truth was that the defendant had not issued the policy, and that the goods had not been destroyed by fire, and, besides that, that after the date of the alleged issuance of the policy the plaintiff had put a mortgage on the property, the defendant could not, after denying the allegations of the petition, plead affirmatively that the plaintiff had mortgaged the property, without being thereby adjudged to have confessed that it issued the policy and that the goods were destroyed by fire. We have no doubt the Nebraska court correctly construed its own statute; but the rules of pleading are not entirely uniform in all the states, not so even in those states having Codes of Civil Procedure of the same general nature. Under our system a defendant in his answer may avail himself of as many defenses as he may have, provided they be not inconsistent; that is, provided the proof of one does not disprove another. And, even when he pleads inconsistent defenses, neither his adversary nor the court can choose for him which he will abandon. He is entitled to make the election. There are no rules of pleading applicable to an insurance company not applicable to other defendants. Under the rules of pleading in this state, in the case just supposed, the defendant would be allowed the benefit of both of its denials and its affirmative defense. If a life insurance company is sued in Missouri on a policy alleged to have been issued by it, and if it is true that the company did not issue the policy, and true that the man died of a cause not covered by the alleged policy, and true that the notice and proof of loss required by

the supposed policy were not given, there is nothing in our Code of Civil Procedure relating to pleading that forbids the company in such case availing itself of all three of those defenses.

We have devoted so much space to this Nebraska case, because the learned counsel for appellant rely with earnestness upon it. To the same effect is the later case in that court. *Omaha Fire Ins. Co. v. Hildebrand*, 54 Neb. 306, 74 N. W. 589. In that case there seems to have been a general denial, and a plea that the insured property was vacant and unoccupied at the time it was destroyed; and the court said that that plea "rendered it unnecessary for the insured to prove the allegation of her petition that prior to the bringing of the suit she had furnished the insurer with proof of loss."

The foregoing are not all the cases which the learning and industry of counsel have enabled them to bring to our assistance; but they are the ones chiefly relied on for the proposition of appellant, and they give more countenance to it than any others to which our attention has been called. After a careful study of those cases we are convinced that it was not the intention of the courts to say more than that, if the insurance company, before the time for furnishing proofs of loss expired, denied its liability, and let the policy holder know that it had resolved not to pay the claim, the latter was excused from offering the proofs, and that if, after that time, the company did anything in its dealing with the insured which showed an intention on its part to waive the defense of failure of notice and preliminary proofs, it will be adjudged to have done so. The last New York case above cited (*Armstrong v. Insurance Co.*, 130 N. Y. 560, 29 N. E. 991), after reviewing a large number of cases, reached the conclusion that the insurance company was neither estopped to deny that the proofs were furnished, nor to be adjudged as having waived that defense by pleading its nonliability under the terms of the policy. The court said (loc. cit. 567, 130 N. Y., page 993, 29 N. E.): "It needs no argument to show that it was justified in standing upon its legal rights and asserting them in the ordinary way and at the proper time, so long as in doing so it did not mislead the plaintiff to his own harm. It had the right to base its defense to any claim made upon it upon the violation prior to the fire of any of the provisions of the contract, and to require performance by the assured after the fire of those conditions which he had contracted to perform, and which were essential to his cause of action and preliminary to the assertion of any claim upon the policy. And in demanding strict compliance with such condition it did not waive any of its rights under the contract." We think that correctly expresses the law, and if, therefore, in the case at bar, the failure to give notice and make proofs was fatal to the plaintiff's

right of recovery, the defendant would not have waived that defense by pleading, if it had so pleaded facts showing that the insured died of a cause not covered by the policy, and also asserted in the same answer the defense of failure of the plaintiff to give the notice or make the proofs.

2. This conclusion brings us back to a re-examination of the defendant's answer in this case, which thus far we have treated as if it contained statements of facts going to show that the insured died of a cause not covered by the policy. We have treated it in that light, because counsel on both sides have so treated it, and because it is only in that light that the questions of estoppel and waiver as above discussed have any application. But that is not our judgment of this answer. The answer admits the issuance of the policy, that it was in full force at the date of the death of the insured, and then "denies each and every other allegation in said petition not hereinafter specifically admitted." That denial amounts to nothing. It is neither the general nor the special denial which our statute calls for. *Long v. Long*, 79 Mo. 644; *Snyder v. Free*, 114 Mo. 363, 21 S. W. 847; *Young v. Schofield*, 132 Mo. 650, 34 S. W. 497; *Boles v. Bennington*, 136 Mo. 522, 38 S. W. 806. The defense, therefore, rests upon what follows after that in the answer, which is that the insured "did not die of any bodily injuries sustained through any external, violent, or accidental means, but, upon the contrary, died from the result of a medicine commonly called 'morphine,' intentionally and knowingly taken by said deceased without expecting or intending the same should produce death." The first part of that sentence expresses a mere conclusion; the latter part states the facts from which the conclusion is drawn. The sentence, taken as a whole, means that in the opinion of the pleader death caused in the manner there stated is not an accidental death within the meaning of the policy. The answer states the facts substantially as the petition states them, but from the same facts draws a different conclusion. The court will take the facts as stated, but will draw its own conclusion.

In paragraph 1 of the opinion in this case delivered in Division No. 1, in which we all concur, Judge MARSHALL shows, by reason and authority, that death caused in the manner stated in the pleadings is the result of "external, violent, and accidental means" within the meaning of the policy. The only purpose of the notice called for by the policy was to put the defendant on the inquiry. But when the defendant comes into court and shows by its answer that it knows as much about the facts as the plaintiff does, and agrees with the plaintiff as to the facts, we are bound to conclusively presume that it had notice in due time. This presumption is not as a finding of the fact from the evidence, which is the province of the jury, but

as a judgment upon the answer, which is the province of the court. In all the cases above discussed, in which the terms of the policies in regard to the notice and proofs of loss are given, it is stipulated that the failure to give such notice and furnish such proof should operate as a forfeiture of all claims under the policy; but in the case at bar there is no such penalty specified in the policy and none such is pleaded. The answer goes as far as the policy justifies the pleader in going, which is to state that the policy was issued on the express condition that immediate notice of the death should be given, and proofs furnished as soon as the circumstances of the case permitted, and that the plaintiff had wholly failed to comply with that condition. In discussing a similar clause in a policy the Supreme Court of Nebraska has said: "There is no forfeiture expressly provided for, and we are not authorized to supply one by construction." *N. Assurance Co. v. Hanna*, 60 Neb. 29, 82 N. W. 97, citing *Rheims v. Insurance Co.*, 39 W. Va. 672, 20 S. E. 670; *Tubbs v. Ins. Co.*, 84 Mich. 646, 48 N. W. 296; *Steele v. Ins. Co.*, 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85, which are to the same effect. In 13 A. & E. Ency. L. (2d Ed.) p. 329, it is said: "And if no forfeiture is provided for in case of failure to furnish proofs, forfeiture being stipulated in case of breach of other requirements, or furnishing of the proofs in the specified time is not expressly made a condition precedent to recovery, the great majority of recent decisions hold that the effect of the failure to furnish them is merely to postpone the time of payment to the specified time after they are furnished." And the same law writer goes on to say that if no time is specified, or if the notice is required to be given and the proofs furnished immediately, it means within a reasonable time, with due diligence. *Id.* p. 330.

Thus it appears that the courts draw a distinction between policies which call for the notice of death and proofs of loss, and stipulate that a failure to give such notice or furnish such proof shall work a forfeiture of the insurance, and policies which call for such notice and proofs, but make no stipulation as to the consequence of failure to comply with such call; and, whilst the courts are powerless to strike out the forfeiture feature in those contracts in which the parties have seen fit to insert it, they are equally powerless to insert such a feature when the parties have not seen fit to do so. Where no forfeiture is prescribed in the contract, the court should have regard to the consequence that results from the failure to give the notice as shown by the facts in the case, and, if it appears that the purpose for which the notice and proofs were required has really been accomplished, the plaintiffs should not be precluded. In the first Nebraska case above referred to that court with reason and justice said that the failure of the plaintiff

to give the notice was immaterial, "since it appears that the company had actual knowledge of the loss through its agents and acted on that knowledge." That was the case where the agent of the company was present at the fire and made a report of it, though the plaintiff failed to do so. In the case at bar the defendant by its answer shows that the purpose for which the notice was required has been accomplished, and, as it was not stipulated in the contract that a forfeiture should result from a failure to give the notice, the failure in that respect was immaterial, and it furnishes no defense to the plaintiff's suit. The plaintiff's cause of action being otherwise admitted, the motion for a judgment notwithstanding the verdict should have been sustained.

The judgment is therefore reversed, and the cause remanded to the circuit court, with directions to sustain the plaintiff's motion for a judgment notwithstanding the verdict and enter judgment accordingly.

BRACE, GANTT, and FOX, JJ., concur. ROBINSON, C. J., concurs in paragraph 1 of this opinion, and dissents from paragraph 2. MARSHALL and BURGESS, JJ., dissent from paragraph 1, and concur in paragraph 2 and in the result.

ARTHUR FRITSCH FOUNDRY & MACHINE CO. v. GOODWIN MFG. CO.

(Court of Appeals at St. Louis, Mo. December, 1902.)

APPEAL—MOTION TO DISMISS—NOTICE—COURT OF APPEALS RULES—WAIVER.

1. The written notice of motion to dismiss an appeal for failure to prosecute the same, required by Court of Appeals Practice Rule 24, may be waived, and the motion submitted on consent of parties, without service thereof.

Appeal from St. Louis Circuit Court; Warwick Hough, Judge.

Action by the Arthur Fritsch Foundry & Machine Company against the Goodwin Manufacturing Company. From a judgment in favor of defendant, plaintiff appeals. Dismissed.

A. N. Edwards and Geo. L. Edwards, for appellant. E. S. & D. G. Robert, for respondent.

PER CURIAM. Defendant has moved for an affirmance of a judgment of the circuit court in the city of St. Louis on a certificate, pursuant to section 812, Rev. St. 1899, showing that a judgment was rendered by that court February 11, 1902, for defendant in this cause, and that an appeal was granted to the St. Louis Court of Appeals March 21, 1902. No steps appear to have been taken to prosecute the appeal. The twenty-fourth rule of practice of this court requires a written notice of such a motion, as preliminary to any action thereon by the court; but in

¶ 1. See Appeal and Error, vol. 3, Cent. Dig. § 3357.

this instance counsel of record for appellant has appeared at the bar, on the submission of the motion, and waived other service there-
 or, and consented to the dismissal of the appeal. The required notice may be so waived, and accordingly the appeal is dismissed at the cost of the appellant. All the Judges concurring.

MEYERS et al. v. SCHOOL DIST. NO. 2, TP. 29, RANGE 13, et al.

(Court of Appeals at St. Louis, Mo. March 4, 1901.)

SCHOOLS AND SCHOOL DISTRICTS—ORGANIZATION—OBLITERATION OF DISTRICT—APPEAL—OBJECTIONS TO EVIDENCE—REVIEW.

1. An objection that the testimony of a witness was incompetent, as secondary evidence, cannot be first made on appeal.

2. Under Rev. St. 1899, § 9742, authorizing the formation of a new school district, composed of two or more entire districts, or parts of two or more districts, or to divide one district to form two, or to change the boundary lines of two or more districts, the voters of three existing districts may form two new districts by dividing and obliterating one of them.

Appeal from Circuit Court, Scott County; Henry C. Riley, Judge.

Suit by W. B. Meyers and others against School Districts Nos. 2 and 3, township 29, range 13 east, in Scott county, Mo. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Albert De Relgu, for appellants. M. Arnold and J. J. Russell, for respondents.

BLAND, P. J. This is an injunction suit for the purpose of preventing School Districts Nos. 2 and 3, township 29, range 13 east, in Scott county, from absorbing School District No. 4 in the same township by dividing its territory between them. The plaintiffs' petition states that all three of these districts were duly organized, and that at an election held at the annual school meeting of District No. 4 on the 3d day of April, 1900, a proposition to divide said district into two parts, and add one part to the adjoining district, No. 2, and the other part to District No. 3, was carried by a majority vote, and that on said date at the said annual meeting in said Districts Nos. 2 and 3 the propositions were carried by majority vote in each of said districts to receive and annex the territory of District No. 4. The above is, in brief, the substance of the material allegations. The defendants, in their answer, admit that all of Districts Nos. 2, 3, and 4 were regularly organized, and admit that a proposition was submitted to the annual meetings to divide District No. 4 by changing the boundary line of Districts Nos. 2 and 3, and giving part of District No. 4 to each of the others, and thus consuming all of said District No. 4, and that, proper and legal notices having been given as required by law, the proposition to

divide said District No. 4, and to change the boundary lines of said Districts Nos. 2 and 3, was carried by a majority vote of those voting at each and all of said meetings in all of said districts, and that more than 15 days before the said annual meetings a petition signed by more than 10 qualified voters of each of said school districts was presented to the clerk of each of said districts affected by the proposed change of boundary line, said petition asking for said change; and each of the clerks of said districts gave more than 15 days' notice of the proposed change of boundary line by posters in each of said three districts, and written notices in five public places in each of said districts, and the proposition was decided and carried by a majority vote in each and all of said districts by the qualified voters present and voting. The defendants deny that the change leaves any district with less than 20 pupils of school age, and deny that it was to encroach upon any district simply for the acquisition of territory, but was in good faith, believing it to be for the best interest of the people and taxpayers of all the districts affected, for the reason that District No. 4 has not maintained a successful school in the past, having had an average attendance of less than five pupils, but that good schools have been and will be maintained in Districts Nos. 2 and 3, to which said district is now attached, and that the educational facilities furnished the children will be better than before, with less expense to the taxpayers. Defendants also filed their motion to dissolve the temporary writ of injunction for the reasons alleged in the answer. No replication was filed. On motion to dissolve the temporary injunction which had been granted, a hearing was had before the court. The motion was sustained, dissolving the temporary restraining order, and plaintiffs' bill was dismissed. Plaintiffs appealed.

It is admitted by the pleadings that the proposition to absorb all of District No. 4, by dividing it between Districts Nos. 2 and 3, was carried in all three of the districts by a majority vote cast at the annual April election. It was proven by the evidence of Moore, a director and clerk of District No. 4, that all the steps required by statute to be taken in respect to voting on the proposition were taken before the election was held. Appellant objects to the testimony of Moore because it was secondary evidence. He made no such objection on the trial, and cannot for the first time make it here. No irregularity is charged either in the steps taken leading up to the election, or in the conduct of the election itself. The only question in the case, as presented by the record, is whether, under the statute (section 9742, Rev. St. 1899), it was competent for Organized Districts Nos. 2 and 3 to absorb Organized District No. 4. This question is answered in the affirmative by the case of *State ex rel. v. Hill*, 152 Mo. loc. cit. 242, 243, 53 S. W. 1062.

The judgment is affirmed. All concur.

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 1262.

**HOLLIDAY-KLOTZ LAND & LUMBER
CO. v. MARKHAM et al.**

(Court of Appeals at St. Louis, Mo. March 4,
1901.)

**REAL ACTIONS—TRESPASS—CUTTING TIMBER—
ADVERSE POSSESSION—ISSUES—QUESTIONS
FOR JURY—INSTRUCTIONS—HARMLESS ER-
ROR.**

1. Where, in an action for injury to possession of land, both parties claimed title under deeds from different sources, and defendant claimed adverse possession, the submission of the question of defendant's adverse possession only to the jury constituted a construction and interpretation of the deeds by the court, and a finding that plaintiff had the better paper title to the land.

2. Where the court sufficiently defined adverse possession in an instruction given, it was not error to refuse a requested instruction on such subject.

3. Where the court properly defined adverse possession, and charged that actual possession of the land with the claim and exercise of rights of ownership would entitle defendant to a verdict, defendant was not prejudiced by an instruction that the jury should not consider the fact that defendant, under color of title, went on the land to cut timber, as evidence of adverse possession on his part, the jury being presumed to be capable of distinguishing between mere entry to cut timber and facts showing actual possession with the claim and exercise of rights of ownership.

Appeal from Circuit Court, Wayne County;
Frank R. Dearing, Judge.

Action by Holliday-Klotz Land & Lumber Company against one Markham and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

The court gave of its own motion the following instructions: "No. 1. That if you believe and find from the evidence in the case that the defendants, some time in the years 1897 and 1898, entered in and upon the southeast quarter and southwest quarter of section 29, township 27, range 4 east, and the northeast quarter of the northeast quarter of section 31, township 27, range 4 east, and cut and carried away timber from the lands, your verdict should be for the plaintiff, and you should assess his damages at such sum as you may find from the evidence the timber so taken was reasonably worth at the time it was taken, not to exceed the sum of two thousand dollars, unless you should further find that at the time the timber was so taken the defendants were in the actual possession and occupancy of said land claiming same adversely to the plaintiff. No. 2. You are further instructed that if you believe and find from the evidence that at the time the timber was so taken the defendants, by themselves or their tenants, were in the actual possession of the said lands, claiming and exercising the rights of ownership over the same, your verdict should be for the defendants." And at the request of the plaintiff the following instruction: "No. 3. The court instructs the jury that if you find from the evidence that the defendants, after the deed introduced in evidence by the defendants

was made by the Wayne County Land & Investment Company to Markham, simply went upon the lands described in said deed for the purpose of cutting and removing timber from such lands, then such acts of defendants do not constitute such possession of the lands as will defeat plaintiff's action." It refused the following instruction, requested by the defendants: "No. 4. The court instructs the jury that the quitclaim deed from the Wayne County Land & Investment Company to Jeff Markham, one of the defendants in this case, embracing the land in dispute, is sufficient to constitute color of title in defendants; and you are further instructed that if you find from the evidence that defendants, after obtaining said deed, entered into actual, continuous, visible possession of said lands, and so remained in possession thereof until the institution of the plaintiff's action herein claiming the same adversely to the plaintiff, and that the said timber and trees were by the defendants cut down and removed from the said lands by the defendants when they were thus in the possession of the said lands, then you will find the issues for the defendants."

M. R. Smith, for appellants. James F. Green, for respondent.

BOND, J. 1. Plaintiff's action was for injury to possession of land. It could be sustained, therefore, only on one of two theories: First, that plaintiff was in the actual possession of the land when the trespass was committed; second, that the land was not in the actual possession of any one, but was in the constructive possession of plaintiff as the rightful owner. *Hampton v. Massey*, 53 Mo. App. 501; *Brown v. Hartzell*, 87 Mo., loc. cit. 568, and cases cited; *Harris v. Sconce*, 66 Mo. App., loc. cit. 347. In the case at bar plaintiff did not claim actual possession; hence it was necessary to show that it (plaintiff) had title to the land, and the constructive possession which the law attaches, in the absence of adverse possession, to the holder of the legal title. To sustain this theory, plaintiff attempts to derails title by a chain of conveyances ending in deeds to it purporting to convey the land. The defendants also gave evidence of a conveyance of the land to one of them, not emanating from any of the grantors of plaintiff or from the government, but which furnished color of title under which defendants' evidence tends to show they were in the adverse possession of the land when they cut and removed the timber thereon. Upon the issues thus presented the trial court should have determined the question of title in plaintiff under the deeds to it; and, if this was resolved in the affirmative, should then have submitted to the jury the single issue of adverse possession by defendants at the time of the alleged trespass. The instructions of the court, while not formally expressing its opinion as to the

title to the land, and the same thing, in effect, by referring to the jury only the issue as to adverse possession. Hence there is no merit in the contention that the court failed to exercise its prerogative of determining the legal effect of the deeds adduced as plaintiff's muniment of title. If the deeds in question operated to vest the title to the land in plaintiff, it is wholly immaterial whether the court so stated in its instructions to the jury, or submitted to them another issue, resting solely upon the assumption that plaintiff was the owner of the land. In either case it did discharge its duty of resolving the question of title presented by the written evidences, and its rulings on that point were only open to attack for errors in construction and interpretation of the deeds and other writings, as to which no opinion need be expressed until such errors are pointed out for review.

2. It is next urged that the court erred in refusing instruction No. 4, *supra*, defining adverse possession. This point cannot be sustained, for an examination of instruction No. 2 given of the court's own motion shows that it embodies a sufficient definition of these terms as applicable to the facts and circumstances shown on the trial.

3. It is finally insisted that the court erred in giving instruction No. 3 at respondent's request, to the effect that the jury should not consider the facts that defendants, under color of title, went upon the land in dispute to cut and remove timber, as evidence of adverse possession on their part. Such facts clearly evidenced a claim of ownership of the land covered by the deed under which they were performed. Adverse possession, if not predicable of these facts discerned from all other acts manifesting permanent occupancy of the land (*Cantlin v. Holladay-Klotz Land & Lumber Co.*, 151 Mo. 159, 52 S. W. 247; *Sweringen v. City of St. Louis*, 151 Mo. 348, 52 S. W. 346), was inferable from such acts of ownership in connection with, and supplemented by, other acts indicating a continuous and permanent possession of the premises. It would have been entirely proper for the trial court to have stated the legal effect of the evidence on this point, taken as a whole, as to which this court has said: "Unless this is done, the jury are left without proper guidance as to the law governing a special ground of defense or right of recovery. Neither are such directions within the rule prohibiting the singling out of particular facts in the chain of proof. They are rather rulings upon the totality of the proof offered to overthrow a defense or sustain a right to recover." *Stewart v. Sparkham*, 75 Mo. App., loc. cit. 109. It may be conceded that the instruction under review is a technical violation of this rule. The question remains, is it reversible error under the facts in this case? Unless it misled or unduly influenced the jury, their verdict should not be disturbed. Taken in connection with in-

struction No. 2, wherein the court told the jury that "actual possession of the land with claim and exercise of rights of ownership" would entitle defendants to a verdict, we do not see how the jury could have been misled, if they were capable (and we must assume they were) of distinguishing between mere entry to cut and remove timber and facts tending to show actual possession with claim and exercise of rights of ownership. And, if they found the added elements necessary to such possession, it was their duty, under the instructions, to return a verdict for the defendants. Taking these instructions as qualitative of each other (*Linn v. Massillon Bridge Co.*, 78 Mo. App., loc. cit. 118; *Carroll v. Railway Co.*, 60 Mo. App., loc. cit. 468), they should have been read together (*Gordon v. Burris*, 153 Mo., loc. cit. 232, 54 S. W. 546). When thus read as a whole, they afforded no just ground for misconception on the part of the jury.

A careful examination of the record in this case satisfies us that the judgment is for the right party. It is therefore affirmed. All concur.

Affirmed.

BARNES et al. v. LITTLE RIVER LAND & LUMBER CO. et al.

(Supreme Court of Tennessee. Nov. 20, 1902.)

ADVERSE POSSESSION—SUCCESSIVE GRANTS—POSSESSION BY LAST GRANTEE—EXTINGUISHMENT OF ALL TITLES.

1. Primarily the title to land is vested absolutely and indefeasibly in the state, and this title, where the land is granted by the state pursuant to statutes authorizing grants, passes to the first grantee, leaving nothing to be thereafter disposed of, and nothing upon which a subsequent grant can operate.

2. The first grant by the state, like the first patent by the United States, of part of the public domain, carries the fee, and is conclusive, not only against the state, but all claiming under junior grants, unless it is void on its face, and junior grantees take nothing by their grants.

3. Where the state by grant has divested herself of title to certain lands, and a person has held adverse possession thereof for a period of seven years under an assurance of title purporting to convey a fee, the statute (Act 1819, c. 28, § 1) takes away the title of the real owner, and transfers it, not in form, but in legal effect, to the adverse possessor, and thus vests him with an absolute estate in fee simple.

4. Where the state made three successive grants of the same lands, and after those claiming under the grantee in the third grant had been in adverse possession for seven years the grantees in the second grant, the complainants herein, brought suit, claiming that such adverse possession had, by extinguishing the title given by the first grant, vitalized or infused title into their intermediate grant, by virtue of which they have both the right of property and the right to the possession of their lands as against the defendants. *Held*, that by virtue of the operation of Acts 1819, c. 28, § 1, the effect of the adverse holding by defendants was to draw to and vest in them the absolute and indefeasible title which the first grantees received from the state under their grant.

Wilkes, J., dissenting.

Appeal from Chancery Court, Sevier County; John P. Smith, Chancellor.

Suit by J. G. Earnest and others against the Little River Land & Lumber Company and others. From a decree of the court of chancery appeals in favor of defendants, plaintiffs appeal. Affirmed.

Lucky, Sanford & Fowler and S. T. Logan, for appellants. Webb & McClung, M. B. McMahan, J. R. Penland, and Pickle & Turner, for appellees.

BEARD, O. J. This is an ejectment bill filed to recover a large body of land lying in Sevier county. Several matters of minor importance were presented at the bar, but, confessedly, as the case involves one controlling or determinative question, to avoid confusion we will state only so much of the record, and that in a condensed form, as bears on this question.

The state issued three series or classes of grants, which interlap so as to cover the lands in controversy, at different dates and to different persons. The older grants were issued in the year 1838 to grantees who are not parties to this suit, and who, so far as is disclosed, are not setting up title under their grants. The intermediate grants are contemporaneous, and were issued to the ancestor of the present complainants in the year 1841, and the junior grants at a still later date. The complainants claim under the intermediate grants, and the defendants under the later grants. But in addition to this claim the defendants rely on the fact that before the institution of this suit they had themselves, and through their privies, held continuous, exclusive, adverse, and peaceable possession of these lands within the interlap of these grants for the full term of seven years, and under an assurance of title purporting to convey an estate in fee.

As against parties claiming under the grant first in the order of issuance, it is conceded that the defendants, by this adverse holding, have obtained the superior title, but the contention of complainants is that such holding has not been operative against them; to the contrary, that the removal or extinguishment, as they say, of the first grants, by this adverse possession, has vitalized or infused title into their intermediate grants, by virtue of which they have both the right of property and the right to the possession of their land as against defendants. In other words, the defendants insist that, under the first section of the act of 1819, the effect of this adverse holding is to invest them with an "indefeasible title in fee," good against all the world. On the other hand, the complainants contend that this possession of defendants has extinguished the first or superior grants, and at the same time set at large the intermediate grants under which they claim, and they are now the muniments of the true title, enforceable against the defend-

ants and all others. Is such claim maintainable on principle or authority?

We think it may be safely asserted that if an individual owner in fee, for a valuable consideration, should make and deliver a deed conveying to a purchaser, without reservation, a tract of land, such writing would take out of the owner all estate, and vest it in the vendee. So, the registration laws out of the way, a second and third deed from the vendor to other parties, in which he undertook to convey to them the same property, would be waste paper, in no way affecting the title or estate of the first conveyee. But a very different condition would be brought about, should the third grantee go into possession of the land, and hold it adversely for the term of seven years. Then, under the first section of the act of 1819, he would secure what, up to the moment of the expiration of this term, the first grantee had,—an estate in fee, good and indefeasible, not only against the first grantee, but against all invaders of his rights, including, of course, the intermediate grantee. In such a case no one would claim that the loss of estate by the first inured to the benefit of the second, as against him, whose assurance of title had ripened into an indefeasible title. If this be true, then there must be found some intelligent and well-defined distinction between private and public grants, to give a different effect to an adverse holding under the last of a series of grants of the same property from the state. Such distinction, at least, is not found in patents for public lands issued by an officer acting under authority of the statutes of the United States. In such case the "patent carries the fee, and is the best title known to a court of law." *Bagnell v. Broderick*, 13 Pet. 450, 10 L. Ed. 235. It is the highest evidence of title, and is conclusive against the government and all claiming under junior patents or titles, until set aside or annulled, unless it is absolutely void on its face. *Hooper v. Scheimer*, 23 How. 235, 16 L. Ed. 452; *Johnson v. Towsley*, 13 Wall. 72, 20 L. Ed. 485; *Gibson v. Chouteau*, 13 Wall. 92, 20 L. Ed. 534. We can conceive of no reason, and none is suggested at the bar, why the same is not true as to grants issued by the state. The title to the land is primarily in the state. It is there absolutely and indefeasibly, save by its own act. Ultimately it sees proper to part with a portion of its domain, over which it is lord paramount, and does so by the issuance and delivery of a grant in which the property is confirmed to the grantee, without limitation or condition. Held by the state, it was a fee simple absolute, and such an estate passes by the terms of the instrument to its grantee. Nothing remains in the state to be afterwards disposed of. The estate in the land is gone, and there is nothing left upon which a subsequent grant can operate. It is true, there are exceptional cases in which this rule will not control, such as when a

younger grant is made to relate to an older special entry, but the present is not one of those cases. This rule is applied uniformly in controversies between parties claiming land under successive grants, where the statute of limitations is out of the way. In such a controversy, the claimant under the older grant will always succeed, upon the ground that by it the state had parted with the estate or title to the land. It is true that it has been found that the state has often issued a number of grants to the same land; but this was without warrant of law, and has resulted either from carelessness upon the part of the officials of the state, from incorrect surveys, or possibly other causes. The courts have been burdened with litigation growing out of the multiplication of grants, but nowhere has it ever been intimated that there were two or more titles to the same land, which might be parceled out in a series of grants. There is but one "good and indefeasible title," as is said by Judge Lurton in *Coal Co. v. Wiggins*, 15 C. C. A. 510, 68 Fed. 449, and this title passes to the first grantee, "and as it is impossible," says Judge Reese in *Crutinger v. Catron*, 10 Humph. 27, "that there shall be a good, subsisting legal title in two different persons, claiming in different rights to the same land," we think it clear that, as the state has nothing left to dispose of, subsequent grantees obtain nothing.

Leaving, however, these general considerations, which seem to dispose of the present controversy, inasmuch as it would follow that the intermediate grantees took nothing covered by the first grants, we return to the specific question, did the adverse holding by the defendants of the property located within the interlap of all the grants, as hereinbefore set out, serve to draw to them or vest in them the absolute title to this property, which they can maintain against every owner, or did it simply extinguish the rights of the first grantee or grantees, and leave them exposed to the substantive rights and the aggressive attacks of complainants, under the cover of their intermediate grants?

This brings us to an examination of the first section of the act of 1819, which, in substance, is carried into Shannon's Code, §§ 4456-4458, and reads as follows:

"Sec. 4456. Any person, having had by himself or those through whom he claims, seven years' adverse possession of any lands, tenements, or hereditaments, granted by this state, or the state of North Carolina, holding by conveyance, devise, grant or other assurance of title, purporting to convey an estate in fee, without any claim by action at law, or in equity, commenced within that time and effectually prosecuted against him, is vested with a good and indefeasible title in fee to the lands described in his assurances of title.

"Sec. 4457. And on the other hand, any person and those claiming under him, neglecting for the said term of seven years to

avail themselves of the benefit of any title, legal or equitable, by action at law, or in equity, effectually prosecuted against the person in possession, as in the foregoing section, are forever barred.

"Sec. 4458. No person, or any one claiming under him shall have any action at law or in equity, for any lands, tenements, or hereditaments, but within seven years after the right of action has accrued."

The conditions that lead to the passage of this celebrated act are recorded in the opinions of the courts of that day. *Barton's Lessee v. Shall*, Peck, 218; *Wallace v. Hannum*, 1 Humph. 449, 34 Am. Dec. 659; and *Dyche v. Gass' Lessee*, 3 Yerg. 401. But nowhere are they more graphically portrayed than in the preamble to the act itself, which is in these words, "Whereas many disputes have arisen with regard to the proper construction of the statute of limitations, and the time seems fast approaching, when the titles to land will become so perplexed that no man will know from whom to take or buy land," and to remedy these evils this legislation was enacted. The act is drawn with great precision in the use of terms, and, even if it was not a part of the judicial history of the state that it was drafted by an eminent lawyer, itself would give evidence of the work of a master hand. What, then, was meant by the provision that a party holding "by himself, or those through whom he claims, adversely under an assurance of title purporting to convey an estate in fee, without any claim by action at law, or in equity, commenced within seven years, is vested with a good and indefeasible title in fee to the land described in his assurance of title"? The eminent author of this act, as well as the legislature and the courts of that day, well knew the technical meaning of the term "title in fee." They were well aware that it defined a full and absolute estate, beyond and outside of which there was no other interest, or even shadow of right. So, when the act vested the adverse holder with such a title, it clothed him with an estate which was good, not only against him who had been the owner, but against the whole world,—a title in which was blended actual possession, the right of possession, and the right of property 4 Kent, Comm. 580. It was an "indefeasible" title in fee or estate, with which its owner could repel all attacks upon, and expel all invaders from, its possession. This title, thus vested by operation of law, from whence did it come? Not from the state, because the state had already parted with its interest. Not from the second or third or any subsequent grantee of the same land, for he had none. It seems to us, from no other source than him—the first grantee—whose laches had lost what the diligence of the adverse possessor had acquired. By operation of this statutory provision, the estate or title which was in the first taker until the last moment of the seven-years adverse holding was de-

vested out of him, and at the same instant vested in the adverse holder or possessor. Thus it is that the grant or deed of the original owner becomes an empty shell, without any element of force or life, and the estate in the land, having passed from him, thereafter vests in the adverse possessor, and in him is "good and indefeasible." In other words, "the statute takes away the title of the real owner, and transfers it, not in form indeed, but in legal effect, to the adverse occupant," and thus clothes him with a "perfect title." 3 Washb. Real Prop. 163-165.

An examination of our cases, we think, will disclose, with one exception, that this has been the uniform construction of this act. We refer on this point particularly to *Wallace v. Hannum*, supra; *Waterhouse v. Martin*, Peck, 393; *Norris v. Ellis*, 7 Humph. 464; *Belote v. White*, 2 Head, 712; *Hopkins' Heirs v. Calloway*, 7 Cold. 46. In *Wallace v. Hannum*, 1 Humph. 450, 34 Am. Dec. 650, Judge Green states his understanding of this section as follows: "In order that a party shall be protected, who has held possession of land for seven years, he must claim the same by some assurance of title which purports to convey an estate in fee simple. In such case it not only protects his possession, but in express words it confers on him the title. He shall have a good and indefeasible title in fee simple." In *Belote v. White*, 2 Head, 712, Judge Wright says: "The act of 1819 bars equitable as well as legal titles, and operates as an extinguishment of the same, and invests the possessor of the same with a perfect title in fee simple. Whenever the equitable owner is sui juris, and can sue, but omits to do so for seven years, the entire title and fee are by the statute placed in the possessor. And this is so though the legal title be in a trustee, and whether he be capable of suing or not." In *Norris v. Ellis*, 7 Humph. 464, Judge Reese bears this testimony as to the proper construction of the act of 1819: "The titles which are perfected by the bar of the statute, and which draw to them the better title, are thus enumerated in the first section of the act, which purports to convey to the possessor, or those for whom he claims, an estate of inheritance." So in *Hopkins' Heirs v. Calloway*, 7 Cold. 46, Judge Andrews says of the proper construction of this act: "Under the operation of the first section, an adverse possession of seven years under a deed, grant, or other assurance of title, purporting to convey a fee, not only bars the remedy of the party out of possession, but vests the possessor with an absolute estate in fee simple." The effect, as we understand these cases, of such adverse holding, is, as Judge Reese expresses it in *Norris v. Ellis*, supra, that there is drawn to such holder the "better title," or, as tersely put by Judge Haywood in *Waterhouse v. Martin*, supra, "The adverse possessor acquires what his adversary loses."

It would hardly seem necessary, yet, to

prevent all possible misinterpretation of our holding, it is not improper to say that, while it happens in the present case the defendants connect with the grantees of the third class, this was not essential to their successful defense under the first section of the act of 1819. For it is too well settled to admit of doubt, or to require at this late day an array of cases in support, that, to give the adverse holder the benefit of this section, it is only necessary that he be in possession of granted land, and under an assurance of title purporting to convey an estate in fee, without regard to the source of such assurance. But it is said that we have decided otherwise in the case of *Coal Creek Consol. Coal Co. v. East Tennessee Iron & Coal Co.*, 105 Tenn. 564, 59 S. W. 634, and the rule of stare decisis is invoked. The opinion in that case was delivered at the September term, 1900, of this court, and is therefore of too recent date to have become a rule of property in the state. That being so, the doctrine of stare decisis is not so inflexible as to require us to adhere to it, when upon further examination we discover error in the conclusions announced. We will not stop to inquire what, if any, are the distinguishing features between that and the present case, but will content ourselves with saying that, in whatever respect it may conflict with our present holding, it is overruled.

WILKES, J. I earnestly but respectfully dissent from the views of the majority in this case. The holding is contrary to that in *Coal Creek Consol. Coal Co. v. East Tennessee Iron & Coal Co.*, 105 Tenn. 563, 59 S. W. 634, which was the unanimous opinion of the whole court in a case where the questions considered were directly involved. It is now proposed to overrule that case by an opinion concurred in by a bare majority of three; Justice NEIL being incompetent, though probably holding the view of the majority. The present case is reported by the court of chancery appeals to be distinguishable from the *Coal Creek Case* in important particulars. This is conceded by counsel for defendants in their brief, and it is argued that because of these differences the *Coal Creek Case* is not controlling or applicable. One of the differences pointed out is that in the *Coal Creek Case* there was no adverse possession as to the intermediate grant of complainant, while in this case the possession is adverse to the intermediate as well as to the original grant. Such a difference is vital, and probably would, even under the holding in the *Coal Creek Case*, have forced this court to a different conclusion in that case. While, therefore, the correctness of the decision of this court in the *Coal Creek Case* does not properly arise in the present case, as the majority have seen proper to overrule it, I desire to say that, in my opinion, it was correctly decided, and is not successfully impeached in this case, nor can it be, upon its controlling features. The

Coal Creek Case received the most mature consideration when it was before the court. Every feature now argued was then most carefully examined and unanimously agreed to. No new authorities have been presented; no new arguments have been made, and the same counsel have relied substantially upon the same printed briefs and oral arguments.

I only desire to consider two features passed on by the majority, but, in my opinion, not necessarily involved in the present case. The first is whether the original title is tolled and brought to the support of the title of the adverse holder under color of title. Before entering upon the consideration of this feature, I only desire to say that the expression "toll the title" is not properly used by counsel to express their meaning. To "toll a title" does not mean to draw that title to another. Bouvier defines the term "toll" as follows: "To bar, defeat, or take away, as to toll an entry into lands is to deny or take away the right of entry." 2 Bouv. Law Dict. p. 598. In its proper legal sense, the original title is tolled,—that is, it is defeated and taken away; but it is not tolled in the sense of being kept alive and drawn to the adverse holder. The fundamental error of the majority, in my opinion, is in maintaining that the adverse holding must be coupled to the original title, and derive its indefeasibility therefrom. To strengthen this view, they rely upon the general statement that there can be but one true title, and, since the original title is assumed to be the true title, it must be brought to the support of the adverse title, so as to make it appear that the adverse holder is in of right, whereas he is in simply by force of the statute, not as of right in as a disseisor, and not as a holder of the true title. It would seem to be a work of supererogation to cite authorities to such a proposition, if it were not for the opinion of the majority holding to the contrary. In 1 Cyc. Law & Proc. 1083, the doctrine is thus laid down: "Whenever this defense [of adverse possession] is set up, the idea of right is excluded; otherwise the statute of limitations would be of but little use for protecting those who could not otherwise show an indefeasible title to the land." Citing *Smith v. Burtis*, 9 Johns. 174; *Pillow v. Roberts*, 13 How. 472, 14 L. Ed. 228. The effect of adverse holding under color of title is a disseisin of the prior estate; that is, in the language of Mr. Preston: "It takes the seisin or estate from one man, and places it in another. * * * It is the commencement of a new title, producing that change by which the estate (not the title) is taken from the rightful owner and placed in the wrongdoer. As soon as a disseisin is committed, the title consists of two divisions—First, the title under the (new) estate and seisin; and, second, the title under the former ownership." 2 Prest. Abst. 284; 3 Washb. Real Prop. (3d Ed.) 118; Tied. Real Prop. § 693. "Disseisin" and "ouster" mean very much the same thing as "adverse possession." *Id.* Disseisin is al-

ways a wrongful dispossession; i. e., it is never supported by a good title. Tied. Real Prop. § 694. This court has already commented upon the expression found in 3 Washb. Real Prop. 163-165. *Coal Creek Consol. Coal Co. v. East Tennessee Iron & Coal Co.*, 105 Tenn. 574, 59 S. W. 634. In addition to what was then said as the view of the court, I desire to add that the statement of Mr. Washburne is supported by no authority, and none is cited. Mr. Tiedeman, commenting on it, says: "Mr. Washburne says that the operation of the statute takes away the title of the true owner, and transfers it, not in form, indeed, but in legal effect, to the adverse occupant." And he adds: "The statute may have the effect of destroying the title of the owner altogether and for all purposes, but it cannot be said to transfer it to the disseisor. His title is acquired by adverse possession, and it is only made perfect by rendering the rightful owner powerless to defeat it, either by entry or ejectment. The only real value of this distinction lies in the settlement of a question arising under the subject of title by abandonment."

Considering our own cases, it is conceded that the adverse holder under color of title must show that the land held has been granted by the state to some one, because the statute so provides; and, from the very reason of the law, there can be no adverse holding of land which the state has never granted, but it is not required that the adverse holder must connect himself with the original grant, or that it can bring any further support to his title under the adverse holding. It was long a controverted question in this state whether the adverse holder must connect himself with the original grant, but the question has been settled ever since the case of *Gray v. Darby's Lessee*, Mart. & Y. 396-426, decided in 1825 by Judge Catron, which terminated a long and spirited controversy. See note of Judge Cooper, page 426. Mart. & Y., and note to *Weatherhead v. Bledsoe's Heirs' Lessee*, 2 Tenn. 352. A perfect system and network of decisions has been built up on this holding, contrary to that of the majority, and in accord with the holding of Judge Catron in *Gray v. Darby's Lessee*. The cases are too numerous to mention. Thus, a voidable deed, a void deed, a fraudulent deed, a forged deed, a sheriff's deed based on a void tax sale, a deed under a void decree, an unregistered deed, a decree for partition, an entry, a title by decent cast, and a title by devise have all been held to be an assurance of title, which, coupled with adverse possession, will confer an indefeasible title. And yet in none of these cases is it necessary or practicable to connect the title of the adverse holder with the original grant, or that the latter be brought to the support of the title of the adverse holder. If the original title or grant must be brought to the adverse title, then all the intermediate links must be brought, also, so that the result

is that the adverse holder makes his title indefeasible by showing a chain of conveyances from the state, and not by operation of the statute; and the act is therefore of no force or virtue, and has no practical effect. The true holding is that the title gained by adverse possession, coupled with the color of title, becomes indefeasible, because it extinguishes the original title, and substitutes for it a new one created by the statute. As this new title derives its indefeasibility under the law from an adverse possession, it is only indefeasible as to the title to which the possession has been adverse. That the original title is extinguished is held by a vast array of cases in Tennessee and elsewhere, and that it is kept alive and brought to the support of the adverse title is held in none, except in a dictum in *Norris v. Ellis*, 7 Humph. 464. In *Belote v. White*, 2 Head, 712, cited by the majority, it is said: "The act of 1819 bars equitable as well as legal titles, and operates as an extinguishment of the same, and invests the possessor with a perfect title in fee simple." That the act operates to "extinguish" the original title is expressly held by many authorities. *Wood, Lim. Act*, 499, 563; *Cooley, Const. Lim.* 365; *Trim v. McPherson*, 7 Cold. 18; *Belote v. White*, 2 Head, 712; *McClung v. Sneed*, 3 Head, 222; *Hanks v. Folsom*, 11 Lea, 562; *Leffingwell v. Warren*, 2 Black, 599-605, 17 L. Ed. 261; *Bicknell v. Comstock*, 113 U. S. 149, 5 Sup. Ct. 399, 28 L. Ed. 962; *Coal Co. v. Wiggins*, 15 C. C. A. 510, 68 Fed. 449 (opinion by Lurton, J.),—all referring to the operation of the statute as an extinguishment of the original title, in express language and terms.

To repeat: The substance of virtually all the cases is that the adverse title becomes indefeasible by force of the statute alone, and because it extinguishes the original title, and not because it draws that title to its support, or derives any aid from it. The majority opinion relies upon expressions used in *Wallace v. Hannum*, 1 Humph. 443, 34 Am. Dec. 659; *Hopkins' Heirs v. Calloway*, 7 Cold. 46; *Waterhouse v. Martin*, Peck, 393; *Norris v. Ellis*, 7 Humph. 464. All these cases, and the expressions used in them, were thoroughly considered in the *Coal Creek Case*, and were then explained as having a meaning different from that now ascribed to them, except, perhaps, the case of *Norris v. Ellis*, 7 Humph. 464. The language used by Judge Reese in the latter case was mere dictum, as the case involved was one of adverse possession only, and not of adverse possession with color of title; and the language used in regard to the latter class of cases was not, perhaps, intended to be exact, but, if so, was, and only could be, dictum.

The majority opinion asks the question, "Where does this indefeasible title or fee come from?" and answers it, "Not from the state, because the state had already parted with its interest, but from no other source

than from the first grantee, whose laches had lost what the diligence of the adverse possessor had acquired." And yet nothing is better settled than that the adverse possessor does not derive his title from the original grantee, but adversely to him, and only because of his open, continued, and notorious holding adversely to him.

It is important that there should be stability in the holdings of the court, whether that holding has become a rule of property or not; and, when a holding is overruled, it should be for sound reasonings or newly discovered authorities, and never unless a question is directly and unavoidably involved.

The second determinative proposition is involved in more of doubt and question than that already considered. Counsel for the defendants state the case thus: Three grants were issued by the state for the same land,—the older one, to A.; the second one, to B.; the third one, to C. Complainants claim under the second or B. grant; defendants, under the third or C. grant. The insistence is that the first grant to A. passes the entire title and interest of the state to A., and the subsequent grants to B. and C. passed no interest whatever and were void, and neither party could recover, because neither has any title. Grant A. is not before the court. The holding of the majority is, in substance, that a second grant or a second deed has no vitality and is absolutely void. I am of opinion that a grant or deed regular upon its face is *prima facie* valid, and its validity must be shown and not presumed. It is evident that a second grant is not without some potentiality. When it issues upon an older entry, it carries the title, even as against the first grant; and yet, under the opinion of the majority, it must necessarily be void, because the first grant had deprived the state of any power to make a second one, and had divested it of all estate and title in the land. Concede that the first grant does divest all interest in the land out of the state; it does so only when that grant is valid and regular and sufficient to convey the title. The majority opinion assumes this validity, regularity, and sufficiency simply from the fact that it is prior in point of time, while, in my opinion, such validity, regularity, and sufficiency are not presumed against another grant regular upon its face, and it becomes superior to the second only after being brought into contest with it and prevailing over it,—in other words, by being shown to be valid. So, also, by analogy, a second deed becomes superior title if it is first registered; and yet, on the theory of the majority, it must be absolutely void, because the grantee, after he had conveyed by the first deed, could not make a second one, and had nothing to convey. The majority dispose of this feature by simply saying there are exceptions, but they give no explanations how in these exceptional cases title could remain in the state or grantee sufficient to authorize a second deed. By Acts 1777, c. 1,

§ 11, it is provided that every grant must be registered in the county where the land lies, within 12 months after issuance, or it shall be void. If a grantee should refuse to register his grant or take possession and ownership of his land, and should abandon it and leave the state, as thousands have done, must it forever remain unappropriated, because, forsooth, the state cannot make a second grant, even when the first was abandoned? It may be said that it is a condition subsequent that the grant shall be void, of which the state alone can take advantage. Grant this. Does not the state take this advantage when it issued the second grant? If the first grant is irregular and defective, cannot the state issue a second one that is regular and valid. In case of a deed, a vendor for full value parts with all his title, and does it in good faith. His vendee fails to register it, and the vendor makes a second deed to an innocent purchaser, which is first registered, and becomes the true title; and yet all the title had passed by the first deed out of the grantor, and nothing could, in the opinion of the majority, pass by the second. Now, the original grantees under the first grant are not before the court. Whether they are now setting up any claim to the land, does not appear. So far as this record shows, they never took under the grant, or, if they did, they do not now claim, and the legitimate presumption of law and fact is they have long since abandoned any claim they have, because of the invalidity of their grant, or for other reasons. The holding of the majority is, in effect, that the defendants may set up this first original title as one outstanding, in order to defeat complainants. And if it is prior in point of time, it is prior in point of right, without regard to whether it is regular or irregular, while the proper position is that it must be tested before it can be said to be good. The authorities all hold that an outstanding title which has been aban-

doned, defeated, reverted, barred, or extinguished cannot be set up as a defense by defendants. *Peck v. Carmicheal*, 9 Yerg. 328; *Dickinson's Lessee v. Collins*, 1 Swan, 519; *Howard v. Massengale*, 13 Lea, 577; *Jackson v. Hudson*, 3 Johns. 375; *Jackson v. Todd*, 6 Johns. 257; *Greenleaf v. Brith*, 6 Pet. 302, 8 L. Ed. 406; *Humble v. Spears*, 8 Baxt. 159; *Crutsinger v. Catron*, 10 Humph. 24. Now it appears from the record that, in an ejectment suit brought heretofore by the first against the second and third titles, it was defeated before this suit was brought, so that the original title is decreed to be barred and defeated. How, then, can it be brought to the support of defendants' title? It is upon the idea of abandonment or extinguishment that the whole theory is based,—that by virtue of adverse possession and the statute of limitations, whether with or without color of title, the inferior becomes the superior title,—in the one case as offering a defense, and in the other of conferring a new title. But it is only where the possession is adverse, and notoriously so, that it meets the requirements of the statute; and, while a possession may be adverse as to all titles, it does not always follow that it is so. To illustrate the fallacy of the holding of the majority, we suppose A. has color of title to 100 acres, with adverse possession on 10 acres. B. has adverse possession of 10 acres within the same 100-acre boundary. Now, it is evident A. cannot recover B's 10 acres, because he has not held adversely to him, but, on the contrary, B. has held adversely to A. and is protected by the second section of the statute. What would be the effect if B. had also held under color of title, as well as A., we do not stop to consider. Every grant by the state is presumably and prima facie valid, and its invalidity must appear before it can be rejected, and this invalidity only appears after a contest, unless void on its face.

MEMORANDUM DECISIONS.

MAYSVILLE GAS CO. v. THOMAS' ADM'R. (Court of Appeals of Kentucky. June 19, 1903.) Appeal from Circuit Court, Mason County. "Not to be officially reported." Action by Isaac Thomas' administrator against the Maysville Gas Company. Judgment for plaintiff, and defendant appeals. Affirmed. W. H. Wadsworth, E. L. Worthington, Edward W. Hines, W. D. Cochran, and L. W. Robertson, for appellant. A. E. Cole & Son and Thos. R. Phister, for appellee.

BARKER, J. Isaac Thomas, about 15 years of age, was killed on one of the streets of Maysville, Ky., by coming in contact with a wire charged with electricity, which had broken from its fastening and hung down over the sidewalk. This was a guy wire, which connected with a trolley owned and used by the Maysville Street Railroad & Transfer Company in carrying the current of electricity which propelled its cars. After the accident this action was instituted against the Maysville Street Railroad & Transfer Company and the Maysville Gas Company to recover damages for the death of appellee's decedent. The petition alleges, substantially, that appellant and the Maysville Street Railroad & Transfer Company jointly operated the street car line, that appellant furnished the current of electricity which constituted the motive power by which this was done, and that the death of Isaac Thomas was caused by the negligence of the two corporations. The answer of the defendant corporations controverted the material allegations of the petition, and pleaded affirmatively the contributory negligence of the decedent. Upon the trial of the case the court sustained a motion of the appellant for a peremptory instruction to the jury to find for it, which was done. The jury then returned a verdict against the Maysville Street Railroad & Transfer Company for the sum of \$5,500. From the judgment awarding the peremptory instruction, an appeal was prosecuted, and the case reversed; the opinion of the court being in 56 S. W. 153. Upon the return of the case, the Maysville Gas Company amended its answer, and pleaded affirmatively that it neither had the power under its charter, nor did it in fact, furnish the electric current to the Maysville Street Railroad & Transfer Company by which its cars were operated, but that it under contract furnished the steam power by which the street railroad company generated its own electricity. The material allegations of this amended answer were controverted by reply. A second trial of the case resulted in a verdict against appellant awarding damages in the sum of \$5,000. Appellant's motion for a new trial having been overruled, it has brought the case here for review.

The main ground for a reversal of the case insisted on by appellant is the refusal of the court to sustain its motion for a peremptory instruction. We do not think that appellant substantially changed the issue between it and appellee by filing the amended answer after the return of the case to the court below. This amended answer, after all, amounts to no more than placing in affirmative form the issue raised by its denial in the original answer to the allegation of the petition that it furnished the electricity by which its codefendant operated its street car line; and a careful comparison of the evidence on this issue adduced on the first trial with that on the same issue in the second trial shows it to be substantially the same.

This court held that "the street railroad company owned and had charge of the wire, and the gas company generated and sent into the wire the electricity. The gas company received so much per month for supplying the wire of the street railroad company with electricity to operate its line of street cars, and had no interest in the car line, except that its income might enable it to pay the bill for the electricity. * * * Considering the dangerous character of the force produced by the gas company, there was a duty imposed on each to see that the wires into which it was sent were properly insulated. The danger was exactly the same, whether the wires were owned by one or both of the corporations. When one, through the instrumentality of machinery, can accumulate or produce such deadly force as electricity, he should be compelled to know that the means of its distribution are in such condition that those whose business or pleasure may bring them in contact with it may do so with safety. * * * If the wires were not properly insulated, and the death resulted therefrom, then both companies are liable, as it was the duty of the street railway company to have its wires properly insulated, and there was a duty resting on the gas company to see it was done before charging them with electricity." The evidence contained in the bill of exceptions on this appeal on the question of appellant's position with reference to the furnishing of the electric current is substantially the same as that adduced upon the same question in the first trial. All of the evidence upon this issue was obtained from the officers of appellant. It was shown on both trials that the street car company owned the dynamos and generators wherein the electric current was produced; that appellant only furnished the steam power by which the generator was operated; that this was done under a contract between the two corporations; that the engineers who operated the machinery were employes of the gas company, but that, in the matter of turning on or off the electric current by which the street car line was operated, they took their orders alone from the street car company; that the two corporations were distinct corporate entities, whose stockholders were not the same; that the gas company, as a corporation, had no interest in the street car company, except to the extent of the contract for furnishing the power by which the electricity was generated. Appellant's motion for a peremptory instruction was properly overruled.

It is also urged that the trial court erred in giving an instruction on the subject of gross negligence; it being contended that appellant had a right to rely upon the diligence and care of those having control of the operation of the street car line, and, as these were reliable and competent men, appellant cannot be charged with gross negligence in depending upon their skillful management of the trust in their charge. The opinion on the former appeal permits of no such distinction. It holds that appellant owed a duty to the public of seeing that the wires of the street car line were properly insulated before charging them with electricity, and, having this duty, they could as well be guilty of gross negligence with reference to it as of ordinary negligence. The opinion delivered on the former appeal contains the law of this case, and, as the trial court and the jury have carried into effect the principles therein announced, the judgment is affirmed.

BURNAM, C. J., dissents.

OTT v. MEDART PATENT PULLEY CO.* (Supreme Court of Missouri, Division No. 1. May 27, 1903.) Appeal from St. Louis Circuit Court; John A. Talty, Judge. Action by George Ott, by next friend, against the Medart Patent Pulley Company. Judgment for defendant, and plaintiff appeals. Affirmed. Alfred Gfeller and Geo. D. Reynolds, for appellant. Geo. F. McNulty and Percy Werner, for respondent.

MARSHALL, J. This is an action for \$5,000 damages for personal injuries. The defendant asked and was granted a special jury, and when the case was called for trial counsel for plaintiffs filed a motion to quash the venire, on the ground that the special jury law in St. Louis violates the state and federal Constitutions. Counsel for plaintiff in this case are the same as counsel for the plaintiff in *Eckrich v. St. Louis Transit Co.* (No. 10,744, just decided) 75 S. W. 755, and the motion to quash in this case is almost literally the same as the motions to quash in the *Eckrich* Case. In this case, also, the court overruled the motion, the plaintiff declined to proceed, and the court dismissed the case for failure to prosecute; and from this judgment the plaintiff appealed. Several minor points are made by respondent in this case which were not present in the *Eckrich* Case; but it is unnecessary to set them out, as the contention of the plaintiff that the special jury law is unconstitutional is untenable, and this necessarily must result in the affirmance of the judgment. What is said in *Eckrich v. St. Louis Transit Co.* applies equally to this case, and therefore it is unnecessary to repeat it here. The judgment of the circuit court is affirmed. All concur, except **ROBINSON, J.**, absent.

COMBS v. VERITY et al. (Court of Appeals at Kansas City, Mo. June 8, 1903.) Appeal from Circuit Court, Mercer County; Paris C. Stepp, Judge. Action by George H. Combs against W. H. Verity and others. From a judgment for plaintiff, defendants appeal. Reversed. Morton Jourdan and Conklin & Rea, for appellants. Platt Hubbell, Geo. Hubbell, and Martin Read, for respondent.

PER CURIAM. This case in its essential facts is so much like that of Stanley against the same defendant (73 S. W. 727), decided at the present term, that the rulings therein made must dominate the disposition to be made of it, and accordingly the judgment therein must be reversed, and cause remanded.

BELL v. STATE. (Court of Criminal Appeals of Texas. June 23, 1903.) Appeal from District Court, McLennan County; Sam R. Scott, Judge. Alex Bell was convicted of theft, and appeals. Affirmed. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Conviction of theft from the person; the penalty assessed being two years' confinement in the penitentiary. The record is without statement of facts or bill of exception. No error is made manifest, and the judgment is affirmed.

BROWN v. STATE. (Court of Criminal Appeals of Texas. June 23, 1903.) Appeal from District Court, Wharton County; Wells Thompson, Judge. Oscar Brown was convicted of manslaughter, and appeals. Affirmed. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of manslaughter, and his punishment assessed at confinement in the penitentiary for a term of four years. The record is without statement of

facts or bill of exceptions. No complaint is made as to the charge of the court. The record shows no error, and the judgment is affirmed.

GRAY v. STATE. (Court of Criminal Appeals of Texas. June 24, 1903.) Appeal from McLennan County Court; G. B. Gerald, Judge. Bob Gray was convicted of crime, and appeals. Reversed. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The information in this case is identical with that in *Buck Robinson v. State*, 75 S. W. 526, from McLennan county, just decided; and on the authority of that case the information is held to be vicious, and the judgment herein is reversed, and the prosecution ordered dismissed.

HENDERSON, J., dissents.

GREEN v. STATE. (Court of Criminal Appeals of Texas. June 24, 1903.) Appeal from Bowie County Court; A. S. Watlington, Judge. Henry Green was convicted of crime, and appeals. Reversed. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Under the authority of *Buck Robinson v. State*, 75 S. W. 526, from McLennan county, just decided, the indictment in this case is defective. A proper form is laid down for indictments in this character of prosecutions in the *Buck Robinson* Case. Accordingly the judgment is reversed, and the prosecution ordered dismissed.

HENDERSON, J., dissents.

Ex parte HARRIS. (Court of Criminal Appeals of Texas. June 24, 1903.) Appeal from District Court, Jasper County; W. P. Nicks, Judge. Application by Doug Harris for a writ of habeas corpus. From an order remanding relator to custody without bail, he appeals. Affirmed. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Relator was indicted for murder, and filed an application for the writ of habeas corpus before Hon. W. P. Nicks, which application was granted, and upon the hearing relator was remanded to the custody of the sheriff without bail. From this order he appeals to this court. We have carefully read the evidence as contained in this record, and, without discussing it, in our opinion the court did not err in so remanding him to custody. The judgment is affirmed.

JOHNSON v. STATE. (Court of Criminal Appeals of Texas. June 24, 1903.) Appeal from District Court, Bexar County; John H. Clark, Judge. H. H. Johnson was convicted of crime, and appeals. Affirmed. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of knowingly passing a forged instrument, and his punishment assessed at five years' confinement in the penitentiary. The record is without statement of facts or bill of exception. No error is made apparent, and the judgment is affirmed.

MOORE v. STATE. (Court of Criminal Appeals of Texas. June 10, 1903.) Appeal from Cherokee County Court; James P. Gibson, Judge. J. L. Moore was convicted of illegally giving a prescription on which to obtain whisky in a local option district, and he appeals. Reversed. Guinn, Normain & Guinn and Willson, Box & Watkins, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was charged by indictment with illegally giving a prescription up-

*Rehearing denied July 2, 1903.

on which to obtain whisky in a local option district. Upon conviction he was fined \$50, and given 20 days' imprisonment in the county jail. The indictment is not sufficient, under the authority of *Stephens v. State* (Tex. Cr. App.) 73 S. W. 1056. The judgment is accordingly reversed, and the prosecution ordered dismissed.

MOSLEY v. STATE. (Court of Criminal Appeals of Texas. June 23, 1903.) Appeal from District Court, Somervell County; W. J. Oxford, Judge. Sunday Mosley was convicted of theft, and appeals. Affirmed. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of the theft of a horse, and his punishment assessed at confinement in the penitentiary for a term of five years. Hence this appeal. There is no bill of exceptions nor statement of facts in this record. There appearing no error, the judgment is affirmed.

OLIVER v. STATE. (Court of Criminal Appeals of Texas. June 17, 1903.) Appeal from District Court, Hill County; Wm. Poin-dexter, Judge. John Oliver was convicted of murder, and appeals. Affirmed. Douglass & Shurtleff, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of 16 years. There is no bill of exceptions in the record. In the motion for new trial appellant complains because the court refused to give a charge on manslaughter. We have examined the record carefully, and, without here stating the facts attending the homicide, we would observe that we fail to find any evidence requiring the court to charge on manslaughter. There being no errors in the record, the judgment is affirmed.

WADE v. STATE. (Court of Criminal Appeals of Texas. June 8, 1903.) Appeal from District Court, Victoria County; James C. Wilson, Judge. Manuel Wade was convicted of burglary, and appeals. Affirmed. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Under an indictment charging burglary, appellant was convicted, and his punishment assessed at confinement in the penitentiary for a term of five years. The record is without statement of facts, bill of exceptions, or motion for new trial. No error is made manifest, and the judgment is accordingly affirmed.

WALKER v. STATE. (Court of Criminal Appeals of Texas. June 24, 1903.) Appeal from Wise County Court; S. G. Tankersley, Judge. Urs Walker was convicted of selling intoxicating liquor, and appeals. Reversed. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted for selling intoxicating liquor in a local option territory without having procured the license required by law. The indictment is defective under the authority of *Buck Robinson v. State*, 75 S. W. 526, from McLennan county, just decided, where proper form is laid down for indictments in this character of prosecutions. Accordingly the judgment is reversed, and the prosecution ordered dismissed.

HENDERSON, J., dissents.

AUGUST KERN BARBER SUPPLY CO. v. FREEZE et al. (Court of Civil Appeals of Texas. June 13, 1903.) Appeal from District

Court, Hunt County; H. O. Connor, Judge. Suit by the August Kern Barber Supply Company against E. K. Freeze and others to restrain the enforcement of a judgment. From a decree dissolving an injunction restraining execution of a justice's judgment, plaintiff appeals. Reversed. Looney & Clark and W. B. Hamilton, for appellant. G. O. Green, for appellees.

BOOKHOUT, J. On a former day of the term the questions involved in this appeal were certified to the Supreme Court for its opinion therein. See the opinion of that court, for a statement of the case and facts, in 74 S. W. 303, 7 Tex. Ct. Rep. 451. The Supreme Court having answered the certified questions in accordance with the appellant's contention, the judgment is reversed, and here rendered for appellant, perpetually enjoining the judgment of the justice's court set out in the petition. Reversed and rendered.

CITY OF AUSTIN v. AUSTIN CITY CEMETERY ASS'N. (Court of Civil Appeals of Texas. May 27, 1903.) Appeal from District Court, Travis County; F. G. Morris, Judge. Action between the city of Austin and the Austin City Cemetery Association. From a judgment for the cemetery association, the city appealed to the Court of Civil Appeals, which certified a certain question to the Supreme Court. On remand after answer to such question. Judgment below reversed. V. L. Brooks, for appellant. D. W. Doom and D. H. Doom, for appellee.

FISHER, C. J. For the reasons stated by this court in its certificate to the Supreme Court, wherein a certain question was certified, the judgment is reversed, and the cause remanded. The grounds of reversal are fully stated in the certificate, which is set out and copied by the Supreme Court in its opinion (73 S. W. 525) in answering the question certified. Reversed and remanded.

HAJEK & SIMICEK et al. v. LUCK. (Court of Civil Appeals of Texas. June 11, 1903.) Appeal from Fayette County Court; Joseph Ehlinger, Judge. Action by C. Luck against Hajek & Simicek and others. From a judgment for plaintiff, defendants appeal. Certified to the Supreme Court for decision. Reversed in accordance with the opinion of the Supreme Court. Wolters, Lane & Lenert, for appellants. Robson & Duncan, for appellee.

GARRETT, C. J. The appellee brought this suit against the appellants to recover the balance of a promissory note remaining after a credit of more than 33½ per cent. received by the appellee as an accepting creditor from the assignee of Hajek & Simicek in a general assignment made in accordance with the statute of this state concerning assignments for creditors for the benefit of such of their creditors as would accept the assignment and discharge them from further liability. It was contended by the appellee that, the assignment having been made subsequent to the passage of the national bankrupt act of 1898, under a statute suspended by that law it was void, and that his acceptance thereunder and receipt of 33½ per cent. of his claim from the assignee did not operate as a discharge of the balance of the debt. The court below so held, and rendered judgment in his favor. Upon appeal to this court the question was certified to the Supreme Court for decision, and in an opinion delivered May 18, 1903 (74 S. W. 305, 7 Tex. Ct. Rep. 450), that court answered that the debt was discharged in full. Therefore the judgment of the court below will be reversed, and judgment will be here rendered in favor of the appellants. Reversed and rendered.

HOUSE et al. v. CITY OF DALLAS. (Court of Civil Appeals of Texas. June 27, 1903.) Error from Dallas County Court; Ed. S. Lauderdale, Judge. Action by the city of Dallas against Ford House and others. Judgment for plaintiff. Defendants bring error. Questions certified to the Supreme Court, which remanded the case with answers thereto. Judgment reversed and rendered. Etheridge & Baker and Geo. H. Plowman, for plaintiffs in error. W. T. Henry and J. J. Collins, for defendant in error.

TEMPLETON, J. The questions involved in this case were certified to the Supreme Court, and the opinion of that court may be found in 74 S. W. 901, 7 Tex. Ct. Rep. 647. The opinion sustains the contention of appellants that none of them can be held liable in this action. The judgment will therefore be reversed, and judgment will be here rendered for appellants. It is so ordered. Reversed and rendered.

INTERNATIONAL & G. N. R. CO. v. ALFORD. (Court of Civil Appeals of Texas. June 17, 1903.) Appeal from Milam County Court; R. B. Pool, Judge. Action by Solomon Alford against the International & Great Northern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed. S. R. Fisher, J. H. Tallichet, and N. A. Stedman, for appellant. Clement & Garver, for appellee.

KEY, J. This is a damage suit, resulting in a verdict and judgment for the plaintiff for \$200; and the defendant has appealed. Appellant has presented numerous assignments of error complaining of the court's charge, the refusal of requested instructions, and the verdict of the jury. They have all been duly considered, and, without discussing them in detail, we hold that the charge of the court and special instructions given at the request of appellant submitted the case to the jury correctly, and that the assignments on that subject are untenable. We also hold that the verdict is supported by testimony. Judgment affirmed.

LINDSEY et al. v. STATE et al. (Court of Civil Appeals of Texas. June 24, 1902.) Appeal from District Court, Edwards County; I. L. Martin, Judge. Action by the state and others against A. J. Lindsey and others. Judgment for plaintiffs, and defendants appeal. Case certified to Supreme Court. Judgment below reversed. Walter Anderson, W. C. Linden, H. C. Fisher, Jr., and Jno. C. Townes, for appellants.

NEILL, J. The question involved in this appeal was certified to the Supreme Court, and its decision thereof (74 S. W. 750, 7 Tex. Ct. Rep. 573), requires that the judgment of the district court be reversed, and the cause remanded, which is done.

McLENNAN COUNTY v. PRIMM et al. (Court of Civil Appeals of Texas. June 10, 1903.) Appeal from District Court, McLennan County; M. Surratt, Judge. Action by McLennan county against T. J. Primm, Mrs. M. A. Prescott, and others. From a judgment for defendant Prescott, plaintiff appeals. Affirmed. Clark & Bolinger, for appellant. Taylor & Gallagher, for appellee.

STREETMAN, J. The question of law involved in this case is precisely the same as that decided in the case of McLennan County v. Frost (this day decided) 75 S. W. 876. The defendant Primm was tax collector of McLennan county, and the appellee, Mrs. A. M. Prescott, was his deputy. The suit was brought by the county to recover an alleged balance of \$1,078

and interest thereon, excess of fees due the county, under the provisions of the act of the Twenty-Fifth Legislature, known as the "Fee Bill." The defendant Primm admitted an indebtedness of \$680.43, for which judgment was rendered in favor of the county. The balance of the excess which was claimed to be due the county was claimed by Mrs. Prescott under her contract as deputy, and a judgment was awarded her against the defendant Primm for said sum, amounting to \$531. There is no conflict in the evidence, and therefore no occasion to set out the facts more at length. There being no error in the judgment, it is affirmed. Affirmed.

MAGNOLIA PARK CO. et al. v. TINSLEY et al.* (Court of Civil Appeals of Texas. May 14, 1903.) Appeal from District Court, Harris County; Wm. H. Wilson, Judge. Action by Charles Tinsley and others against the Magnolia Park Company and others. Judgment for plaintiffs. Defendants appeal. On remand from the Supreme Court with answers to certified questions. Judgment below reversed. Ewing & Ring, for appellants. Jacob C. Baldwin and Rowe & Rowe, for appellees.

GARRETT, C. J. The questions in this case were certified to the Supreme Court, and were answered in an opinion delivered by that court March 26, 1903. 73 S. W. 5. The answers of the Supreme Court require a reversal of the judgment of the court below; and, it appearing from the undisputed facts that the plaintiffs Chas. Tinsley and the heirs of Isaac Henderson Tinsley were not entitled to recover of the defendant Magnolia Park Company the land sued for, judgment will be here rendered in favor of said defendant. Reversed and rendered.

(May 21, 1903.)

In disposing of this case at our session on last Thursday in accordance with the answers of the Supreme Court to the certified questions, we failed to pass upon the question of the right of the plaintiffs to recover against the defendants who are the heirs of John T. Brady, Jr., and the heirs and devisees of John T. Brady. As stated in the certificate, 28 acres of the 109-acre tract set apart to Mary Tinsley and put in controversy by the suit of the plaintiffs was conveyed by Mary A. Tinsley to John T. Brady, as trustee for his son John T. Brady, Jr. It was taken from the west side of the tract. The remainder of the tract, which was conveyed by Mary A. Tinsley to John T. Brady, containing 81 acres, was afterwards partitioned between John T. Brady and Lucy Sherman Brady and Sidney Sherman Brady, the children of his deceased wife, Lennie S. Brady, as community property of the said John T. Brady and the said Lennie S. Brady, and 65¼ acres thereof was set apart to the said John T. Brady, and 15½ acres was set apart to the said Lucy Sherman Brady and Sidney Sherman Brady. The partition was made by the district court of Harris county in cause No. 13,366, John T. Brady v. L. S. and S. S. Brady, and included other property. The commissioners who partitioned this land allotted to J. T. Brady 65¼ acres of said 81-acre tract, which is taken off of the east side of said tract, and is described by metes and bounds. There is allotted to L. S. and S. S. Brady 15½ acres out of said 81-acre tract, beginning on the division line of said 81-acre tract and the 28-acre tract belonging to J. T. Brady, Jr., said point of beginning being 348 feet from Buffalo Bayou; thence running east 413½ feet; thence south 1,633 feet to the division line of said tract and the E. S. Butler tract; thence west on said line 413½ feet, to the line of said J. T. Brady, Jr., tract, 28 acres; thence north of said line 1,633 feet.

*Rehearing denied.

to the place of beginning. The remainder of said 81 acres was allotted to J. T. Brady. The 65½ acres set apart to John T. Brady was conveyed by him to the Houston Land & Trust Company, as trustee for the Port Houston Land Improvement Company, as part of a tract of 1,374 acres, and was acquired through mesne conveyances by the defendant Magnolia Park Company. The 81 acres conveyed by Mary A. Tinsley to John T. Brady included the balance of her share and the shares of Chas. Tinsley and Isaac Henderson Tinsley, and the jury found on special issues submitted that the conveyance as to the shares of Chas. and Isaac Tinsley was made in trust for them. We think the facts of the case justify this conclusion. The Magnolia Park Company, as an innocent purchaser for value, acquired title to the tract of 65½ acres, and as to it should have judgment. As the heirs of John T. Brady, Jr., the defendants Lucy Sherman Brady, Sidney Sherman Brady, and Mary Etta Brady acquired title to the tract of 28 acres conveyed by Mary A. Tinsley to John T. Brady, for the use of John T. Brady, Jr., as his share of the lands set apart to Mary A. Tinsley in lieu of the stock in the New Houston City Company, and are entitled to judgment therefor. The tract of 15½ acres set apart to Lucy S. and Sidney S. Brady in the partition between John T. Brady and his deceased wife, Lennie S. Brady, was received by them charged with the trust in favor of the plaintiffs; but, as Mary A. Tinsley owned an absolute interest in the 81 acres conveyed by her to John T. Brady, amounting to the difference between the entire tract and the shares of the plaintiffs, which were found to be 64½ acres, to wit, 16½ acres, which more than covers the 15½ acres, the heirs of Lennie S. Brady would take her share of the community unaffected by such trust. The jury found the interest of Chas. Tinsley, Isaac H. Tinsley, and John T. Brady, Jr., in the 109 acres to be 32½ acres each, which would leave only 12 acres to Mary A. Tinsley; but, as she conveyed only 28 acres of the land in full of John T. Brady, Jr.'s, interest, we must suppose that the difference in acreage was accounted for in the quality of the land, as she was invested with the legal title and had the right to make partition. There would still be a question, perhaps, of division between the share of Mary A. Tinsley and those of the plaintiffs; but the number of acres that she received from the 109-acre tract and the balance to her in the 109 acres would still amount to less in acreage than the difference between the shares of the plaintiffs and the entire tract conveyed by her to Brady. So we conclude that the interest in the 109 acres of Mary A. Tinsley as the owner of one of the shares does not amount to less than the 15½ acres, and that the title to this amount at least became vested in the community estate of John T. and Lennie S. Brady unaffected by the trust in favor of plaintiffs, except as to the community share of John T. Brady, which equity would require to be substituted in the place of the land really charged with it, and conveyed by him and acquired by the Magnolia Park Company discharged of it. The plaintiffs, therefore, would be entitled to recover an undivided one-half of the tract of 15½ acres, and for the other half of said tract the defendants Lucy Sherman Brady and Sidney Sherman Brady should have judgment. The judgment heretofore entered by this court is set aside of the court's own motion, and judgment will be here rendered in accordance with the above conclusions. Reversed and rendered.

On Motion for Additional Conclusions.
(June 19, 1903.)

The appellees have filed a motion for additional conclusions of fact, and specify a number of points on which they desire such conclusions.

Several of the particulars upon which they ask for conclusions are of matters that appear from the record as of the facts appertaining to the motion to dismiss the appeal. Counsel may present such facts to the Supreme Court in their application for a writ of error, should they make one, without its being necessary for this court to gather such facts for them from the record. There are other particulars which are either included in the conclusions heretofore filed or upon which this court does not think it would be material to make conclusions. But the following facts are found supplemental to those included in the conclusions heretofore filed. We refer to the statement made for the Supreme Court on the certified questions, and to the facts found in our disposition of the case on May 21, 1903, as conclusions heretofore filed. (1) The jury in the court below, upon the submission to them of special issues, found that the 209 acres was awarded in the partition to Mary A. Tinsley in lieu of the 1,700 shares of stock conveyed to her in trust by Isaac T. Tinsley for the benefit of his heirs; that the said Mary A. Tinsley so held the land in trust, and at all times recognized the beneficial interest of the parties mentioned in the deed. (2) The consideration of the deed from John T. Brady to the Port Houston Land & Improvement Company, as found by the jury, was bonds and stock of said company, to wit, 260 bonds of \$1,000 each and 2,500 shares of stock; that at the time of his death Brady owned about one-half of the bonds of said company, and that the Magnolia Park Company issued to the heirs of Brady stock and bonds in lieu thereof; and that the heirs of Brady still own the same, and inherited from their father that and other property, all amounting to \$200,000, which is in the hands of their guardian. (3) At the date of the deed from Mary A. Tinsley to John T. Brady, to wit, October 2, 1881, as stated in the certificate, Isaac Henderson Tinsley was of unsound mind. He continued so until his death March 19, 1892. When he died he left surviving him his wife, Louisa Tinsley, and two children, to wit, Mamie and Henderson, both of whom were under age when this suit was brought. Isaac Henderson Tinsley never knew of the conveyance to Brady, or that he was claiming the land. The jury found that the land was worth, at the time of the trial in the court below, \$200 an acre. The deed executed by Mary A. Tinsley to John T. Brady did not purport to have been executed by her as trustee, and did not disclose that she intended to act in any other than an individual capacity.

MASEK & JIRASEK v. FIRST NAT. BANK OF BARTLETT. (Court of Civil Appeals of Texas. May 20, 1903.) Appeal from Bell County Court; G. M. Felts, Judge. Action between Masek & Jirasek and the First National Bank of Bartlett. From a judgment for the latter, the former appeals. Affirmed. Robertson & Goldstein, for appellant. A. M. Monteith and Stanton Allen, for appellee.

FISHER, C. J. There is evidence in the record which authorized the conclusion of the trial court that the jurisdiction and venue of the suit was properly in Bell county. There was no error in the court's rendering judgment for the interest, as complained of in appellant's second assignment of error. No amendment was necessary. We find no error in the record, and the judgment is affirmed.

SLAYDEN-KIRKSEY WOOLEN MILLS v. FRANKLIN. (Court of Civil Appeals of Texas. June 17, 1903.) Appeal from McLennan County Court; G. B. Gerald, Judge. Action between the Slayden-Kirksey Woollen Mills and J. B. Franklin. Judgment for Franklin, and the

Slayden-Kirksey Woolen Mills appeal. Affirmed. T. A. Blair and Allan D. Sanford, for appellant. Boynton & Boynton, for appellee.

FISHER, C. J. The law as stated in *National Bank v. Ashworth* (Pa.) 18 Atl. 596, 2 L. R. A. 493; *Ward v. Smith*, 7 Wall. 447, 19 L. Ed. 207; *Dodge v. Trust Co.*, 93 U. S. 379, 23 L. Ed. 920; *Bank v. Goodman*, 109 Pa. 422, 2 Atl. 687, 58 Am. Rep. 728; *Bank v. Packing Co.*, 117 Ill. 100, 7 N. E. 601, 57 Am. Rep. 855; *Anderson v. Gill*, 79 Md. 318, 29 Atl. 529, 25 L. R. A. 200, 47 Am. St. Rep. 415; *Hazlett v. Bank* (Pa.) 19 Atl. 55; and *Fernald v. Bush*, 131 Mass. 591—when applied to the facts stated in the record, settles the case in favor of appellee. Affirmed.

SMITH et al. v. KIRKHAM. (Court of Civil Appeals of Texas. April 15, 1903.) Appeal from District Court, Johnson County; J. F. Henry, Special Judge. Action by William Kirkham against L. L. Smith and others. Judgment for plaintiff. Defendants appeal. Affirmed. Frost, Neblett & Blanding and Plummer & Green, for appellants. E. L. Stovall and L. B. Davis, for appellee.

KEY, J. This is an action of trespass to try title, resulting in a judgment for the plaintiff, and the defendants have appealed. The trial judge filed conclusions of fact and law. The former find support in the testimony, and the latter state the law correctly on the principal questions in the case. The conclusions referred to are adopted by this court, and the judgment is affirmed. Affirmed.

STATE v. LAREDO ICE CO. et al.* (Court of Civil Appeals of Texas. May 20, 1903.) Ap-

*Rehearing denied June 17, 1903.

peal from District Court, Webb County; A. L. McLane, Judge. Action by the state of Texas against the Laredo Ice Company and others. On rehearing, after remand from the Supreme Court with answers to certified questions. Judgment below reversed. C. K. Bell, for appellant. Nicholson & Mullaly and E. A. Atlee, for appellees.

JAMES, C. J. The district court sustained a general demurrer to the petition; the ruling being to the effect that the act of the Legislature known as the "Anti-Trust Law of 1899" (Laws 1899, p. 246, c. 146) was unconstitutional. We certified the question to the Supreme Court, and they have, in an opinion published in 73 S. W. 951, 7 Tex. Ct. Rep. 239, held it constitutional. Therefore the judgment is reversed, and the cause remanded.

SUPREME COUNCIL OF AMERICAN LEGION OF HONOR v. TAYLOR et al. (Court of Civil Appeals of Texas. May 27, 1903.) Appeal from District Court, Milam County; J. C. Scott, Judge. Action between the Supreme Council of the American Legion of Honor and Hattie E. Taylor and others. From a judgment for Taylor and others, the Supreme Council appeals. Affirmed. John L. Terrell and Monta J. Moore, for appellant. Hefley, McBride & Watson, for appellees.

STREETMAN, J. The questions involved in this appeal are the same as in the case of Supreme Council of American Legion of Honor v. Storey (this day decided) 75 S. W. 901. There is no complaint against the findings of fact filed by the court, and it is not necessary to set out the facts in this opinion. We find no error in the judgment, and it is therefore affirmed. Affirmed.

END OF CASES IN VOL. 75.

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Frightening animals on highway, see "Highways," § 2.
Injuries from operation of railroads, see "Railroads," § 9.

The action of the live stock sanitary commission in establishing a quarantine line, independent of the federal quarantine line, was ultra vires and void, under *Sayles' Ann. Civ. St. art. 5043k.—Trent v. State (Tex. Cr. App.) 857.*

ANNULMENT.

Of will, see "Wills," § 8.

ANSWER.

In pleading, see "Pleading," § 2.

APPEAL AND ERROR.

See "Exceptions, Bill of"; "New Trial."
Appellate jurisdiction of particular courts, see "Courts," § 5.
Review of ejectment proceedings, see "Ejectment," § 2.
Review of proceedings in justices' courts, see "Justices of the Peace," § 2.

Review in special proceedings.

See "Specific Performance," § 1.
Condemnation proceedings, see "Eminent Domain," § 2.
Disbarment proceedings, see "Attorney and Client," § 1.
Drainage proceedings, see "Drains," § 1.

Review of criminal prosecutions.

See "Criminal Law," §§ 25-27; "Homicide," § 8.
For obstruction of highway, see "Highways," § 2.

§ 1. Nature and grounds of appellate jurisdiction.

The district court, trying a probate case appealed from the county court, has no jurisdiction to try a question of title founded on an alleged contract for adoption made with deceased by an orphans' home society.—*McColpin v. McColpin's Estate (Tex. Civ. App.) 824.*

§ 2. Decisions reviewable.

A determination, on preliminary trial in condemnation proceedings, that a railroad was entitled to condemn the land, held not appealable before final judgment awarding petitioner the land.—*Tennessee Cent. R. Co. v. Campbell (Tenn.) 1012.*

A judgment in a proceeding to condemn land for a railroad right of way, awarding land to petitioner, is final and appealable, though the question of damages remained undetermined.—*Tennessee Cent. R. Co. v. Campbell (Tenn.) 1012.*

Where a judgment in trespass to try title does not dispose of all the parties, it is not final, and no appeal lies therefrom.—*Britt v. Sweeney (Tex. Civ. App.) 983.*

§ 3. Presentation and reservation in lower court of grounds of review—Issues and questions in lower court.

An objection that a notice of an administrator's sale of decedent's real estate to pay debts was not published for the requisite period of time cannot be made for the first time on appeal.—*Meddis v. Kenney (Mo. Sup.) 633.*

Objection that bill of interpleader cannot be maintained, because complainant asserts an interest in the fund to the extent of compensation for his services, cannot be first made on appeal.—*Read v. Citizens' St. R. Co. (Tenn.) 1056.*

§ 4. — Objections and motions, and rulings thereon.

One may complain of an erroneous instruction, though he has not offered one correctly presenting the law.—*Louisville & N. R. Co. v. Roberts (Ky.) 207.*

On objection that the petition does not state a cause of action, made for the first time on appeal, it will be construed to state a cause of action if possible.—*D. R. Vivion Mfg. Co. v. Robertson (Mo. Sup.) 644.*

Where objection is specially made to the form of a question, complaint cannot be made on appeal of the substance of the evidence.—*Cook v. Strother (Mo. App.) 175.*

An objection that the testimony of a witness was incompetent as secondary evidence cannot be first made on appeal.—*Meyers v. School Dist. No. 2, Tp. 29, Range 13 (Mo. App.) 1120.*

An instruction on plaintiff's negligence in an action against a carrier held not open to attack by defendant, in view of statements contained in the record.—*Memphis St. Ry. Co. v. Shaw (Tenn.) 713.*

Where defendant, a carrier, did not ask for another or additional charge on contributory negligence, it cannot complain of the one given.—*Memphis St. Ry. Co. v. Shaw (Tenn.) 713.*

Complaint cannot be made in the appellate court for the first time that a contract was proved by secondary evidence.—*Mensing Bros. & Co. v. Cardwell (Tex. Civ. App.) 347.*

Where, in an action for injuries on a railroad track, the authenticity of a city ordinance book was not disputed, it could not be first contended on appeal that the ordinance was not shown to have been in force at the time of the accident.—*Missouri, K. & T. Ry. Co. of Texas v. Owens (Tex. Civ. App.) 579.*

Where an appeal was taken to the county court from a justice's judgment, which was not final,

the determination of the county court will be reversed on appeal to the Court of Civil Appeals, without objection raised in the county court.—*Carothers v. Holloman* (Tex. Civ. App.) 1084.

§ 5. — Exceptions.

Defenses stricken out without exception are not available on appeal.—*Linn County v. Farmers' & Merchants' Bank* (Mo. Sup.) 393.

§ 6. — Motions for new trial.

Alleged error in overruling motion to strike answer *held* not properly presented for review.—*Lorts v. Wash* (Mo. Sup.) 95.

Alleged error in rulings on evidence cannot be reviewed, where no motion for a new trial is made below.—*Phillips v. Jones* (Mo. Sup.) 920.

A motion for new trial *held* not to allow defendant to complain on appeal of the insufficiency of the evidence to support the verdict in a certain respect.—*San Antonio & A. P. Ry. Co. v. Thigpen* (Tex. Civ. App.) 836.

§ 7. Requisites and proceedings for transfer of cause.

Under Rev. St. 1899, §§ 800, 810, Court of Appeals *held* to have no power to fix the amount of an appeal bond, or to take and approve the same, after the granting of an appeal by the circuit court.—*Kreyling v. O'Reilly* (Mo. App.) 694.

Appeal dismissed, because bond filed was not in double the amount of the probable costs.—*Black v. Claiborne* (Tex. Civ. App.) 40.

Affidavit filed in lieu of cost bond *held* made before court trying the case.—*Harwell v. Southern Furniture Co.* (Tex. Civ. App.) 888.

Under Rev. St. 1895, art. 5, party's attorney *held* authorized to make affidavit filed in lieu of cost bond on perfecting writ of error.—*Harwell v. Southern Furniture Co.* (Tex. Civ. App.) 888.

§ 8. Record and proceedings not in record.

Where the bill of exceptions has been stricken from the record, the only question presented is the sufficiency of the pleadings to support the judgment.—*Kice v. Louisville & N. R. Co.* (Ky.) 218.

That a motion for a new trial was made can only be shown by bill of exceptions.—*Phillips v. Jones* (Mo. Sup.) 920.

Bill of exceptions *held* to sufficiently show preservation of exception to overruling of motion for new trial.—*Bank of Liberal v. Anderson* (Mo. App.) 189.

Findings of fact, filed after the expiration of the term at which the cause was tried, cannot be considered for any purpose.—*Beaumont Imp. Co. v. Carr* (Tex. Civ. App.) 327.

Where the record contains no statement of facts, such assignments as involve issues of fact cannot be considered.—*Beaumont Imp. Co. v. Carr* (Tex. Civ. App.) 327.

In trespass to try title, a certificate of acknowledgment in a deed could not be regarded as proven, where the petition was generally denied and there were no facts or findings of fact in the record.—*Beaumont Imp. Co. v. Carr* (Tex. Civ. App.) 327.

Bills of exceptions to the court's refusal to permit witnesses to answer certain questions cannot be considered, where it is not shown what the answers would have been.—*Chimine v. Baker* (Tex. Civ. App.) 330.

A statement of facts, filed more than ten days after adjournment of the court, cannot be considered.—*Conner v. Downs* (Tex. Civ. App.) 335.

In the absence of a statement of facts, the facts found by the trial judge will be regarded

as conclusive.—*Conner v. Downs* (Tex. Civ. App.) 335.

An assignment of error complaining of the competency of a witness will be overruled, where he does not appear to have given the testimony stated in the bill of exceptions.—*International & G. N. R. Co. v. Anchonda* (Tex. Civ. App.) 557.

Where the record contains neither findings of fact nor bills of exceptions, the only question for determination is whether there is evidence to support the judgment.—*Holler v. Scott* (Tex. Civ. App.) 839.

Where the record on appeal does not contain any requested instruction in writing, signed by the appellants or their attorneys, no error in refusal to give charges requested by appellants is shown.—*Wren v. Howland* (Tex. Civ. App.) 894.

In the absence of a statement of facts, it will be presumed that there was sufficient evidence to warrant findings of the trial court.—*Henning v. Wren* (Tex. Civ. App.) 905.

§ 9. Assignment of errors.

An assignment of error to the admission of evidence, merely referring to several pages of the transcript, will not be considered.—*Hamilton v. Crowe* (Mo. Sup.) 389.

An assignment that the court erred in refusing to give questions numbered 1, 2, 3, *held* unintelligible.—*Hamilton v. Crowe* (Mo. Sup.) 389.

An assignment of error *held* too general.—*City of Palestine v. Addington* (Tex. Civ. App.) 322.

An assignment of error, not accompanied by any statement, cannot be considered.—*Chimine v. Baker* (Tex. Civ. App.) 330.

An assignment of error, complaining of the overruling of special exceptions, which does not indicate the error, will not be considered.—*Chimine v. Baker* (Tex. Civ. App.) 330.

An assignment of error cannot be extended by the brief to include a bill of exceptions not referred to therein.—*Word v. Kennon* (Tex. Civ. App.) 334.

An assignment of error, that "the trial court erred in overruling defendant's motion for a new trial," *held* too general.—*St. Louis, I. M. & S. R. Co. v. Dobie & Billingsley* (Tex. Civ. App.) 340.

An assignment of error containing separate grounds of error will not be considered on appeal.—*Cochran v. Siegfried* (Tex. Civ. App.) 542.

An assignment of error *held* insufficient.—*Texas & P. R. Co. v. Huber* (Tex. Civ. App.) 547; *Missouri, K. & T. Ry. Co. of Texas v. McFarland* (Tex. Civ. App.) 811.

An assignment of error, having no proposition of law presented in connection with it, cannot be considered.—*International & G. N. R. Co. v. Anchonda* (Tex. Civ. App.) 557.

The Court of Civil Appeals will not consider assignments of error submitted together, when the questions raised by them are separate and independent and are presented in one proposition.—*Western Union Tel. Co. v. Crawford* (Tex. Civ. App.) 843.

An assignment of error that the court erred in refusing to sustain all of appellant's special demurrers is too general.—*Baum v. Corsicana Nat. Bank* (Tex. Civ. App.) 863.

An assignment of error complaining of several distinct rulings of the trial court presents no question for review on appeal.—*Baum v. Corsicana Nat. Bank* (Tex. Civ. App.) 863.

An assignment of error embracing more than one distinct question will not be considered on

appeal.—*Wren v. Howland* (Tex. Civ. App.) 804.

Findings of fact, not complained of by assignments of error as unsupported by evidence, will be considered on appeal as correct.—Supreme Council, American Legion of Honor v. Storey (Tex. Civ. App.) 901.

An assignment of error *held* waived.—*Duckworth v. Ft. Worth & R. G. Ry. Co.* (Tex. Civ. App.) 913.

§ 10. Briefs.

Where briefs of counsel on appeal did not point out wherein instructions objected to were erroneous, such objections will not be considered.—*Hamilton v. Crowe* (Mo. Sup.) 389.

Failure of brief to comply with rules 29, 30, and 31 of Court of Civil Appeals (67 S. W. xv) *held* cause for dismissal.—*Walker v. Texas & N. O. R. Co.* (Tex. Civ. App.) 47.

§ 11. Dismissal, withdrawal, or abandonment.

As no abstract had been filed in an appeal, as required by Sup. Ct. Rules 12, 13 (73 S. W. vi), and the statement was utterly insufficient, *held*, that the appeal must be dismissed.—*Whitehead v. St. Louis, I. M. & S. Ry. Co.* (Mo. Sup.) 919.

Mistake in date of affidavit for appeal may be corrected on appeal.—*Viertel v. Viertel* (Mo. App.) 187.

Notice of motion to dismiss an appeal, required by Court of Appeals Practice Rule 24, may be waived on consent of parties.—*Arthur Fritsch Foundry & Machine Co. v. Goodwin Mfg. Co.* (Mo. App.) 1119.

§ 12. Review.

Allowing amendments to pleadings is a matter of discretion, with which the appellate court will not interfere.—*City of Madisonville v. Pemberton's Adm'r* (Ky.) 229.

A finding of the court of chancery appeals with reference to statements made during the negotiations for a bond to indemnify an employer for loss occasioned by the fraud of his employe *held* a finding of fact.—*First Nat. Bank v. United States Fidelity & Guaranty Co.* (Tenn.) 1076.

§ 13. — Scope and extent in general.

The record on appeal in a former suit, filed with the papers in a subsequent suit, may be considered, where no motion was made to strike it out before submission.—*Gardner v. Continental Ins. Co.* (Ky.) 283.

Where a motion for new trial specified several instructions as erroneous, and the court, in granting the motion, entered in the record that it erred in one certain instruction, on appeal therefrom, the appellee might claim error in the other instructions.—*Emmons v. Quade* (Mo. Sup.) 103.

§ 14. — Parties entitled to allege error.

Plaintiff cannot complain of an instruction without certain qualifications, where he has invited the omission.—*Cook v. Strother* (Mo. App.) 175.

In an action against a carrier for delay in carriage of cattle, defendant *held* not in position to complain of the jury failing to find on all the issues.—*Chinn v. Chicago & A. Ry. Co.* (Mo. App.) 375.

An error in a charge, invited by the special instructions requested by a party, which were refused, was not ground of reversal.—*Ellyson v. International & G. N. R. Co.* (Tex. Civ. App.) 868.

§ 15. — Presumptions.

Where a demurrer is sustained to the plaintiff's evidence, every fact which the evidence tends in the slightest degree to prove must be

taken as admitted.—*Moore v. St. Louis Transit Co.* (Mo. App.) 699.

Plea in abatement *held* presumably abandoned.—*Word v. Kennon* (Tex. Civ. App.) 334.

§ 16. — Questions of fact, verdicts, and findings.

A verdict on conflicting evidence will not be disturbed on appeal.—*Haller v. City of St. Louis* (Mo. Sup.) 613.

A mere preponderance of the evidence against the verdict will not authorize a reversal.—*Sonka v. Sonka* (Tex. Civ. App.) 325.

§ 17. — Harmless error.

Remark of counsel, in action against railroad, that if defendant's witnesses had not testified to a certain effect they would have been discharged, *held* not ground for reversal.—*St. Louis, I. M. & S. Ry. Co. v. Boback* (Ark.) 473.

In an action for injuries caused by a defective derrick, error in the instructions in assuming that defendant had negligently permitted the derrick to remain out of repair *held* not prejudicial.—*Louisville & N. R. Co. v. Harrod* (Ky.) 233.

Error in the admission of evidence which was merely cumulative was harmless.—*Hamilton v. Crowe* (Mo. Sup.) 389.

Where the verdict is for the right party, it will not be disturbed, though the court gave erroneous instructions.—*Moore v. Lindell Ry. Co.* (Mo. Sup.) 672.

In an action for personal injuries, the refusal of defendant railroad's request for an instruction submitting the hypothesis whether the employes in charge of its train were not under the sole control of another road *held* harmful error.—*Garven v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 198.

A question calling for a conclusion in an action by an employe for injuries *held* harmless error, in view of the answer.—*Hexter v. Jacob Dold Packing Co.* (Mo. App.) 695.

In an action against a railroad for injury to cattle in transit, charge on the measure of damages *held* not prejudicial.—*101 Live Stock Co. v. Kansas City, M. & B. R. Co.* (Mo. App.) 782.

Error of the Court of Civil Appeals in refusing to consider an assignment of error to the denial of a continuance *held* harmless.—*Chicago, R. I. & T. Ry. Co. v. Long* (Tex. Sup.) 483.

Where there was an irreconcilable conflict in the evidence, an erroneous instruction, requiring the jury to reconcile such conflict if possible, *held* harmless.—*Houston & T. C. R. Co. v. Bell* (Tex. Sup.) 484.

Defendant could not complain of a judgment fixing boundaries, as determined by modified agreement, which he had refused to accept, but which allowed more land than he was entitled to under the agreement actually made by him.—*Masteron v. Bockel* (Tex. Civ. App.) 42.

Where there was ample legitimate testimony to support the court's findings, it will be presumed that it did not consider incompetent testimony.—*Nicholson-Watson Shoe & Clothing Co. v. Urquhart* (Tex. Civ. App.) 45.

In action against railroad for damages to employe by reason of incompetency of surgeon employed in the company's hospital, exclusion of certain evidence *held* harmless.—*Poling v. San Antonio & A. P. Ry. Co.* (Tex. Civ. App.) 69.

In a suit on a fire policy, error in allowing the jury to consider the value of certain books *held* not harmless.—*American Fire Ins. Co. v. Bell* (Tex. Civ. App.) 319.

In a suit by a married woman to recover horses belonging to the community estate, rul-

ings on evidence *held* not prejudicial.—Word v. Kennon (Tex. Civ. App.) 334.

In an action by a servant for injuries from defective machinery, the refusal to give a requested charge *held* not harmless error.—Lancaster Cotton Oil Co. v. White (Tex. Civ. App.) 339.

Error in admission of testimony explaining unambiguous writing *held* harmless.—Chas. F. Orthwein's Sons v. Wichita Mill & Elevator Co. (Tex. Civ. App.) 364.

In an action on a note and to foreclose a vendor's lien, brought by an indorsee, the exclusion of the written agreement by the maker to reconvey the land *held* harmless.—Cochran v. Siegfried (Tex. Civ. App.) 542.

Where, in trespass to try title, the evidence failed to show delivery of a deed through which defendant claimed, any error in instruction requiring delivery by two joint grantors, instead of by either, was harmless.—King v. Hill (Tex. Civ. App.) 550.

The objection that the charge, in instructing the jury to find against that plaintiff whose negligence contributed to the injury, instead of stating that the negligence of either plaintiff should be imputed to the other, was error, *held* untenable.—Ft. Worth & R. G. Ry. Co. v. Greer (Tex. Civ. App.) 552.

Any error in the charge in not employing the term "market value" in defining the measure of damages for injury to property *held* not ground for reversal.—Ft. Worth & R. G. Ry. Co. v. Greer (Tex. Civ. App.) 552.

A statement of an expert witness' conclusion that he was competent to testify, after he had testified to facts showing his competency, *held* harmless.—International & G. N. R. Co. v. Collins (Tex. Civ. App.) 814.

In action for personal injuries, the mere asking whether plaintiff was a married man, which the court on objection refused to allow, *held* not error.—International & G. N. R. Co. v. Collins (Tex. Civ. App.) 814.

In action for personal injuries, admission of certain irrelevant and immaterial evidence *held* harmless error.—International & G. N. R. Co. v. Collins (Tex. Civ. App.) 814.

Averments and evidence in an action for a nuisance, appearing not to enter into the consideration of the jury in arriving at a verdict, *held* harmless.—Missouri, K. & T. Ry. Co. of Texas v. McGehee (Tex. Civ. App.) 841.

A party could not complain of the action of the court refusing to sustain an exception to the prayer of the opposite party asking for a personal judgment against him, where no personal judgment was rendered.—Baum v. Corsicana Nat. Bank (Tex. Civ. App.) 863.

Where the execution and delivery of a deed were established by evidence not objected to, the alleged erroneous admission of a certificate of acknowledgment was harmless.—Wren v. Howland (Tex. Civ. App.) 894.

§ 18. Determination and disposition of cause.

On the retrial of a case reversed on appeal, the opinion of the appellate court is the law of the case.—Seaboard Nat. Bank v. Woesten (Mo. Sup.) 464.

Court on appeal *held* to have power to correct certain error in the judgment without remanding the case.—Johnson v. Fluetsch (Mo. Sup.) 1005.

Where cause was dropped from trial docket, plaintiff *held* entitled to notice of reinstatement thereof after return of mandate on appeal.—Peuniman v. Tinsley (Tex. Civ. App.) 367.

APPEARANCE

Where a judgment on a counterclaim was rendered without jurisdiction of the plaintiff, and plaintiff appealed, such appeal constituted an appearance, and the judgment would be reversed, and a new trial granted.—Louisville Tobacco Warehouse Co. v. Gist (Ky.) 243.

Where, after a default judgment, defendant sued out a writ of error and the judgment was affirmed, the Supreme Court acquired jurisdiction of defendant's person, which cured any defect in the service of the original summons.—Taylor v. Sledge (Tenn.) 1074.

APPLIANCES.

Liability of employer for defects, see "Master and Servant," § 2.

APPOINTMENT.

Of guardian, see "Guardian and Ward," § 1.
Of school officers, see "Schools and School Districts," § 1.

Of tax assessors, see "Taxation," § 3.

APPRAISAL.

Of estate of decedent, see "Executors and Administrators," § 1.

Of loss within insurance policy, see "Insurance," § 10.

Of public lands, see "Public Lands," § 2.

ARBITRATION AND AWARD.

See "Reference."

ARGUMENT OF COUNSEL.

In civil actions, see "Trial," § 2.

In criminal prosecutions, see "Criminal Law," § 20.

ARREST OF JUDGMENT.

In criminal prosecutions, see "Criminal Law," § 24.

ASSAULT AND BATTERY.

Conviction of assault as bar to prosecution for murder, see "Criminal Law," § 3.

Trespass to the person, see "Trespass," § 1.

ASSESSMENT.

Of compensation for property taken for public use, see "Eminent Domain," § 2.

Of damages, see "Damages," § 4.

Of expenses of public improvements, see "Municipal Corporations," § 5.

Of loss on insured, see "Insurance," § 6.

Of tax, see "Taxation," § 3.

ASSETS.

Of estate of decedent, see "Executors and Administrators," § 1.

ASSIGNMENT OF ERRORS.

See "Appeal and Error," § 9.

ASSIGNMENTS.

For benefit of creditors, see "Assignments for Benefit of Creditors."

Fraud as to creditors, see "Fraudulent Conveyances."

In bankruptcy, see "Bankruptcy," § 1.

Of land warrants, see "Public Lands," § 1.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See "Bankruptcy," § 1.

§ 1. Administration of assigned estate.

In an action against an assignee for creditors for breach of trust in indirectly purchasing trust property, evidence *held* to raise the issue as to whether the contract of sale to the original purchaser was executed or executory.—*Nabours v. McCord* (Tex. Civ. App.) 827.

Where an assignee for creditors guarantees a purchaser of trust property to find a market for it for the purpose of becoming the purchaser of the property himself, and does so purchase it, such purchase is invalid as to the assignee, though the purchaser may have been innocent.—*Nabours v. McCord* (Tex. Civ. App.) 827.

Where a sale of trust property by a trustee remains executory, and title is not vested, disqualification of the trustee to purchase the property from the purchaser still exists.—*Nabours v. McCord* (Tex. Civ. App.) 827.

ASSOCIATIONS.

See "Building and Loan Associations."

ASSUMPTION.

By judge as to facts in instructions, see "Trial," § 4.

Of mortgage debt by grantee, see "Mortgages," § 4.

Of risk by employé, see "Master and Servant," §§ 5, 8, 9.

ATTACHMENT.

See "Execution"; "Garnishment."

Effect of proceedings in bankruptcy, see "Bankruptcy," § 1.

Exemptions, see "Exemptions"; "Homestead." To enforce mechanic's lien, see "Master and Servant," § 2.

§ 1. Nature and grounds.

Execution of deed of trust *held* to remove prior fraudulent mortgage as ground of attachment.—*Wolf & Bro. v. Erwin & Wood Co.* (Ark.) 722.

§ 2. Proceedings to procure.

Seizure of goods in plaintiff's possession on attachment against a stranger, dismissal of suit, removal of goods to another state, and levy of an attachment there, *held* fraudulent in law, and to confer no jurisdiction on the court of such other state.—*Rosencranz v. Swofford Bros.* Dry Goods Co. (Mo. Sup.) 445.

Where plaintiff as a naked trespasser brought goods into the jurisdiction and had an attachment levied thereon, a levy of a second attachment on the goods before dismissal of the first suit was pervaded with the vices of the first.—*Rosencranz v. Swofford Bros.* Dry Goods Co. (Mo. Sup.) 445.

§ 3. Proceedings to support or enforce.

Attachment *held* void for failure to make trustees named in deed of trust parties defendant.—*Jackson v. Coffman* (Tenn.) 718.

§ 4. Claims by third persons.

Mortgaged property *held* sufficiently identified in an attachment suit against the mortgagor.—*Rice, Stix & Co. v. Sally* (Mo. Sup.) 398.

An interpleader in attachment must have the legal title or right to the immediate possession of the property in controversy.—*Rice, Stix & Co. v. Sally* (Mo. Sup.) 398.

A landlord, whose claim for rent against a debtor who executed a deed to a trustee for the benefit of creditors was fraudulent, *held*

not in a position to complain of the requirements of a certain judgment.—*Baum v. Corsicana Nat. Bank* (Tex. Civ. App.) 863.

§ 5. Wrongful attachment.

In an action by a trustee for the benefit of creditors, the petition of intervention by a creditor *held* to assert a lien on or interest in the proceeds of the sale of certain goods conveyed by the deed.—*Baum v. Corsicana Nat. Bank* (Tex. Civ. App.) 863.

ATTENDANCE.

Of juror, see "Jury," § 2.

ATTORNEY AND CLIENT.

Acting as counsel as disqualifying judge, see "Judges," § 3.

Allowance of alimony for attorney's fees, see "Divorce," § 3.

Argument and conduct of counsel at trial in civil actions, see "Trial," § 2.

Argument and conduct of counsel at trial in criminal prosecutions, see "Criminal Law," § 20.

Attorney's fees in interpleader proceedings, see "Interpleader," § 2.

Attorneys in fact, see "Principal and Agent." Champertous contracts between, see "Champertry and Maintenance."

Harmless error in conduct of counsel, see "Appeal and Error," § 17.

Misconduct of counsel ground for new trial, see "New Trial," § 1.

Privileged communications, see "Witnesses," § 1.

§ 1. The office of attorney.

On certiorari to review proceedings at Kansas City Court of Appeals, on appeal in disbarment proceedings, order of court *held* to show that it tried the case de novo, instead of exercising appellate jurisdiction.—*State ex rel. Scott v. Smith* (Mo. Sup.) 586.

Under Rev. St. 1890, §§ 866, 4924, 4925, 4926, 4935, Kansas City Court of Appeals, on appeal thereto in disbarment proceedings, *held* to have no jurisdiction to try the case de novo, even on theory that the case was in equity.—*State ex rel. Scott v. Smith* (Mo. Sup.) 586.

The failure of a lawyer to pay the occupation tax imposed by Rev. St. 1895, arts. 5049, 5054, will not bar his right to recover on a cause of action assigned to him by his client as compensation for his services.—*Ft. Worth & D. C. Ry. Co. v. Carlock & Gillespie* (Tex. Civ. App.) 931.

§ 2. Compensation and Lien of attorney.

Provision in contract between attorney and client prohibiting settlement without attorney's consent *held* not against public policy.—*Ft. Worth & D. C. Ry. Co. v. Carlock & Gillespie* (Tex. Civ. App.) 931.

AUDITORS.

Report of, see "Reference," § 1.

AUTHORITY.

Of agent, see "Principal and Agent," § 2.

Of broker, see "Brokers," § 1.

AVOIDANCE.

Of sale of infant's property, see "Infants," § 1.

BAGGAGE.

Of passenger, see "Carriers," § 7.

BAILMENT.

See "Banks and Banking," § 1; "Carriers," § 2; "Pledges."
Embezzlement or larceny by bailee, see "Embezzlement."

BANKRUPTCY.

See "Assignments for Benefit of Creditors."

§ 1. **Assignment, administration, and distribution of bankrupt's estate.**

Section 57g of the bankrupt act (Act July 1, 1898, 30 Stat. 560, c. 541 [U. S. Comp. St. 1901, p. 3443]), which provides that the claims of creditors who have received preferences shall not be allowed unless they surrender their preferences, applies though such a preference was innocently received.—*Harris v. Second Nat. Bank (Tenn.)* 1053.

Evidence held to show that defendant bank, receiving money from a bankrupt, had reasonable ground for believing that a preference was intended.—*Harris v. Second Nat. Bank (Tenn.)* 1053.

The trustee in bankruptcy is not precluded from recovering from the payee in a note money paid by the bankrupt on the note within four months of his adjudication, by reason of the fact that there are solvent indorsers on the note.—*Harris v. Second Nat. Bank (Tenn.)* 1053.

Section 68 of the bankrupt law (Act July 1, 1898, 30 Stat. 565, c. 541 [U. S. Comp. St. 1901, p. 3450]) does not authorize the creditor, in a suit against him by the trustee to recover an unlawful preference, to set off the debt on which the alleged preferential payment was made.—*Harris v. Second Nat. Bank (Tenn.)* 1053.

BANKS AND BANKING.

§ 1. **Functions and dealings.**

Bank held not liable to an employer for moneys paid on checks raised by employe, whose duty it was to make out such checks.—*Champion Ice Mfg. & Cold Storage Co. v. American Bonding & Trust Co. (Ky.)* 197.

In an action for conversion of certain property held by a bank as security, an instruction as to the authority of the president of the bank held properly modified.—*Memphis City Bank v. Smith (Tenn.)* 1065.

BAR.

Of action by former adjudication, see "Judgment," § 5.

Of action by limitation, see "Limitation of Actions," § 2.

Of dower, see "Dower," § 2.

BASTARDS.

§ 1. **Property.**

Under Shannon's Code, § 4166, property inherited by a legitimated bastard from his father held to pass to the bastard's mother, and not to the heirs at law of his father.—*Scott v. Wilson (Tenn.)* 1091.

An illegitimate child, legitimated by order of county court on application of its natural father, under Acts 1806, c. 2, held entitled to inherit realty as an heir, and to take personality as next of kin, lineally and collaterally, as though lawfully born.—*Scott v. Wilson (Tenn.)* 1091.

Under Rev. St. 1895, art. 1700, the estate of a deceased bastard held to pass to his mother, to the exclusion of his putative father.—*Ford v. Boone (Tex. Civ. App.)* 853.

BENEFICIAL ASSOCIATIONS.

Building or loan associations, see "Building and Loan Associations."

BEQUESTS.

See "Wills."

BEST AND SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 3.

BETTING.

See "Gaming."

BIAS.

Of juror, see "Jury," § 3.

BILL OF EXCEPTIONS.

See "Exceptions, Bill of."

BILL OF EXCHANGE.

See "Bills and Notes."

BILLS AND NOTES.

Harmless error in action on note, see "Appeal and Error," § 17.

§ 1. **Rights and liabilities on indorsement or transfer.**

A bank, purchasing drafts from a consignor with bills of lading attached, is not, after collecting them, liable to the consignee for frauds perpetrated by his consignor in making out the bills of lading.—*S. Blaisdel, Jr., Co. v. Citizens' Nat. Bank (Tex. Sup.)* 292.

Purchaser of note, paying but for one-half interest therein, held not purchaser for value as to remaining half.—*Kersey v. Fuqua (Tex. Civ. App.)* 56.

Purchaser of note, knowing that one-half of it was owned by some third person, held not purchaser without notice of actual ownership.—*Kersey v. Fuqua (Tex. Civ. App.)* 56.

An accommodation indorser may withdraw his indorsement at any time before the note passes to innocent third parties.—*Markowitz v. Greenwall Theatrical Circuit Co. (Tex. Civ. App.)* 74, 317.

Suit brought at the first term of court after the maturity of the note for which service could be obtained held sufficient to charge an indorser, under Rev. St. art. 304.—*Vitkovitch v. Kleinecke (Tex. Civ. App.)* 544.

That there was not sufficient time to obtain service in an action on a note for a particular term of court held a sufficient excuse for the bringing of the suit at the second term, required to charge the indorser by Rev. St. 1895, art. 304.—*Vitkovitch v. Kleinecke (Tex. Civ. App.)* 544.

Where a builder indorsed defendant's note, in order that she might obtain money to erect certain buildings under a contract with such builder, the latter was an indorser for value, and liable as such.—*Vitkovitch v. Kleinecke (Tex. Civ. App.)* 544.

§ 2. **Actions.**

Where one to whom a note had been transferred by parol was a surety or guarantor thereon, the payee was not a necessary party to an action thereon.—*Louisville Tobacco Warehouse Co. v. Gist (Ky.)* 243.

Allegations in a petition held to show that a bank had bought drafts from a consignor on the consignee with the bills of lading as mere

security for the payments of the draft.—*S. Blaisdell, Jr., Co. v. Citizens' Nat. Bank* (Tex. Sup.) 292.

An agent who buys a note with his principal's money, and has it indorsed to himself, may sue thereon in his own name.—*Cochran v. Slegfried* (Tex. Civ. App.) 542.

BONA FIDE PURCHASERS.

Of bill of exchange or promissory note, see "Bills and Notes," § 1.

Of municipal bonds, see "Municipal Corporations," § 9.

BONDS.

County bonds, see "Counties," § 2.

Municipal bonds, see "Municipal Corporations," § 9.

Of guardian, see "Guardian and Ward," § 5.

School bonds, see "Schools and School Districts," § 1.

Sureties on bonds, see "Principal and Surety."

Bonds in legal proceedings.

See "Appeal and Error," § 7; "Execution," § 2.

Appeal from justice's court, see "Justices of the Peace," § 2.

Appeal in criminal prosecutions, see "Criminal Law," § 25.

BOUNDARIES.

Of counties, see "Counties," § 1.

Of precinct, effect of change of, as to local option, see "Intoxicating Liquors," § 2.

Of school districts, see "Schools and School Districts," § 1.

§ 1. Evidence, ascertainment, and establishment.

Refusal by defendant to enter into a modified agreement to fix boundaries, or to accept boundaries fixed thereby, *held* to leave original agreement made for that purpose in full force.—*Masterson v. Bockel* (Tex. Civ. App.) 42.

BOUNTIES.

Bounty lands, see "Public Lands," § 1.

BREACH.

Of condition, see "Insurance," § 6.

Of contract, see "Contracts," § 5; "Sales," § 3; "Vendor and Purchaser."

Of warranty, see "Insurance," §§ 5, 6; "Sales," § 5.

BRIDGES.

§ 1. Establishment, construction, and maintenance.

A bridge on a county road within a city of the sixth class *held* a part of the county road, which the fiscal court was bound to replace on its destruction.—*Leslie County v. Wooton* (Ky.) 208.

BRIEFS.

On appeal or writ of error, see "Appeal and Error," § 10.

BROKERS.

See "Principal and Agent."

Insurance brokers, see "Insurance," § 2.

§ 1. Employment and authority.

Agency for the sale of real estate *held* revocable.—*George B. Loving Co. v. Hesperian Cattle Co.* (Mo. Sup.) 1095.

Agency for the sale of real estate *held* to have been revoked.—*George B. Loving Co. v. Hesperian Cattle Co.* (Mo. Sup.) 1095.

Facts in an action to recover a commission for the sale of real estate *held* to show that complainant was defendant's sole agent.—*Sylvester v. Johnson* (Tenn.) 923.

§ 2. Compensation and lien.

Facts *held* not to show a ratification of unauthorized negotiations by real estate agent, so as to entitle him to commission.—*George B. Loving Co. v. Hesperian Cattle Co.* (Mo. Sup.) 1095.

Right of real estate agent to commissions determined.—*McCormack v. Henderson* (Mo. App.) 171.

A real estate agent *held* to have substantially complied with his contract, and to be entitled to commissions.—*McCormack v. Henderson* (Mo. App.) 171.

Facts *held* not to show an abandonment of the agency by a real estate agent.—*McCormack v. Henderson* (Mo. App.) 171.

A sole agent for the sale of a lot *held* entitled to his commission, though the sale was consummated through another.—*Sylvester v. Johnson* (Tenn.) 923.

The termination of a real estate agency by the sale of the property *held* not to defeat the agent's right to his commission.—*Sylvester v. Johnson* (Tenn.) 923.

§ 3. Actions for compensation.

In an action by a real estate agent for commissions, certain faulty instruction *held* not prejudicial to defendant.—*McCormack v. Henderson* (Mo. App.) 171.

Petition in real estate broker's action against another broker for share of commissions *held* not demurrable.—*Blake v. Austin* (Tex. Civ. App.) 571.

BUILDING AND LOAN ASSOCIATIONS.

A director of a building association is not incompetent to discharge the duties of trustee in a deed of trust given the association on a loan.—*McDonnell v. DeSoto Sav. & Bldg. Ass'n* (Mo. Sup.) 438.

Under Rev. St. 1899, § 1862, a loan by building association *held* usurious.—*McDonnell v. DeSoto Sav. & Bldg. Ass'n* (Mo. Sup.) 438.

Where the premium paid to a building association is to be treated as interest, because fixed arbitrarily, instead of by free competition, the rate charged cannot be calculated without evidence as to the time when the stock will probably mature.—*McDonnell v. DeSoto Sav. & Bldg. Ass'n* (Mo. Sup.) 438.

Statement by secretary of building association *held* not to amount to an agreement with borrower as to premium to be paid by him.—*McDonnell v. DeSoto Sav. & Bldg. Ass'n* (Mo. Sup.) 438.

BUILDINGS.

In municipal corporations, see "Municipal Corporations," § 6.

BURDEN OF PROOF.

In criminal prosecutions, see "Criminal Law," § 6; "Homicide," § 3.

CANCELLATION OF INSTRUMENTS.

See "Quieting Title"; "Reformation of Instruments."

Rescission of contracts, see "Sales," § 2.

Setting aside fraudulent conveyances, see "Fraudulent Conveyances," § 3.

CANDIDATES.

For office, see "Elections," § 1.

CARNAL KNOWLEDGE.

See "Rape."

CARRIERS.

Harmless error in action for injuries to cattle in transit, see "Appeal and Error," § 17.

Parties entitled to allege error in action for delay in carriage of cattle, see "Appeal and Error," § 14.

Presentation of objections to instructions in action against, for purpose of review, see "Appeal and Error," § 4.

§ 1. Control and regulation of common carriers.

Rev. St. 1899, §§ 1112-1115, *held* not to prevent initial common carriers from imposing a reconignment charge for delivering a shipment upon another track than that upon which it was originally placed.—*State ex inf. Crow v. Atchison, T. & S. F. Ry. Co.* (Mo. Sup.) 776.

Railroad cannot refuse to carry papers on an early morning train, put in service by special contract with a publisher, on the ground that it has other trains later in the day.—*Memphis News Pub. Co. v. Southern Ry. Co.* (Tenn.) 941.

Where an early morning train has been put in operation by a railroad under special contract with a publishing house, it cannot refuse to accommodate a rival publishing house.—*Memphis News Pub. Co. v. Southern Ry. Co.* (Tenn.) 941.

A railroad which had contracted with a publishing house to run an early morning train for its accommodation could not refuse to carry papers tendered it by a rival publishing house, which offered to comply with all the conditions complied with by the contracting house.—*Memphis News Pub. Co. v. Southern Ry. Co.* (Tenn.) 941.

That a publishing house obtained the institution of an early morning train service at a great expense did not make the train, when operated, a special one, nor excuse the railroad from carrying the papers of a rival house.—*Memphis News Pub. Co. v. Southern Ry. Co.* (Tenn.) 941.

Neither a railroad nor the party contracting for a train service could impose, as a condition of delivery of the goods tendered by another, an obligation to share part of the burden of establishing the service.—*Memphis News Pub. Co. v. Southern Ry. Co.* (Tenn.) 941.

Where a special train service was put in operation by a publishing house, other publishers, desiring to avail themselves of such service, would only be required to contribute with other shippers to the extent of their proportional part of the service.—*Memphis News Pub. Co. v. Southern Ry. Co.* (Tenn.) 941.

In a suit against a railroad for unlawful discrimination, granting of an accounting against plaintiff to a party made defendant *held* impracticable.—*Memphis News Pub. Co. v. Southern Ry. Co.* (Tenn.) 941.

In a suit against a railroad for unlawful discrimination, the party in favor of whom the discrimination was made *held* not entitled, when made a party by plaintiff, to file a cross-bill.—*Memphis News Pub. Co. v. Southern Ry. Co.* (Tenn.) 941.

In an action against a railway company for the recovery of the penalty prescribed by Rev. St. 1895, art. 4539, for unlawful discrimination in forwarding goods, the court *held* to have jurisdiction to render judgment for the actual damages.—*Hill & Morris v. St. Louis Southwestern Ry. Co.* (Tex. Civ. App.) 874.

Rev. St. 1895, art. 4537, *held* to require a railroad to forward property received on a platform used by it for handling that kind of property in

the order in which it is received.—*Hill & Morris v. St. Louis Southwestern Ry. Co.* (Tex. Civ. App.) 874.

Rev. St. 1895, arts. 4537, 4539, relating to discriminations in the transporting of goods by railroads, *held* valid.—*Hill & Morris v. St. Louis Southwestern Ry. Co.* (Tex. Civ. App.) 874.

§ 2. Carriage of goods.

A carrier's lien for freight *held* not assignable, and therefore such assignment to one attempting to attach the goods *held* no defense to an action for conversion by the consignor.—*Rosencranz v. Swofford Bros. Dry Goods Co.* (Mo. Sup.) 445.

Rev. St. 1899, § 5222, when construed as depriving a common carrier of the right to contract for a limitation of liability beyond its own line with respect to through shipments, *held* not unconstitutional.—*Marshall & Michel Grain Co. v. Kansas City, Ft. S. & M. R. Co.* (Mo. Sup.) 638.

Under Rev. St. 1899, § 5222, a carrier issuing a bill of lading in Missouri *held* not authorized to exempt itself from liability for a conversion by the connecting carrier by a provision limiting its liability to its own line.—*Marshall & Michel Grain Co. v. Kansas City, Ft. S. & M. R. Co.* (Mo. Sup.) 638.

Delivery of grain by a connecting carrier to the consignee without presentation and surrender of bill of lading, to which a draft had been attached, which had been protested and returned, *held* a conversion of the grain.—*Marshall & Michel Grain Co. v. Kansas City, Ft. S. & M. R. Co.* (Mo. Sup.) 638.

In an action for conversion of grain, evidence that it was the carrier's custom to store grain in a warehouse awaiting demand or bill of lading *held* immaterial.—*Marshall & Michel Grain Co. v. Kansas City, Ft. S. & M. R. Co.* (Mo. Sup.) 638.

In an action against a carrier for conversion of grain, evidence that, after the grain was converted, plaintiffs knew that it was at a certain place at their disposal, *held* immaterial.—*Marshall & Michel Grain Co. v. Kansas City, Ft. S. & M. R. Co.* (Mo. Sup.) 638.

Variance *held* to exist between petition and proof in consignee's action against express company for loss of goods.—*Farr v. Adams Exp. Co.* (Mo. App.) 183.

The overruling of defendant's plea of privilege in an action against one of several alleged connecting railroads for damages resulting from plaintiff's ejection from its train *held* error.—*Texas & P. Ry. Co. v. Lynch* (Tex. Sup.) 486.

Act May 20, 1899 (Laws 1899, p. 214, c. 125), *held* not to authorize suit against two railroads, not acting under a joint contract, for the distinctly separate wrong of one, merely because plaintiff's property had been transported over the connecting lines of the two.—*Texas & P. Ry. Co. v. Lynch* (Tex. Sup.) 486.

§ 3. Carriage of live stock.

In action against a carrier for delay in the carriage of cattle, evidence *held* sufficient to take the case to the jury.—*Chinn v. Chicago & A. Ry. Co.* (Mo. App.) 375.

In an action against an initial carrier for injuries to cattle in transit, evidence *held* sufficient to show negligence.—*101 Live Stock Co. v. Kansas City, M. & B. R. Co.* (Mo. App.) 782.

Notice of injury to stock, required by a contract of shipment to be given by the shipper, *held* waived by the carrier.—*101 Live Stock Co. v. Kansas City, M. & B. R. Co.* (Mo. App.) 782.

Responsibility for the refusal of a connecting carrier to accept cattle tendered by the initial carrier, because unaccompanied by a proper

bill of lading, *held* to lie on the initial carrier.—101 Live Stock Co. v. Kansas City, M. & B. R. Co. (Mo. App.) 782.

A stipulation, in a contract of shipment of cattle, that in case of loss the value should be fixed as at the time and place of shipment, *held* valid.—101 Live Stock Co. v. Kansas City, M. & B. R. Co. (Mo. App.) 782.

Though a contract of shipment of cattle provided that shipper should feed and water, the carrier, on undertaking to do so against plaintiff's protest, was liable for negligent performance of the duty.—101 Live Stock Co. v. Kansas City, M. & B. R. Co. (Mo. App.) 782.

In an action against a railroad for delay in transporting cattle, evidence *held* not to show variance between contract alleged and proved.—Missouri, K. & T. Ry. Co. of Texas v. Storey (Tex. Civ. App.) 847.

In an action against a railroad for delay in transporting cattle, a charge on the measure of damages *held* not misleading.—Missouri, K. & T. Ry. Co. of Texas v. Storey (Tex. Civ. App.) 847.

Verdict in an action for damages to horses shipped on defendant's railroad *held* to have no basis in the evidence as to the amount.—Moseley v. Houston & T. C. R. Co. (Tex. Civ. App.) 912.

§ 4. Carriage of passengers—Personal injuries.

In an action by a trespasser against a railroad for injuries received in an attempt to alight from a train, *held*, defendant was not guilty of negligence.—Chicago, St. L. & N. O. R. Co. v. Smith (Tenn.) 711.

Evidence in an action against a carrier for injuries *held* not to warrant a charge on punitive damages, but to justify the awarding of such damages.—Memphis St. Ry. Co. v. Shaw (Tenn.) 713.

It is the duty of a street car conductor to see that no passenger is in the act of alighting when he starts the car.—Memphis St. Ry. Co. v. Shaw (Tenn.) 713.

It is the duty of street car conductor to exercise greater care for the safety of aged and infirm passengers than for others.—Memphis St. Ry. Co. v. Shaw (Tenn.) 713.

In an action against a railway company, an instruction is proper that, if certain negligence of defendant was the proximate cause of the injuries, plaintiff should recover all the damages arising from her physical injuries.—International & G. N. R. Co. v. Anchonda (Tex. Civ. App.) 557.

In an action for injuries and mental anguish suffered by plaintiff in being thrown from a train and separated from her children, an instruction *held* not erroneous, because it did not condition recovery for the mental anguish on the absence of contributory negligence.—International & G. N. R. Co. v. Anchonda (Tex. Civ. App.) 557.

In an action for injuries suffered by plaintiff in being thrown from a train in attempting to board it, an instruction *held* not misleading.—International & G. N. R. Co. v. Anchonda (Tex. Civ. App.) 557.

In a suit against a carrier for offensive language by other passengers, a statement that they "cursed and used vulgar and obscene language," etc., *held* not sufficient showing of the language complained of.—St. Louis Southwestern Ry. Co. v. Wright (Tex. Civ. App.) 565.

In a suit against a carrier for insulting language by other passengers, *held* sufficient to allege the general character of the language complained of.—St. Louis Southwestern Ry. Co. v. Wright (Tex. Civ. App.) 565.

§ 5. — Contributory negligence of person injured.

Though, in an action by a passenger for injuries, there is no plea of contributory negligence, yet, where it clearly appears from plaintiff's own evidence that he was guilty of such negligence, it is proper to take the case from the jury.—Chaney v. Louisiana & M. R. R. Co. (Mo. Sup.) 595.

Neither on general principles nor under Rev. St. 1800, § 1080, is a passenger justified, on account of the crowded condition of the passenger car, in taking a dangerous position on top of a freight car.—Chaney v. Louisiana & M. R. R. Co. (Mo. Sup.) 595.

In an action to recover for injuries suffered by plaintiff in being thrown from a train and separated from her children, an instruction to find for the defendant if plaintiff caused the children to board the train in motion, and while it was still in motion attempted to board it, unless an ordinarily prudent person would have done so, *held* properly refused.—International & G. N. R. Co. v. Anchonda (Tex. Civ. App.) 557.

§ 6. — Ejection of passengers and intruders.

A passenger on a street railway, whose transfer ticket was refused and who was forcibly put off the car, *held* entitled to recover.—Memphis St. Ry. Co. v. Graves (Tenn.) 729.

In an action against a railway company for wrongful ejection from its train, evidence that plaintiff was jerked off the car was sufficient to justify an instruction authorizing damages for physical suffering.—Choctaw, O. & G. R. Co. v. Hill (Tenn.) 963.

In an action against a railroad company for wrongful ejection from its train, in which there was evidence that plaintiff was forcibly jerked from the train, and then held and restrained of his liberty, a charge authorizing punitive damages was not error.—Choctaw, O. & G. R. Co. v. Hill (Tenn.) 963.

In an action against a railroad company for wrongful ejection from a train, instruction *held* not objectionable, because predicated liability of the railroad company on whether or not the act was done in the line of duty of the conductor.—Choctaw, O. & G. R. Co. v. Hill (Tenn.) 963.

In an action against a railroad company for wrongful ejection from its train, an instruction authorizing exemplary damages *held* not erroneous, because authorizing such damages if the act was done in a "careless" manner.—Choctaw, O. & G. R. Co. v. Hill (Tenn.) 963.

In an action against a railroad company for wrongful ejection from its train, an instruction on measure of damage *held* not error.—Choctaw, O. & G. R. Co. v. Hill (Tenn.) 963.

In an action against a railroad company for wrongful ejection from a train, verdict for \$250 *held* not excessive.—Choctaw, O. & G. R. Co. v. Hill (Tenn.) 963.

Ejection from train of a passenger after tendering fare *held* wrongful.—Choctaw, O. & G. R. Co. v. Hill (Tenn.) 963.

An action against a connecting railroad, refusing to honor shipper's contract for return transportation and ejecting him from its train, *held* one for personal injuries, within the meaning of Act March 27, 1901 (Laws 1901, p. 31, c. 27), prescribing the venue of such actions.—Texas & P. Ry. Co. v. Lynch (Tex. Sup.) 486.

In action against carrier by ejected passenger, evidence of custom allowing old trackmen to ride free *held* inadmissible.—Missouri, K. & T. Ry. Co. of Texas v. Tarwater (Tex. Civ. App.) 937.

An action lies against a common carrier for mental suffering occasioned by being ejected from a train, though not accompanied with

physical injury.—Missouri, K. & T. Ry. Co. of Texas v. Tarwater (Tex. Civ. App.) 937.

§ 7. — Passengers' effects.

Whether certain tools belonging to a mechanic were baggage *held* a question for the jury.—Missouri, K. & T. Ry. Co. of Texas v. Meek (Tex. Civ. App.) 317.

In an action for lost baggage, *held* error to assume as matter of law that winter clothing taken on a short summer journey was baggage.—Missouri, K. & T. Ry. Co. of Texas v. Meek (Tex. Civ. App.) 317.

A carrier's liability as bailee for the storage of unclaimed baggage *held* limited to articles coming within the definition of baggage.—Missouri, K. & T. Ry. Co. of Texas v. Meek (Tex. Civ. App.) 317.

CATTLE.

See "Animals."

Theft of, see "Larceny," § 1.

CAUSE OF ACTION.

See "Action."

CERTIFICATE.

Certified copies, see "Evidence," § 7.

Of acknowledgment of written instrument, see "Acknowledgment," § 1.

CERTIORARI.

Issuance by supreme court, see "Courts," § 5.

To review condemnation proceedings, see "Eminent Domain," § 2.

CHALLENGE.

To juror, see "Jury," § 8.

CHAMPERTY AND MAINTENANCE.

A conveyance after a final judgment for recovery has been rendered in favor of the grantor, though no writ of possession in his favor has been sued out, is not champertous.—Miller v. Farmers' Bank (Ky.) 218.

In an action by an electric company to restrain another company from setting up a claim to the exclusive right to furnish light to the city, a plea of champerty *held* demurrable.—People's Electric Light & Power Co. v. Campbell Gas & Electric Light Co. (Ky.) 280.

Where a vendee is not in actual possession of land outside the boundaries of his deed, a deed to the lands of which he has no possession is not champertous.—Slotton v. Tennessee Coal, Iron & R. Co. (Tenn.) 926; Tennessee Coal, Iron & R. Co. v. J. J. Dykes & Co., Id.

Whether the promise of attorneys to pay the expenses incident to the collection of their client's claim was made to induce their employment by him *held*, under the evidence, to be for the jury.—Ft. Worth & D. C. Ry. Co. v. Carlock & Gillespie (Tex. Civ. App.) 931.

A certain promise by an attorney *held* to be a promise to give or grant a "valuable thing," within Acts 1901, p. 125, which made it a misdemeanor for an attorney to promise to give any "valuable thing" to induce his employment.—Ft. Worth & D. C. Ry. Co. v. Carlock & Gillespie (Tex. Civ. App.) 931.

CHANCERY.

See "Equity."

CHANGE OF VENUE.

Of civil action, see "Venue," § 2.

Of criminal prosecutions, see "Criminal Law," § 2.

CHARACTER.

Of accused in criminal prosecutions, see "Homicide," § 4.

Of witness, see "Witnesses," § 3.

CHARGE.

By carriers, see "Carriers," §§ 1, 2.

To jury in civil actions, see "Trial," §§ 4-9.

To jury in criminal prosecutions, see "Criminal Law," § 21.

CHARITIES.

§ 1. Creation, existence, and validity.

A will devising testator's property to her executor, to be by him distributed to the poor in his discretion, *held* valid, under Ky. St. 1899, § 317.—Thompson's Ex'r v. Brown (Ky.) 210.

CHARTER.

Of municipal corporations, see "Municipal Corporations," § 1.

CHATTEL MORTGAGES.

See "Pledges."

§ 1. Requisites and validity.

A lease providing that all the property of the lessee shall be bound and subject to the payment of the rent is, as between the parties, a mortgage.—Feller v. McKillip (Mo. App.) 379.

Right to manufacture and sell certain proprietary medicine *held* capable of being mortgaged.—Tuttle v. Blow (Mo. Sup.) 617.

§ 2. Filing, recording, and registration.

Under Rev. St. 1899, § 3404, a chattel mortgage must be recorded in the mortgagor's county, though the property be in another.—Rice, Stix & Co. v. Sally (Mo. Sup.) 398.

§ 3. Construction and operation.

Contract between wholesaler and retailer *held* a mortgage, within Ky. St. § 496.—Rankin v. McFarlane Carriage Co. (Ky.) 221.

Description in a mortgage *held* sufficient to cover the right to manufacture and sell certain proprietary medicine.—Tuttle v. Blow (Mo. Sup.) 617.

Notice given by plaintiff to one of the defendants that he had a mortgage on the crops of a third person *held* ineffective.—McKinney v. Ellison (Tex. Civ. App.) 55.

§ 4. Rights and liabilities of parties.

Under a mortgage clause in a lease, landlord *held* entitled to maintain replevin for the lessee's goods on default in payment of rent.—Feller v. McKillip (Mo. App.) 379.

§ 5. Rights and remedies of creditors.

Property covered by an unrecorded mortgage must be transferred in an open and notorious manner to give notice of its contents.—Rice, Stix & Co. v. Sally (Mo. Sup.) 398.

Evidence in an attachment suit *held* not to show that property covered by an unrecorded mortgage had been transferred to interpleader in such manner as to affect plaintiffs with notice.—Rice, Stix & Co. v. Sally (Mo. Sup.) 398.

A chattel mortgage, given under agreement that the mortgagor may sell portions of the property to pay other creditors, is fraudulent.—Bank of Liberal v. Anderson (Mo. App.) 189.

Evidence *held* to show agreement whereby chattel mortgagor was to sell portions of the property to pay other creditors.—*Bank of Liberal v. Anderson* (Mo. App.) 189.

A mortgage clause in unrecorded lease *held* void as to creditors of the lessee.—*Feller v. McKillip* (Mo. App.) 379.

§ 6. Foreclosure.

In a suit to foreclose a mortgage on the right to manufacture and sell certain proprietary medicine, a receiver *held* properly appointed.—*Tuttle v. Blow* (Mo. Sup.) 617.

Sale made by trustee under deed of trust to secure named creditors, for credit, instead of for cash, as required by the deed, *held* not absolutely void, so as to preclude buyer from recovering damages caused by the levy of an attachment on the goods.—*Rouss v. Ratliff* (Tex. Civ. App.) 862.

CHEAT.

See "Fraud."

CHECKS.

Payment by, as accord and satisfaction, see "Accord and Satisfaction."

CHILD.

See "Adoption"; "Bastards"; "Guardian and Ward"; "Infants"; "Parent and Child."

CITIES.

See "Municipal Corporations."

CITIZENS.

Citizenship ground of jurisdiction of United States courts, see "Removal of Causes," § 1. Equal protection of laws, see "Constitutional Law," § 3. Privileges and immunities, see "Constitutional Law," § 2.

CIVIL DAMAGE LAWS.

See "Intoxicating Liquors," § 8.

CIVIL RIGHTS.

See "Constitutional Law," §§ 2, 3.

CLAIM AND DELIVERY.

See "Replevin."

CLAIMS.

Against estate of bankrupt, see "Bankruptcy," § 1.

Against estate of decedent, see "Executors and Administrators," § 4.

Against estate of ward, see "Guardian and Ward," § 2.

To property levied on, see "Attachment," § 4; "Execution," § 2.

CLASSIFICATION.

Of public lands, see "Public Lands," § 2.

CLASS LEGISLATION.

See "Constitutional Law," § 2.

CLERKS OF COURTS.

Motion to require district court clerk to pay over the money appropriated by him *held* prop-

erly overruled.—*City of Whitesboro v. Diamond* (Tex. Civ. App.) 640.

CLOUD ON TITLE.

See "Quieting Title."

COLLATERAL AGREEMENT.

Parol evidence, see "Evidence," § 8.

COLLATERAL ATTACK.

On judgment, see "Judgment," § 4.

On tax sale, see "Taxation," § 5.

COLLATERAL SECURITY.

See "Pledges."

COLLECTION.

Of estate of decedent, see "Executors and Administrators," § 2.

Of taxes, see "Taxation," § 4.

COLOR OF TITLE.

To sustain adverse possession, see "Adverse Possession."

COMBINATIONS.

See "Conspiracy"; "Monopolies," § 1.

COMMERCE.

Carriage of goods and passengers, see "Carriers."

§ 1. Means and methods of regulation.

Evidence *held* to show that goods shipped by a foreign corporation to an agent in Tennessee for distribution to customers were so dealt with as to make them part of the common mass of property in the state, and not exempt from taxation because sold in original packages.—*American Steel & Wire Co. v. Speed* (Tenn.) 1037.

Acts 1901, p. 329, c. 174, § 27, imposing a tax on capital of merchants invested in their business, *held* not in violation of Const. U. S. art. 1, § 8, subsec. 3, as applied to a foreign corporation storing goods in Tennessee for distribution to purchasers.—*American Steel & Wire Co. v. Speed* (Tenn.) 1037.

A manufacturer's agent, selling ranges for a corporation located in another state, *held* within the protection of the interstate commerce clause of the federal Constitution.—*Harkins v. State* (Tex. Cr. App.) 26.

COMMISSION.

To take testimony, see "Depositions."

COMMISSIONS.

Of broker, see "Brokers," § 2.

COMMON CARRIERS.

See "Carriers."

COMMON SCHOOLS.

See "Schools and School Districts," § 1.

COMMUNITY PROPERTY.

See "Husband and Wife," § 4.

COMPENSATION.

Of attorney, see "Attorney and Client," § 2.
 Of broker, see "Brokers," §§ 2, 3.
 Of guardian, see "Guardian and Ward," § 4.
 Of judges, see "Judges," § 2.

COMPETENCY.

Of evidence in criminal prosecutions, see "Criminal Law," § 6.
 Of experts as witnesses, see "Evidence," § 8.
 Of jurors, see "Jury," § 3.
 Of witnesses in general, see "Witnesses," § 1.

COMPLAINT.

In criminal prosecutions, see "Indictment and Information."

COMPOUND INTEREST.

As usury, see "Usury," § 1.

COMPROMISE AND SETTLEMENT.

See "Accord and Satisfaction"; "Payment."

COMPUTATION.

Of period of limitation, see "Limitation of Actions," § 1.

CONCLUSION.

In pleadings, see "Pleading," § 1.
 Of witness, see "Evidence," § 8.

CONCURRENT JURISDICTION.

Of courts, see "Courts," § 6.

CONDEMNATION.

Taking property for public use, see "Eminent Domain."

CONDITIONAL SALES.

See "Sales," § 6.

CONDITIONS.

In insurance policies, see "Insurance," § 6.
 Precedent to action, see "Limitation of Actions," § 1.
 Precedent to action for delay in delivery of message, see "Telegraphs and Telephones," § 1.
 Precedent to issue of county bonds, see "Counties," § 2.

CONFESSION.

Admissibility in evidence, see "Criminal Law," § 14.

CONFIDENTIAL RELATIONS.

Disclosure of communications, see "Witnesses," § 1.

CONFLICT OF LAWS.

See "Wills," § 2.

CONNECTING CARRIERS.

See "Carriers," §§ 2, 3.

CONNIVANCE.

As defense in divorce proceedings, see "Divorce," § 1.

CONSIDERATION.

Of contract, see "Contracts," § 1.
 Of fraudulent conveyance, see "Fraudulent Conveyances," § 1.

CONSOLIDATION.

Of actions, see "Action," § 2.
 Of corporations, see "Corporations," § 5.

CONSPIRACY.

Combinations to monopolize trade, see "Monopolies," § 1.
 Evidence of acts and declarations of conspirators, see "Criminal Law," § 10.
 Instructions as to, see "Criminal Law," § 21.

§ 1. Civil liability.

Members of a church convention may lawfully combine to exclude by lawful means an elected member from a seat.—*Cranfill v. Hayden* (Tex. Civ. App.) 573.

CONSTITUTIONAL LAW.*Provisions relating to particular subjects.*

See "Eminent Domain," § 1; "Intoxicating Liquors," § 1; "Jury," § 1; "Taxation," § 1.
 Municipal officers, see "Municipal Corporations," § 4.
 Subjects and titles of statutes, see "Statutes," § 1.

§ 1. Construction, operation, and enforcement of constitutional provisions.

Under Const. art. 2, and article 3, § 1, if there is a doubt as to the constitutionality of a law, it should be resolved in favor of its validity.—*Brown v. City of Galveston* (Tex. Sup.) 488.

§ 2. Privileges or immunities, and class legislation.

Sand. & H. Dig. § 7234, relative to stock grazing, held not violative of Const. U. S. art. 4, § 2, which gives to citizens of one state all the privileges of citizens in the several states.—*State v. Smith* (Ark.) 1081.

The "four-mile law," prohibiting the sale of intoxicating liquors within four miles of institutions of learning (Acts 1877, p. 37, c. 23, as amended by Acts 1887, p. 293, c. 167, Acts 1899, p. 474, c. 221, and Act 1903), held not unconstitutional as class legislation.—*Webster v. State* (Tenn.) 1020.

§ 3. Equal protection of laws.

Rev. St. 1899, p. 1553, c. 91, art. 23, § 6566, requiring party applying for special jury to deposit the cost thereof, held not obnoxious to federal Constitution, as denying to any person the equal protection of the law.—*Eckrich v. St. Louis Transit Co.* (Mo. Sup.) 755.

The "four-mile law," prohibiting the sale of intoxicating liquors within four miles of institutions of learning (Acts 1877, p. 37, c. 23, as amended by Acts 1887, p. 293, c. 167, Acts 1899, p. 474, c. 221, and Act 1903), held not to deny to all citizens equal protection of the law, within the meaning of Const. U. S. Amend. 14.—*Webster v. State* (Tenn.) 1020.

§ 4. Due process of law.

Rev. St. 1889, § 2614, imposing penalty on railroad failing to keep right of way clear of undergrowth to prevent escape of fire, held not violative of the fourteenth amendment or of the

state Constitution.—*McFarland v. Mississippi River & B. T. Ry. Co.* (Mo. Sup.) 152.

§ 5. Right to justice and remedies for injuries.

Rev. St. 1890, p. 1553, c. 91, art. 23, § 6506, providing for special juries, *held* not violative of Const. Mo. art. 2, § 15, requiring justice to be administered without sale, denial, or delay.—*Eckrich v. St. Louis Transit Co.* (Mo. Sup.) 755.

CONTEMPT.

Violation of injunction, see "Injunction," § 2.

CONTEST.

Of will, see "Wills," § 3.

CONTINGENT FEES.

Of attorneys, see "Attorney and Client," § 2.

CONTINUANCE.

In criminal prosecution, see "Criminal Law," § 15.

Denial of continuance to obtain two absent witnesses *held* not error, where the deposition of one of the witnesses was not taken and the evidence of the other was not material.—*Chicago, B. L. & T. Ry. Co. v. Long* (Tex. Sup.) 483.

A continuance for absence of witness *held* properly denied, where plaintiff admitted the facts sought to be proved by such witness were true.—*St. Louis Southwestern Ry. Co. of Texas v. Campbell* (Tex. Civ. App.) 564.

An admission of certain facts to prevent a continuance *held* not conclusive against plaintiff, so as to prevent the introduction of other evidence relating thereto.—*St. Louis Southwestern Ry. Co. of Texas v. Campbell* (Tex. Civ. App.) 564.

A second application for a continuance, not made in strict compliance with the statute, is addressed to the sound discretion of the court.—*Gulf, C. & S. F. Ry. Co. v. Brown* (Tex. Civ. App.) 807.

A verification to an application for a continuance *held* insufficient, within Rev. St. 1895, art. 1276.—*Gulf, C. & S. F. Ry. Co. v. Brown* (Tex. Civ. App.) 807.

A continuance should be granted where the application shows on its face a legal defense, and defendant exercised due diligence after service of citation in presenting the same.—*Security Mut. Life Ins. Co. v. Calvert* (Tex. Civ. App.) 912.

On application for continuance, controverting affidavits *held* irrelevant on the issue of diligence.—*Security Mut. Life Ins. Co. v. Calvert* (Tex. Civ. App.) 912.

CONTRACTS.

Damages for breach, see "Damages," § 2.

Discharge of, see "Accord and Satisfaction"; "Payment."

For interest, see "Interest."

Operation and effect of champerty, see "Champerty and Maintenance."

Operation and effect of usury laws, see "Usury," § 1.

Specific performance, see "Specific Performance."

Contracts of particular classes of parties.

See "Corporations," § 3; "Husband and Wife," § 1; "Master and Servant."

Teachers, see "Schools and School Districts," § 1.

Particular classes of express contracts.

See "Bills and Notes"; "Insurance"; "Partnership"; "Sales."

Agency, see "Principal and Agent."

Employment, see "Master and Servant."

Employment of teachers, see "Schools and School Districts," § 1.

Leases, see "Landlord and Tenant."

Mutual benefit insurance, see "Insurance," § 13.

Sales of realty, see "Vendor and Purchaser."

Suretyship, see "Principal and Surety."

§ 1. Requisites and validity.

A contract by a railroad company to relieve itself from liability for fire in a building communicated thereto by its negligence is not against public policy.—*Ordelheide v. Wabash R. Co.* (Mo. Sup.) 149.

One taking an invalid assignment of a life policy, under an agreement with the beneficiary to share the proceeds on payment of premiums, cannot recover back from the company premiums paid.—*Buer v. Kansas Mut. Life Ins. Co.* (Mo. App.) 380.

§ 2. Construction and operation.

A member of a committee supervising a work for several corporations *held* entitled to recover for services as engineer.—*Wagner v. Edison Electric Illuminating Co. of Carondelet* (Mo. Sup.) 966.

A contract of employment for a certain work *held*, under the circumstances, to be apportionable as to the compensation.—*Wagner v. Edison Electric Illuminating Co. of Carondelet* (Mo. Sup.) 966.

An engineer, employed to supervise a work under the general supervision of a committee of which he was a member, *held* not entitled to recover for services, unless it appears that it was understood that he was to be compensated.—*Wagner v. Edison Electric Illuminating Co. of Carondelet* (Mo. Sup.) 966.

A contract to rent land for plaintiff construed.—*Barr v. Cardiff* (Tex. Civ. App.) 341.

A contract *held* not to contemplate division of interests in land subsequently purchased by one of the parties.—*Kelly v. Short* (Tex. Civ. App.) 877.

§ 3. Modification and merger.

A valid verbal contract is not destroyed or affected by an attempt to execute an invalid written one in its stead.—*Word v. Kennon* (Tex. Civ. App.) 865.

§ 4. Rescission and abandonment.

The parties having repudiated and abandoned a contract, one of them may not afterwards claim it is in force.—*Kelly v. Short* (Tex. Civ. App.) 877.

§ 5. Performance or breach.

A bank *held* not justified in failing to comply with a contract to reconvey property pledged to a surety on the debt for the amount bid therefor at a sale, on the ground that such amount was less than the indebtedness for which the property was pledged.—*Memphis City Bank v. Smith* (Tenn.) 1065.

A party to a contract *held* not to have forfeited his rights after repudiation of the contract by the other party because of his failure to tender a certain sum to the other.—*Markowitz v. Greenwall Theatrical Circuit Co.* (Tex. Civ. App.) 74, 317.

In action on a contract, *held*, that return to accommodation indorser of a note given by plaintiff to defendant as consideration did not preclude maintenance of the suit.—*Markowitz v. Greenwall Theatrical Circuit Co.* (Tex. Civ. App.) 74, 317.

Sale of a lease by the lessee of opera house *held* to have amounted to breach by him of his

contract with manager of the house.—Markowitz v. Greenwall Theatrical Circuit Co. (Tex. Civ. App.) 74, 317.

§ 6. Actions for breach.

Evidence in action by creditor of grantor, against grantee, *held* to sustain findings warranting plaintiff's recovery.—Senn v. Louisville Malting Co. (Ky.) 235.

In an action for breach of contract under which plaintiff had purchased interest in opera house, certain testimony of defendant *held* not to present an issue whether a certain sum should be deducted in arriving at plaintiff's damages.—Markowitz v. Greenwall Theatrical Circuit Co. (Tex. Civ. App.) 74, 317.

CONTRIBUTORY NEGLIGENCE.

See "Negligence," § 2.

CONVERSION.

Wrongful conversion of personal property, see "Trove and Conversion."

A provision in a will for the sale of real estate and distribution of the proceeds is only effective to work a conversion of the real estate into personalty where the direction to sell is imperative and unconditional.—Bedford v. Bedford (Tenn.) 1017.

CONVEYANCES.

In fraud of creditors, see "Fraudulent Conveyances."

Conveyances by or to particular classes of parties.

See "Guardian and Ward," § 3; "Husband and Wife," § 1; "Infants," § 1.

Married women, see "Husband and Wife," § 2.

Conveyances of particular species of property.

See "Public Lands," § 1.

Mortgaged property, see "Mortgages," § 4.

Separate property of married women, see "Husband and Wife," § 2.

Particular classes of conveyances.

See "Assignments for Benefit of Creditors"; "Chattel Mortgages"; "Deeds"; "Mortgages."

CONVICTS.

Pardon, see "Pardon."

CORPORATIONS.

Combinations by, in restraint of trade, see "Monopolies," § 1.

Embezzlement by corporate officers, see "Embezzlement."

Quo warranto, see "Quo Warranto."

Taxation of, see "Taxation," § 1.

Particular classes of corporations.

See "Building and Loan Associations"; "Municipal Corporations"; "Railroads," § 1; "Street Railroads," § 1.

§ 1. Capital, stock, and dividends.

By-laws of an insolvent investment company *held* not to authorize the directors to distribute dividends from certain funds as against creditors of the corporation.—Taylor v. Commonwealth (Ky.) 244.

A county, as subscriber for corporate stock, *held* estopped from claiming the right to interest on the stock to the time the corporation declared a cash dividend.—Louisville & N. R. Co. v. Hart County (Ky.) 288; Hart County v. Louisville & N. R. Co., *Id.*

A transferee of corporate stock acquires the right to any interest due on the stock, though payable in stock, instead of cash.—Louisville & N. R. Co. v. Hart County (Ky.) 288; Hart County v. Louisville & N. R. Co., *Id.*

Failure to comply with Rev. St. 1895, art. 668, *held* to render attempted forfeiture of subscriber's stock for nonpayment of amount due thereon void.—Nicholson-Watson Shoe & Clothing Co. v. Urquhart (Tex. Civ. App.) 45.

The measure of damages for the conversion by a company of shares of its stock, subscribed for at par value, but not received by the subscriber, is the difference between the par and market values, less the amount due thereon.—Nicholson-Watson Shoe & Clothing Co. v. Urquhart (Tex. Civ. App.) 45.

Acts of corporation with reference to subscriber's stock *held* to constitute conversion thereof.—Nicholson-Watson Shoe & Clothing Co. v. Urquhart (Tex. Civ. App.) 45.

§ 2. Officers and agents.

If a corporation engages in a business not within its corporate powers, and the assets are lost in such transaction, the directors are personally liable.—Dietrich v. Rothenberger (Ky.) 271.

A transaction by a corporation with plaintiff *held* not to have amounted to the doing of a banking business in excess of its charter.—Dietrich v. Rothenberger (Ky.) 271.

Fact that corporation had exceeded charter powers in transactions with others *held* not to render its directors personally liable to plaintiff.—Dietrich v. Rothenberger (Ky.) 271.

A pledge of corporate property by directors of the corporation to themselves, without the consent of all the stockholders, *held* void.—Scott v. Farmers' & Merchants' Nat. Bank (Tex. Sup.) 7.

A stipulation in a contract between two street railway companies, made for the benefit of the directors of one of them, *held* void.—Scott v. Farmers' & Merchants' Nat. Bank (Tex. Sup.) 7.

President of a street railway company *held* to have taken a grant of land as trustee for the company.—Scott v. Farmers' & Merchants' Nat. Bank (Tex. Sup.) 7.

President of a corporation cannot acquire title to property at a trustee's sale made merely to clear the title of the corporation to that property.—Scott v. Farmers' & Merchants' Nat. Bank (Tex. Sup.) 7.

§ 3. Corporate powers and liabilities.

Execution of deed of trust by corporation *held* on sufficient authority, directors having practical notice of the meetings.—Wolf & Bro. v. Erwin & Wood Co. (Ark.) 722.

The president and general manager of a corporation has authority to bind it to pay for medical services rendered an employee hurt through the negligence of the corporation.—Evans v. Marion Min. Co. (Mo. App.) 178.

A disposition of property of a corporation, not objected to by any stockholder or creditor, cannot be objected to by any one, unless by the state in a proper proceeding.—Read v. Citizens' St. R. Co. (Tenn.) 1056.

A judgment creditor of the president of a corporation cannot, by purchase on execution sale of property held by him in trust for the corporation, defeat the corporation's title on the ground that it was not authorized to acquire such property.—Scott v. Farmers' & Merchants' Nat. Bank (Tex. Sup.) 7.

In an action against a corporation on a contract, the question whether it was ultra vires *held* raised by general demurrer.—Markowitz v. Greenwall Theatrical Circuit Co. (Tex. Civ. App.) 74, 317.

A contract between a corporation, which had leased an opera house, and an individual, making him manager of the house, etc., *held* not ultra vires.—Markowitz v. Greenwall Theatrical Circuit Co. (Tex. Civ. App.) 74, 817.

§ 4. Insolvency and receivers.

The right of a corporation to prefer one of its directors and officers as a creditor cannot be questioned, where the corporation is not shown to be insolvent.—Wolf & Bro. v. Erwin & Wood Co. (Ark.) 722.

§ 5. Consolidation.

The term "surplus," in a resolution of a corporation setting aside bonds to retire other bonds, any surplus to go to the stockholders, construed.—Read v. Citizens' St. R. Co. (Tenn.) 1056.

A transfer of the stock of a corporation *held* not to pass by implication the right of stockholders in a fund under a resolution of the corporation, which was thereby reserved to them as individuals.—Read v. Citizens' St. R. Co. (Tenn.) 1056.

A disposition of the proceeds of bonds to stockholders on the consolidation of two corporations *held* to be on a valuable consideration.—Read v. Citizens' St. R. Co. (Tenn.) 1056.

The right of stockholders under a resolution of a corporation to any surplus from bonds set aside to retire other bonds *held* not waived because the mortgage to secure them made no mention of the surplus.—Read v. Citizens' St. R. Co. (Tenn.) 1056.

§ 6. Foreign corporations.

A resident broker *held* an agent of a non-resident corporation, within Civ. Code Prac. § 51, subsec. 6, authorizing service on agent in suit against corporation.—Nelson, Morris & Co. v. E. Rehkopf & Sons (Ky.) 203.

Under Civ. Code Prac. § 51, subsec. 6, it is not necessary that the return of service on an agent of a nonresident corporation should show all the facts required by the statute authorizing such service.—Nelson, Morris & Co. v. E. Rehkopf & Sons (Ky.) 203.

The mere entering into a contract for street lighting with a city by a foreign corporation before complying with Rev. St. 1899, §§ 1024, 1025, *held* not a transaction of business within the state, within such provisions.—Hogan v. City of St. Louis (Mo. Sup.) 604.

Rev. St. 1899, §§ 1024-1026, *held* not to prevent a foreign corporation, which had not complied therewith, which was the holder of a claim against a resident decedent, from purchasing real estate of the latter sold at an administrator's sale for the payment of debts.—Meddis v. Kenney (Mo. Sup.) 633.

COSTS.

In Interpleader proceedings, see "Interpleader," § 2.

Payment on taking appeal, see "Appeal and Error," § 7.

§ 1. Taxation.

Under Rev. St. 1899, § 9378, a court *held* to have no power to allow attorney's fees in a tax suit three years after the end of the term at which the suit was decided.—State ex rel. O'Brian v. Keokuk & W. R. Co. (Mo. Sup.) 630.

Where there was a final settlement and satisfaction of a judgment in the trial court, costs cannot be retaxed without a showing of equitable grounds for opening the case and setting aside the settlements.—Patton v. Cox (Tex. Civ. App.) 871.

COUNCIL.

See "Municipal Corporations," § 3.

COUNTERCLAIM.

See "Set-Off and Counterclaim."

COUNTERFEITING.

See "Forgery."

COUNTIES.

See "Municipal Corporations."

§ 1. Creation, alteration, existence, and political functions.

Fact that commissioners appointed to divide county into justice districts only allowed two magistrates to a city in the county, while five were allowed the rest of the county, *held* not ground for enjoining a tax levied by the fiscal court composed of the county judge and magistrates.—McInerney v. Huelefeld (Ky.) 237.

§ 2. Fiscal management, public debt, securities, and taxation.

Resolution of fiscal court levying tax *held* to sufficiently indicate purposes of levy.—McInerney v. Huelefeld (Ky.) 237.

Conditions of subscriptions by county to railroad stock construed, and *held*, that exoneration from a former stock subscription by the county was a condition precedent.—Green County v. Shortell (Ky.) 251.

An order of the county court directing the clerk to subscribe to certain railroad stock on behalf of the county *held* not an invalid delegation of the power vested by the county court to make subscription.—Green County v. Shortell (Ky.) 251.

A construction of a part of a railroad by a successor of a railroad to whose stock a county had subscribed and issued bonds on certain conditions *held* not a substantial compliance with the conditions of the subscription and the bond issue.—Green County v. Shortell (Ky.) 251.

COUNTY COURTS.

See "Courts," § 4.

COURTS.

Clerks, see "Clerks of Courts."
Judges, see "Judges."

Justices' courts, see "Justices of the Peace."
Province of court and jury, see "Trial," § 4.
Removal of action from state court to United States court, see "Removal of Causes."

Review of decisions, see "Appeal and Error."
Right to trial by jury, see "Jury," § 1.
Trial by court without jury, see "Trial," § 12.

Jurisdiction of particular actions, proceedings, or subjects.

Against personal representatives, see "Executors and Administrators," § 6.
For accounting by executors and administrators, see "Executors and Administrators," § 7.

§ 1. Nature, extent, and exercise of jurisdiction in general.

In the absence of countervailing circumstances, it will be presumed that the circuit court, in ordering a sale of testator's lands to pay debts, acted within its jurisdiction.—Meddis v. Kenney (Mo. Sup.) 633.

§ 2. Establishment, organization, and procedure in general.

Where the Supreme Court has decided that a city was not bound by a designation as to use of property dedicated, and the decision has been acquiesced in for 69 years, it will not be disturbed.—Wilkins v. Chicago, St. L. & N. O. R. Co. (Tenn.) 1026.

The force of a decision of an intermediate appellate court is destroyed by a holding of the Supreme Court that the questions passed upon were not involved in the case.—*Ex parte Conley* (Tex. Cr. App.) 301.

A court may in vacation correct its minutes, so as to make them speak the truth with reference to a judgment actually rendered by it at a term.—*Baum v. Corsicana Nat. Bank* (Tex. Civ. App.) 863.

§ 3. Courts of general original jurisdiction.

Section 18 of charter of Cape Girardeau common pleas (Rev. St. 1899, p. 2582), *held* to confer equitable jurisdiction upon it.—*Oliver v. Snider* (Mo. Sup.) 591.

A motion to require the clerk of the district court to pay over to a judgment creditor \$50 paid on the judgment cannot be treated as a suit, as the amount in controversy is not within the court's jurisdiction.—*City of Whitesboro v. Diamond* (Tex. Civ. App.) 540.

§ 4. Courts of limited or inferior jurisdiction.

County court *held* to have jurisdiction of action to recover value of land fraudulently conveyed by trustee to innocent purchaser.—*Epey v. Boone* (Tex. Civ. App.) 570.

§ 5. Courts of appellate jurisdiction.

To bring an appeal within jurisdiction of Supreme Court, record must clearly show that constitutional construction was involved.—*State ex rel. Kansas City Loan Guarantee Co. v. Smith* (Mo. Sup.) 468.

In mandamus, answer to return *held* not to necessarily challenge constitutionality of city ordinance so as to bring case within the jurisdiction of the Supreme Court.—*State ex rel. Kansas City Loan Guarantee Co. v. Smith* (Mo. Sup.) 468.

In mandamus, a general allegation, in the answer to the return, of the invalidity of a city ordinance, *held* not to inject a constitutional question in the case, so as to give the Supreme Court jurisdiction.—*State ex rel. Kansas City Loan Guarantee Co. v. Smith* (Mo. Sup.) 468.

An action on a special tax bill *held* to involve the constitutionality of Kansas City Charter, art. 9, § 23, authorizing an appeal to the Supreme Court.—*State ex rel. Curtice v. Smith* (Mo. Sup.) 625.

That a city ordinance had been previously declared unconstitutional by the Supreme Court *held* not to affect its jurisdiction of an appeal in a subsequent action in which the constitutionality of such act was raised.—*State ex rel. Curtice v. Smith* (Mo. Sup.) 625.

The Supreme Court's right to issue certiorari *held* not restrained by Const. art. 6, § 10, authorizing the issuance of such writs by the judges of inferior courts.—*Tennessee Cent. R. Co. v. Campbell* (Tenn.) 1012.

§ 6. Concurrent and conflicting jurisdiction, and comity.

After title to public land has vested, state courts may determine controversies relative thereto.—*Johnson v. Fluetsch* (Mo. Sup.) 1005.

By reason of a demand for damages for the detention of property, *held*, that the district court had jurisdiction of a cause praying for interference with a judgment of the county court.—*Chriswell v. Lussier* (Tex. Civ. App.) 552.

COVERTURE.

See "Husband and Wife."

CREDIBILITY.

Of witness, see "Witnesses," § 8.
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CREDITORS.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Fraudulent Conveyances." Of intestate, see "Descent and Distribution," § 1.

Of testator, see "Wills," § 5.
Rights as to chattel mortgage by debtor, see "Chattel Mortgages," § 6.

CREDITORS' SUIT.

Remedies in cases of fraudulent conveyances, see "Fraudulent Conveyances," § 3.

CRIMINAL LAW.

Admissibility of evidence in prosecution for violation of liquor laws, to explain mistake in election returns as to name of precinct, see "Evidence," § 8.
Fines, see "Fines."

Indictment, information, or complaint, see "Indictment and Information."
Pardon, see "Pardon."

Particular offenses.

See "Embezzlement"; "Forgery"; "Gaming," § 1; "Homicide"; "Larceny"; "Libel and Slander," § 4; "Perjury"; "Prize Fighting"; "Rape"; "Seduction," § 1; "Trespass," § 3.
Obstruction of highway, see "Highways," § 2.
Sabbath-breaking, see "Sunday."
Violation of liquor laws, see "Intoxicating Liquors," §§ 5, 7.
Violations of municipal ordinances, see "Municipal Corporations," § 6.

§ 1. Nature and elements of crime and defenses in general.

An agreement not to prosecute accused under an indictment, in consideration of his turning state's evidence, *held* binding on the state.—*Young v. State* (Tex. Cr. App.) 23.

§ 2. Venue.

Refusal of change of venue *held* not abuse of discretion.—*Connell v. State* (Tex. Cr. App.) 512.

§ 3. Former jeopardy.

Shannon's Code, § 7180, *held* not to render a conviction of assault a bar to subsequent prosecution for murder predicated on fact that person assaulted had died.—*McNulty v. State* (Tenn.) 1015.

A conviction of assault and battery *held* no bar to subsequent prosecution for murder.—*McNulty v. State* (Tenn.) 1015.

§ 4. Preliminary complaint, affidavit, warrant, examination, commitment, and summary trial.

Defendant, by the execution of a mortgage to secure his fine, did not lose his right to appeal.—*Hubbard v. State* (Ark.) 853.

§ 5. Arraignment and pleas, and nolle prosequi or discontinuance.

On prosecution for murder, a plea of former jeopardy, offered after the state had closed its case and accused had testified in his own behalf, *held* properly refused.—*McNulty v. State* (Tenn.) 1015.

§ 6. Evidence.

Guilt of a felony must be established beyond a reasonable doubt, and, if established by circumstantial evidence, the circumstances must be consistent with guilt and inconsistent with innocence.—*State v. Faulkner* (Mo. Sup.) 116.

In a prosecution for homicide, defendant *held* properly required to state on cross-examination that he had married the prosecuting witness the day before his trial began.—*Moore v. State* (Tex. Cr. App.) 497.

The admission of evidence, in a prosecution for homicide, as to a feud between others, *held* not to authorize the introduction of the particulars thereof.—*Willis v. State* (Tex. Cr. App.) 790.

§ 7. — Facts in issue and relevant to issues, and res gestæ.

Question to witness for defendant as to whether he had had a conversation with certain other person, it being sought to show that the other person had endeavored to influence the witness, *held* properly excluded.—*Marchan v. State* (Tex. Cr. App.) 532.

Evidence of flight of defendant on meeting prosecuting witness *held* admissible.—*McFarland v. State* (Tex. Cr. App.) 788.

Where defendant and B. were arrested for swindling, evidence of B.'s action in attempting to conceal evidences of guilt on his person *held* admissible against defendant.—*McFarland v. State* (Tex. Cr. App.) 788.

In a prosecution for homicide, evidence as to a difficulty between third persons *held* inadmissible.—*Willis v. State* (Tex. Cr. App.) 790.

§ 8. — Best and secondary, and demonstrative evidence.

In a prosecution for violating the local option law, certain liquor *held* inadmissible in evidence for purposes of comparison with that sold on date charged.—*Parker v. State* (Tex. Cr. App.) 30.

The court cannot compel prosecutrix in a slander suit to submit to a physical examination to show the truth of accused's statement that she had lost her virginity.—*Bowers v. State* (Tex. Cr. App.) 299.

In a prosecution for homicide it is proper to show peculiarities in the impression of a footprint found on the ground at the scene of the murder.—*Jenkins v. State* (Tex. Cr. App.) 312.

§ 9. — Admissions, declarations, and hearsay.

In a prosecution for perjury, certain testimony *held* hearsay and inadmissible.—*State v. Faulkner* (Mo. Sup.) 116.

On a prosecution for murder, certain statements of defendant's father, made to decedent, *held* inadmissible against defendant, who was not present.—*State v. Kennedy* (Mo. Sup.) 979.

In a prosecution for receiving stolen property, admission of declarations of thief, made in defendant's absence, *held* error.—*Richardson v. State* (Tex. Cr. App.) 505.

Testimony by accomplice as to attempt by defendant to bribe accomplice to testify in his favor *held* improperly admitted.—*Hankins v. State* (Tex. Cr. App.) 787.

§ 10. — Acts and declarations of conspirators and codefendants.

On a trial for crime, evidence of the statements of third persons *held* admissible against defendant, if the court is satisfied that a conspiracy to commit the crime existed between the parties.—*State v. Kennedy* (Mo. Sup.) 979.

The declaration of a conspirator to a homicide, made after the homicide, is inadmissible against a co-conspirator.—*State v. Kennedy* (Mo. Sup.) 979.

On a prosecution for crime, *held* error to admit in evidence the statements of third persons, in the absence of proof showing a conspiracy between them.—*State v. Kennedy* (Mo. Sup.) 979.

On a prosecution for murder, certain evidence *held* not to show the existence of a conspiracy between the defendant and third persons to commit the homicide.—*State v. Kennedy* (Mo. Sup.) 979.

In a prosecution for receiving stolen horses, sufficient predicate *held* to have been laid for

the introduction of declarations of defendant's companions on the theory of conspiracy.—*Williams v. State* (Tex. Cr. App.) 509.

§ 11. — Documentary evidence and exclusion of parol evidence thereby.

Testimony of a witness identifying letters written by defendant in a prosecution for perjury *held* admissible, even though he did not know defendant's signature.—*McLeod v. State* (Tex. Cr. App.) 522.

Testimony by witness, given on his examination in chief, as to certain entries showing the ages of his daughters, *held* inadmissible.—*Twiggs v. State* (Tex. Cr. App.) 531.

§ 12. — Opinion evidence.

An expert may express his opinion as to accused's mental condition, predicated on the evidence as he heard it and as stated to him.—*State v. Privitt* (Mo. Sup.) 457.

A hypothetical question is not improper because it includes only a part of the facts in evidence.—*State v. Privitt* (Mo. Sup.) 457.

A hypothetical question to an expert witness, calling for an opinion as to accused's insanity, need not be predicated on all the evidence bearing on the question.—*State v. Privitt* (Mo. Sup.) 457.

In a prosecution for violating the local option law, expert testimony as to contents of certain bottles *held* inadmissible, without proof that they contained the same kind of liquor as that charged to have been sold.—*Parker v. State* (Tex. Cr. App.) 30.

In a prosecution for violation of local option law, certain opinion evidence *held* not objectionable.—*Woods v. State* (Tex. Cr. App.) 37.

§ 13. — Testimony of accomplices and codefendants.

In a prosecution for incest, testimony of the woman's sister *held* not to show her an accomplice.—*Ingram v. State* (Tex. Cr. App.) 304.

Evidence in a prosecution for murder examined, and *held* to connect accused with the offense, so as to sufficiently corroborate accomplices.—*Locklin v. State* (Tex. Cr. App.) 306.

In a criminal prosecution, an accomplice is sufficiently corroborated, if the corroboration goes to the main fact, though he may be contradicted as to some details.—*Locklin v. State* (Tex. Cr. App.) 305.

The testimony of an accomplice on a trial for murder, corroborated by circumstances, *held* sufficient to support a verdict of guilty.—*Stiles v. State* (Tex. Cr. App.) 511.

§ 14. — Confessions.

A statement by an officer to defendant *held* not to constitute an inducement for defendant to make a confession, so as to render such a confession inadmissible.—*Brown v. State* (Tex. Cr. App.) 33.

Facts *held* not to show accused was conscious of arrest when making statement, so as to preclude its admission as a confession.—*Connell v. State* (Tex. Cr. App.) 512.

Testimony given by defendant before grand jury, he not having been warned, *held* not admissible against him, on trial for perjury, before the jury.—*Twiggs v. State* (Tex. Cr. App.) 531.

§ 15. Time of trial and continuance.

A continuance for an absent witness *held* properly denied for want of diligence.—*Carroll v. State* (Ark.) 471.

Continuance of homicide case *held* properly refused.—*Hutsell v. Commonwealth* (Ky.) 225.

Continuance *held* properly overruled in criminal case.—*Reyna v. State* (Tex. Cr. App.) 25.

A first application for a continuance for absence of material witnesses *held* improperly denied.—Torno v. State (Tex. Cr. App.) 500.

Refusal to hear evidence on controversy over motion for continuance *held* not error.—Nelson v. State (Tex. Cr. App.) 502.

New trial *held* improperly refused, where the absent witness made positive affidavit that she would have testified to the facts set up in the affidavit for continuance.—Freeman v. State (Tex. Cr. App.) 506.

Continuance of murder prosecution to obtain testimony of absent witness *held* properly refused.—Connell v. State (Tex. Cr. App.) 512.

A continuance for absent witness, in a prosecution for perjury, *held* properly refused.—McLeod v. State (Tex. Cr. App.) 522.

A continuance for absent witnesses was properly denied, where their evidence was cumulative.—Williams v. State (Tex. Cr. App.) 539.

§ 16. Trial.

An objection to testimony as relating to a privileged communication comes too late, when made by motion to strike out after examination without objection.—State v. Lehman (Mo. Sup.) 139.

In a criminal case, defendant, failing to except to the state's version of certain testimony as presented by district attorney, *held* to have conceded its substantial correctness.—Johnson v. State (Tex. Cr. App.) 34.

In a prosecution for murder, charge *held* erroneous as on the weight of the testimony.—Bennett v. State (Tex. Cr. App.) 314.

A joint verdict against two defendants in a misdemeanor case, assessing their fine at \$75, *held* not to support a judgment.—Edwards v. State (Tex. Cr. App.) 859.

§ 17. — Preliminary proceedings.

In a criminal prosecution, service by clerk, instead of by sheriff, of list of special jurors, *held* sufficient.—State v. Faulkner (Mo. Sup.) 116.

Under Rev. St. 1899, § 2619, defendant, in a prosecution for perjury, *held* only entitled to a list of jurors before trial, and if he requests it.—State v. Faulkner (Mo. Sup.) 116.

Rev. St. 1899, § 2619, providing time within which list of jurors shall be delivered to defendant in criminal prosecution, and section 6566, providing for drawing a special jury in cities of a certain size, *held* not in conflict.—State v. Faulkner (Mo. Sup.) 116.

Where by change of venue a postponement of defendant's trial until after that of a codefendant will work a continuance, the postponement provided for by Code Cr. Proc. 1895, art. 707, is properly refused.—Locklin v. State (Tex. Cr. App.) 305.

§ 18. — Course and conduct of trial in general.

Denial of motion for continuance, because of the withdrawal of one of defendant's counsel, *held* not error.—Marchan v. State (Tex. Cr. App.) 532.

In a prosecution for homicide, a remark in excluding evidence *held* harmless.—Willis v. State (Tex. Cr. App.) 790.

§ 19. — Reception of evidence.

In a prosecution for embezzlement in receiving a certain dividend declared by an insolvent corporation, evidence of the declaration and payment of other dividends, admitted on the issue of motive, should have been limited to such issue.—Taylor v. Commonwealth (Ky.) 244.

Instruction on impeachment of witness in murder prosecution *held* to sufficiently guard impeaching evidence.—Connell v. State (Tex. Cr. App.) 512.

§ 20. — Arguments and conduct of counsel.

A reference by prosecution to the crime as the most tragic ever perpetrated in the county, and to accused as a murderer, *held* not cause for reversal, where accused was convicted of manslaughter.—Carroll v. State (Ark.) 471.

Comment of prosecuting attorney in opening statement in prosecution for grand larceny *held* ground for reversal.—Marshall v. State (Ark.) 534.

Under Rev. St. 1899, § 2627, *held* error to permit the prosecuting attorney to make a reply to the opening statement of the defense and attack defendant's character.—State v. Kennedy (Mo. Sup.) 979.

On prosecution for horse theft, remark of counsel *held* not susceptible of construction that it called jury's attention to the fact that defendant did not testify.—Wingo v. State (Tex. Cr. App.) 29.

In a prosecution for incest, remarks of county attorney to the jury *held* a legitimate argument on the evidence.—Ingram v. State (Tex. Cr. App.) 304.

The allusion in argument of counsel for the state to the fact that accused had failed to explain or rebut criminative circumstances by the testimony of his wife, who appeared as his witness, is not erroneous.—Locklin v. State (Tex. Cr. App.) 305.

Argument of state's counsel *held* not so prejudicial as to require reversal, in absence of timely objection, exception, and request for instruction.—Locklin v. State (Tex. Cr. App.) 305.

Where defendant married the prosecuting witness the day before his trial to suppress her testimony, placing her on the stand and compelling defendant to object to her testimony on the ground that she was his wife *held* prejudicial error.—Moore v. State (Tex. Cr. App.) 497.

§ 21. — Necessity, requisites, and sufficiency of instructions.

Instruction, in prosecution for grand larceny, to convict if testimony of accomplice was corroborated, *held* error, for assuming that accomplice's testimony tended to show defendant to be guilty.—Lott v. State (Ark.) 850.

In a prosecution for murder, an instruction on reasonable doubt *held* erroneously modified.—Tanks v. State (Ark.) 851.

Court in criminal case must instruct on reasonable doubt.—Bruce v. State (Ark.) 1080.

Failure to define "feloniously" in a prosecution for homicide was not error.—Hutsell v. Commonwealth (Ky.) 225.

Failure of court to define the limitations of the term "right," and the meaning of "fraudulent," in a prosecution of the president of an insolvent corporation for wrongfully receiving dividends, *held* error.—Taylor v. Commonwealth (Ky.) 244.

In a prosecution for perjury, *held* error for the court to refuse to charge that defendant should be found guilty, if he falsely swore that he had not "heard" of the existence of a certain bribery fund.—State v. Faulkner (Mo. Sup.) 116.

Where an indictment for perjury alleged that defendant falsely testified that he did not know of a certain deposit, when "in truth and fact he knew of such deposit," an instruction authorizing conviction if defendant "had never heard" of the deposit was erroneous.—State v. Lehman (Mo. Sup.) 139.

Under Rev. St. 1899, § 2627, the court's failure to instruct on the subject of conspiracy, where evidence of the statements of third persons was admitted, *held* error.—State v. Kennedy (Mo. Sup.) 979.

On a prosecution for murder, where evidence of the statements of third person was admitted on the theory of a conspiracy, the court held required to instruct on the subject of conspiracy.—*State v. Kennedy* (Mo. Sup.) 979.

Where there was no pretense that a rape was committed by threats or fraud, the court was not required to instruct in regard thereto.—*Reyna v. State* (Tex. Cr. App.) 25.

In prosecution for rape, failure to charge on accomplice testimony held not error.—*Reyna v. State* (Tex. Cr. App.) 25.

On a prosecution for theft, a certain instruction held not to have been required under the evidence.—*Wingo v. State* (Tex. Cr. App.) 29.

On a prosecution for horse theft held proper to charge on the law of principals.—*Wingo v. State* (Tex. Cr. App.) 29.

In a prosecution for violation of local option law, held, that jury should not have been permitted to smell or handle liquor introduced in evidence.—*Parker v. State* (Tex. Cr. App.) 30.

In a prosecution for homicide, it is not necessary to instruct as to the alibi of an alleged accomplice.—*Jenkins v. State* (Tex. Cr. App.) 312.

In a prosecution for murder, a charge limiting the consideration of impeaching testimony held erroneous for failure to include all such testimony.—*Bennett v. State* (Tex. Cr. App.) 314.

In a prosecution for murder, charge held self-contradictory.—*Bennett v. State* (Tex. Cr. App.) 314.

On a prosecution for violating the local option law, the court, under the evidence, properly refused a charge on the law of agency.—*Taylor v. State* (Tex. Cr. App.) 536.

§ 22. — Requests for instructions.

In a criminal prosecution, it is not error to refuse requested instructions which are fully covered by the charge as given.—*State v. Faulkner* (Mo. Sup.) 116.

On a trial for murder, defendant, in view of the court's statement and instructions, held not required to request an instruction on the subject of conspiracy.—*State v. Kennedy* (Mo. Sup.) 979.

In misdemeanor case, defendant must request charges, if he deems court's charge incomplete.—*Hanks v. State* (Tex. Cr. App.) 787.

§ 23. — Custody, conduct, and deliberations of jury.

Facts held to show misconduct of the jury in a prosecution for receiving stolen property.—*Williams v. State* (Tex. Cr. App.) 509.

A defendant held not prejudiced by a talesman entering the jury box and having a conversation with one of the five or six jurymen accepted and sworn.—*Stiles v. State* (Tex. Cr. App.) 511.

§ 24. Motions for new trial and in arrest.

A general motion in arrest of judgment, failing to point out to the trial court matters complained of, is properly overruled.—*Hall v. State* (Tenn.) 716.

The making of a motion in arrest prior to the making of a motion for a new trial held a waiver of the latter motion.—*Hall v. State* (Tenn.) 716.

A new trial will not be granted for disqualification of jurors, not called to the attention of the court at the trial, in the absence of a showing by accused or his counsel that the disqualification was not known to them until after verdict.—*Thomas v. State* (Tenn.) 1025.

Misconduct of jurors in drinking whisky after case had been submitted to them held not

ground for a new trial.—*Brown v. State* (Tex. Cr. App.) 33.

Accused, failing to examine witnesses present at trial, cannot set up facts elicited from them after the trial as newly discovered evidence, on which to base application for continuance.—*Ray v. State* (Tex. Cr. App.) 798.

In a prosecution for murder, the testimony of an absent witness held not material, or sufficient to warrant the granting of a continuance.—*Ray v. State* (Tex. Cr. App.) 798.

Certain testimony of absent witnesses held not ground for new trial in criminal case.—*Ray v. State* (Tex. Cr. App.) 798.

Facts held not to show defendant entitled to a new trial on the ground that he was not prepared, because induced to believe his case would be dismissed.—*Berry v. State* (Tex. Cr. App.) 858.

Affidavit held insufficient to entitle defendant to a new trial for newly discovered evidence.—*Berry v. State* (Tex. Cr. App.) 858.

§ 25. Appeal and error, and certiorari.

Jurisdiction of Court of Criminal Appeals does not attach, where recognition on appeal does not conclude with clause "in this case," as required by statute.—*Parker v. State* (Tex. Cr. App.) 30.

In a prosecution for misdemeanor, omissions in the charge of the court must be cured by requesting a special written charge, or the omission cannot be available on appeal; and this, notwithstanding Code Cr. Proc. 1895, art. 723.—*Woods v. State* (Tex. Cr. App.) 37.

§ 26. — Record and proceedings not in record.

On appeal in a criminal case, action of the trial court in submitting and failing to submit certain issues cannot be reviewed, in the absence of the evidence adduced.—*Brooks v. State* (Tex. Cr. App.) 507.

On appeal in a criminal case, complaint that the trial court erred in failing to require the state to elect on which count it would seek a conviction cannot be reviewed, in the absence of a bill of exceptions presenting the matter complained of.—*Brooks v. State* (Tex. Cr. App.) 507.

On appeal in a criminal case, action of trial court in excluding certain testimony cannot be reviewed, in the absence of a bill of exceptions verifying the matter.—*Brooks v. State* (Tex. Cr. App.) 507.

A trial court's ruling refusing a requested instruction not to consider certain argument of the state's counsel held not properly presented on appeal.—*McLeod v. State* (Tex. Cr. App.) 522.

Objection that the jury, after being sworn, were permitted to separate, could not be considered, where there was no bill of exceptions presenting the matter.—*Lewis v. State* (Tex. Cr. App.) 788.

An assignment of error to the overruling of defendant's objections to the array cannot be reviewed, where the grounds of objection were not proved in some manner as facts.—*Willis v. State* (Tex. Cr. App.) 790.

The exclusion of testimony cannot be reviewed, where the object thereof is not assigned in the bill of exceptions.—*Willis v. State* (Tex. Cr. App.) 790.

An affidavit held insufficient to excuse absence of a bill of exceptions.—*Berry v. State* (Tex. Cr. App.) 858.

An affidavit explaining absence of a statement of facts held insufficient.—*Berry v. State* (Tex. Cr. App.) 858.

§ 27. — Review.

A recital in an appeal record held not to justify a presumption that a motion for a new

trial was made and overruled before the hearing of a motion in arrest.—*Hall v. State* (Tenn.) 716.

A finding by a trial judge on a motion for a new trial, sustained by material evidence that jurors claimed to have been disqualified were competent, will not be reviewed on appeal.—*Thomas v. State* (Tenn.) 1025.

On criminal prosecution, erroneous admission of certain testimony as to statements *held* cured by an instruction of the court.—*Wingo v. State* (Tex. Cr. App.) 29.

In a prosecution for theft, certain evidence that defendant was passing as a physician *held* not prejudicial to the defendant.—*Smith v. State* (Tex. Cr. App.) 298.

In a prosecution for slandering a female, admitting evidence that her father was a renter, and had a wife and four children, is not ground for reversal.—*Bowers v. State* (Tex. Cr. App.) 299.

Admission of evidence in a criminal prosecution that accomplice, turning state's evidence, was not induced to do so by promise of immunity, *held* harmless error.—*Locklin v. State* (Tex. Cr. App.) 805.

The improper impeachment of accused's witness in a criminal case, whereby his credibility is prejudicially affected, is ground for reversal.—*Jenkins v. State* (Tex. Cr. App.) 312.

Error in trial court's not entering a record judgment disposing of a plea of former acquittal *held* harmless, where the plea on its face offered no legal defense.—*Richardson v. State* (Tex. Cr. App.) 505.

Overruling challenge for cause to juror in murder prosecution *held* not ground for reversal.—*Connell v. State* (Tex. Cr. App.) 512.

Error in styling the cause as "2,275," instead of "2,475," in the charge, *held* harmless.—*McLeod v. State* (Tex. Cr. App.) 522.

CROPS.

Renting on shares, see "Landlord and Tenant," § 3.

CROSS-EXAMINATION.

See "Witnesses," § 2.

CURTESY.

See "Dower."

Rev. St. 1899, § 4339, *held* to absolutely prohibit a levy and sale during coverture, for the debts of the husband, of his contingent interest of curtesy in his wife's separate property.—*Ball v. Woolfolk* (Mo. Sup.) 410.

CUSTODY.

Of public records, see "Records."

DAMAGES.

Recovery in ejectment, see "Ejectment," § 3.

Damages for particular injuries.

See "Death," § 1; "Nuisance," § 1.

Breach by seller of contract for sale of goods, see "Sales," § 5.

Breach of rental contract, see "Landlord and Tenant," § 3.

Caused by surface waters, see "Waters and Water Courses," § 1.

Delay in delivery of message, see "Telegraphs and Telephones," § 1.

To live stock in transit, see "Carriers," § 3.

Wrongful ejection of passenger, see "Carriers," § 6.

§ 1. Nature and grounds in general.

A plaintiff in an action on contract cannot recover, where there is no data from which the amount to which he is entitled can be ascertained.—*Louisville Bridge Co. v. Louisville & N. R. Co.* (Ky.) 285; *Pittsburg, C. & St. L. Ry. Co. v. Same, Id.*

§ 2. Measure of damages.

Measure of damages on breach by railroad of contract to take piling from plaintiff defined.—*Reed v. Illinois Cent. R. Co.* (Ky.) 200.

Measure of damages in an action for breach of a contract, whereby plaintiff purchased an interest in the business of conducting an opera house, determined.—*Markowitz v. Greenwall Theatrical Circuit Co.* (Tex. Civ. App.) 74, 317.

§ 3. Inadequate and excessive damages.

Verdict for \$1,500 for injuries to married woman, supporting herself, *held* not excessive.—*Brake v. Kansas City* (Mo. App.) 191.

A verdict of \$15,000 in favor of a railroad engineer who had lost his left hand in an accident *held* excessive, and reduced to \$10,000.—*Texas & Ft. S. R. Co. v. Hartnett* (Tex. Civ. App.) 809.

§ 4. Pleading, evidence, and assessment.

Defendant's requested instruction, in an action for personal injury, as to consideration of plaintiff's prior rheumatism, *held* properly modified.—*Copeland v. Wabash R. Co.* (Mo. Sup.) 106.

Allegation of damage in an action for personal injuries *held* sufficient to admit evidence of the amount expended for nurse hire.—*Moore v. Southwest Missouri Electric Ry. Co.* (Mo. Sup.) 176.

Petition in personal injury case *held* to substantially allege damages from loss of time.—*Brake v. Kansas City* (Mo. App.) 191.

Instruction, in married woman's action for injuries, allowing consideration of her age and condition in life, *held* proper.—*Brake v. Kansas City* (Mo. App.) 191.

Permanent injury to the uterus, and likelihood of a recurrence of retroversion, are proper to be considered in estimating damages from a personal injury.—*Brake v. Kansas City* (Mo. App.) 191.

Instruction on damages in married woman's personal injury action *held* not objectionable as permitting recovery for loss of ability for sexual intercourse or to bear children.—*Brake v. Kansas City* (Mo. App.) 191.

Where there is no evidence of the value of the time lost, or which will probably be lost, by reason of a personal injury, an instruction allowing a recovery therefor is error.—*Brake v. Kansas City* (Mo. App.) 191.

On the issue of damages for killing a mule, certain evidence *held* admissible.—*Southern Kansas Ry. Co. of Texas v. Cooper* (Tex. Civ. App.) 328.

The refusal to compel plaintiff in a personal injury action to submit to a physical examination by physicians *held* not erroneous.—*Gulf, C. & S. F. Ry. Co. v. Brown* (Tex. Civ. App.) 807.

DEATH.

Of party to action ground for abatement, see "Abatement and Revival," § 3.

§ 1. Actions for causing death.

In an action for death from an injury occasioned by a defective sidewalk, the question as to the actual cause of death is one of fact for the jury.—*City of Madisonville v. Pemberton's Adm'r* (Ky.) 229.

Instruction, in action for death, as to measure of damages, *held* proper.—*Stumbo v. Duluth Zinc Co.* (Mo. App.) 185.

Parents' recovery for the death of their son held not excessive.—*Stumbo v. Duluth Zinc Co.* (Mo. App.) 185.

Introduction of mortuary tables to show expectancy of life is not necessary to show proper damages from death.—*Haines v. Pearson* (Mo. App.) 194.

In an action for personal injuries, a charge that jury might consider the injuries the cause of death, if they in part, operating concurrently with a disease, produced that result, held error.—*Ellyson v. International & G. N. R. Co.* (Tex. Civ. App.) 868.

In an action for personal injuries, on an issue as to the cause of death of injured party, held error to limit jury to a consideration of the effect of a disease after the injuries only.—*Ellyson v. International & G. N. R. Co.* (Tex. Civ. App.) 868.

To attribute death to two or more concurrent causes, each must be a prominent efficient cause; for, if one of the alleged causes operates slightly with another, which is the prominent efficient cause, then the proximate cause of death should be traced to the latter.—*Ellyson v. International & G. N. R. Co.* (Tex. Civ. App.) 868.

DEBTOR AND CREDITOR.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Fraudulent Conveyances."

DECEDENTS.

Estates, see "Descent and Distribution"; "Executors and Administrators."

DECEIT.

See "Fraud."

DECLARATIONS.

As evidence in civil actions, see "Evidence," § 5.

As evidence in criminal prosecutions, see "Criminal Law," § 9.

Dying declarations, see "Homicide," § 3.

DECREE.

In equity, see "Equity," § 2.

DEDICATION.

§ 1. **Nature and requisites.**

A city held to have acquired title to land dedicated for a public market, so as to be able to maintain a suit for trespass to try title.—*Heffron v. City of Galveston* (Tex. Civ. App.) 370.

DEEDS.

Acknowledgment of execution, see "Acknowledgment."

Admissions by grantor, see "Evidence," § 4.

Distinguished from wills, see "Wills," § 2.

In fraud of creditors, see "Fraudulent Conveyances."

Of separate property of married women, see "Husband and Wife," § 2.

Of trust, see "Mortgages."

Parol or extrinsic evidence, see "Evidence," § 8.

Reformation, see "Reformation of Instruments."

Tax deeds, see "Taxation," § 6.

Deeds by or to particular classes of parties.

See "Guardian and Ward," § 3; "Husband and Wife," § 1; "Infants," § 1.

Married women, see "Husband and Wife," § 2.

§ 1. **Requisites and validity.**

Evidence held to show delivery of a deed.—*Ford v. Boone* (Tex. Civ. App.) 353.

§ 2. **Construction and operation.**

A deed in trust held to convey the equitable fee in land to the beneficiary.—*Ball v. Woolfolk* (Mo. Sup.) 410.

Deed construed, and held, that a clause therein reserving the right in the grantors to sell the land to other persons was void.—*Hamilton v. Jones* (Tex. Civ. App.) 554.

§ 3. **Pleading and evidence.**

In trespass to try title, evidence held insufficient to show that a deed through which defendant claimed had ever been delivered with intent to pass title.—*King v. Hill* (Tex. Civ. App.) 550.

DEFAMATION.

See "Libel and Slander."

DELEGATION.

Of authority of municipal corporation, see "Municipal Corporations," § 2.

Of police power of state, see "Municipal Corporations," § 6.

DELEGATION OF POWER.

Of eminent domain, see "Eminent Domain," § 1.

DELIVERY.

Of deed, see "Deeds," § 1.

Of goods sold, see "Sales," §§ 1, 2.

DEMAND.

Before action, see "Limitation of Actions," § 1.

DEMURRER.

In pleading, see "Pleading," § 3.

To evidence, see "Trial," § 3.

DENIALS.

In pleading, see "Pleading," § 2.

DEPOSITIONS.

See "Witnesses."

Under Shannon's Code, § 5626, where plaintiff took the deposition of a witness residing in the county, and defendant subpoenaed the witness, plaintiff was entitled to read the deposition or not, subject to defendant's right to examine the witness as plaintiff's witness as to all matters.—*Sherrod & Co. v. Hughes* (Tenn.) 717.

DEPOSITS.

In bank, see "Banks and Banking," § 1.

DESCENT AND DISTRIBUTION.

See "Curtesy"; "Dower"; "Executors and Administrators"; "Wills."

Inheritance by, from, or through bastards, see "Bastards," § 1.

§ 1. **Rights and liabilities of heirs and distributees.**

Where after expiration of the six months mentioned in Ky. St. 1890, § 2087, one becomes a purchaser in good faith and for value, nothing but a valid lis pendens can affect the land as a lien.—*Kelley v. Culver's Adm'r* (Ky.) 272.

Ky. St. 1899, § 2087, *held* not to create *lis pendens* lien on lands descended or devised, for payment of ancestor's debts for longer period than six months after time for commencing settlement suit.—*Kelley v. Culver's Adm'r* (Ky.) 272.

Creditors of an estate, made parties to settlement suit under Ky. St. 1899, § 2087, *held* barred by laches from subjecting land sold to bona fide purchaser to payment of their claims.—*Kelley v. Culver's Adm'r* (Ky.) 272.

A petition by an heir to recover land *held* not to show that the heirs had no interest in the estate.—*Baker v. Hamblen* (Tex. Civ. App.) 362.

Heir *held* warranted in bringing suit to recover land of an estate in danger of loss by adverse possession.—*Baker v. Hamblen* (Tex. Civ. App.) 362.

DESCRIPTION

Of property devised or bequeathed, see "Wills," § 4.

Of property insured, see "Insurance," § 4.

Of property mortgaged, see "Chattel Mortgages," § 3.

DETINUE

See "Replevin."

DEVISES.

See "Wills."

DILATORY PLEAS.

See "Pleading," § 2.

DISABILITIES.

Contributory negligence of persons under disability, see "Negligence," § 2.

Effect on limitation, see "Limitation of Actions," § 1.

Of attorneys, see "Attorney and Client," § 1.

DISBARMENT.

Of attorney, see "Attorney and Client," § 1.

DISCHARGE.

From indebtedness, see "Accord and Satisfaction"; "Payment."

From liability as surety, see "Principal and Surety," § 1.

DISCOVERY.

§ 1. Under statutory provisions.

Under Rev. St. 1899, §§ 8983, 8984, 8985, showing an application of the attorney general for an order for the attendance of nonresident witnesses in proceedings under the law against trusts, *held* not sufficient to require the issuance of the order.—*State ex inf. Crow v. Continental Tobacco Co.* (Mo. Sup.) 737.

DISCRETION OF COURT.

Review in civil actions, see "Appeal and Error," § 12.

DISCRIMINATION.

By carriers, see "Carriers," § 1.

DISMISSAL AND NONSUIT.

Dismissal of appeal or writ of error, see "Appeal and Error," § 11.

Dismissal of cause removed from state court, see "Removal of Causes," § 2.

DISQUALIFICATION.

Of judge, see "Judges," § 3.

DISSOLUTION.

Of partnership, see "Partnership," § 1.

Of school districts, see "Schools and School Districts," § 1.

DISTRESS.

For rent, see "Landlord and Tenant," § 2.

DISTRIBUTION.

Of estate of decedent, see "Descent and Distribution."

Of proceeds of foreclosure, see "Mortgages," § 7.

DITCHES.

See "Drains."

DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States courts see "Removal of Causes," § 1.

DIVIDENDS.

On corporate stock, see "Corporations," § 1.

DIVORCE.

§ 1. *Defenses.*

Connivance of a husband at an act of adultery of his wife will not bar his obtaining a divorce for a subsequent act of adultery.—*Viertel v. Viertel* (Mo. App.) 187.

§ 2. *Jurisdiction, proceedings, and rehear.*

That a decree dismissing a suit for divorce for adultery shall not be a bar to later suit for a prior act, it must be shown such act was not known of when the first suit was brought.—*Viertel v. Viertel* (Mo. App.) 187.

§ 3. *Alimony, allowances, and disposition of property.*

Alimony for attorney's fees may be allowed on appeal, though the appeal is unsuccessful.—*Viertel v. Viertel* (Mo. App.) 187.

§ 4. *Operation and effect of divorce, and rights of divorced persons.*

Foreign decree of divorce, awarding custody of infant child, *held* res judicata as to all questions as to fitness of parties and best interests of child existing prior to decree.—*Wilson v. Elliott* (Tex. Civ. App.) 368.

DOCUMENTS.

As evidence in civil actions, see "Evidence," § 7.

As evidence in criminal prosecutions, see "Criminal Law," § 11.

DONATIONS.

See "Gifts."

DOWER.

See "Curtesy."

§ 1. *Nature and requisites.*

Under Rev. St. 1899, § 4535, a widow is entitled to dower, though there may have been no actual possession of the land by the husband.—*Bartlett v. Tinsley* (Mo. Sup.) 143.

Where a deed conveying land is absolute on its face, the right of the widow of the grantee to dower cannot be defeated by parol proof tending to establish a trust in favor of the grantor.—*Bartlett v. Tinsley* (Mo. Sup.) 143.

Under Rev. St. 1899, §§ 2933, 2935, 2936, widow *held* entitled to dower in land purchased by deceased husband subject to trust deeds; the deeds being paid off after her death.—*Casteel v. Potter* (Mo. Sup.) 597.

§ 2. Inchoate interest.

Rev. St. 1889, § 8839, *held* not to estop a widow from claiming dower in land conveyed by her husband alone, especially in view of section 4525.—*Bartlett v. Tinsley* (Mo. Sup.) 143.

Evidence *held* to show that plaintiff had voluntarily abandoned her husband and contracted an adulterous marriage, and that she was therefore barred from dower in her first husband's estate, under Rev. St. 1889, § 4532.—*Wilson v. Craig* (Mo. Sup.) 419.

DRAFT.

See "Bills and Notes."

DRAINS.

§ 1. Establishment and maintenance.

An objection to the competency of a commissioner appointed to lay out a drainage district may be raised for the first time on appeal.—*King's Lake Drainage & Levee Dist. v. Jamison* (Mo. Sup.) 679.

Rev. St. 1899, § 8331, relating to appeals in drainage proceedings, does not provide for a direct appeal from the county court to the Supreme Court, but for an appeal according to the provisions in Rev. St. 1889, §§ 3318, 3434.—*King's Lake Drainage & Levee Dist. v. Jamison* (Mo. Sup.) 679.

Rev. St. 1899, § 8331, *held* to authorize an appeal of all issues tried in the county court on exceptions to the report of commissioners appointed to lay out a drainage district.—*King's Lake Drainage & Levee Dist. v. Jamison* (Mo. Sup.) 679.

Though two of the three commissioners appointed to lay out a new drainage district are competent to act, their action will be void if the third one is incompetent.—*King's Lake Drainage & Levee Dist. v. Jamison* (Mo. Sup.) 679.

Under Acts 1893, p. 189, § 5, *held*, that a person whose wife owns land affected by the erection of a drainage district is not competent to act as a commissioner.—*King's Lake Drainage & Levee Dist. v. Jamison* (Mo. Sup.) 679.

DUE PROCESS OF LAW.

See "Constitutional Law," § 4.

DUPLICITY.

In indictment, see "Indictment and Information," § 3.

DYING DECLARATIONS.

See "Homicide," § 3.

EASEMENTS.

See "Dedication"; "Highways."

EJECTION.

Of passenger, see "Carriers," § 6.

EJECTMENT.

See "Trespass to Try Title."

§ 1. Right of action and defenses.

One having a lien on land for the purchase money may sue for the possession thereof, though he has conveyed it to a third person.—*Miller v. Farmers' Bank* (Ky.) 218.

§ 2. Trial, judgment, enforcement of judgment, and review.

Discharge of receiver in ejectment *held* to preclude review of legality of his sale of property, and to prevent ordering restitution to defendant after reversal of plaintiff's judgment.—*Colbern v. Yantis* (Mo. Sup.) 653.

Illegality in sale of property by receiver in ejectment *held* waived by defendant, so as to preclude subsequent restitution.—*Colbern v. Yantis* (Mo. Sup.) 653.

Defendant in ejectment *held* not liable for rents after taking possession by receiver, and hence entitled to recover them on reversing plaintiff's judgment.—*Colbern v. Yantis* (Mo. Sup.) 653.

Defendant in ejectment, on reversing plaintiff's judgment, *held* entitled to recover proceeds representing equity of redemption in land in suit.—*Colbern v. Yantis* (Mo. Sup.) 653.

Defendant in ejectment, entitled, on reversing plaintiff's judgment, to recover certain moneys paid thereunder, *held* entitled to summary relief.—*Colbern v. Yantis* (Mo. Sup.) 653.

Restitution to ejectment defendant of property sold to third person prior to reversal of plaintiff's judgment *held* improper, where purchaser was not a party.—*Colbern v. Yantis* (Mo. Sup.) 653.

Restitution to ejectment defendant of property sold under paramount deed of trust before reversal of plaintiff's judgment *held* improper.—*Colbern v. Yantis* (Mo. Sup.) 653.

§ 3. Damages, mesne profits, improvements, and taxes.

Defendants in ejectment, having no notice of plaintiff's title until the action was brought, *held* only chargeable with rents and profits from the date of the suit.—*Cowan v. Mueller* (Mo. Sup.) 606.

Appointment of receiver in ejectment *held* erroneous.—*Colbern v. Yantis* (Mo. Sup.) 653.

ELECTION.

Between counts in indictment, see "Indictment and Information," § 3.
Between testamentary provisions and other rights, see "Wills," § 5.

ELECTIONS.

Local option election, see "Intoxicating Liquors," § 2.

§ 1. Nominations and primary elections.

Equity has jurisdiction to restrain by injunction the chairman of the state Democratic central committee from removing a county Democratic committee and appointing a new one, and to restrain such state central committee from unauthorized conduct in attempting to prevent the holding of a primary election at the time regularly fixed by the county committee.—*Neal v. Young* (Ky.) 1082.

The action of the chairman of the state central Democratic committee in attempting to remove county committee and appoint a new one was void for lack of any authority on his part.—*Neal v. Young* (Ky.) 1082.

Where, pursuant to a primary election called by the Democratic committee of a county, can-

idates had been elected and incurred expenses, and ballots printed, and the officers of election appointed, the state central committee had no authority to forbid the holding of the primary.—*Neal v. Young* (Ky.) 1082.

ELECTRICITY.

Electric street railroads, see "Street Railroads."
Grants of rights in streets to electric companies, see "Municipal Corporations," § 7.

EMBEZZLEMENT.

Duplicity in indictment for, see "Indictment and Information," § 3.
Reception of evidence, see "Criminal Law," § 19.

In a prosecution of the president of an insolvent corporation for embezzlement in the declaration and receipt of dividends, failure to submit the fraudulent action of defendant's co-directors in declaring and paying such dividends was error.—*Taylor v. Commonwealth* (Ky.) 244.

In a prosecution for embezzlement in declaring and receiving corporate dividends, "fraudulent conversion" held to mean the intentional appropriation of the corporation's property, and "fraudulent intent" the intent to effectuate such appropriation.—*Taylor v. Commonwealth* (Ky.) 244.

In a prosecution of the president of an insolvent corporation for embezzlement in receiving dividends paid out of the corporation's assets, evidence that other like companies had been accustomed to pay dividends from funds of the same character held admissible.—*Taylor v. Commonwealth* (Ky.) 244.

In a prosecution for embezzlement in the declaration and receipt of corporate dividends wrongfully declared, evidence that defendant and his co-directors believed such declaration and receipt were rightful was admissible.—*Taylor v. Commonwealth* (Ky.) 244.

In a prosecution of the president of an insolvent corporation for embezzlement in receiving dividends, evidence of other dividends declared and the condition of the company at various dates held admissible on the issue of motive.—*Taylor v. Commonwealth* (Ky.) 244.

Under Ky. St. 1899, § 1202, an indictment against the president of a corporation for embezzlement of its funds held sufficient.—*Taylor v. Commonwealth* (Ky.) 244.

That all of the stockholders of an insolvent corporation voted for the payment of dividends from its assets held no defense to a prosecution against the president for embezzlement of the corporation's assets in receiving such dividends.—*Taylor v. Commonwealth* (Ky.) 244.

The president of an insolvent corporation held not guilty of embezzlement in receiving dividends declared, unless he knew that there was no fund from which the dividends could be legally paid.—*Taylor v. Commonwealth* (Ky.) 244.

Ky. St. 1899, §§ 548, 550, held not to provide a penalty for embezzlement by officer of an insolvent corporation, committed by the fraudulent declaration of a dividend, prohibited by section 1202.—*Taylor v. Commonwealth* (Ky.) 244.

EMINENT DOMAIN.

Appealability of judgment in condemnation proceedings, see "Appeal and Error," § 2.
Public improvements by municipalities, see "Municipal Corporations," § 5.

§ 1. Nature, extent, and delegation of power.

Railroad corporation of sister state, complying with the act of March 13, 1889, held to become domestic corporation, entitled to exercise eminent domain under the Constitution.—*Russell v. St. Louis Southwestern Ry. Co.* (Ark.) 725.

Rev. St. 1880, § 2614, imposing penalty on railroad failing to keep right of way clear of undergrowth to prevent escape of fire, held not violative of the clause of the state Constitution providing that private property shall not be taken for private use.—*McFarland v. Mississippi River & B. T. Ry. Co.* (Mo. Sup.) 152.

§ 2. Proceedings to take property and assess compensation.

Instruction as to damages in eminent domain proceedings by railroad company held error, and not cured by another instruction.—*Russell v. St. Louis Southwestern Ry. Co.* (Ark.) 725.

Though part only of defendants in a condemnation proceeding appeal, the verdict and judgment as to all is set aside by a reversal.—*In re West Terrace Park* (Mo. Sup.) 973; *Kansas City v. Mulkey*, Id.

On a second trial in condemnation proceedings, or on a second proceeding after repeal of the ordinance authorizing the first, the verdict on the first trial cannot be made the basis for the verdict on the second trial.—*In re West Terrace Park* (Mo. Sup.) 973; *Kansas City v. Mulkey*, Id.

Shannon's Code, §§ 4834, 4853, 4854, 6320, 6336, held to authorize the Supreme Court to grant a writ of certiorari to review a proceeding to condemn land for a railroad right of way, in the absence of any other adequate remedy.—*Tennessee Cent. R. Co. v. Campbell* (Tenn.) 1012.

§ 3. Remedies of owners of property.

In an action for damages by defendant's constructing its tracks along the street in front of plaintiff's homestead, held, that the court's action in submitting only the issue of damage to property as a home was proper.—*Eastern Texas R. Co. v. Scurlock* (Tex. Civ. App.) 366.

EMPLOYES.

See "Master and Servant."

ENCROACHMENT.

On highways, see "Highways," § 2.

ENTRY, WRIT OF.

See "Ejectment."

EQUITABLE CONVERSION.

See "Conversion."

EQUITABLE ESTOPPEL.

See "Estoppel," § 1.

EQUITABLE SET-OFF.

See "Set-Off and Counterclaim."

EQUITY.

Equitable conversion, see "Conversion."
Equitable estoppel, see "Estoppel," § 1.
Equitable set-off, see "Set-Off and Counterclaim."
Legal or equitable action, see "Actions," § 1.

Particular subjects of equitable jurisdiction and equitable remedies.

See "Fraudulent Conveyances"; "Injunction"; "Interpleader"; "Nuisance," § 2; "Partition," § 1; "Quieting Title"; "Receivers"; "Reformation of Instruments"; "Specific Performance"; "Trusts."

Relief against judgment, see "Judgment," § 3.

§ 1. Pleading.

Where a bill seeks to set aside a judgment opening a highway, and also asks damages against road overseers, there is an improper joinder of matters of equitable jurisdiction with those cognizable at law.—*Searcy v. Clay County* (Mo. Sup.) 657.

§ 2. Decree and enforcement thereof.

Relief granted must be founded on and consistent with allegations of the bill, and not such as may be proven at the trial.—*Schneider v. Patton* (Mo. Sup.) 155.

ERROR, WRIT OF.

See "Appeal and Error"; "Criminal Law," §§ 25-27.

ESTABLISHMENT.

Of boundaries, see "Boundaries," § 1.

Of drains, see "Drains," § 1.

Of highways, see "Highways," § 1.

Of will, see "Wills," § 3.

ESTATES.

See "Curtesy"; "Dower"; "Life Estates."

Created by deed, see "Deeds," § 2.

Created by will, see "Wills," § 4.

Decedents' estates, see "Descent and Distribution"; "Executors and Administrators."

Estates for years, see "Landlord and Tenant."

Restrictions on creation of future estates, see "Perpetuities."

Trusts, see "Trusts," § 2.

ESTOPPEL.

By judgment, see "Judgment," §§ 5, 6.

To allege error, see "Appeal and Error," § 14.

To claim dower, see "Dower," § 2.

To claim homestead, see "Homestead," § 2.

To question membership in fraternal order, see "Insurance."

§ 1. Equitable estoppel.

Failure to plead an estoppel may be waived by proceeding with the trial without objection.—*McDonnell v. De Soto Sav. & Bldg. Ass'n* (Mo. Sup.) 438.

Where buyer of goods told seller that certain creditor would not push his claim against buyer, but seller did not verify statement until after the sale, the creditor held not estopped from claiming title to goods received from the buyer.—*Rosencranz v. Swoford Bros. Dry Goods Co.* (Mo. Sup.) 445.

Plaintiffs held estopped to allege that plaintiffs and defendant were not adversary parties in a prior suit, and that therefore a judgment rendered therein was not res judicata.—*Fiene v. Kirchoff* (Mo. Sup.) 608.

An equitable estoppel is not available, unless pleaded.—*George B. Loving Co. v. Hesperian Cattle Co.* (Mo. Sup.) 1095.

An estoppel must be pleaded.—*Read v. Citizens' St. R. Co.* (Tenn.) 1056.

Conduct which does not mislead held not to work an estoppel.—*Roach v. Springer* (Tex. Civ. App.) 933.

EVIDENCE.

See "Depositions"; "Discovery"; "Witnesses." Applicability of instructions to evidence, see "Trial," § 7.

Assignment of error as to admission of, see "Appeal and Error," § 9.

Harmless error in admission or exclusion of, see "Appeal and Error," § 17; "Criminal Law," § 27; "Homicide," § 8.

Necessity of motion for new trial for purpose of review of, see "Appeal and Error," § 6.

Presentation of objections to, for purpose of review, see "Appeal and Error," § 4.

Presumptions as to jurisdiction of courts, see "Courts," § 1.

Reception at trial, see "Criminal Law," § 19; "Homicide," § 6; "Trial," § 1.

Review of, as dependent on presentation of question by record, see "Appeal and Error," § 8; "Criminal Law," § 26.

Review on appeal or writ of error, see "Appeal and Error," § 16.

Tax deeds as evidence, see "Taxation," § 6.

Weight of, as question for jury, see "Criminal Law," § 16.

As to particular facts or issues.

See "Adoption"; "Damages," § 4; "Fraudulent Conveyances," § 3; "Usury," § 1.

Adoption of local option, see "Intoxicating Liquors," § 2.

Agency of broker, see "Brokers," § 1.

Authority of agent, see "Principal and Agent," § 2.

Classification and appraisement of public lands before sale, see "Public Lands," § 2.

Delivery of deed, see "Deeds," § 1.

Establishment of trust, see "Trusts," § 1.

Separate property of married woman, see "Husband and Wife," § 2.

Validity of deed, see "Deeds," § 3.

In actions by or against particular classes of parties.

See "Carriers," §§ 2-4, 6, 7; "Master and Servant," § 8; "Municipal Corporations," § 8; "Railroads," §§ 7, 9; "Street Railroads," § 2.

Telegraph companies, see "Telegraphs and Telephones," § 1.

Trustees, see "Trusts," § 4.

Trustees in bankruptcy, see "Bankruptcy," § 1.

In particular civil actions or proceedings.

See "Libel and Slander," § 3; "Malicious Prosecution," § 2; "Nuisance," § 1; "Reformation of Instruments," § 1; "Replevin," § 1; "Specific Performance," § 1; "Trespass to Try Title," § 2; "Trove and Conversion," § 1.

For breach of contract, see "Contracts," § 6.

For causing death, see "Death," § 1.

For civil damages for sale of liquors, see "Intoxicating Liquors," § 8.

For delay in delivery of message, see "Telegraphs and Telephones," § 1.

For injuries to animals caused by operation of railroad, see "Railroads," § 9.

For injuries to live stock in transit, see "Carriers," § 3.

For loss of goods by carrier, see "Carriers," § 2.

For loss of passenger's baggage, see "Carriers," § 7.

For personal injuries, see "Carriers," § 4; "Master and Servant," § 8; "Municipal Corporations," § 8; "Railroads," § 7; "Street Railroads," § 2.

For rent, see "Landlord and Tenant," § 2.

For wrongful ejection of passenger, see "Carriers," § 6.

On benefit certificate, see "Insurance," § 13.

On insurance policy, see "Insurance," § 12.

On municipal bonds, see "Municipal Corporations," § 9.

Probate proceedings, see "Wills," § 3.

To enforce trust, see "Trusts," § 4.
 To recover interest, see "Interest," § 1.
 Trial of right to property levied on, see "Attachment," § 4; "Execution," § 2.

In criminal prosecutions.

See "Criminal Law," §§ 6-23; "Embezzlement"; "Gaming," § 1; "Homicide," §§ 3-5; "Larceny," § 1; "Libel and Slander," § 4; "Perjury," § 2; "Prize Fighting"; "Seduction," § 1; "Trespass," § 3.

For obstruction of highway, see "Highways," § 2.

For violation of liquor laws, see "Intoxicating Liquors," § 7.

§ 1. Judicial notice.

In an action against a carrier for delay in the carriage of cattle, the court may take judicial notice of the fact that the live stock traffic increases yearly.—*Chinn v. Chicago & A. Ry. Co.* (Mo. App.) 375.

The court may take judicial notice that rice cannot be grown to maturity without water.—*Barr v. Cardiff* (Tex. Civ. App.) 341.

§ 2. Relevancy, materiality, and competency in general.

In an action against a carrier for injuries, caused by misconduct of conductor, *held*, that evidence of what plaintiff and the conductor said on the trip was competent.—*Memphis St. Ry. Co. v. Shaw* (Tenn.) 713.

Certain declarations of injured railroad switchman *held* admissible as *res gestæ*.—*Missouri, K. & T. Ry. Co. of Texas v. Schilling* (Tex. Civ. App.) 64.

In an action for damages by defendant's constructing tracks along the street in front of plaintiff's property, testimony as to what plaintiff would take for his property *held* properly excluded.—*Eastern Texas R. Co. v. Scurlock* (Tex. Civ. App.) 366.

Certain testimony *held* *res gestæ*.—*Gresham v. Harcourt* (Tex. Civ. App.) 808.

In action for partnership accounting, contract whereby defendant sold third person half interest in the property *held* not admissible on question of the value of the property when sale was made.—*Gresham v. Harcourt* (Tex. Civ. App.) 808.

On issue whether conveyance was in fraud of creditors, certain testimony *held* improperly excluded.—*Moore v. Robinson* (Tex. Civ. App.) 890.

Certain statement by passenger, ejected from train, *held* not *res gestæ*.—*Missouri, K. & T. Ry. Co. of Texas v. Tarwater* (Tex. Civ. App.) 937.

§ 3. Best and secondary evidence.

In an action by a railway company to recover excessive tolls paid to a bridge company, way-bills and transfer slips, showing the amount of freight transported over the bridge, *held* not objectionable as secondary evidence.—*Louisville Bridge Co. v. Louisville & N. R. Co.* (Ky.) 285; *Pittsburg, C., C. & St. L. Ry. Co. v. Same, Id.*

The record of a corporation *held* the best evidence as to the date when bonds were delivered to it in payment of stock.—*Louisville & N. R. Co. v. Hart County* (Ky.) 288; *Hart County v. Louisville & N. R. Co., Id.*

§ 4. Admissions.

In replevin for a piano sold defendant by plaintiff's agent, who took a note payable to himself and appropriated the proceeds, on an issue as to a custom of agents so to deal, certain evidence *held* properly admitted.—*D. H. Baldwin & Co. v. Tucker* (Ky.) 196.

In an action by a real estate agent for commissions, conversation between plaintiff and a party who purchased the property, had subsequent to a revocation of the agency, *held* in-

admissible.—*George B. Loving Co. v. Hesperian Cattle Co.* (Mo. Sup.) 1096.

Declarations of a husband as to the ownership of cattle, claimed by wife as her separate property, made in her absence, were not binding on her.—*Word v. Kennon* (Tex. Civ. App.) 365.

Proof of tender by real estate broker to other brokers of their share of commissions *held* not objectionable, as proving offer of compromise.—*Blake v. Austin* (Tex. Civ. App.) 571.

To warrant admissions of declarations of the grantor, made after the sale, tending to show it was in fraud of creditors, *prima facie* case to defraud must first be established.—*Moore v. Robinson* (Tex. Civ. App.) 890.

On issue of fraudulent conveyance, certain conversation between creditor and grantor *held* admissible over objection that it was not binding on grantee.—*Moore v. Robinson* (Tex. Civ. App.) 890.

In action on fire policy, proof *held* to sufficiently establish a conspiracy to defraud the company to warrant the admission in evidence of the acts and declarations of the conspirators.—*McCarty v. Hartford Fire Ins. Co.* (Tex. Civ. App.) 934.

In action on fire policy, declarations concerning the insurance, made by the woman first sent by plaintiff to obtain it, *held* admissible.—*McCarty v. Hartford Fire Ins. Co.* (Tex. Civ. App.) 934.

§ 5. Declarations.

In trespass to try title, certain declarations made by a landowner *held* inadmissible.—*Tenzler v. Tyrrell* (Tex. Civ. App.) 57.

Declaration by injured railroad switchman *held* not self-serving.—*Missouri, K. & T. Ry. Co. of Texas v. Schilling* (Tex. Civ. App.) 64.

In an action of trespass to try title, certain evidence *held* admissible to show the death of plaintiff's remote grantor, as a predicate for the introduction of a deed containing a declaration by him as to his pedigree.—*Wren v. Howland* (Tex. Civ. App.) 894.

In trespass to try title, in which defendants denied that plaintiff's remote grantor was the son of the original patentee of the land, the pleadings in a suit for divorce by the wife of such original patentee, in which she prayed for the custody of a minor child, who was afterwards plaintiff's remote grantor, were admissible in evidence.—*Wren v. Howland* (Tex. Civ. App.) 894.

In trespass to try title, where it was in issue whether plaintiff's remote grantor was the son of the original patentee of the land, a deed wherein such remote grantor stated that he was the son of the original patentee, and the only heir with the exception of his mother, was properly admitted.—*Wren v. Howland* (Tex. Civ. App.) 894.

In trespass to try title, declarations made by the mother of the plaintiff's remote grantor as to his pedigree *held* admissible.—*Wren v. Howland* (Tex. Civ. App.) 894.

In trespass to try title, certain evidence *held* admissible as tending to show that plaintiff's remote grantor was the son and heir of the original patentee.—*Wren v. Howland* (Tex. Civ. App.) 894.

In trespass to try title, in which it was in issue whether plaintiff's remote grantor was the son of the original patentee of the land, the Family Bible of plaintiff's remote grantor, identified by his son, was admissible to show that such remote grantor was the son of the original patentee.—*Wren v. Howland* (Tex. Civ. App.) 894.

§ 6. Hearsay.

Certain testimony *held* not inadmissible as hearsay.—*Missouri, K. & T. Ry. Co. of Texas v. Schilling* (Tex. Civ. App.) 64.

In action against railroad for damages to employé by reason of incompetence of surgeon employed in the company's hospital, a newspaper account of the proceedings of the state board of medical examiners *held* inadmissible.—*Poling v. San Antonio & A. P. Ry. Co.* (Tex. Civ. App.) 69.

Certain testimony *held* not hearsay.—*Gresham v. Harcourt* (Tex. Civ. App.) 808; *Moore v. Robinson* (Tex. Civ. App.) 890.

§ 7. Documentary evidence.

In a suit by a railway company to recover excessive tolls charged by a bridge company, tables prepared from waybills and transfer slips *held* admissible to show the amount of freight transported over bridge.—*Louisville Bridge Co. v. Louisville & N. R. Co.* (Ky.) 285; *Pittsburg, C., C. & St. L. Ry. Co. v. Same, Id.*

Under Rev. St. 1899, § 3100, a volume of ordinances purporting to be published by authority of a city is admissible as evidence of an ordinance contained therein.—*Campbell v. St. Louis & Suburban Ry. Co.* (Mo. Sup.) 86.

Under Sp. Acts 22d Leg. 1891, p. 58, §§ 164, 172, an ordinance of the city of Dennison, bound in an original ordinance book of the city, *held* admissible, without proof of the date of its enactment.—*Missouri, K. & T. Ry. Co. of Texas v. Owens* (Tex. Civ. App.) 579.

Where certified copies of the record in a proceeding in a foreign state were not admissible in evidence, because the court in which such proceedings were had was without jurisdiction, partial contents of such copies were not admissible for the purpose of proving statements therein contained.—*Wren v. Howland* (Tex. Civ. App.) 894.

In trespass to try title, certified copies of the record in proceedings in a foreign state over which the court in which the proceedings were had had no jurisdiction, were not admissible in evidence.—*Wren v. Howland* (Tex. Civ. App.) 894.

Where a power of attorney with reference to the sale of lands was recorded in a county in which none of the land was situated, a copy of the record filed in the land office did not become an archive of that office.—*Wren v. Howland* (Tex. Civ. App.) 894.

Under the express provisions of Rev. St. 1895, art. 2306, certified copies of the record in proceedings of courts of this state, made under seal of the custodian of such record, are admissible in evidence.—*Wren v. Howland* (Tex. Civ. App.) 894.

§ 8. Parol or extrinsic evidence affecting writings.

In replevin for sawmill machinery, certain evidence admitted *held* not to vary the terms of note given for purchase price.—*Ramsey & Bro. v. Capshaw* (Ark.) 479.

Under Rev. St. 1899, § 4679, the signature of a person not charged to be in any way connected with a forgery cannot be introduced for comparison.—*Cook v. Strother* (Mo. App.) 175.

In a prosecution for violating local option law, parol evidence *held* competent to explain mistake in election returns as to name of precinct.—*Nelson v. State* (Tex. Cr. App.) 502.

Evidence that a grantor in a deed conveying land did not intend to give possession of the land until the youngest grantee became of age *held* inadmissible.—*Ford v. Boone* (Tex. Civ. App.) 853.

Where the record of a deed to an undivided interest in a survey of land was defective for failure to describe the land as it was described in the deed, the defect could not be cured by parol.—*Henning v. Wren* (Tex. Civ. App.) 905.

§ 9. Opinion evidence.

A person *held* not competent to give an opinion as to the speed of a car, based on the noise

heard at a distance of more than 120 feet.—*Campbell v. St. Louis & Suburban Ry. Co.* (Mo. Sup.) 86.

Witness *held* not shown to be properly qualified as expert on question of testamentary capacity.—*Lorts v. Wash* (Mo. Sup.) 95.

In action against railroad for damages to employé by reason of the incompetence of a surgeon employed in the company's hospital, evidence that a witness did not consider the surgeon well versed in the science of medicine *held* immaterial.—*Poling v. San Antonio & A. P. Ry. Co.* (Tex. Civ. App.) 69.

In an action against a railroad for killing a mule, testimony of witness that the place was dangerous *held* improper.—*Southern Kansas Ry. Co. of Texas v. Cooper* (Tex. Civ. App.) 328.

The statement of a witness that a railway company's agent saw the children accompanying plaintiff before he gave them the tickets is the statement of a fact.—*International & G. N. R. Co. v. Anchonda* (Tex. Civ. App.) 557.

In an action for injuries by being struck by a train, a rule of the defendant *held* admissible to show the qualifications of an alleged expert witness, though it was not claimed that the train by which plaintiff was struck violated such rule.—*Missouri, K. & T. Ry. Co. of Texas v. Owens* (Tex. Civ. App.) 579.

A question asked an expert *held* not objectionable as calling for a conclusion.—*International & G. N. R. Co. v. Collins* (Tex. Civ. App.) 814.

Facts *held* sufficient to qualify plaintiff as an expert to testify whether a defect in a brake-staff could have been discovered by proper inspection.—*International & G. N. R. Co. v. Collins* (Tex. Civ. App.) 814.

EXAMINATION.

Of adverse party before trial, see "Discovery," § 1.

Of person accused of crime, see "Criminal Law," § 4.

Of witnesses in general, see "Witnesses," § 2.

EXCEPTIONS.

Necessity for purpose of review, see "Appeal and Error," § 5.

EXCEPTIONS, BILL OF.

Necessity for purpose of review, see "Appeal and Error," § 8; "Criminal Law," § 26.

§ 1. Settlement, signing, and filing.

Mandamus will not be granted to compel a trial judge to certify a bill of exceptions, which he states under oath does not contain a true record of the trial.—*State v. Maiden* (Tenn.) 710.

EXCESSIVE DAMAGES.

See "Damages," § 3.

EXCISE.

Regulation of traffic in intoxicating liquors, see "Intoxicating Liquors."

EXCLUSION.

Of witnesses, see "Trial," § 1.

EXECUTION.

See "Attachment"; "Garnishment."

Exemptions, see "Exemptions"; "Homestead."

Of judgments of justices of the peace, see "Justices of the Peace," § 1.

§ 1. Lien, levy or extent, and custody of property.

Under Rev. St. 1895, arts. 2349, 2352, a levy under execution on personal property *held* not void by reason of irregularity.—*Davis v. Jones* (Tex. Civ. App.) 63.

Under Rev. St. 1895, art. 5311, irregularity in manner of levy on personal property under execution against debtor *held* waived.—*Davis v. Jones* (Tex. Civ. App.) 63.

§ 2. Claims by third persons.

Evidence *held* not to show that judgment debtor had no interest in certain property which was subject to execution.—*Davis v. Jones* (Tex. Civ. App.) 63.

Under Rev. St. 1895, art. 5307, a judgment on bond given by claimants of personal property levied on under execution against debtor *held* warranted, where they failed to establish joint claim made by them.—*Davis v. Jones* (Tex. Civ. App.) 63.

§ 3. Sale.

Defendants in action to quiet title *held* not to have acquired any title to the property by purchase on execution, and therefore not to be in a position to question the regularity of proceedings whereby a trustee was substituted for one named in a deed making up plaintiffs' chain of title.—*Ball v. Woolfolk* (Mo. Sup.) 410.

EXECUTORS AND ADMINISTRATORS.

See "Descent and Distribution"; "Wills."

Necessity of objections to notice of administrator's sale, for purpose of review, see "Appeal and Error," § 3.

Testamentary trustees, see "Trusts."

§ 1. Assets, appraisal, and inventory.

Sayles' Ann. Civ. St. 1897, art. 1973, expressly authorizes filing of additional inventory by administrator, embracing property not originally listed.—*Texas Loan Agency v. Dingee* (Tex. Civ. App.) 866.

§ 2. Collection and management of estate.

One of three executors having died, the two survivors *held* empowered to exercise the power of sale contained in the will.—*Bedford v. Bedford* (Tenn.) 1017.

Power to sell real estate contained in will *held* vested in the executors.—*Bedford v. Bedford* (Tenn.) 1017.

Will *held* to authorize sale of certain real estate.—*Bedford v. Bedford* (Tenn.) 1017.

The exercise of the executors' discretion as to the necessity or propriety of a sale *held* conclusive, and not subject to review.—*Bedford v. Bedford* (Tenn.) 1017.

§ 3. Allowances to surviving wife, husband, or children.

Widow *held* entitled to quarantine in mansion house and plantation of deceased, including land purchased by him subject to trust deeds; the deeds being paid off after his death.—*Casteel v. Potter* (Mo. Sup.) 597.

§ 4. Allowance and payment of claims.

Cestui que trust under deed of trust *held* to have lost debt and lien by failing to file claim during administration of grantor's estate.—*Texas Loan Agency v. Dingee* (Tex. Civ. App.) 866.

§ 5. Sales and conveyances under order of court.

Where an application for the sale of land to pay testator's debts was certified to the circuit court on disqualification of the judge of the court of common pleas, under Rev. St. 1899, § 1760, such circuit court had jurisdiction to or-

der a sale of the property.—*Meddis v. Kenney* (Mo. Sup.) 633.

Where land was devised to a widow subject to debts, a declaration of law that the widow's heirs were estopped to deny that the real estate was subject to sale to pay testator's debts *held* proper.—*Meddis v. Kenney* (Mo. Sup.) 633.

Where an heir received his share of the proceeds of the sale of land sold by the executor to pay debts, as did his brothers and sisters, he was estopped to assert title, through deeds from his brothers and sisters, against the title arising from the executor's sale.—*Meddis v. Kenney* (Mo. Sup.) 633.

§ 6. Actions.

In a suit to establish a rejected claim against a decedent's estate, the district court has jurisdiction to determine the validity of a trust deed given to secure it.—*Ryon v. George* (Tex. Civ. App.) 48.

In a suit to establish a rejected claim against a decedent's estate, and to determine the validity of a trust deed given to secure it, the trustee is not a necessary party.—*Ryon v. George* (Tex. Civ. App.) 48.

§ 7. Accounting and settlement.

In view of Batts' Ann. Civ. St. art. 3357 et seq., county court has no jurisdiction to determine amount due from deceased executor or administrator to the estate.—*McClellan v. Mangum* (Tex. Civ. App.) 840.

§ 8. Foreign and ancillary administration.

An executor appointed in New Hampshire and domiciled in Kentucky *held* liable to account in the courts of Kentucky to the persons entitled to the estate.—*Hussey v. Sargent* (Ky.) 211.

EXEMPTIONS.

See "Homestead."

From taxation, see "Taxation," § 2.

§ 1. Protection and enforcement of rights.

Rev. St. 1899, § 3162, relating to exemptions, and section 4495, relating to set-off of judgments, construed, and *held*, that a judgment for costs in favor of defendant could not be set off against a \$300 personal injury judgment recovered by plaintiff, who was the head of a family, had no other property, and claimed such judgment as an exemption.—*Bowen v. City of Holden* (Mo. App.) 686.

EXPERT TESTIMONY.

In civil actions, see "Evidence," § 9.

In criminal prosecutions, see "Criminal Law," § 12.

EXTENSION.

Of time for payment, as discharging surety, see "Principal and Surety," § 1.

FACTORS.

See "Brokers"; "Principal and Agent."

FALSE IMPRISONMENT.

See "Malicious Prosecution."

FALSE PRETENSES.

Relevancy of evidence, see "Criminal Law," § 7.

FALSE SWEARING.

See "Perjury."

FEES.

In interpleader proceedings, see "Interpleader," § 2.
Of attorney, see "Attorney and Client," § 2.

FEE SIMPLE.

Creation by deed, see "Deeds," § 2.
Creation by will, see "Wills," § 4.

FELLOW SERVANTS.

See "Master and Servant," § 4.

FIDUCIARY RELATIONS.

Adverse possession by persons holding, see "Adverse Possession," § 1.

FILING.

Chattel mortgage, see "Chattel Mortgages," § 2.
Indictment or presentment, see "Indictment and Information," § 1.
Statement of facts for purpose of review, see "Appeal and Error," § 8.

FINAL JUDGMENT.

Appealability, see "Appeal and Error," § 2.

FINDINGS.

Review in criminal prosecutions, see "Criminal Law," § 27.

FINES.

Act March 3, 1897 (Acts 1897, p. 47, No. 37), amending Sand. & H. Dig. § 2321, *held* not to give authority to receive a mortgage as security for a fine imposed by a justice.—Hubbard v. State (Ark.) 853.

FIRES.

Caused by operation of railroad, see "Railroad," § 10.

FORCIBLE DEFILEMENT.

See "Rape."

FORCIBLE ENTRY AND DETAINER.**§ 1. Civil Liability.**

Under Code Prac. § 134, *held*, that a writ of forcible entry, issued by a justice, may be amended to allege peaceable possession by plaintiff; and this, after traverse and appeal to the circuit court.—Hoffman v. Mann (Ky.) 219.

FORECLOSURE.

Of lien, see "Mechanics' Liens," § 2.
Of mortgage, see "Chattel Mortgages," § 6;
"Mortgages," §§ 6, 7.

FOREIGN ADMINISTRATION.

See "Executors and Administrators," § 8.

FOREIGN JUDGMENTS.

Of divorce, see "Divorce," § 4.

FORFEITURES.

Of dower, see "Dower," § 2.
Of homestead, see "Homestead," § 2.

Of insurance, see "Insurance," §§ 6, 12.
Of unpaid shares of stock, see "Corporations," § 1.

FORGERY.

An indictment for forgery of an instrument *held* insufficient for lack of certain innuendo.—Wilson v. State (Tex. Cr. App.) 504.

An indictment for forgery *held* insufficient for failing to show that instrument forged created any obligation on the person whose name it purported to bear.—Wilson v. State (Tex. Cr. App.) 504.

Passing of a forged teacher's certificate *held* an offense, under Pen. Code 1895, arts. 540a, 542.—Brooks v. State (Tex. Cr. App.) 507.

FORMER ADJUDICATION.

See "Judgment," §§ 5, 6.

FORMER JEOPARDY.

Bar to prosecution, see "Criminal Law," § 3.
Plea of, see "Criminal Law," § 5.

FORMS OF ACTION.

See "Action," § 1; "Ejectment"; "Replevin"; "Trespass," § 2; "Trove and Conversion."

FORNICATION.

See "Seduction," § 1.

FRANCHISES.

Grant by municipality, see "Municipal Corporations," § 5.

FRAUD.

See "Fraudulent Conveyances."

§ 1. Deception constituting fraud, and liability therefor.

In an action by a real estate broker to recover damages for fraud practiced in defeating a commission, *held* immaterial whether a certain verbal agreement was within the statute of frauds.—Corder v. O'Neill (Mo. Sup.) 764.

§ 2. Actions.

In an action by a real estate broker to recover damages for fraud practiced in defeating a commission, *held* necessary to allege and prove the breach of a certain verbal contract.—Corder v. O'Neill (Mo. Sup.) 764.

A misleading averment in an action by a real estate broker to recover damages for fraud practiced in defeating a commission *held* not to affect the substantial averments of the petition.—Corder v. O'Neill (Mo. Sup.) 764.

In an action by a real estate broker to recover damages for fraud practiced in defeating a commission, *held* necessary to allege the contract of employment.—Corder v. O'Neill (Mo. Sup.) 764.

A petition in an action by a real estate broker against a vendor to recover damages for fraud practiced in defeating a commission *held* to state a good cause of action for fraud.—Corder v. O'Neill (Mo. Sup.) 764.

Facts *held* sufficient to submit a question of agency to the jury.—Corder v. O'Neill (Mo. Sup.) 764.

In an action by a real estate broker to recover damages for fraud practiced in defeating a commission, *held* error to instruct the jury to assess plaintiff's damages in the amount of the agreed commission.—Corder v. O'Neill (Mo. Sup.) 764.

In an action by a real estate broker to recover damages for fraud practiced in defeating a commission, *held* error to make a certain verbal contract the sole basis of recovery.—Corder v. O'Neill (Mo. Sup.) 764.

In an action by a real estate broker to recover damages for fraud practiced in defeating a commission, *held* error to instruct the jury to award interest as part of the damages.—Corder v. O'Neill (Mo. Sup.) 764.

FRAUDULENT CONVEYANCES.

By bankrupt, see "Bankruptcy," § 1.

§ 1. Transfers and transactions invalid.

That a creditor of an insolvent might retain notes transferred by the insolvent, who received them in payment for goods sold to hinder creditors, would not inure to the benefit of a purchaser of the goods with knowledge of the intent to delay.—Kurtz v. Lewis Voight & Sons Co. (Mo. Sup.) 386.

Where an insolvent sold goods with the intention of giving the notes received for the price to his brother for a debt, and hindering other creditors, the sale was invalid as to a purchaser with knowledge.—Kurtz v. Lewis Voight & Sons Co. (Mo. Sup.) 386.

Where a trust deed was given to secure an existing debt, but with intent to defraud creditors the deed was made to secure an excessive sum, it was void as a whole.—Bates County Bank v. Gailey (Mo. Sup.) 646; Same v. Hensley, Id.

A transfer of property from debtor to creditor is not invalidated by the mere fact that it is made in order to defeat another creditor in the collection of his claim.—Moore v. Robinson (Tex. Civ. App.) 890.

Mere fact that grantor is insolvent *held* not to make a transfer of his property to a creditor invalid as to other creditors.—Moore v. Robinson (Tex. Civ. App.) 890.

§ 2. Rights and liabilities of parties and purchasers.

In an action to set aside a conveyance as in fraud of creditors, grantee, selling the land, *held* discharged from liability by payment of proceeds to grantor.—Schneider v. Patton (Mo. Sup.) 155.

§ 3. Remedies of creditors and purchasers.

An amendment to a petition to set aside a conveyance as in fraud of creditors *held* not to convert petition into one charging defendant as a fraudulent grantee, and liable in equity to a personal judgment in plaintiff's favor.—Schneider v. Patton (Mo. Sup.) 155.

In an action to set aside a conveyance as in fraud of creditors, petition *held* not to authorize a personal judgment against the grantee.—Schneider v. Patton (Mo. Sup.) 155.

In an action by a judgment creditor against a fraudulent grantee to set aside a conveyance of real estate by the judgment debtor for fraud, and to subject it to the payment of the judgment, the judgment debtor is not a necessary party.—Schneider v. Patton (Mo. Sup.) 155.

Defendant, in conversion, *held* not entitled to question alleged fraudulent conveyance from third person to plaintiff.—Rosencranz v. Swotford Bros. Dry Goods Co. (Mo. Sup.) 445.

In a suit to set aside a trust deed as fraudulent, evidence *held* sufficient to show that the amount of the deed was greater than the amount to which the grantor was indebted.—Bates County Bank v. Gailey (Mo. Sup.) 646; Same v. Hensley, Id.

In an action to set aside a trust deed as in fraud of creditors, evidence *held* sufficient to show that the beneficiary had knowledge of the fraudulent purpose of the grantor.—Bates Coun-

ty Bank v. Gailey (Mo. Sup.) 646; Same v. Hensley, Id.

On the issue whether a landlord's claim for rent against a debtor who executed a deed to a trustee for the benefit of creditors was fraudulent, evidence that a bank's claim against the debtor was fraudulent, *held* admissible.—Baum v. Corsicana Nat. Bank (Tex. Civ. App.) 863.

Whether the transaction between a debtor, who executed a deed for the benefit of creditors, and an alleged creditor, was fraudulent, *held* immaterial to one whose claim against the debtor was fraudulent.—Baum v. Corsicana Nat. Bank (Tex. Civ. App.) 863.

On issue of fraudulent conveyance, case *held* sufficient to go to the jury.—Moore v. Robinson (Tex. Civ. App.) 890.

FREIGHT.

See "Carriers," § 2.

GAMING.

§ 1. Criminal responsibility.

A game of cards, played about 10 feet from a residence, *held* a game "at a residence," etc., within Acts 1901, p. 26, arts. 379, 381.—Hipp v. State (Tex. Cr. App.) 28.

A certain tent *held* a residence occupied by a family, within Acts 1901, p. 26, arts. 379, 381.—Hipp v. State (Tex. Cr. App.) 28.

Information charging gambling at private residence commonly resorted to for the purpose of gaming *held* sufficient, under Pen. Code 1895, art. 379, as amended by Acts 27th Leg. 1901, p. 26, c. 22.—Floekinger v. State (Tex. Cr. App.) 303.

Evidence in gambling prosecution *held* to sustain finding that private residence was commonly resorted to for the purpose of gaming, within Pen. Code 1895, art. 379, as amended by Acts 27th Leg. 1901, p. 26, c. 22.—Floekinger v. State (Tex. Cr. App.) 303.

An indictment for dealing in futures, under Pen. Code, art. 377, need not allege the specific sales relied on.—Fullerton v. State (Tex. Cr. App.) 584.

A person dealing in futures by placing the orders of purchasers with brokers in other cities *held* to come within the provisions of Pen. Code, art. 377.—Fullerton v. State (Tex. Cr. App.) 534.

GARNISHMENT.

See "Attachment"; "Execution."

§ 1. Lien of garnishment and liability of garnishee.

Levy by garnishment on surplus proceeds arising from sale under deed of trust *held* not to defeat lien of second mortgagee thereon.—Jackson v. Coffman (Tenn.) 718.

§ 2. Wrongful garnishment.

Plaintiff *held* liable for suing out a writ of garnishment in a suit against him, the alleged ground therefor not existing.—Barr v. Cardiff (Tex. Civ. App.) 341.

GAS.

Grants of rights in streets to gas companies, see "Municipal Corporations," § 7.

GIFTS.

Charitable gifts, see "Charities."

§ 1. Inter vivos.

Facts *held* not to show a gift inter vivos.—Balling v. Manhattan Sav. Bank & Trust Co. (Tenn.) 1051.

GOOD FAITH.

Of purchaser, see "Bills and Notes," § 1.

GRAND JURY.

See "Indictment and Information."

GRANTS.

Of public lands, see "Public Lands."

GUARANTY.

See "Principal and Surety."

Guaranty insurance, see "Insurance," § 8.

GUARDIAN AND WARD.

Conclusiveness of judgment against wards, see "Judgment," § 6.

§ 1. Appointment, qualification, and tenure of guardian.

An appointment of a guardian of minors living out of the state *held* proper, under Ky. St. 1899, § 2022.—*McVaw v. Shelby* (Ky.) 227.

§ 2. Custody and care of ward's person and estate.

Rev. St. 1895, arts. 2717, 2718, *held* to expect approval of claims of third persons against a ward's estate from the matters which, under article 2799, may be reviewed by bill of review.—*De Cordova v. Rogers* (Tex. Sup.) 18.

Under Rev. St. 1895, arts. 1847, 1853, 2080, *held*, that entry on the claim docket of approval of a claim against a ward's estate is an entry on the "records of the court."—*De Cordova v. Rogers* (Tex. Sup.) 16.

When the income for the period covered by the guardian's claim for expenditure for education and support has been applied thereon, he may not be allowed the balance of the claim.—*De Cordova v. Rogers* (Tex. Sup.) 16.

The "clear income" which a guardian may, under Rev. St. 1895, art. 2630, expend for education and maintenance of the ward, without an order of court, defined.—*De Cordova v. Rogers* (Tex. Sup.) 16.

Interest charged against a guardian on money in his hands which he should have lent is to be added to the income of the estate.—*De Cordova v. Rogers* (Tex. Sup.) 16.

A guardian may not, without leave of court, use the corpus of the ward's estate for his maintenance.—*Freedman v. Vallie* (Tex. Civ. App.) 322.

A guardian, failing to lend the ward's money, is liable for 10 per cent. interest, if by ordinary diligence he could have made the loan.—*Freedman v. Vallie* (Tex. Civ. App.) 322.

§ 3. Sales and conveyances under order of court.

A curatrix, acting under authority of a probate court of Louisiana, could not make a valid conveyance of land belonging to the ward and situated in Texas.—*Wren v. Howland* (Tex. Civ. App.) 894.

§ 4. Accounting and settlement.

The share of the estate of one ward cannot be diminished by guardian's commissions and disbursements made on account of the other ward.—*Freedman v. Vallie* (Tex. Civ. App.) 322.

§ 5. Liabilities on guardianship bonds.

The fact that a guardian loaned the ward's money without leave of the court did not relieve the guardian or his surety from responsibility therefor.—*Freedman v. Vallie* (Tex. Civ. App.) 322.

An action against a surety on a guardian's bond is barred in two years after the ward attains his majority.—*Freedman v. Vallie* (Tex. Civ. App.) 322.

The fact that a guardian loaned to himself a part of the ward's estate did not pass the same out of his hands as guardian, nor affect the liability of the surety on his bond.—*Freedman v. Vallie* (Tex. Civ. App.) 322.

A surety on a guardian's bond is not liable for interest, after the death of the guardian, until the ward demands a settlement from the surety.—*Freedman v. Vallie* (Tex. Civ. App.) 322.

A surety on a guardian's bond *held* not entitled to certain credits.—*Freedman v. Vallie* (Tex. Civ. App.) 322.

Liability of a surety on a bond of a guardian of two wards whose estates are jointly administered determined.—*Freedman v. Vallie* (Tex. Civ. App.) 322.

A surety on a guardian's bond is not liable for interest that the guardian could have realized by loaning money before the execution of the bond.—*Freedman v. Vallie* (Tex. Civ. App.) 322.

A guardian of two wards equally interested in the estate cannot lawfully expend more than half of the estate for one of them, and this the surety is presumed to know.—*Freedman v. Vallie* (Tex. Civ. App.) 322.

HANDWRITING.

Comparison, see "Evidence," § 8.

HARMLESS ERROR.

In civil actions, see "Appeal and Error," § 17. In criminal prosecutions, see "Criminal Law," § 27; "Homicide," § 8.

HAWKERS AND PEDDLERS.

Regulation of, see "Commerce," § 1.

A manufacturer's agent *held* not engaged in peddling cooking stoves or ranges, within the meaning of the act of 1899, imposing license tax on persons so engaged.—*Harkins v. State* (Tex. Cr. App.) 28.

An information *held* not to charge a violation of act of 1899 (Gen. Laws 1899, p. 201, c. 116), requiring every person peddling cooking stoves and ranges to pay an occupation tax.—*Harkins v. State* (Tex. Cr. App.) 26.

HEALTH.

Quarantine of diseased animals, see "Animals."

HEARSAY EVIDENCE.

In civil actions, see "Evidence," § 6. In criminal prosecutions, see "Criminal Law," § 9.

HEIRS.

See "Descent and Distribution."

HIGHWAYS.

See "Bridges"; "Municipal Corporations," §§ 7, 8.

Accidents at railroad crossings, see "Railroads," § 7.

§ 1. Establishment, alteration, and discontinuance.

A landowner, having notice of proceedings for the opening of a highway, is presumed to

have been present during the survey.—*Searcy v. Clay County* (Mo. Sup.) 657.

Bill seeking to vacate judgment of county court opening a highway, on account of surveyor's error, *held* demurrable.—*Searcy v. Clay County* (Mo. Sup.) 657.

As Rev. St. 1899, § 9419, provides for an appeal from an order for the opening of a highway, an adjoining landowner, failing to appeal, cannot sue to vacate the proceedings.—*Searcy v. Clay County* (Mo. Sup.) 657.

The county is improperly made a party to a bill by an adjoining landowner to vacate proceedings by the county court for the opening of a highway.—*Searcy v. Clay County* (Mo. Sup.) 657.

§ 2. Regulation and use for travel.

Ky. St. 1899, § 4336, providing the right of appeal for violation of road act in certain cases, does not authorize an appeal from a conviction or acquittal of violation of section 4335.—*Commonwealth v. Feriel* (Ky.) 231.

An indictment for suffering a water gap to be erected and maintained on defendant's premises, forcing water over a turnpike, making it dangerous to travelers, *held* defective.—*Commonwealth v. Collier* (Ky.) 236.

Failure to have a flagman to warn drivers of vehicles of the approach of a steam roller *held* not the cause of plaintiff's injury.—*Haller v. City of St. Louis* (Mo. Sup.) 613.

Whether a summer road, along which plaintiff was driving when injured, was part of the main street alongside of which it ran, *held* to be for the jury.—*Haller v. City of St. Louis* (Mo. Sup.) 613.

Whether plaintiff was guilty of contributory negligence in driving along summer road when steam roller which frightened her horse was operating on the main street alongside of which it ran, or whether she assumed the risk, *held* to be for the jury.—*Haller v. City of St. Louis* (Mo. Sup.) 613.

In a prosecution for obstructing a public road, where the existence of the road at the point in question was controverted, it was error simply to define what constitutes a public road, without requiring the jury to find that the land defendant was charged with inclosing was used as a public road.—*Torno v. State* (Tex. Cr. App.) 500.

In prosecution for obstructing a public road, evidence that a certain person was an overseer at the time the obstruction was erected *held* immaterial.—*Torno v. State* (Tex. Cr. App.) 500.

HOLIDAYS.

See "Sunday."

HOMESTEAD.

See "Exemptions."

§ 1. Nature, acquisition, and extent.

A tract of land *held* as a matter of law not to be the homestead of the owner.—*Ryon v. George* (Tex. Civ. App.) 48.

§ 2. Abandonment, waiver, or forfeiture.

Husband and wife, mortgaging homestead, *held* not estopped to assert that it was homestead.—*Sheekles v. Lewis* (Tex. Civ. App.) 836.

HOMICIDE.

Arguments of counsel, see "Criminal Law," § 20.

Competency of evidence, see "Criminal Law," § 6.

Continuance, see "Criminal Law," § 15.

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Conviction of assault as bar to prosecution for, see "Criminal Law," § 3.

Declarations as evidence, see "Criminal Law," § 9.

Demonstrative evidence, see "Criminal Law," § 8.

Evidence admissible under indictment for, see "Indictment and Information," § 4.

Evidence of acts and declarations of conspirators, see "Criminal Law," § 10.

Harmless error, see "Criminal Law," § 27.

Impeachment of witness, see "Witnesses," § 3.

Instructions as to alibi, see "Criminal Law," § 21.

Instructions as to conspiracy, see "Criminal Law," § 21.

Instructions as to reasonable doubt, see "Criminal Law," § 21.

New trial, see "Criminal Law," § 24.

Plea of former jeopardy, see "Criminal Law," § 5.

Questions for jury, see "Criminal Law," § 16.

Reception of evidence, see "Criminal Law," § 19.

Refreshing memory of witness, see "Witnesses," § 2.

Relevancy of evidence, see "Criminal Law," § 7.

Remarks of judge, see "Criminal Law," § 18.

Requests for instructions, see "Criminal Law," § 22.

Testimony of accomplices, see "Criminal Law," § 13.

§ 1. Manslaughter.

Sand. & H. Dig. § 1660, providing that the killing of a human being without design to effect death, in a cruel and unusual manner, shall be manslaughter, is not applicable to a killing with a pistol.—*Tanks v. State* (Ark.) 851.

An instruction, in a prosecution for homicide, authorizing the jury to convict defendant of manslaughter if he was laboring under passion aroused from adequate cause at the time of the killing was correct.—*Brown v. State* (Tex. Cr. App.) 33.

Homicide committed by husband in preventing wife's father from taking her from him *held* justifiable, if necessary; otherwise, manslaughter only.—*Cole v. State* (Tex. Cr. App.) 527.

The statute relating to insults toward female relatives, as affecting the liability for homicide, *held* to apply to insults committed on defendant's sister by her husband.—*Willis v. State* (Tex. Cr. App.) 790.

The fact that the husband of defendant's sister compelled her to submit to sexual intercourse while she was sick with her menses was not sufficient to reduce defendant's killing of the husband from murder to manslaughter.—*Willis v. State* (Tex. Cr. App.) 790.

The statute relating to insults offered to female relatives, as affecting liability for homicide, *held* to include female relative who was dead at the time of the alleged insult or communication thereof to the defendant.—*Willis v. State* (Tex. Cr. App.) 790.

§ 2. Indictment and information.

An indictment charging that accused "did feloniously and with malice aforethought kill" deceased is not insufficient, because not charging that the killing was either unlawfully or willfully done.—*Carroll v. State* (Ark.) 471.

An information charging accused with murder *held* not invalid, because not stating when or where, or with what instrument, the mortal wound was given.—*State v. Privitt* (Mo. Sup.) 457.

Where it is not claimed a homicide was in self-defense, testimony that deceased had gone armed in the expectation of meeting accused, and had stated he might use the weapons on accused, is inadmissible.—*State v. Privitt* (Mo. Sup.) 457.

§ 3. Evidence.

Under Sand. & H. Dig. § 1643, burden of proof of justification *held* not on defendant in a prosecution for murder.—*Tanks v. State* (Ark.) 851.

Where a dying declaration contained objectionable matter, which could not be separated therefrom without destroying the sense, it was not error to admit the declaration as a whole.—*Bennett v. State* (Tex. Cr. App.) 314.

§ 4. — Admissibility in general.

In a prosecution for homicide, evidence of defendant's conduct shortly prior thereto *held* admissible.—*Hutsell v. Commonwealth* (Ky.) 225.

A trust deed, executed by accused four days after the homicide to his attorney, *held* admissible as tending to show sanity at the time of the homicide.—*State v. Privitt* (Mo. Sup.) 457.

On a prosecution for murder, the petition by decedent for the annulment of his marriage to defendant was not competent evidence.—*State v. Kennedy* (Mo. Sup.) 979.

On a prosecution for murder, evidence in chief tending to attack defendant's character *held* inadmissible.—*State v. Kennedy* (Mo. Sup.) 979.

In a prosecution for murder, it was proper for the state to show the movements of an accomplice, who turned state's evidence, in connection with the homicide.—*Jenkins v. State* (Tex. Cr. App.) 312.

Movements of conspirators to commit murder, both before and immediately after its commission, may be shown by the state.—*Jenkins v. State* (Tex. Cr. App.) 312.

The doctrine of the admissibility of evidence of decedent's character as a vicious man, to show who was the aggressor, does not apply where the evidence concerning the homicide is positive and merely conflicting.—*Connell v. State* (Tex. Cr. App.) 512.

In a prosecution for patricide, evidence of specific violent assaults by decedent on members of his family, which were not connected with the homicide, are inadmissible to prove his dangerous character.—*Connell v. State* (Tex. Cr. App.) 512.

In a prosecution for homicide, evidence that decedent, in his altercations with other persons, would never admit that he was wrong, is inadmissible.—*Connell v. State* (Tex. Cr. App.) 512.

Accused's evidence in murder prosecution, to show that violent action of decedent toward third person was not occasion of homicide, *held* properly rejected.—*Connell v. State* (Tex. Cr. App.) 512.

In prosecution for homicide, testimony as to defendant's remarks on leaving the scene of the difficulty *held* improperly excluded.—*Cole v. State* (Tex. Cr. App.) 527.

In prosecution for homicide, testimony indicating an attempt on defendant's part to surrender himself to the officers *held* improperly excluded.—*Cole v. State* (Tex. Cr. App.) 527.

In prosecution of defendant for shooting his father-in-law, statement by defendant's wife to her mother, made as defendant was returning to the scene of the shooting, *held* inadmissible.—*Cole v. State* (Tex. Cr. App.) 527.

In a prosecution of defendant for shooting his father-in-law, letters written by defendant's wife to defendant, indicating affection for him, *held* improperly excluded.—*Cole v. State* (Tex. Cr. App.) 527.

In prosecution for homicide, conversations and expressions of opinion relative to decedent's health and strength *held* improperly admitted.—*Cole v. State* (Tex. Cr. App.) 527.

On prosecution for murder, certain threat made by defendant shortly before the killing *held* properly admitted.—*Marchan v. State* (Tex. Cr. App.) 532.

In a prosecution for homicide, evidence of maltreatment of defendant's sister by her husband, alleged to have caused the homicide, *held* admissible as showing sudden passion.—*Willis v. State* (Tex. Cr. App.) 790.

In a prosecution for homicide, evidence that decedent's cousin had attempted to poison his wife, who was defendant's sister, *held* admissible as tending to show adequate cause for killing deceased.—*Willis v. State* (Tex. Cr. App.) 790.

In a prosecution for homicide, evidence of various insults offered by decedent's cousin to his wife, who was defendant's sister, *held* admissible in evidence as showing defendant's state of mind at the time of the homicide.—*Willis v. State* (Tex. Cr. App.) 790.

§ 5. — Weight and sufficiency.

Evidence *held* insufficient to support a conviction of murder in the second degree.—*Tanks v. State* (Ark.) 851.

Evidence *held* insufficient to support conviction for murder.—*Newsome v. State* (Tex. Cr. App.) 296.

§ 6. Trial—Conduct in general.

In prosecution for homicide, bloody clothes of deceased *held* improperly admitted.—*Cole v. State* (Tex. Cr. App.) 527.

§ 7. — Instructions.

Use of the expression "good faith believe," in an instruction on self-defense, was not misleading.—*Hutsell v. Commonwealth* (Ky.) 225.

An instruction in a homicide case *held* not erroneous because it eliminated from the jury's consideration any question of a less grade of homicide than murder in the first degree.—*State v. Privitt* (Mo. Sup.) 457.

Where the court has properly instructed on murder in the first degree, an instruction stating under what circumstances a person would be guilty of murder in the second degree, where there was no such issue, is not reversible error.—*State v. Privitt* (Mo. Sup.) 457.

In a prosecution for homicide, a charge on adequate cause and manslaughter as the result of a killing under sudden passion *held* not prejudicially erroneous.—*Brown v. State* (Tex. Cr. App.) 33.

In a prosecution for murder, evidence *held* to require a charge on self-defense.—*Newsome v. State* (Tex. Cr. App.) 296.

In a prosecution for murder, evidence *held* to require a charge on aggravated assault.—*Newsome v. State* (Tex. Cr. App.) 296.

In a prosecution for murder, charge *held* misleading.—*Bennett v. State* (Tex. Cr. App.) 314.

Instruction as to relationship between parties, depriving accused of legal rights as between murder and manslaughter, *held* unnecessary, in view of instruction given.—*Connell v. State* (Tex. Cr. App.) 512.

In view of accused's evidence in murder prosecution, instruction that he was not bound to retreat *held* not to impinge his right of self-defense.—*Connell v. State* (Tex. Cr. App.) 512.

Facts of homicide *held* not to require an instruction that accused must have exerted every other means besides retreating before he was authorized to kill in self-defense.—*Connell v. State* (Tex. Cr. App.) 512.

In murder prosecution, instruction on reduction of crime to manslaughter *held* erroneous.—*Connell v. State* (Tex. Cr. App.) 512.

In a prosecution of defendant for shooting his father-in-law, an instruction on justifiable

homicide and manslaughter *held* necessary.—*Cole v. State* (Tex. Cr. App.) 527.

Where defendant was convicted of murder in the second degree, failure of the court to charge on manslaughter induced by insulting language toward defendant's wife *held* not cured by instruction relative to improper language toward defendant's daughter.—*McComas v. State* (Tex. Cr. App.) 533.

Evidence *held* to call for an instruction on manslaughter induced by insulting language used by deceased toward defendant's wife.—*McComas v. State* (Tex. Cr. App.) 533.

Where the record left a point in doubt, defendant should have had the benefit of the doubt by an appropriate instruction.—*McComas v. State* (Tex. Cr. App.) 533.

In prosecution for murder, evidence *held* not to require charge on self-defense.—*Lewis v. State* (Tex. Cr. App.) 788.

An instruction on negligent homicide *held* properly refused.—*Williams v. State* (Tex. Cr. App.) 859.

§ 8. Appeal and error.

On a prosecution for murder, admission in evidence of statements of third persons *held* prejudicial.—*State v. Kennedy* (Mo. Sup.) 979.

Erroneous instruction on reduction of crime to manslaughter *held* prejudicial.—*Connell v. State* (Tex. Cr. App.) 512.

In a prosecution for homicide, a bill of exceptions to the exclusion of evidence relating to acts of cruelty practiced by decedent's cousin on his wife, who was defendant's sister, *held* insufficient to show error.—*Willis v. State* (Tex. Cr. App.) 790.

In view of the instruction given, *held* harmless error not to instruct on accidental homicide.—*Williams v. State* (Tex. Cr. App.) 859.

HUSBAND AND WIFE.

See "Curtesy"; "Divorce"; "Dower."

Harmless error in action to recover community property, see "Appeal and Error," § 17. Insurable interest of husband in wife's property, see "Insurance," § 3.

Rights of survivor, see "Executors and Administrators," § 3.

§ 1. Conveyances, contracts, and other transactions between husband and wife.

Rev. St. 1899, § 4335, is broad enough to permit a wife to contract with her husband.—*Rice, Stix & Co. v. Sally* (Mo. Sup.) 398.

Acts 1869-70, p. 113, c. 99, *held* not to validate the deed of a married woman, not belonging to the classes specified in the act, conveying her real estate to her husband.—*Worrell v. Drake* (Tenn.) 1015.

A conveyance of land in the usual form from husband to wife *held* to pass the title to the land to the wife, and to vest in her a separate estate.—*Barnum v. Le Master* (Tenn.) 1045.

§ 2. Wife's separate estate.

A deed of a married woman's land construed, and *held* to be the joint deed of herself and husband, as required by Rev. St. 1879, § 669, though her husband's name did not appear as a grantor in the introductory clause thereof.—*Peter v. Byrne* (Mo. Sup.) 433.

An agreement by a married woman, together with her husband, that her cattle should be held as security for community debts to be incurred by him, was valid.—*Word v. Kennon* (Tex. Civ. App.) 365.

Rev. St. art. 2967, includes a feme sole's claim for unliquidated damages, so that it does not become community property on her mar-

riage.—*St. Louis Southwestern Ry. Co. of Texas v. Wright* (Tex. Civ. App.) 565.

In trespass to try title, where plaintiff claims under a deed from a married woman certain testimony *held* admissible to show that the land was her separate property.—*Wren v. Howland* (Tex. Civ. App.) 894.

§ 3. Actions.

Under Rev. St. 1899, § 4335, a married woman can interplead in an attachment suit against her husband to recover her separate property, whether acquired from third persons or from her husband.—*Rice, Stix & Co. v. Sally* (Mo. Sup.) 398.

Abandoned wife *held* entitled to sue alone to recover her separate property.—*Word v. Kennon* (Tex. Civ. App.) 365.

Under Rev. St. art. 1252, the retention of a wife as a party to a suit commenced before her marriage, together with the husband, does not constitute misjoinder of parties.—*St. Louis Southwestern Ry. Co. of Texas v. Wright* (Tex. Civ. App.) 565.

§ 4. Community property.

Under Laws 1848, p. 273, c. 157, relating to partition of community property, a partition of real estate owned by a husband and wife *held* only a partition between the estate of the deceased wife and her surviving husband, and the half set apart to the wife's heirs was subject to further administration.—*Bevil v. Moulton* (Tex. Civ. App.) 60.

Allegation by married woman that her husband had permanently abandoned her without her fault, and had left the state, is sufficient to authorize her to sue for the community property.—*Word v. Kennon* (Tex. Civ. App.) 334.

HYPOTHETICAL QUESTIONS.

To expert witnesses, see "Criminal Law," § 12.

ILLEGITIMATE CHILDREN.

See "Bastards."

IMPEACHMENT.

Of witness, see "Witnesses," § 3.

IMPROVEMENTS.

Liens, see "Mechanics' Liens."

Public improvements, see "Municipal Corporations," § 5.

INCEST.

Arguments of counsel, see "Criminal Law," § 20.

Testimony of accomplices, see "Criminal Law," § 13.

INCORPORATION.

See "Municipal Corporations," § 1.

INDEBTEDNESS.

Of fraudulent grantor, see "Fraudulent Conveyances," § 1.

Of testator, see "Wills," § 5.

INDEMNITY.

See "Principal and Surety."

Indemnity insurance, see "Insurance," § 8.

INDICTMENT AND INFORMATION.

Against particular classes of parties.

See "Hawkers and Peddlers."

Corporate officers, see "Embezzlement."

For particular offenses.

See "Embezzlement"; "Forgery"; "Gaming," § 1; "Homicide," § 2; "Larceny," § 1; "Perjury," § 2; "Seduction," § 1; "Trespass," § 3.

Obstruction of highway, see "Highways," § 2. Sabbath-breaking, see "Sunday."

Violation of liquor laws, see "Intoxicating Liquors," § 7.

§ 1. Finding and filing of indictment or presentment.

The fact that the original complaint was not read by the person verifying it *held* not ground for quashing a substituted complaint; the original having been lost.—*Bowers v. State* (Tex. Cr. App.) 299.

Accused *held* to have the right to contest proposed substitution, under White's Ann. Code Cr. Proc. art. 470, for lost information.—*Bowers v. State* (Tex. Cr. App.) 299.

§ 2. Requisites and sufficiency of accusation.

An indictment for perjury committed before grand jury *held* not repugnant because of certain allegations.—*State v. Faulkner* (Mo. Sup.) 116.

§ 3. Joinder of parties, offenses, and counts, duplicity, and election.

Under Cr. Code, § 128, an indictment for embezzlement *held* not erroneous as charging two offenses.—*Taylor v. Commonwealth* (Ky.) 244.

Under an indictment assigning various statements as perjury, the court is not compelled to elect between the different assignments, where they are based on the same testimony.—*McLeod v. State* (Tex. Cr. App.) 522.

§ 4. Issues, proof, and variance.

On a trial for murder, under an indictment which charges defendant alone with the crime, and contains no averment of a conspiracy between him and third persons to commit the crime, evidence showing the conspiracy is admissible.—*State v. Kennedy* (Mo. Sup.) 979.

INDORSEMENT.

Of bill of exchange or promissory note, see "Bills and Notes," § 1.

INFANTS.

See "Adoption"; "Guardian and Ward"; "Parent and Child."

Admittance to saloons, see "Intoxicating Liquors," § 4.

Contributory negligence on part of children, see "Negligence," § 2.

§ 1. Property and conveyances.

A stepfather, who had purchased land from his infant stepdaughter, *held* entitled, on her disaffirmance of such purchase, to recover what he had conveyed in consideration therefor, so far as still retained by the daughter, and chargeable with timber which he had cut and rental for the land.—*Ison v. Cornett* (Ky.) 204.

A purchaser of land from a grantor, who had during infancy made a prior conveyance thereof, took a good title, notwithstanding actual knowledge of such prior conveyance.—*Ison v. Cornett* (Ky.) 204.

Purchaser of land from an infant, who has paid therefor with other land, which the infant has also sold, cannot demand of such infant a disaffirmance of the latter sale as a condition of disaffirming the sale to him.—*Ison v. Cornett* (Ky.) 204.

It is an indispensable requisite to the validity of proceedings under Civ. Code, § 491, for the sale of real estate belonging to infants in remainder, that the requirements of the statute as

to reinvestment of the entire proceeds be followed.—*Liter v. Fishback* (Ky.) 232.

Civ. Code, § 490, relative to sale of real estate owned jointly, has no application where it is sought to sell real estate in which one person has a life estate and another the remainder.—*Liter v. Fishback* (Ky.) 232.

The powers of equity to sell and reinvest infants' real estate are not inherent, but statutory.—*Liter v. Fishback* (Ky.) 232.

INFERIOR COURTS.

See "Courts," § 4.

IN FORMA PAUPERIS.

Proceedings on appeal or error, see "Appeal and Error," § 7.

INFORMATION.

Criminal accusation, see "Indictment and Information."

INHERITANCE.

See "Descent and Distribution."

INJUNCTION.

To restrain execution of justice's judgment, see "Justices of the Peace," § 1.

To restrain nuisance, see "Nuisance," § 2.

§ 1. Nature and grounds in general.

Ky. St. 1899, § 1289, *held* to authorize a court of equity to enjoin one from permitting the holding of a prize fight on his premises, though it cannot enjoin the principals, etc., in the prize fight.—*Commonwealth v. McGovern* (Ky.) 261.

§ 2. Actions for injunctions.

Property owners, who own no property abutting on a street about to be closed by a city contract affecting the street, have no special or peculiar interest authorizing them to restrain the execution of the contract.—*Wilkins v. Chicago, St. L. & N. O. R. Co.* (Tenn.) 1026.

Property owners, having no special interest different from that of other inhabitants of a city as to the period of time for which city contracts extend, cannot restrain the execution of the contracts.—*Wilkins v. Chicago, St. L. & N. O. R. Co.* (Tenn.) 1026.

Petition of liquor dealers *held* not to show them entitled to enjoin publication of result of a local option election.—*L. Eppstein & Son v. Webb* (Tex. Civ. App.) 337.

Facts *held* not to show that the right to amend the petition was denied plaintiffs by the trial court.—*L. Eppstein & Son v. Webb* (Tex. Civ. App.) 337.

§ 3. Violation and punishment.

One not a party, who violates an injunction with actual notice only of it, *held* punishable for contempt, under Rev. St. 1899, § 3643.—*In re Coggs* (Mo. App.) 183.

IN PAIS.

Estoppel, see "Estoppel," § 1.

INSANE PERSONS.

Evidence as to insanity of accused, see "Homicide," § 4.

INSOLVENCY.

See "Assignments for Benefit of Creditors"; "Bankruptcy."

Of corporation, see "Corporations," § 4.
Of fraudulent grantor, see "Fraudulent Conveyances," § 1.

INSTRUCTIONS.

In civil actions, see "Trial," §§ 4-9.
In criminal prosecutions, see "Criminal Law," §§ 21, 22; "Homicide," § 7.

INSURANCE.

Credibility of witness in action on insurance policy, see "Witnesses," § 3.

Harmless error in action on insurance policy, see "Insurance," § 17.

Operation and effect of admissions as evidence in action on insurance policy, see "Evidence," § 4.

§ 1. **Control and regulation in general.**
Under Rev. St. 1899, § 8048, a city *held* without power to require a license tax of insurance agents in addition to the \$100 tax on each insurance agency authorized by the statute.—*Kansas City v. Oppenheimer* (Mo. App.) 174.

§ 2. **Insurance agents and brokers.**
Fire policy *held* not avoided as to owner by reason of the fact that company's agents, in obtaining the policy, were also, without its knowledge, acting for the mortgagee to whom policy was payable.—*Fiske v. Royal Exchange Assur. Co.* (Mo. App.) 382.

§ 3. **Insurable interest.**
Under Const. art. 9, § 7, husband *held* not to have insurable interest in his wife's property, and his policy thereon is void.—*Planters' Mut. Ins. Co. v. Loyd* (Ark.) 725.

§ 4. **The contract in general.**
The contract expressed in an employé's fidelity bond is a form of insurance, and is to be construed most strongly against the surety.—*Champion Ice Mfg. & Cold Storage Co. v. American Bonding & Trust Co.* (Ky.) 197.

A bond to indemnify an employer for loss occasioned by the fraud of his employé, together with a renewal bond, *held* but one bond, with one penalty.—*First Nat. Bank v. United States Fidelity & Guaranty Co.* (Tenn.) 1076.

A fire policy *held* not to cover dental books.—*American Fire Ins. Co. v. Bell* (Tex. Civ. App.) 319.

§ 5. **Avoidance of policy for misrepresentation, fraud, or breach of warranty or condition.**

Shannon's Code, § 3306, relating to representations or warranties made in negotiations for a contract or policy of insurance, *held* applicable to bonds given to indemnify an employer for loss occasioned by the fraud of his employé.—*First Nat. Bank v. United States Fidelity & Guaranty Co.* (Tenn.) 1076.

§ 6. **Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent.**

Representations by an employer in an application for a fiduciary bond for an employé *held* not material or fraudulent, in view of the provisions of the bond.—*Champion Ice Mfg. & Cold Storage Co. v. American Bonding & Trust Co.* (Ky.) 197.

Representations made by an employer in an application for a fiduciary bond for an employé *held*, under Ky. St. 1899, § 639, not to be warranties.—*Champion Ice Mfg. & Cold Storage Co. v. American Bonding & Trust Co.* (Ky.) 197.

A suit to obtain a paid-up policy, according to the terms of a previous policy, which had been forfeited for nonpayment of premiums, not brought within five years after forfeiture, *held*

barred by laches.—*New York Life Ins. Co. v. Warren Deposit Bank* (Ky.) 234.

Neglect of insured to apply for paid-up policy for over five years from default in payment of premium *held* laches, barring his right thereto.—*Equitable Life Assur. Soc. v. Warren Deposit Bank* (Ky.) 275.

The holding of a post mortem examination of insured's remains without notice to insurer *held* not to authorize a forfeiture of the policy.—*Loesch v. Union Casualty & Surety Co.* (Mo. Sup.) 621.

The term "Paid-up insurance," as used in the proviso of Rev. St. 1889, § 5859, as amended in 1895, *held* to mean insurance for life fully paid up, and not paid-up temporary insurance.—*Nichols v. Mutual Life Ins. Co.* (Mo. Sup.) 664.

Policy issued by company organized in foreign state *held* to comply with Rev. St. 1889, § 5859, as amended in 1895, so that the three preceding sections relative to rights of insured on forfeiture of policy after payment of two annual premiums were inapplicable.—*Nichols v. Mutual Life Ins. Co.* (Mo. Sup.) 664.

Failure to pay note given in payment of a premium on a life insurance policy *held* to render the policy void.—*Reasler v. Fidelity Mut. Life Ins. Co.* (Tenn.) 735.

§ 7. **Estoppel, waiver, or agreements affecting right to avoid or forfeit policy.**

Failure of an insurance company to offer to return a premium note after maturity *held* not to estop it from relying on a forfeiture for failure to pay the note.—*New York Life Ins. Co. v. Warren Deposit Bank* (Ky.) 234.

The furnishing of blanks for proof of loss under an accident policy *held* not a waiver of a forfeiture for breach of a condition requiring notice of a post mortem examination.—*Loesch v. Union Casualty & Surety Co.* (Mo. Sup.) 621.

A misrepresentation, in applying for accident insurance, as to previous insurance, is waived where the company's agent had knowledge of the truth.—*Carr v. Pacific Mut. Life Ins. Co.* (Mo. App.) 180.

§ 8. **Risks and causes of loss.**

Employé's fidelity bond *held* to cover fraudulent act of employé in raising the amount of checks entrusted to him to cash.—*Champion Ice Mfg. & Cold Storage Co. v. American Bonding & Trust Co.* (Ky.) 197.

Cattle transported by rail *held* "in transit" until unloaded from the cars, within meaning of accident policy describing insured's occupation as a stock dealer not tending in transit.—*Loesch v. Union Casualty & Surety Co.* (Mo. Sup.) 621.

In an action on an accident policy, the business in which plaintiff was engaged at the time of his injury *held* more hazardous than his occupation stated in the application, so as to preclude a recovery of more than the insurance obtainable for the premium paid in the extrahazardous class.—*Loesch v. Union Casualty & Surety Co.* (Mo. Sup.) 621.

Manner of death of insured *held* to be an accident, within the meaning of a policy of accident insurance.—*Dezell v. Fidelity & Casualty Co.* (Mo. Sup.) 1102.

Where one holding an accident policy falls from a window in delirium, the delirium is the proximate cause of the injury.—*Carr v. Pacific Mut. Life Ins. Co.* (Mo. App.) 180.

Exceptions in accident policy construed, and general phrase, "disease or bodily infirmity," *held* not limited by special exceptions.—*Carr v. Pacific Mut. Life Ins. Co.* (Mo. App.) 180.

Accident policy construed, and held not to permit recovery for fall from window in consequence of delirium.—*Carr v. Pacific Mut. Life Ins. Co.* (Mo. App.) 180.

Accident policy held not to permit recovery for fall while sick.—*Carr v. Pacific Mut. Life Ins. Co.* (Mo. App.) 180.

§ 9. Extent of loss and liability of insurer.

Clause in fire policy limiting the liability of certain co-insurers held not to affect insurer in another policy having no such clause.—*Kansas City Paper Box Co. v. American Fire Ins. Co.* (Mo. App.) 186.

§ 10. Adjustment of loss.

Insurance company held to have waived its right to reappraisal of property injured in fire.—*American Fire Ins. Co. v. Bell* (Tex. Civ. App.) 319.

Appraisers held to have no authority to refuse to appraise property claimed by insured to have been destroyed.—*American Fire Ins. Co. v. Bell* (Tex. Civ. App.) 319.

§ 11. Right to proceeds.

A life policy held to become, on death of assured, a part of his estate, to be administered according to the terms of his will.—*Schumacher v. Schumacher* (Tex. Civ. App.) 50.

§ 12. Actions on policies.

In order that liability might attach on a bond conditioned to insure an employer against larceny or embezzlement by an employé, it was not necessary for the employer to introduce such proof as would convict the employé of the crime.—*Champion Ice Mfg. & Cold Storage Co. v. American Bonding & Trust Co.* (Ky.) 197.

The fact that a bank was liable for a loss resulting to plaintiff through the fraudulent act of his employé in raising the amount of checks cashed by him would not release such employé's surety on a fidelity bond from liability to plaintiff.—*Champion Ice Mfg. & Cold Storage Co. v. American Bonding & Trust Co.* (Ky.) 197.

In an action on a fire policy, it is matter of defense that insured has breached the condition requiring sole and unconditional ownership.—*Gardner v. Continental Ins. Co.* (Ky.) 283.

Evidence held to justify a finding that insured's death resulted from accidental means, within meaning of accident policy.—*Loesch v. Union Casualty & Surety Co.* (Mo. Sup.) 621.

In action on accident policy, referring to a manual classification of risks, an instruction held erroneous as submitting a construction of the manual to the jury.—*Loesch v. Union Casualty & Surety Co.* (Mo. Sup.) 621.

In an action on an accident policy, an instruction authorizing recovery of the face of plaintiff's policy held not sustained by the evidence.—*Loesch v. Union Casualty & Surety Co.* (Mo. Sup.) 621.

Answer of an insurance company in a suit on the policy held not to waive defenses based on neglect to give notice of accident and proofs of loss.—*Dezell v. Fidelity & Casualty Co.* (Mo. Sup.) 1102.

Where there is no controversy of the means by which insured came to his death, it is purely a question of law whether death resulted from a cause insured against by the policy.—*Dezell v. Fidelity & Casualty Co.* (Mo. Sup.) 1102.

In an action on a policy of accident insurance, where the answer showed that insurer was fully cognizant of facts, it must be conclusively presumed that it had notice thereof in due time.—*Dezell v. Fidelity & Casualty Co.* (Mo. Sup.) 1102.

The question whether statements of a bank cashier, made to a fidelity company during the negotiations for the issuance of a bond insur-

ing the fidelity of an employé of the bank were true, held for the jury.—*First Nat. Bank v. United States Fidelity & Guaranty Co.* (Tenn.) 1076.

In an action on a fire policy, evidence held to show that the property covered belonged, not to plaintiff, but to the woman with whom he was living in adultery.—*McCarty v. Hartford Fire Ins. Co.* (Tex. Civ. App.) 934.

Evidence held to show that alleged mistake of insurance company in supposing that property insured belonged to person other than plaintiff was not due to negligence on its part.—*McCarty v. Hartford Fire Ins. Co.* (Tex. Civ. App.) 934.

Plea in action on fire policy held not to require verification.—*McCarty v. Hartford Fire Ins. Co.* (Tex. Civ. App.) 934.

§ 13. Mutual benefit insurance.

The extent of liability of a fraternal benefit society under a certificate of insurance determined.—*Laker v. Royal Fraternal Union* (Mo. App.) 705.

The mere fact that a member of a fraternal insurance order had been permitted to pay two delinquent assessments held not to create a binding custom to receive delinquent assessments.—*Fraternal Union of America v. Hurlock* (Tex. Civ. App.) 539.

Evidence held to sustain a finding that deceased's answers in his application for insurance as to the state of his health were true.—*Supreme Ruling of the Fraternal Mystic Circle v. Crawford* (Tex. Civ. App.) 844.

A fraternal order, after receipt of assessments from a person and delivery to him of a benefit certificate, cannot question his membership, though he were not initiated.—*Supreme Ruling of the Fraternal Mystic Circle v. Crawford* (Tex. Civ. App.) 844.

The applicant's answer that he had never had any serious illness held a mere expression of opinion, which will not avoid the policy.—*Supreme Ruling of the Fraternal Mystic Circle v. Crawford* (Tex. Civ. App.) 844.

Medical examination of an applicant for membership in a fraternal order held sufficient, though not by the official examiner.—*Supreme Ruling of the Fraternal Mystic Circle v. Crawford* (Tex. Civ. App.) 844.

A beneficial association held not entitled to prove a by-law, not pleaded, passed after issuance of the certificate sued on.—*Supreme Council, American Legion of Honor v. Storey* (Tex. Civ. App.) 901.

A receipt or release in whole, given on payment by a beneficial association of part of a certificate, held to be without consideration.—*Supreme Council, American Legion of Honor v. Storey* (Tex. Civ. App.) 901.

A beneficial society, not shown to be a fraternal beneficiary association, as defined by Act May 12, 1899 (Acts 1899, p. 195, c. 115, § 1), held, like an insurance company, liable for 12 per cent. damages and attorney's fees, not having paid, as it should, its certificate in full.—*Supreme Council, American Legion of Honor v. Storey* (Tex. Civ. App.) 901.

The meaning of the words "face value," in a by-law of a beneficial association relative to payment of certificates, defined.—*Supreme Council, American Legion of Honor v. Storey* (Tex. Civ. App.) 901.

INTENT.

Fraudulent, see "Fraudulent Conveyances," § 1.

INTEREST.

See "Usury."

Insurable interest, see "Insurance," § 3.

Special laws relating to, see "Statutes," § 1.

On particular classes of *Habillities*.

Funds of ward's estate, see "Guardian and Ward," § 2.

Loans by building and loan associations, see "Building and Loan Associations."

Shares in corporation, see "Corporations," § 1.

§ 1. Recovery.

Testimony *held* to show a sufficient demand on a bank for payment of interest due a county.—*Linn County v. Farmers' & Merchants' Bank* (Mo. Sup.) 398.

Under Rev. St. 1899, § 1575, the fact that no demand was made on a bank for interest on daily balances previous to suit cannot be urged, in the absence of pleading setting up want of demand.—*Linn County v. Farmers' & Merchants' Bank* (Mo. Sup.) 398.

Where the amount due a depositor as interest is ascertainable from data at hand, it is not necessary to make demand for any specific amount before suing.—*Linn County v. Farmers' & Merchants' Bank* (Mo. Sup.) 398.

Where there was no agreement to pay interest on a loan, demand for the amount due and the date of such demand must be alleged and proved in order to justify a judgment for interest.—*Shinn v. Wooderson* (Mo. App.) 687.

INTERPLEADER.**§ 1. Right to interpleader.**

A bill of interpleader may be maintained, where the doubt as to which of the claimants of the fund is entitled thereto is a doubt as to matters of law only.—*Sovereign Camp Woodmen of the World v. Wood* (Mo. App.) 377.

Master, against which judgment for wages had been procured by servant, and against which garnishee judgment for same wages had also been procured by a creditor of servant, *held* not entitled to an interpleader against servant and his creditor.—*Wabash R. Co. v. Flannigan* (Mo. App.) 691.

§ 2. Proceedings and relief.

Where complainant in a bill of interpleader is entitled to relief, he is also entitled to his costs out of the fund.—*Sovereign Camp Woodmen of the World v. Wood* (Mo. App.) 377.

Where complainant in a bill of interpleader is allowed his costs same will be charged against the party whose claim to the fund is found to be invalid.—*Sovereign Camp Woodmen of the World v. Wood* (Mo. App.) 377.

A showing in an answer to a bill of interpleader that one of the contesting claimants is entitled to the fund cannot affect complainant's right to relief by having the interpleas filed.—*Sovereign Camp Woodmen of the World v. Wood* (Mo. App.) 377.

A bill of interpleader by a mutual benefit association *held* to state facts entitling plaintiff to relief.—*Sovereign Camp Woodmen of the World v. Wood* (Mo. App.) 377.

Consent by one defendant to an interpleader *held* not to confer jurisdiction over the other defendant.—*Wabash R. Co. v. Flannigan* (Mo. App.) 691.

Where the only prayer for judgment for attorney's fees covered by an indemnity bond given defendant bank was in the event judgment should be rendered against the bank and in favor of plaintiff, and plaintiff was beaten, a judgment in favor of the bank for such attorney's fees was erroneous.—*Great Council of Texas, Improved Order of Red Men, v. Adams* (Tex. Civ. App.) 560.

INTERROGATORIES.

To witnesses, see "Depositions."

INTERSTATE COMMERCE.

Regulation, see "Commerce."

INTERVENTION.

In attachment proceedings, see "Attachment," § 4.

INTER VIVOS.

See "Gifts," § 1.

INTESTACY.

See "Descent and Distribution."

INTOXICATING LIQUORS.

Admissibility of evidence in prosecution for violation of liquor laws to explain mistake in election returns as to name of precinct, see "Evidence," § 8.

Constitutional guaranty against class legislation as applied to statutes relating to sales of, see "Constitutional Law," § 2.

Constitutional guaranty of equal protection of laws as applied to statutes relating to sales of, see "Constitutional Law," § 3.

Demonstrative evidence in prosecution for violation of liquor laws, see "Criminal Law," § 8.

Instructions in prosecution for violation of liquor laws, see "Criminal Law," § 21.

Opinion evidence in prosecution for violation of liquor laws, see "Criminal Law," § 12.

§ 1. Constitutionality of acts and ordinances.

The local option law (Rev. St. 1899, p. 765, art. 3, c. 22), authorizing cities having a population of 2,500 inhabitants to prohibit the sale of intoxicating liquors therein, is not in contravention of Const. art. 9, § 7, as making a new class of cities of the fourth class.—*Ex parte Handler* (Mo. Sup.) 920.

§ 2. Local option.

The statute expressly provides that prosecutions may be maintained for a violation of the local option law after the repeal of the law in the territory.—*Woods v. State* (Tex. Cr. App.) 37.

Failure to post one notice of local option election for requisite number of days *held* to invalidate election.—*Ex Parte Conley* (Tex. Cr. App.) 301.

The fact that notices of local option election actually posted were subsequently torn or blown down *held* not to affect validity of election.—*Nelson v. State* (Tex. Cr. App.) 502.

In a prosecution for violating local option law, *held*, that order for election need not show who was appointed to hold same.—*Nelson v. State* (Tex. Cr. App.) 502.

"Posting as required by law" notices of local option election *held* to mean actual posting requisite number of days before election is held.—*Nelson v. State* (Tex. Cr. App.) 502.

In a prosecution for violating local option law, return and poll list of election *held* competent in evidence.—*Nelson v. State* (Tex. Cr. App.) 502.

In a prosecution for violating local option law, *prima facie* case of fact of publication is made where county judge's certificate of the result of the election has been properly entered of record.—*Nelson v. State* (Tex. Cr. App.) 502.

Change of boundaries of justice precinct, made subsequent to local option election, *held* not to invalidate same.—*Nelson v. State* (Tex. Cr. App.) 502.

An entry on the minutes of the commissioners' court *held* to show that the order of such court

declaring the result of a local option election was published four successive weeks.—*Ex parte Sullivan* (Tex. Cr. App.) 790.

§ 3. Licenses and taxes.

Whether a minor remained in a saloon, within the law giving a parent a cause of action against a saloon keeper and sureties on his bond in such case, was for the jury.—*Cox v. Thompson* (Tex. Civ. App.) 819.

§ 4. Regulations.

Where an order of the county court prohibiting the sale of liquors within three miles of a school was made, under Acts 1895, p. 86, that a dramshop keeper possessed a license previously granted was no defense to a prosecution for violating the order.—*Viefhaus & Bohenstehn v. State* (Ark.) 585.

The proviso of Acts 1881, p. 140, exempting licensed persons from the force of an order granted thereunder prohibiting the sale of liquors within three miles of a schoolhouse, *held* to apply only to persons who had obtained a license before the passage of the act.—*Viefhaus & Bohenstehn v. State* (Ark.) 585.

Under Ky. St. § 3058, an ordinance prohibiting the dispensing of spirituous liquors during certain hours *held* valid in certain respects and invalid in others.—*McNulty v. Toopf* (Ky.) 258.

Act approved Feb. 2, 1903, amending the four-mile liquor law as found in Acts 1887, p. 233, c. 167, amended by Acts 1899, p. 474, c. 221, construed, and *held* not to re-enact the provisions of Act 1899, saving sales made under licenses in force at the time the act was passed.—*Webster v. State* (Tenn.) 1020.

The fact that a liquor dealer in good faith believes a minor, whom he permits to enter and remain in his saloon, to be of age, is no defense to an action permitting such entry and remaining.—*Cox v. Thompson* (Tex. Civ. App.) 819.

Where a minor enters a saloon to procure a drink, and remains no longer than necessary for such purpose, the saloon keeper, who honestly believes him to be of age, is not liable for permitting a minor to enter and remain in saloons.—*Cox v. Thompson* (Tex. Civ. App.) 819.

If a minor enters a saloon for a lawful purpose, and leaves after he accomplishes it, no liability attaches to the saloon keeper, under statute giving parent right of action when minor enters and remains in a saloon.—*Cox v. Thompson* (Tex. Civ. App.) 819.

To render a liquor dealer and his sureties liable to a parent whose minor child is permitted by the saloon keeper to "enter and remain" in the saloon, it is necessary that such minor both "enter" and "remain."—*Cox v. Thompson* (Tex. Civ. App.) 819.

§ 5. Offenses.

Under Ky. St. 1899, § 2558, a sale of liquor at wholesale *held* not a violation of section 2557, by reason of the fact that the purchaser was an inebriate and intended to personally consume the liquor at his residence.—*Walker v. Commonwealth* (Ky.) 242.

A wholesale liquor dealer *held*, under the facts, to be guilty with the saloon keeper of an illegal sale, though the same was made in the name of the saloon keeper.—*Webster v. State* (Tenn.) 1020.

The local option law prohibits all sale of intoxicating liquors in any local option district, whether as a beverage or otherwise, except for sacramental and medicinal purposes.—*Greiner-Kelley Drug Co. v. Truett* (Tex. Civ. App.) 536.

The local option law does not prohibit the sale of alcohol for medicinal purposes on a prescription.—*Greiner-Kelley Drug Co. v. Truett* (Tex. Civ. App.) 536.

The local option law *held* to prohibit the sale of alcohol by wholesale druggists to retail druggists for medicinal purposes.—*Greiner-Kelley Drug Co. v. Truett* (Tex. Civ. App.) 536.

Alcohol *held* an intoxicating liquor, within the meaning of the local option law.—*Greiner-Kelley Drug Co. v. Truett* (Tex. Civ. App.) 536.

§ 6. Actions for penalties.

In an action for the penalty for violating an ordinance requiring the closing of saloons, an answer controverting the validity of the ordinance, because it had not been published as required by Ky. St. § 3045, may be filed.—*McNulty v. Toopf* (Ky.) 258.

Under Ky. St. § 3063, an answer, in an action for the penalty for violating an ordinance, averring that the ordinance was not recorded in the journal on the days it passed the respective houses, *held* insufficient.—*McNulty v. Toopf* (Ky.) 258.

§ 7. Criminal prosecutions.

Indictment for the illegal selling of intoxicants *held* not to state an offense.—*Hinkle v. Commonwealth* (Ky.) 231.

Where a witness testified that the liquor sold by defendant affected him as an alcoholic stimulant, and made the purchaser drunk, these facts, if true, proved the sale of intoxicating liquor, and evidence of extraneous sales was inadmissible.—*Parker v. State* (Tex. Cr. App.) 30.

In a prosecution for illegally selling liquor, evidence *held* sufficient to show that B. was a liquor dealer, and that defendant was his agent and employé.—*Bradley v. State* (Tex. Cr. App.) 32.

In a prosecution for selling liquor as agent of B., a judgment against B., and a plea of guilty to a charge of selling liquor, *held* admissible to show that the business belonged to B.—*Bradley v. State* (Tex. Cr. App.) 32.

An information for violation of the local option law *held* not invalidated by a clause stating that the offense was committed in a certain precinct "as it existed" on and prior to a certain date.—*Woods v. State* (Tex. Cr. App.) 37.

An information for violation of the local option law *held* sufficient, though not alleging the boundaries of the precinct as it existed after a change of the boundaries by the commissioners' court.—*Woods v. State* (Tex. Cr. App.) 37.

In a prosecution for violating local option law, where posting of notices of election is conclusively shown, court may charge that law is valid.—*Nelson v. State* (Tex. Cr. App.) 502.

In a prosecution for violating local option law, question as to whether notices of election were properly posted *held* one for jury, where evidence was conflicting.—*Nelson v. State* (Tex. Cr. App.) 502.

Indictment for selling liquor in local option district without license need not aver that the sale was under prescription.—*Robinson v. State* (Tex. Cr. App.) 526.

Indictment for engaging in occupation of selling liquor in local option district *held* insufficient. Correct form prescribed.—*Robinson v. State* (Tex. Cr. App.) 526.

On a prosecution for violating the local option law, evidence *held* to support a verdict of guilty.—*Taylor v. State* (Tex. Cr. App.) 536.

§ 8. Civil damage laws.

Consent of a parent to certain liquor dealer's selling liquor to his minor son *held* no defense to an action for a sale to him by another dealer.—*Roach v. Springer* (Tex. Civ. App.) 933.

What a minor, when purchasing liquor, said as to his father's consent, is not admissible in an action by the father against the liquor dealer for making the sale.—*Roach v. Springer* (Tex. Civ. App.) 933.

INVENTORY.

Of estate of decedent, see "Executors and Administrators," § 1.

ISSUES.

In criminal prosecutions, see "Indictment and Information," § 4.

Presented for review on appeal, see "Appeal and Error," § 3.

JEOPARDY.

Former jeopardy bar to prosecution, see "Criminal Law," § 3.

Plea of former jeopardy, see "Criminal Law," § 5.

JOINDER.

Of causes of action, see "Action," § 2.

JUDGES.

See "Courts"; "Justices of the Peace."

Prejudice of, as ground for change of venue, see "Venue," § 2.

§ 1. Special or substitute judges.

Rev. St. 1895, art. 1111, *held* not to prevent special judge from presiding at special term of district court.—Texas Cent. R. Co. v. Bender (Tex. Civ. App.) 561.

§ 2. Rights, powers, duties, and liabilities.

Rev. St. 1899, § 4161, defining the term "circuit court," *held* not applicable to Act 1851 (Rev. St. 1899, p. 2579) granting power to the judge of Cape Girardeau court of common pleas to issue injunctions returnable to circuit court.—Oliver v. Snider (Mo. Sup.) 591.

Under charter of Cape Girardeau court of common pleas (Rev. St. 1899, pp. 2582, 2583, §§ 18, 30), writs of injunction issued by the judge of said court in vacation must be returnable to the circuit court.—Oliver v. Snider (Mo. Sup.) 591.

The Second circuit court of Shelby county, created by Act April 1, 1903, p. 205, c. 99, *held* a state court, so that the provision for payment of the judge's salary by the county violates Const. art. 2, § 29.—Colbert v. Bond (Tenn.) 1061; Glisson v. Calloway, Id.

The probate court of Shelby county, created by Act June 24, 1870 (Acts 1870, p. 135, c. 86), *held* a county court, so that the provision for payment of the judge's salary by the county is valid.—Colbert v. Bond (Tenn.) 1061; Glisson v. Calloway, Id.

Act April 16, 1901 (Acts 1901, p. 247, c. 140), authorizing county courts to make appropriations for compensation of judges of circuit, chancery, and criminal courts, *held* to violate Const. art. 2, § 29, limiting the power of counties to tax to county purposes.—Colbert v. Bond (Tenn.) 1061; Glisson v. Calloway, Id.

Act April 16, 1901 (Acts 1901, p. 247, c. 140), authorizing county courts to appropriate in their discretion sums for payment of judges, *held* to violate Const. art. 6, § 7, providing that the salary of the judges of the state shall be ascertained by law.—Colbert v. Bond (Tenn.) 1061; Glisson v. Calloway, Id.

A trial judge has authority, after the expiration of his term of office and during the term of court at which trial was had, to make and file conclusions of fact and law.—Storrie v. Shaw (Tex. Sup.) 20.

§ 3. Disqualification to act.

Judge *held* not disqualified to try murder case by having acted as assistant district attor-

ney in presenting case against accomplice to grand jury.—Locklin v. State (Tex. Cr. App.) 805.

JUDGMENT.

Decisions of courts in general, see "Courts," § 2.

Review, see "Appeal and Error."

In particular civil actions or proceedings.

See "Divorce," §§ 2, 4; "Reformation of Instruments," § 1.

Decree in equity, see "Equity," § 2.

Foreclosure, see "Mortgages," § 7.

Highway proceedings, see "Highways," § 1.

On appeal or writ of error, see "Appeal and Error," § 18.

Setting aside fraudulent conveyance, see "Fraudulent Conveyances," § 3.

To enforce mechanic's lien, see "Master and Servant," § 2.

§ 1. Nature and essentials in general.

If, under the pleadings in an action to foreclose a mortgage, the court had no jurisdiction to enter a personal judgment, that much of the decree would be void, but the rest of it would not be affected.—State ex rel. Wyandotte Lodge, No. 35, I. O. O. F., v. Evans (Mo. Sup.) 914.

§ 2. On consent, offer, or admission.

Judgment *held* to be by consent, and not a confession, under Sand. & H. Dig. § 5872, and hence valid, in the absence of fraud or ignorance of facts by defendant, though entered by plaintiff's attorney.—Haupt v. Bohl (Ark.) 470.

§ 3. Equitable relief.

Suit in circuit court to enjoin collection of school tax *held* not an attack on judgment of county court ordering election on tax proposition, so as to violate Civ. Code, § 285.—Waring v. Bertram (Ky.) 222.

§ 4. Collateral attack.

Where a judgment of a court of general jurisdiction is attacked collaterally, every presumption is indulged in favor of its integrity.—Northington v. Reid (Ky.) 208.

A defendant, having joined issue on pleading filed by a guardian ad litem, *held* not entitled to question the judgment, in a subsequent suit against a third person, on the ground that the infants were not properly before the court.—Northington v. Reid (Ky.) 206.

Where a judgment is assailed collaterally only, jurisdiction is presumed, though no service of process is shown.—Miller v. Farmers' Bank (Ky.) 218.

§ 5. Merger and bar of causes of action and defenses.

Where a tenant claimed that the collapse of certain floors in a building was due to defective construction and want of repairs, and the landlord claimed it resulted from overloading, a default judgment in an action by the tenant to recover damages therefor *held* conclusive of an action by the landlord for such overloading.—Taylor v. Sledge (Tenn.) 1074.

§ 6. Conclusiveness of adjudication.

Under Ky. St. 1899, §§ 1834, 1840, 4129, 4131, 4148, 4151, 4184, and Const. § 144, a judgment by default against sheriff in suit to enjoin collection of taxes *held* not res judicata in subsequent suit by county to enforce collection of the taxes.—Henderson County v. Henderson Bridge Co. (Ky.) 239.

A justice's judgment, in an action to foreclose a mechanic's lien, finding that purchasers of the land were the owners on the day the delivery of materials began, *held* not res judicata of such question.—Wilson v. Lubke (Mo. Sup.) 602.

Where, in an action to which plaintiff and defendant were parties, it was determined that

plaintiff's ancestor acquired a fee in certain property by a deed to her, the judgment in that suit, unappealed from, was res judicata of such action.—*Fiene v. Kirchoff* (Mo. Sup.) 608.

That certain defendants were minors, and defended by a guardian ad litem after being personally served, *held* not to affect the conclusiveness of the judgment rendered as against them.—*Fiene v. Kirchoff* (Mo. Sup.) 608.

Where the construction of a will could have been settled with only the original parties before the court, the decree would not have been binding, as res judicata, on proper parties not brought in.—*Katzenberger v. Weaver* (Tenn.) 937.

A judgment in an action by a bank for the recovery of a balance due against plaintiff as surety on certain notes *held* not res judicata in a subsequent action in assumpsit for the bank's alleged conversion of property pledged to secure the notes.—*Memphis City Bank v. Smith* (Tenn.) 1065.

A judgment by default is conclusive against the parties of all matters properly pleaded and averred in the declaration.—*Taylor v. Sledge* (Tenn.) 1074.

§ 7. Lien.

Judgment debtor *held* to have been mere conduit in the transfer of title from third person to complainant, so that lien of judgment did not attach to the land.—*Gordon v. Cox* (Tenn.) 925.

Question whether conveyance from judgment debtor to third person was fraudulent, or not, *held* immaterial; complainant, who bought from the third person, having had no notice of the fraud.—*Gordon v. Cox* (Tenn.) 925.

§ 8. Payment, satisfaction, merger, and discharge.

Unless the clerk of the district court is made the agent of the judgment creditor, a payment of money due on the judgment to the clerk is not a satisfaction of the judgment.—*City of Whitesboro v. Diamond* (Tex. Civ. App.) 540.

§ 9. Pleading and evidence of judgment as estoppel or defense.

In an action on a note, a plea of res judicata *held* sufficient.—*Fenn v. Roach & Co.* (Tex. Civ. App.) 361.

A plea of res judicata is not demurrable for failing to show affirmatively that the former judgment has not been appealed from.—*Fenn v. Roach & Co.* (Tex. Civ. App.) 361.

JUDICIAL NOTICE.

In civil actions, see "Evidence," § 1.

JUDICIAL SALES.

Of property of decedent, see "Executors and Administrators," § 5.

Of property of infant, see "Guardian and Ward," § 3.

On execution, see "Execution," § 3.

JURISDICTION.

Effect of appearance, see "Appearance."

Objections to jurisdiction as ground for abatement, see "Abatement and Revival," § 1.

Want of, as ground for collateral attack on judgment, see "Judgment," § 4.

Jurisdiction of particular actions or proceedings.

See "Attachment," § 2.

Against personal representatives, see "Executors and Administrators," § 6.

For accounting by executors or administrators, see "Executors and Administrators," § 7.

Relief against judgment, see "Judgment," § 3.

Special jurisdictions.

Appellate jurisdiction, see "Appeal and Error," § 1.

Particular courts, see "Courts."

JURY.

Constitutional guaranty of equal protection of laws as applied to statutes requiring party applying for special jury to deposit cost thereof, see "Constitutional Law," § 3.

Custody and conduct, see "Criminal Law," § 23; "Trial," § 10.

Disqualification or misconduct ground for new trial, see "Criminal Law," § 24; "New Trial," § 1.

Instructions in civil actions, see "Trial," §§ 4-9. Instructions in criminal prosecutions, see "Criminal Law," § 21.

Questions for jury in criminal prosecutions, see "Criminal Law," § 16.

Service of list of jurors on defendant, see "Criminal Law," § 17.

Taking case or question from jury at trial, see "Trial," § 3.

Verdict in civil actions, see "Trial," § 11.

Verdict in criminal prosecutions, see "Criminal Law," § 16.

§ 1. Right to trial by jury.

Rev. St. 1899, p. 1553, c. 91, art. 23, § 6566, providing for special juries, *held* not unconstitutional by reason of fact that it empowers sheriff or jury commissioner to select such juries.—*Eckrich v. St. Louis Transit Co.* (Mo. Sup.) 755.

Rev. St. 1899, p. 1553, c. 91, art. 23, § 6566, providing for special juries, *held* not violative of federal or Missouri Constitutions, in that it empowers jury commissioner to select such jury, thereby opening the door for the "fixing" of the same.—*Eckrich v. St. Louis Transit Co.* (Mo. Sup.) 755.

Rev. St. 1899, p. 1553, c. 91, art. 23, § 6566, providing for special juries, *held* not violative of the Constitution of Missouri, providing that right of trial by jury shall remain inviolate.—*Eckrich v. St. Louis Transit Co.* (Mo. Sup.) 755.

§ 2. Summoning, attendance, discharge, and compensation.

Statutes providing for summoning jurors are merely directory.—*State v. Faulkner* (Mo. Sup.) 116.

Rev. St. 1899, §§ 3791, 6566, securing to litigants right to special jury, etc., in cities of over 100,000, *held* not unconstitutional.—*State v. Faulkner* (Mo. Sup.) 116.

Rev. St. 1899, §§ 3791, 6566, relative to special juries, *held* not in conflict.—*State v. Faulkner* (Mo. Sup.) 116.

A special jury is not a jury drawn by chance, but one selected by the proper officer in the exercise of discretion.—*State v. Faulkner* (Mo. Sup.) 116.

In a criminal prosecution, *held*, that defendant had no absolute right to require court to draw jurymen from a certain list.—*State v. Faulkner* (Mo. Sup.) 116.

Fact that there was no objection to any juror on a panel on a criminal prosecution *held* to show that no prejudice resulted to defendant from court's action in failing to select jurymen from a certain list.—*State v. Faulkner* (Mo. Sup.) 116.

The defendant in a criminal case has no right to have a special jury drawn by chance.—*State v. Lehman* (Mo. Sup.) 139.

In the trial of a criminal case, court *held* not to have erred in impaneling jury.—*Reyna v. State* (Tex. Cr. App.) 25.

Under Code Cr. Proc. 1895, art. 649, talesmen need not be selected in the manner provided by article 647 for the selection of a special venire.—*Locklin v. State* (Tex. Cr. App.) 305.

The mere fact that all the jurors for a term were selected from one and the same city is not a valid objection to the venire.—*Williams v. State* (Tex. Cr. App.) 859.

Though the jury commissioners for a term are appointed from the same city, they are not disqualified to act by Code Cr. Proc. 1895, art. 372, where the city has two-thirds of the voters in the county.—*Williams v. State* (Tex. Cr. App.) 859.

The issuance of a citation to jury commissioners *held* waived by their appearance in response to a notice.—*Williams v. State* (Tex. Cr. App.) 859.

Court *held* not empowered to require defendant to take a jury from a venire selected by the sheriff; none of the contingencies mentioned in Rev. St. 1895, art. 3150, having occurred.—*Texas & N. O. R. Co. v. Pullen* (Tex. Civ. App.) 1084.

§ 3. Competency of jurors, challenges, and objections.

In a prosecution for theft, refusal to allow defendant peremptory challenges *held* not error.—*Smith v. State* (Tex. Cr. App.) 298.

An irregularity in the selection of talesmen, the summoning of whom is directed in the same writ with that of a special venire, is not ground for quashing the venire.—*Locklin v. State* (Tex. Cr. App.) 305.

Rev. St. 1895, art. 3202, does not restrict the right of a litigant to question the power of the court to order a venire to be summoned by the sheriff, and to substitute such venire for one regularly drawn by the jury commissioners.—*Texas & N. O. R. Co. v. Pullen* (Tex. Civ. App.) 1084.

JUSTICES OF THE PEACE.

§ 1. Procedure in civil cases.

An injunction will not lie to restrain execution of a justice's judgment, rendered in a suit of which he had jurisdiction, where the amount involved was insufficient to sustain an appeal.—*St. Louis, I. M. & S. Ry. Co. v. Coca Cola Co.* (Tex. Civ. App.) 563.

§ 2. Review of proceedings.

Judgment between plaintiff and one defendant in justice's court *held* shown by transcript to have been rendered, so as to make such defendant proper obligee in appeal bond.—*Girvin v. Wood* (Tex. Civ. App.) 49.

Appeal bond from justice's court *held* conditioned substantially in compliance with the statute.—*Girvin v. Wood* (Tex. Civ. App.) 49.

A justice's judgment, sustaining a demurrer to plaintiff's evidence and rendering judgment for defendant for costs, without determining a cross-action filed by defendant, *held* not a final judgment, so as to sustain an appeal to the county court.—*Carothers v. Holloman* (Tex. Civ. App.) 1084.

KNOWLEDGE.

By grantee of fraud in conveyance, see "Fraudulent Conveyances," § 1.

LANDLORD AND TENANT.

Lease distinguished from chattel mortgage, see "Chattel Mortgages," § 1.

§ 1. Terms for years.

Under Rev. St. 1895, art. 3250, where a tenant sublets premises without the landlord's consent, the landlord has the right to forfeit

the lease.—*Markowitz v. Greenwall Theatrical Circuit Co.* (Tex. Civ. App.) 74.

A contract between lessee of opera house and third person *held* not to have amounted to a subletting of the premises by the lessee.—*Markowitz v. Greenwall Theatrical Circuit Co.* (Tex. Civ. App.) 74, 317.

§ 2. Rent and advances.

The lien of a landlord will prevail over a mortgage executed by the tenant upon property subject to the lien, where the mortgagee does not forthwith file the mortgage for record, as required by statute.—*Liquid Carbonic Acid Mfg. Co. v. Lewis* (Tex. Civ. App.) 47.

Under Rev. St. 1895, art. 3236, facts *held* to show conversion by a third person of crop on which was a landlord's lien.—*Mensing Bros. & Co. v. Cardwell* (Tex. Civ. App.) 347.

Evidence *held* sufficient to allow of the judgment for rent, without special testimony as to the value of the corn that was to be given as part of the rent.—*Mensing Bros. & Co. v. Cardwell* (Tex. Civ. App.) 347.

Rev. St. 1895, art. 3240, authorizes a distress warrant under the circumstances stated therein, whether the rent is due or not.—*Allen v. Brunner* (Tex. Civ. App.) 821.

Under Rev. St. 1895, art. 3242, a distress warrant *held* to have been properly returned to the county court.—*Allen v. Brunner* (Tex. Civ. App.) 821.

Under Rev. St. 1895, art. 3251, landlord *held* to have had a lien on the goods in a storehouse, leased by him, for the rent due and to become due in a certain year.—*Allen v. Brunner* (Tex. Civ. App.) 821.

§ 3. Renting on shares.

Measure of damages for breach of contract whereby defendant was to furnish land and plaintiff was to receive half the crops raised by him determined.—*Rogers v. McGuffey* (Tex. Civ. App.) 817.

The measure of damages for breach of a rental contract, whereby plaintiff was to raise crops on defendant's land, *held* not to include value of labor performed by plaintiff.—*Rogers v. McGuffey* (Tex. Civ. App.) 817.

LANDS.

See "Public Lands."

LARCENY.

See "Embezzlement."

Argument of counsel, see "Criminal Law," § 20. Harmless error, see "Criminal Law," § 27. Instructions, see "Criminal Law," § 21.

§ 1. Prosecution and punishment.

Unnecessary recital in indictment for grand larceny *held* to have become a part of the description of the property stolen, and that it must be proved.—*Marshall v. State* (Ark.) 584.

Under Sand. & H. Dig. § 1717, an indictment for larceny *held* to sufficiently describe the money alleged to have been stolen.—*Marshall v. State* (Ark.) 584.

On prosecution for horse theft, an instruction on explanation of recently stolen property *held* proper.—*Wingo v. State* (Tex. Cr. App.) 29.

In a prosecution for cattle theft, evidence *held* sufficient to show a want of consent of the person in possession to the taking.—*Taylor v. State* (Tex. Cr. App.) 35.

In a prosecution for cattle theft, evidence *held* insufficient to raise the issue of voluntary return of stolen property.—*Taylor v. State* (Tex. Cr. App.) 35.

In a prosecution for cattle theft, the fact that cattle had voluntarily strayed from the pasture

of the person in possession, charged to be the owner, *held* to be immaterial.—Taylor v. State (Tex. Cr. App.) 35.

That defendant was not in possession of stolen cattle at the time he explained his possession did not render a charge on recent possession of stolen property inapplicable.—Taylor v. State (Tex. Cr. App.) 35.

Evidence that N. F. had possession, care and control of cattle alleged to have been stolen *held* to support an indictment alleging the ownership of cattle in him.—Taylor v. State (Tex. Cr. App.) 35.

In a prosecution for theft, a charge *held* to sufficiently cover the defense set up.—Smith v. State (Tex. Cr. App.) 298.

In a prosecution for theft, certain evidence by the wife of prosecuting witness *held* admissible.—Smith v. State (Tex. Cr. App.) 298.

An indictment for theft of cattle, charging conversion as bailee, *held* sufficient, under White's Ann. Pen. Code, art. 877, § 1501.—Young v. State (Tex. Cr. App.) 798.

LAW OF THE ROAD.

See "Highways," § 2.

LEADING QUESTIONS.

To witnesses, see "Witnesses," § 2.

LEASES.

See "Landlord and Tenant."

LEGACIES.

See "Wills."

LEVY.

Of execution, see "Execution," § 1.

LIBEL AND SLANDER.

Demonstrative evidence in slander prosecution, see "Criminal Law," § 8.

Harmless error in slander prosecution, see "Criminal Law," § 27.

§ 1. Words and acts actionable, and liability therefor.

Challenge to right of preacher to sit as member of church convention *held* libelous per se.—Cranfill v. Hayden (Tex. Civ. App.) 573.

§ 2. Privileged communications, and malice therein.

If malice enters to any degree as a motive in the publication of libelous matter on a privileged occasion, the defense of privilege is lost.—Cranfill v. Hayden (Tex. Civ. App.) 573.

§ 3. Actions.

In an action for slandering plaintiff's wife, an instruction that in no event can there be any recovery for loss of time or sickness, not alleged and proven, *held* not erroneous as limiting recovery to such damages as plaintiff had proven in connection with loss of time and sickness.—Sonka v. Sonka (Tex. Civ. App.) 325.

In an action for slandering plaintiff's wife, an instruction *held* not misleading, because in conflict with a further instruction.—Sonka v. Sonka (Tex. Civ. App.) 325.

In libel, a requested instruction that mere proof of ill will against plaintiff was not proof of defendant's being actuated by malice, is properly refused as misleading and an invasion of the province of the jury.—Cranfill v. Hayden (Tex. Civ. App.) 573.

A libelous statement made on a privileged occasion is presumed to be untrue, and the burden

of proving its truth is on defendants.—Cranfill v. Hayden (Tex. Civ. App.) 573.

Evidence in an action for libel published, as charged by plaintiff, in pursuance of a conspiracy, examined, and *held* to show such conspiracy.—Cranfill v. Hayden (Tex. Civ. App.) 573.

Requested special instructions, in libel, as to defense of truth of charges, *held* properly refused.—Cranfill v. Hayden (Tex. Civ. App.) 573.

Where a conspiracy to publish a libel is shown, all the conspirators are responsible for all of the publications, though no one of them was concerned in all.—Cranfill v. Hayden (Tex. Civ. App.) 573.

§ 4. Criminal responsibility.

In slander prosecution, admission of evidence of prosecutrix's reputation at time of trial for chastity, and of how she was regarded in community, *held* error.—Bowers v. State (Tex. Cr. App.) 299.

LICENSES.

For sale of intoxicating liquors, see "Intoxicating Liquors," § 3.

Of insurance agents, see "Insurance," § 1.

§ 1. For occupations and privileges.

Where a city is authorized to levy a license tax on particular property or business, and such tax has been imposed, it will be presumed that the levy was made for the purposes authorized by law.—Brown v. City of Galveston (Tex. Sup.) 488.

Tax imposed by city ordinance on vehicles *held* a license, and not an occupation tax, and hence not to contravene Const. art. 8, § 1, though the state had not levied occupation tax.—Brown v. City of Galveston (Tex. Sup.) 488.

LIENS.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 1.

Liens acquired by particular remedies or proceedings.

See "Garnishment," § 1; "Judgment," § 7.

Particular classes of liens.

See "Carriers," § 2; "Mechanics' Liens."

Landlord's lien for rent, see "Landlord and Tenant," § 2.

Loggers' liens, see "Logs and Logging."

Mortgage, see "Chattel Mortgages," § 3; "Mortgages," § 2.

Pledge, see "Pledges."

Vendor's lien on lands sold, see "Vendor and Purchaser," § 1.

Vendor's lien on street railroad, see "Street Railroads," § 1.

LIFE ESTATES.

See "Curtesy"; "Dower."

Creation by will, see "Wills," § 4.

The possession of the grantee of a life tenant does not become adverse to the remainderman until the life tenant's death.—Beatty v. Clymer (Tex. Civ. App.) 540.

LIMITATION OF ACTIONS.

See "Adverse Possession."

Particular actions or proceedings.

See "Partition," § 1; "Trespass To Try Title," § 2.

Against creditors of decedent's estate, see "Descent and Distribution," § 1.

For dissolution of partnership, see "Partnership," § 1.

For taxes, see "Taxation," § 4.
On guardian's bond, see "Guardian and Ward," § 5.

To obtain paid-up insurance policy, see "Insurance," § 6.

§ 1. Computation of period of limitation.

After limitation has begun to run against a note, it continues to run, though the note is transferred to one under disability.—*Meyer v. Christopher* (Mo. Sup.) 750; *Christopher v. Meyer*, Id.

Execution of a mortgage on land by owner thereof, who had given a title bond, *held* not to start running of limitations.—*Tenzler v. Tyrrell* (Tex. Civ. App.) 57.

Where defendants in trespass to try title went into possession during the coverture of the owner of the land, limitations did not begin to run in their favor until termination of the coverture.—*Wren v. Howland* (Tex. Civ. App.) 894.

§ 2. Operation and effect of bar by limitation.

Creditors of corporation could not object to payment of outlawed claims which corporation did not resist, when it was not shown that any creditors would fail to collect their claims.—*Dozier v. Arkadelphia Cotton Mills* (Ark.) 469.

A mortgagee *held* not barred from the right to foreclose, under Rev. St. 1899, § 4276, within the period prescribed by the statute of limitations, by his failure to present the same as a claim against the mortgagor's estate within two years, as required by section 185.—*Cowan v. Mueller* (Mo. Sup.) 606.

LIMITATION OF LIABILITY.

Of carriers, see "Carriers," §§ 2, 3.

LIQUOR SELLING.

See "Intoxicating Liquors."

LIS PENDENS.

Under Civ. Code Prac. § 432, whether creditor of estate, filing claim, was made party to petition in settlement suit, under Ky. St. 1899, § 2087, or not, *held* not to affect validity of lis pendens.—*Kelley v. Culver's Adm'r* (Ky.) 272.

Party seeking benefits of a lis pendens must have suit in which relief in rem is sought against specific property and prosecute same with reasonable diligence.—*Kelley v. Culver's Adm'r* (Ky.) 272.

LIVE STOCK.

See "Animals."

Carriage of, see "Carriers," § 3.
Injuries from operation of railroads, see "Railroads," § 9.

LOAN COMPANIES.

See "Building and Loan Associations."

LOANS.

By building and loan associations, see "Building and Loan Associations."

LOCAL ACTIONS.

See "Venue," § 1.

LOCAL LAWS.

See "Statutes," § 1.

LOCAL OPTION.

Demonstrative evidence in prosecution for violation of local option law, see "Criminal Law," § 8.

Instructions in prosecution for violation of local option laws, see "Criminal Law," § 21.

Local laws, see "Statutes," § 1.

Opinion evidence in prosecution for violation of local option law, see "Criminal Law," § 12.

Traffic in intoxicating liquors, see "Intoxicating Liquors," §§ 1, 2.

LOGS AND LOGGING.

Under Sand. & H. Dig. § 4766, laborers employed by contractor furnishing material for a manufacturing establishment *held* not disentitled to a lien because their labor was not furnished under a contract directly with the manufacturer.—*Klondike Lumber Co. v. Williams Bros.* (Ark.) 854.

Under Sand. & H. Dig. § 4766, one using a team in the performance of labor *held* entitled to a lien for the value of labor of the team, in addition to the value of his own labor.—*Klondike Lumber Co. v. Williams Bros.* (Ark.) 854.

Under Sand. & H. Dig. § 4766, contractors *held* entitled to a laborer's lien to the extent of labor actually performed by them.—*Klondike Lumber Co. v. Williams Bros.* (Ark.) 854.

Under Sand. & H. Dig. § 4766, laborers furnishing timber to a mill *held* entitled to a lien on lumber.—*Klondike Lumber Co. v. Williams Bros.* (Ark.) 854.

Under Sand. & H. Dig. § 348, sale by order of court, made in vacation, *held* void as to an owner of the property not served with notice.—*Klondike Lumber Co. v. Bender Wagon Co.* (Ark.) 855.

LUMBER.

See "Logs and Logging."

MACHINERY.

Assumption of risk of defective machinery, see "Master and Servant," § 5.

Contributory negligence of servant using defective machinery, see "Master and Servant," § 6.

Liability of employer for defects, see "Master and Servant," § 2.

MAINTENANCE.

See "Champerly and Maintenance."

MALICE.

See "Libel and Slander," § 2.

MALICIOUS PROSECUTION.

§ 1. Want of probable cause.

It is not malicious prosecution for one to refer charges against a person to the prosecuting attorney, and follow his instructions in laying the matter before the grand jury.—*St. Louis, I. M. & S. Ry. Co. v. Wallin* (Ark.) 477.

§ 2. Actions.

In an action for malicious prosecution, plaintiff must prove malice, want of probable cause, and that the prosecution terminated in an acquittal or discharge.—*St. Louis, I. M. & S. Ry. Co. v. Wallin* (Ark.) 477.

MALICIOUS TRESPASS.

See "Trespass," § 3.

MANDAMUS.

To compel settlement of bill of exceptions, see "Exceptions, Bill of," § 1.

§ 1. Nature and grounds in general.

A land commissioner cannot be compelled by mandamus to sell land previously sold to an alleged minor, where he would be required to determine the question of minority.—*Boozar v. Terrell* (Tex. Sup.) 482.

§ 2. Subjects and purposes of relief.

Under Ky. St. 1899, §§ 1840, 4345, mandamus would lie to compel the fiscal court to erect a bridge on a county road on its destruction.—*Leslie County v. Wooton* (Ky.) 208.

In mandamus to compel the mayor of a city to allow relator to examine the books of the city, allegations of the answer *held* not sufficient to show that relator was actuated by a fraudulent purpose.—*State v. Williams* (Tenn.) 948.

Where, after mandamus to compel the mayor of a city to allow a taxpayer to examine the books, the mayor appointed a committee to make such an examination, and offered to allow the taxpayer to name a part thereof, such action did not affect relator's right to the writ.—*State v. Williams* (Tenn.) 948.

§ 3. Jurisdiction, proceedings, and relief.

Under Watkins' Dig. 1902, pp. 19, 20, § 6, page 22, §§ 1, 2, and page 109, art. 5, the mayor *held* custodian of the books and records of the city to a sufficient extent to make it proper that a writ of mandamus to enforce a taxpayer's right to examine the books should be directed to the mayor.—*State v. Williams* (Tenn.) 948.

In mandamus, where the cause is set down for hearing on petition and answer, every fact properly averred in the answer must be treated as true.—*State v. Williams* (Tenn.) 948.

MANDATE.

See "Mandamus."

MANSLAUGHTER.

See "Homicide," § 1.

MARRIAGE.

See "Divorce"; "Husband and Wife."

MARRIED WOMEN.

See "Husband and Wife."

MASTER AND SERVANT.

Harmless error in admission of evidence in action for personal injuries, see "Appeal and Error," § 17.

Injuries from accident to train, see "Railroads," § 6.

§ 1. Master's liability for injuries to servant—Nature and extent in general.

Where a railroad company under valid legislative authority leases its lines, it is not liable as an employer for injuries caused to employes of the lessee, through the lessee's negligence.—*Swice's Adm'x v. Maysville & B. S. R. Co.* (Ky.) 278.

Person carried occasionally on mixed train in return for services in handling baggage, etc., *held* not an employé of the railroad company.—*Chaney v. Louisiana & M. R. R. Co.* (Mo. Sup.) 595.

Railroad, maintaining hospital for its employes, *held* required to use only ordinary care in the selection of a competent physician.—*Poling v. San Antonio & A. P. Ry. Co.* (Tex. Civ. App.) 69.

Workman on a railroad bridge, injured by a passing train, *held* entitled to recover against the railroad company.—*Gulf, C. & S. F. Ry. Co. v. Roane* (Tex. Civ. App.) 845.

§ 2. — Tools, machinery, appliances, and places for work.

A railroad company *held* to owe the duty to its trainmen to maintain reasonably safe bridges.—*Copeland v. Wabash R. Co.* (Mo. Sup.) 106.

Platform on which a servant was injured *held* a reasonably safe place for him to work.—*Wendall v. Chicago & A. Ry. Co.* (Mo. App.) 689.

A railroad company must exercise ordinary care to see that an engine is reasonably safe.—*Texas & Ft. S. R. Co. v. Hartnett* (Tex. Civ. App.) 809.

There is no presumption of law that the steps to a locomotive cab were in a proper condition where the locomotive was delivered to an engineer for his run.—*Texas & Ft. S. R. Co. v. Hartnett* (Tex. Civ. App.) 809.

§ 3. — Methods of work, rules, and orders.

Presence of a brakeman at a crossing *held* not a compliance with the rule for a lookout or flagman.—*Missouri, K. & T. Ry. Co. of Texas v. Jones* (Tex. Civ. App.) 63.

§ 4. — Fellow servants.

A railroad company is liable to an employé making a coupling for the negligence of the servant in charge of the engine.—*Gulf, C. & S. F. Ry. Co. v. Wilder* (Tex. Civ. App.) 546.

Railroad employes, taking rails from car and laying them on ties preparatory to spiking, *held* not to be operating car, within Sayles' Rev. Civ. St. art. 4560f, abrogating fellow servant doctrine as to employes operating cars.—*Lakey v. Texas & P. Ry. Co.* (Tex. Civ. App.) 566.

Railroad employé, taking rails from a car, *held*, under Sayles' Rev. Civ. St. art. 4560h, fellow servant of the employé giving signals controlling the work.—*Lakey v. Texas & P. Ry. Co.* (Tex. Civ. App.) 566.

Batts' Ann. Civ. St. art. 4560ea, relating to the liability of railroad companies for injuries to servants caused by the negligence of fellow servants, *held* applicable to employes operating locomotives in yards, at stations, roundhouses, or coal chutes.—*Gulf, C. & S. F. Ry. Co. v. Howard* (Tex. Civ. App.) 803.

§ 5. — Risks assumed by servant.

Though an employé may know of defects in the place where he is at work which do not render it glaringly dangerous, he has a right to assume that he may work with safety.—*Hester v. Jacob Dold Packing Co.* (Mo. App.) 695.

Section foreman, injured in collision while riding on hand car, *held* to have assumed risk of defective brakes, but not of failure of trainmen to whistle.—*Texas Cent. R. Co. v. Bender* (Tex. Civ. App.) 561.

Fact that section foreman, injured in collision while riding on hand car, assumed risk of injury from defective brake, and that that concurred with other negligence of the company in causing the collision, *held* not to preclude recovery.—*Texas Cent. R. Co. v. Bender* (Tex. Civ. App.) 561.

An engineer *held* to have a right to assume that a locomotive furnished him was in a reasonably safe condition and would remain so until inspected.—*Texas & Ft. S. R. Co. v. Hartnett* (Tex. Civ. App.) 809.

§ 6. — Contributory negligence of servant.

Servant *held* guilty of contributory negligence in attempting to remove a funnel from a crank pit.—*Doerr v. St. Louis Brewing Ass'n* (Mo. Sup.) 600.

A carpenter on a scaffolding is not required to exercise the highest degree of care in the performance of his duties in order to avoid injuries.—*Hester v. Jacob Dold Packing Co.* (Mo. App.) 695.

The making of a "cut" in certain cars, which were being switched, without the knowledge of the switchman, was the proximate cause of his injury.—*Missouri, K. & T. Ry. Co. of Texas v. Schilling* (Tex. Civ. App.) 64.

The violation by an employé of a railroad company of a rule of the company is not negligence per se.—*Texas Cent. R. Co. v. Bender* (Tex. Civ. App.) 561.

Section foreman, injured in collision while riding on hand car, *held* not precluded from recovery because he attempted to remove car from track after discovering the train.—*Texas Cent. R. Co. v. Bender* (Tex. Civ. App.) 561.

A charge, in an action by a locomotive engineer for injuries, as to his duties to make repairs, *held* properly refused as contrary to law and on the weight of the evidence.—*Texas & Ft. S. R. Co. v. Hartnett* (Tex. Civ. App.) 809.

A servant is not required to use ordinary care to ascertain the safety of the appliances furnished.—*Texas & Ft. S. R. Co. v. Hartnett* (Tex. Civ. App.) 809.

An engineer has a right to assume that the engine and tender furnished him are reasonably safe.—*Texas & Ft. S. R. Co. v. Hartnett* (Tex. Civ. App.) 809.

§ 7. — Pleading.

Denial in answer to a petition for servant's injuries *held* to place in issue whether the servant was in discharge of his duties at the time he was killed.—*Cincinnati, N. O. & T. P. Ry. Co. v. Cook's Adm'r* (Ky.) 218.

In an action for injuries to a brakeman by the breaking of a defective brakestaff, a variance between allegations of the petition and proof *held* immaterial.—*International & G. N. R. Co. v. Collins* (Tex. Civ. App.) 814.

§ 8. — Evidence.

Evidence in an action for injury to a conductor by the giving away of a pile bridge under his train *held* sufficient to support a finding that the earth under the bridge was insufficient to support the piles.—*Copeland v. Wabash R. Co.* (Mo. Sup.) 106.

Evidence of habit of trainmen as to drinking *held* admissible, in action against the railroad company for death of a car repairer, run into by their train; they being at the time under the influence of liquor.—*Missouri, K. & T. Ry. Co. of Texas v. Jones* (Tex. Civ. App.) 53.

In action against railroad for injuries to switchman, *held*, that certain evidence was not prejudicial to defendant on the question whether defendant's foreman had been negligent in "cutting" certain cars, which were being switched; he cut being unknown to plaintiff.—*Missouri, K. & T. Ry. Co. of Texas v. Schilling* (Tex. Civ. App.) 64.

In an action against railroad for damages to employé by reason of incompetence of surgeon employed by the company in its hospital, evidence that such surgeon had not been properly examined by the board of medical examiners *held* incompetent.—*Poling v. San Antonio & A. Ry. Co.* (Tex. Civ. App.) 69.

In an action by a section hand for injuries, verdict for plaintiff *held* not sustained by the evidence.—*Missouri, K. & T. Ry. Co. of Texas v. Dyer* (Tex. Civ. App.) 930.

§ 9. — Trial.

An instruction in an action for injury to a railroad conductor by the giving away of a bridge under his train *held* not to authorize a verdict for him merely on a finding that the bridge was a pile bridge.—*Copeland v. Wabash R. Co.* (Mo. Sup.) 106.

Instructions as to duty of a railroad company to its trainmen in regard to furnishing safe bridges *held* not conflicting.—*Copeland v. Wabash R. Co.* (Mo. Sup.) 106.

Instruction on employer's duty to furnish reasonably safe place in which to work *held* not error.—*Stumbo v. Duluth Zinc Co.* (Mo. App.) 185.

In action for injuries to servant, where question as to safety of place in which the servant worked was undisputed, the question as to its being reasonably safe is for the court.—*Wendall v. Chicago & A. Ry. Co.* (Mo. App.) 689.

In an action by an employé for injuries, *held* to be a question for the jury whether plaintiff was guilty of negligence in working on a scaffolding.—*Hester v. Jacob Dold Packing Co.* (Mo. App.) 695.

In an action by an employé for injuries, *held*, that an instruction in the nature of a demurrer to plaintiff's case was properly refused.—*Hester v. Jacob Dold Packing Co.* (Mo. App.) 695.

In an action for the death of a railway employé, an instruction on the burden of proving contributory negligence *held* not misleading, in view of other instructions.—*Gulf, C. & S. F. Ry. Co. v. Howard* (Tex. Sup.) 806.

The pleadings in an action against a railroad company for death of an employé *held* to raise the issue as to rules of the company so as to authorize an instruction thereon.—*Missouri, K. & T. Ry. Co. of Texas v. Jones* (Tex. Civ. App.) 53.

Violation of rules of an employer by an employé is not negligence per se.—*Missouri, K. & T. Ry. Co. of Texas v. Jones* (Tex. Civ. App.) 53.

In action against railroad for injuries to switchman, an instruction that it was defendant's duty to use ordinary care, so that employes should be reasonably safe in the discharge of their duties, *held* not erroneous, when considered with other instructions.—*Missouri, K. & T. Ry. Co. of Texas v. Schilling* (Tex. Civ. App.) 64.

In an action by a servant for injuries from defective machinery, a charge that defendant was bound to use ordinary care to have machine in actually safe condition *held* not necessary.—*Lancaster Cotton Oil Co. v. White* (Tex. Civ. App.) 339.

In an action by a servant for injuries from defective machinery, a requested charge *held* not misleading.—*Lancaster Cotton Oil Co. v. White* (Tex. Civ. App.) 339.

An instruction on assumption of risk in an action by an employé against a railroad for injuries *held* not to confuse assumption of risk and contributory negligence.—*Gulf, C. & S. F. Ry. Co. v. Wilder* (Tex. Civ. App.) 546.

An instruction on assumption of risk, in an action by an employé against a railroad for injuries, *held* correct.—*Gulf, C. & S. F. Ry. Co. v. Wilder* (Tex. Civ. App.) 546.

Whether a section foreman, injured in a collision of a freight train with a hand car on which he was riding, was guilty of contributory negligence, *held* to be for the jury.—*Texas Cent. R. Co. v. Bender* (Tex. Civ. App.) 561.

In an action for the death of a railway employé, an instruction that defendant had the burden of proving contributory negligence *held* erroneous.—*Gulf, C. & S. F. Ry. Co. v. Howard* (Tex. Civ. App.) 803.

§ 10. Liabilities for injuries to third persons.

Master, not resigning full control of servants, may be liable for injuries to third persons resulting from negligence of such servants.—*Garven v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 193.

MEASURE OF DAMAGES.

See "Damages," § 2.

MEASURES.

See "Weights and Measures."

MECHANICS' LIENS.**§ 1. Operation and effect.**

A contract for materials to erect a building for the purchaser of the land, under which a mechanic's lien was claimed, cannot relate back, so as to impair a purchase-money mortgage.—*Wilson v. Lubke* (Mo. Sup.) 602.

§ 2. Enforcement.

Under Rev. St. 1899, § 650, where the court held that a mechanic's lien was prior to a mortgage as to certain houses erected, but subsequent to the mortgage as to the land, it was not authorized to charge the amount of the lien as an incumbrance on the buildings, with a right to the owner of the land to redeem.—*Wilson v. Lubke* (Mo. Sup.) 602.

Attachment to enforce a mechanic's lien cannot be issued by the clerk without an order of court.—*De Sota Lumber Co. v. Loeb* (Tenn.) 1043.

Under Code 1858, § 3543, a proceeding to secure an attachment to enforce a mechanic's lien cannot be commenced by affidavit.—*De Sota Lumber Co. v. Loeb* (Tenn.) 1043.

MEETINGS.

School district meetings, see "Schools and School Districts," § 1.

MENTAL SUFFERING.

As element of damages for delay in delivery of message, see "Telegraphs and Telephones," § 1.

MERGER.

Of cause of action in judgment, see "Judgment," § 5.

MINORS.

See "Infants."

MISREPRESENTATION.

See "Fraud."

By insured, see "Insurance," § 5.
Effect on validity of mortgage, see "Mortgages," § 1.

MISTAKE.

Recovery of money paid under mistake of law, see "Payment," § 1.

MODIFICATION.

Of contract, see "Contracts," § 3.
Of judgment or order on appeal, see "Appeal and Error," § 18.

MONEY RECEIVED.

Recovery of payment in general, see "Payment," § 1.

Recovery of price paid for goods, see "Sales," § 5.

MONOPOLIES.

Grants of privileges or immunities, see "Constitutional Law," § 2.

§ 1. Trusts and other combinations in restraint of trade.

Under Sees. Acts 1897, p. 208, prohibiting trusts, it is not unlawful for one manufacturing corporation to purchase for cash and in good faith the business of another similar corporation.—*State ex inf. Crow v. Continental Tobacco Co.* (Mo. Sup.) 737.

Const. art. 10, § 5, forbidding the acquisition of railroad properties by parallel and competing lines, does not apply to street railways.—*Scott v. Farmers' & Merchants' Nat. Bank* (Tex. Sup.) 7.

MORTALITY TABLES.

As evidence in action for death, see "Death," § 1.

MORTGAGES.

By or to building and loan association, see "Building and Loan Associations."
Of personal property, see "Chattel Mortgages."

§ 1. Requisites and validity.

False representation by the beneficiary in a deed of trust *held* not to render the deed void.—*Feller v. McKillip* (Mo. App.) 379.

§ 2. Construction and operation.

A release of lien filed by an original vendor, intended only to release from liability his immediate grantee, and not subsequent grantees, *held* not a waiver of his lien in favor of a second lien holder with notice.—*Maas v. Taquard's Ex'rs* (Tex. Civ. App.) 350.

§ 3. Rights and liabilities of parties.

Plaintiff *held* entitled to maintain action to recover value of land conveyed by him in trust and fraudulently sold by trustee to innocent purchaser.—*Espey v. Boone* (Tex. Civ. App.) 570.

A petition in an action to recover value of land fraudulently sold by trustee *held* to sufficiently describe the land.—*Espey v. Boone* (Tex. Civ. App.) 570.

§ 4. Transfer of property mortgaged or of equity of redemption.

Where a grantee assumes a mortgage indebtedness and interest, legal interest is contemplated.—*Gardner v. Continental Ins. Co.* (Ky.) 283.

A purchase of a portion of the mortgage at foreclosure sale by the attorney of the mortgagee, for the mortgagor, *held* a release of that amount, inuring to the benefit of a grantee of a portion of the premises from the mortgagor.—*Cohn v. Souders* (Mo. Sup.) 413.

Where a bill was filed by a grantee of the mortgagor to enjoin a sale of a portion of the premises covered by the mortgage, a sale of the undisputed portion pending a preliminary injunction was an election to first resort thereto, eliminating the question whether the mortgagee was bound to do so.—*Cohn v. Souders* (Mo. Sup.) 413.

§ 5. Payment or performance of condition, release, and satisfaction.

Payment of loss under fire policy to mortgagee extinguished the mortgage to the extent thereof, precluding a recovery thereon by the company to which mortgage was assigned.—*Gardner v. Continental Ins. Co.* (Ky.) 283.

§ 6. Foreclosure by exercise of power of sale.

Power of sale in trust deed *held* revoked by death of grantor, and sale thereunder void.

though deed provided that death of grantor should not affect the same.—*Texas Loan Agency v. Dingee* (Tex. Civ. App.) 866.

§ 7. Foreclosure by action.

Mere inadequacy of price, in the absence of other considerations, is no ground for setting aside a mortgage sale.—*McDonnell v. DeSoto Sav. & Bldg. Ass'n* (Mo. Sup.) 438.

Courts of equity, in the foreclosure of mortgages, have power to issue writs to put the purchasers into possession of the property sold.—*State ex rel. Wyandotte Lodge, No. 35, I. O. O. F., v. Evans* (Mo. Sup.) 914.

Action to foreclose mortgage *held* to be in equity, and not at law.—*State ex rel. Wyandotte Lodge, No. 35, I. O. O. F., v. Evans* (Mo. Sup.) 914.

A decree in a suit in equity to foreclose a mortgage *held* at most erroneous, and not void.—*State ex rel. Wyandotte Lodge, No. 35, I. O. O. F., v. Evans* (Mo. Sup.) 914.

Sale of property under decree in suit in equity to foreclose mortgage *held* to have been confirmed by the court.—*State ex rel. Wyandotte Lodge, No. 35, I. O. O. F., v. Evans* (Mo. Sup.) 914.

Foreclosure in another state under a statute prohibiting deficiency judgments *held* a bar to a subsequent action on the mortgage note.—*Gates v. Tebbetts* (Mo. App.) 169.

On foreclosure of trust deed, lien of a second mortgagee *held* transferred to the surplus proceeds arising from the sale.—*Jackson v. Coffman* (Tenn.) 718.

MOTIONS.

Arrest of judgment in criminal prosecutions, see "Criminal Law," § 24.

Change of venue in civil actions, see "Venue," § 2.

Continuance in civil actions, see "Continuance."

New trial in civil actions, see "New Trial," § 2.

New trial in criminal prosecutions, see "Criminal Law," § 24.

Presentation of objections for review, see "Appeal and Error," § 4.

Striking out evidence, see "Criminal Law," § 16.

MULTIFARIOUSNESS.

In pleadings in equity, see "Equity," § 1.

MUNICIPAL CORPORATIONS.

See "Counties"; "Schools and School Districts," § 1.

Levy of license tax by, see "Licenses," § 1.

Mandamus, see "Mandamus," § 2.

Ordinances as evidence, see "Evidence," § 7.

Ordinances relating to intoxicating liquors, see "Intoxicating Liquors."

Regulation of railroads, see "Railroads," § 4.

Regulation of street railroads, see "Street Railroads," § 2.

Special laws relating to, see "Statutes," § 1.

Street railroads, see "Street Railroads."

§ 1. Creation, alteration, existence, and dissolution.

The various special acts relating to the city of Covington were repealed by the general act of October, 1892.—*McInerney v. Huefeld* (Ky.) 237.

That an examination of the books of a city would produce inconvenience, and that the transactions recorded are numerous, involving large sums of money, is not a sufficient reason for denying a citizen the right to examine such books.—*State v. Williams* (Tenn.) 948.

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Taxpaying citizen of a municipality *held* entitled to examination of the books of the municipality.—*State v. Williams* (Tenn.) 948.

That a person making application for examination of the books of a city is politically hostile to the city administration is no excuse for refusing to permit such examination.—*State v. Williams* (Tenn.) 948.

The right of a grand jury to examine the books of a city is not exclusive, so as to prevent such an examination by a private individual.—*State v. Williams* (Tenn.) 948.

Provision of a city charter as to the examination of the books of the city *held* not to preclude an examination by persons not specifically designated.—*State v. Williams* (Tenn.) 948.

§ 2. Governmental powers and functions in general.

City ordinance appointing certain persons to superintend construction of a sewer system *held* an invalid delegation of powers delegated to the council by Ky. St. 1899, § 3058, giving the city council authority to establish sewers.—*Lowery v. City of Lexington* (Ky.) 202.

There is nothing in the various special acts relating to the city of Covington to indicate an intention to separate the city from the county of Kenton for governmental purposes.—*McInerney v. Huefeld* (Ky.) 237.

§ 3. Proceedings of council or other governing body.

Where the invalid provisions of an ordinance can be eliminated, it will not be invalid in toto.—*McNulty v. Toopf* (Ky.) 258.

An ordinance *held* not repugnant to Ky. St. § 3059, as embracing more than one subject in its title.—*McNulty v. Toopf* (Ky.) 258.

§ 4. Officers, agents, and employés.

Under the Constitution and its charter, the city of Lexington has no power to create any office or officers other than those provided for therein.—*Lowery v. City of Lexington* (Ky.) 202.

In view of implications arising from Const. art. 11, §§ 4, 5, 7, 10, and article 7, § 3, Galveston city charter, approved April 13, 1901, *held* not to contravene Const. art. 6, § 3, in authorizing the Governor to appoint a majority of the members of the city's governing body.—*Brown v. City of Galveston* (Tex. Sup.) 488.

Under Const. arts. 1, 2, and article 3, § 1, city *held* to have no inherent right to local self-government, precluding Legislature from making its officers gubernatorial appointees.—*Brown v. City of Galveston* (Tex. Sup.) 488.

§ 5. Public improvements.

A strip of land appropriated by the railroad as a right of way, and which is a "lot" within the meaning of the statute governing street improvements, is liable to an assessment for a street improvement.—*Figg v. Louisville & N. R. Co.* (Ky.) 269; *City of Louisville v. Figg, Id.*

Kansas City Charter, art. 9, § 23, prohibiting objections to tax bills not filed with the board of public works 60 days after the issuance thereof, *held* to apply to bills which were irregular and also absolutely void.—*State ex rel. Curtice v. Smith* (Mo. Sup.) 625.

Grading of the street by property owner under authority of the board of public works *held* subject to such changes as the board of public works might subsequently require.—*South Highland Land & Improvement Co. v. Kansas City* (Mo. App.) 383.

§ 6. Police power and regulations.

An ordinance declaring that the entrance or exit of any person from any saloon during certain hours should be prima facie evidence of its violation *held* invalid.—*McNulty v. Toopf* (Ky.) 258.

An ordinance prohibiting the erection within certain limits of buildings not constructed of fireproof and incombustible materials *held* not uncertain and obscure.—*Chimine v. Baker* (Tex. Civ. App.) 330.

A municipal ordinance, expressly authorized by the charter, declaring that buildings of combustible material shall not be constructed within certain limits, cannot be attacked as unreasonable.—*Chimine v. Baker* (Tex. Civ. App.) 330.

A municipal ordinance prohibiting buildings not made of fireproof and incombustible materials within certain limits does not prevent buildings of such materials as will resist ordinary fires.—*Chimine v. Baker* (Tex. Civ. App.) 330.

An adjacent property owner *held* entitled to restrain the construction of a building of combustible material, in violation of an ordinance.—*Chimine v. Baker* (Tex. Civ. App.) 330.

In a suit to restrain the erection of a building of combustible material within established fire limits, certain evidence *held* properly excluded.—*Chimine v. Baker* (Tex. Civ. App.) 330.

The erection of other buildings of combustible material, in violation of an ordinance, cannot preclude an adjacent owner from restraining the construction of such building contiguous to his property.—*Chimine v. Baker* (Tex. Civ. App.) 330.

In a suit to restrain the erection of a building of combustible materials, allegations in the answer *held* properly stricken out.—*Chimine v. Baker* (Tex. Civ. App.) 330.

§ 7. Use and regulation of public places, property, and works.

Injunction *held* proper remedy to prevent the casting of a cloud upon the title to an excessive franchise.—*People's Electric Light & Power Co. v. Capital Gas & Electric Light Co.* (Ky.) 280.

Municipal franchise, purporting to convey to a gas company the exclusive right to furnish gas and "other illuminating light" to a city, *held* void as to other illuminating lights.—*People's Electric Light & Power Co. v. Capital Gas & Electric Light Co.* (Ky.) 235.

Deed from a city to a gas company *held* not to give the company an exclusive right to furnish electric light.—*People's Electric Light & Power Co. v. Capital Gas & Electric Light Co.* (Ky.) 280.

In an action by electric company, claiming an exclusive franchise to furnish light, to restrain another company from claiming a similar franchise, a plea denying the exclusiveness of plaintiff's franchise *held* to state a good defense.—*People's Electric Light & Power Co. v. Capital Gas & Electric Light Co.* (Ky.) 280.

Under Const. § 164, a city cannot enlarge a franchise already granted, except by award to the highest and best bidder.—*People's Electric Light & Power Co. v. Capital Gas & Electric Light Co.* (Ky.) 280.

Contracts between a city and a gas company, made after a deed by the city, *held* not to give the gas company exclusive right to furnish electric light.—*People's Electric Light & Power Co. v. Capital Gas & Electric Light Co.* (Ky.) 280.

A certain municipal ordinance relating to closing a street *held* not void as a delegation of power by the municipal assembly.—*Haller v. City of St. Louis* (Mo. Sup.) 613.

A city *held* entitled to require the removal of a wall erected in a street by a licensee without rendering compensation therefor.—*South Highland Land & Improvement Co. v. Kansas City* (Mo. App.) 383.

Under Rev. Ord. Kansas City 1898, art. 6, § 10, the board of public works *held* authorized to revoke a license for the grading of a street by the erection of a wall, when the removal thereof became necessary for the uses of the public.—*South Highland Land & Improvement Co. v. Kansas City* (Mo. App.) 383.

§ 8. Torts.

A city is not liable for permitting a nuisance to exist on private property.—Board of Councilmen of City of Frankfort v. Commonwealth (Ky.) 217.

Facts *held* to render question of notice to city of defective sidewalk one for the jury.—*City of Madisonville v. Pemberton's Adm'r* (Ky.) 229.

The use of a sidewalk known to be defective is not contributory negligence as a matter of law; the question being for the jury.—*City of Madisonville v. Pemberton's Adm'r* (Ky.) 229.

Actual notice of a defective sidewalk is not necessary to charge a city, notice being presumable from the duration of the defect.—*City of Madisonville v. Pemberton's Adm'r* (Ky.) 229.

City *held* to have taken charge of street, so as to render it liable for defect in the sidewalk.—*City of Madisonville v. Pemberton's Adm'r* (Ky.) 229.

In action against city for injuries owing to plaintiff having slipped on a sidewalk and fallen over a gate, *held*, that the gate had no connection with the injury.—*City of Carlisle v. Secrest* (Ky.) 268.

In action against city for injuries from defect in sidewalk, certain evidence *held* properly excluded as not tending to show anything to put the municipality on notice.—*City of Carlisle v. Secrest* (Ky.) 268.

The fact that a pedestrian knows generally of the existence of a defect in a sidewalk does not make his use thereof negligence per se.—*City of Carlisle v. Secrest* (Ky.) 268.

In action against city for injuries from defective sidewalk, questions whether defendant had failed to keep sidewalk in reasonably safe condition and whether plaintiff was guilty of contributory negligence *held* to be for the jury.—*City of Carlisle v. Secrest* (Ky.) 268.

The fact that a child was playing on a sidewalk when injured *held* not to exonerate the city from liability for the accident.—*Straub v. City of St. Louis* (Mo. Sup.) 100.

The existence of an obstruction on a sidewalk for 10 days *held* to raise a presumption that the city had notice thereof.—*Straub v. City of St. Louis* (Mo. Sup.) 100.

In an action for personal injuries caused by defective sidewalk, instruction *held* not erroneous because stating the defective condition in more general terms than those employed by the pleading.—*Hemphill v. Kansas City* (Mo. App.) 179.

A city is charged from the beginning with notice of the negligent construction of a sidewalk, and is under a continuing duty to repair it.—*Brake v. Kansas City* (Mo. App.) 191.

Whether the defect in a sidewalk, consisting of a loose board, is so obvious as to impart notice to the city, *held* a question for the jury.—*Squiers v. Kansas City* (Mo. App.) 194.

In an action for injuries caused by a defective sidewalk, whether plaintiff's failure to look in the direction he was walking constituted negligence is for the jury.—*City of Palestine v. Addington* (Tex. Civ. App.) 322.

§ 9. Fiscal management, public debt, securities, and taxation.

So long as municipal governments make levies of taxes within the limits prescribed by the Constitution, equity will not inquire into the necessity of the levy at the suit of an individual.

ual taxpayer.—*McInerney v. Huefeld* (Ky.) 327.

Where county bonds contained no recitals as to authority to issue them, or performance of requisite preliminaries, the county was not estopped to plead lack of authority, or noncompliance with conditions.—*Green County v. Shortell* (Ky.) 251.

Purchaser of bonds issued by a county and subscription to railroad stock under the power granted by its charter (1 Sess. Acts 1869, p. 463, c. 1578) *held* charged with notice of the conditions upon which such bonds were issued.—*Green County v. Shortell* (Ky.) 251.

Payment on issue of bonds by a county for some years does not estop it to show their invalidity.—*Green County v. Shortell* (Ky.) 251.

Under Ky. St. 1899, § 3392, a city of the third class may by ordinance inflict a penalty for the nonpayment of municipal taxes to the extent of 10 per cent. on the amount due.—*Owensboro Waterworks Co. v. City of Owensboro* (Ky.) 268.

Under Const. art. 10, § 12, one suing a school district on bonds issued by it has the burden of proving that the bond issue was authorized and did not exceed the debt limit.—*Thornburgh v. School Dist. No. 3* (Mo. Sup.) 81.

The fact that a school district used the money obtained from the sale of invalid bonds issued by it in the construction of a school building did not render the bonds enforceable at law.—*Thornburgh v. School Dist. No. 3* (Mo. Sup.) 81.

Recitals in school district bonds issued in violation of statutory provisions cannot give rise to an estoppel in favor of bona fide purchasers before maturity.—*Thornburgh v. School Dist. No. 3* (Mo. Sup.) 81.

Where a school district issues bonds in excess of the debt limit, the court cannot reduce them to an amount within the debt limit and give judgment thereon for the reduced amount.—*Thornburgh v. School Dist. No. 3* (Mo. Sup.) 81.

MUTUAL BENEFIT INSURANCE.

See "Insurance," § 13.

NAVIGABLE WATERS.

See "Waters and Water Courses."

NEGLIGENCE.

Causing death, see "Death," § 1.
Condition or use of railroads, see "Railroads," §§ 4-10; "Street Railroads," § 2.

By particular classes of parties.

See "Carriers," §§ 2, 4; "Municipal Corporations," § 8.

Employers, see "Master and Servant," §§ 1-9.
Railroad companies, see "Railroads," §§ 4-10.
Street railroad companies, see "Street Railroads," § 2.

Telegraph or telephone companies, see "Telegraphs and Telephones," § 1.

Contributory negligence.

Of passenger, see "Carriers," § 5.
Of person injured by operation of railroad, see "Railroads," § 7.
Of person injured by operation of street railroad, see "Street Railroads," § 2.
Of servant, see "Master and Servant," §§ 6, 9.

§ 1. Acts or omissions constituting negligence.

Where plaintiff entered defendant's field in the daytime, and was shot by a spring gun set to protect melon patch, defendant was liable

for damages.—*Grant v. Hass* (Tex. Civ. App.) 342.

Pen. Code 1895, arts. 675, 790, relating to homicide for theft at night, *held* no defense in an action for injuries caused by the discharge of a spring gun.—*Grant v. Hass* (Tex. Civ. App.) 342.

The fact that a person who set a spring gun in his field believed that no one but a thief would go before it *held* no defense to an action for injuries caused by the discharge of the gun.—*Grant v. Hass* (Tex. Civ. App.) 342.

§ 2. Contributory negligence.

In determining whether a 16 year old boy, killed by street car, was guilty of contributory negligence, his conduct is to be measured by the standard of a boy of his age.—*Campbell v. St. Louis & Suburban Ry. Co.* (Mo. Sup.) 86.

In an action for injuries suffered in being thrown from a train in attempting to board it, an instruction *held* to properly define contributory negligence.—*International & G. N. R. Co. v. Anchonda* (Tex. Civ. App.) 557.

§ 3. Actions.

Under a petition alleging negligence in the original hanging of the sign which fell, recovery may not be had on proof that it afterwards became insecure, and was allowed to so remain.—*Haines v. Pearson* (Mo. App.) 194.

NEGOTIABLE INSTRUMENTS.

See "Bills and Notes."

NEWLY-DISCOVERED EVIDENCE.

Ground for new trial in civil actions, see "New Trial," § 1.

Ground for new trial in criminal prosecution, see "Criminal Law," § 24.

NEW TRIAL.

In criminal prosecutions, see "Criminal Law," § 24.

Necessity of motion for purpose of review, see "Appeal and Error," § 6.

Presumptions on appeal as to motion for, see "Criminal Law," § 27.

Remand by appellate court for new trial, see "Appeal and Error," § 18.

§ 1. Grounds.

That plaintiff's attorney gave interviews to reporters *held* not tending to prove, so as to be ground for new trial, that he procured his statements as to a former trial to be published and distributed that they might be read by the jurors, to prejudice them against defendant.—*Copeland v. Wabash R. Co.* (Mo. Sup.) 106.

The reading by jurors, pending the trial, of an article merely stating a few facts connected with the accident in which plaintiff was injured, and how the jurors stood on a former trial, *held* not ground for new trial.—*Copeland v. Wabash R. Co.* (Mo. Sup.) 106.

Showing of diligence on motion for a new trial on the ground of newly discovered witness *held* not to entitle moving party to a new trial as a matter of law.—*Gulf, C. & S. F. Ry. Co. v. Blanchard* (Tex. Sup.) 6.

Under the facts, *held*, the trial court's action in refusing a new trial for newly discovered evidence would not be disturbed.—*Duckworth v. Ft. Worth & R. G. Ry. Co.* (Tex. Civ. App.) 913.

§ 2. Proceedings to procure new trial.

In an action to set aside a conveyance as in fraud of creditors, a decree *held* a final judgment, and motion for new trial *held* properly made after its rendition.—*Schneider v. Patton* (Mo. Sup.) 155.

An application for a new trial for newly discovered evidence *held* insufficient.—*King v. Hill* (Tex. Civ. App.) 550.

NEXT OF KIN.

See "Descent and Distribution."

NOMINATION.

For office, see "Elections," § 1.

NOTES.

Promissory notes, see "Bills and Notes."

NOTICE.

To municipal corporations, see "Municipal Corporations," § 8.

Of particular facts, acts, or proceedings.

See "Chattel Mortgages," § 3.

Defects in sidewalks, see "Municipal Corporations," § 8.

Enforcement of logger's lien, see "Logs and Logging."

Highway proceedings, see "Highways," § 1.

Local option election, see "Intoxicating Liquors," § 2.

Meeting of school officers, see "Schools and School Districts," § 1.

Motion to dismiss appeal, see "Appeal and Error," § 11.

NUISANCE.

Harmless error in action for, see "Appeal and Error," § 17.

Liability of city for permitting, see "Municipal Corporations," § 8.

§ 1. Private nuisances.

In an action for a nuisance in polluting a stream and causing a stench on plaintiff's premises, defendant *held* entitled to show that the stench arose from other causes.—*Shain Packing Co. v. Burrus* (Tex. Civ. App.) 838.

On the erection of live stock pens, constituting a nuisance of a permanent nature, the measure of damages is the depreciation in value of plaintiff's premises caused thereby.—*Missouri, K. & T. Ry. Co. of Texas v. McGehee* (Tex. Civ. App.) 841.

§ 2. Public nuisances.

Ky. St. 1899, § 1289, *held* to authorize a court of equity to enjoin one from permitting a prize fight on his premises, on the ground that it will constitute a public nuisance, though it cannot enjoin the principals in the fight.—*Commonwealth v. McGovern* (Ky.) 261.

OBJECTIONS.

Necessity for purpose of review, see "Appeal and Error," § 4; "Criminal Law," §§ 25-27.

To reception of evidence, see "Trial," § 1.

OBSTRUCTIONS.

Of highways, see "Highways," § 2.

OFFICERS.

Embezzlement, see "Embezzlement."

Mandamus, see "Mandamus," § 2.

Quo warranto, see "Quo Warranto."

Particular classes of officers.

See "Clerks of Courts"; "Judges"; "Justices of the Peace"; "Receivers."

Assessors of taxes, see "Taxation," § 8.
Corporate officers, see "Corporations," §§ 2, 3.
Drainage commissioners, see "Drains," § 1.
Jury commissioners, see "Jury," § 2.
Municipal officers, see "Municipal Corporations," § 4.
School officers, see "Schools and School Districts," § 1.

OPINION EVIDENCE.

In civil actions, see "Evidence," § 9.

In criminal prosecutions, see "Criminal Law," § 12.

OPINIONS.

Of courts, see "Courts," § 2.

ORDERS.

Review of appealable orders, see "Appeal and Error."

ORDINANCES.

Municipal ordinances, see "Municipal Corporations," §§ 8, 6.

PARDON.

A pardon restoring the convict to rights of citizenship may be granted after the expiration of his term of service.—*Locklin v. State* (Tex. Cr. App.) 305.

A pardon reciting that it is granted because the convict's testimony is needed in a criminal case is not invalid.—*Locklin v. State* (Tex. Cr. App.) 305.

The validity of a pardon restoring a convict to rights of citizenship is not affected by a recital of the grant of a previous pardon.—*Locklin v. State* (Tex. Cr. App.) 305.

PARENT AND CHILD.

See "Adoption"; "Bastards"; "Guardian and Ward"; "Infants."

Declarations as to birth or pedigree, see "Evidence," § 5.

In an action against a carrier to recover expense incurred by reason of his child's sickness from exposure, instructions given *held* not conflicting.—*St. Louis S. W. Ry. Co. of Texas v. Campbell* (Tex. Civ. App.) 564.

PAROL EVIDENCE.

In civil actions, see "Evidence," § 8.

In criminal prosecutions, see "Criminal Law," § 11.

PARTIES.

Death ground for abatement, see "Abatement and Revival," § 3.

Entitled to allege error, see "Appeal and Error," § 14.

Interpleading, see "Interpleader."

Persons against whom proceedings to abate nuisance may be brought, see "Nuisance," § 2.

Persons concluded by judgment, see "Judgment," § 6.

Persons entitled to claim property by prescription, see "Adverse Possession," § 1.

Persons entitled to enforce liabilities of corporate officers, see "Corporations," § 2.

Persons entitled to question corporate powers, see "Corporations," § 3.

Persons liable for libel, see "Libel and Slander," § 3.

Persons liable for penalties for violation of usury laws, see "Usury," § 2.

Persons to whom bar by limitations is available, see "Limitation of Actions," § 2.

Persons to whom payment of judgment may be made, see "Judgment," § 8.
Persons who may be compelled to interplead, see "Interpleader," § 1.

Persons who may contest will, see "Wills," § 3.

To fraudulent conveyances, see "Fraudulent Conveyances," § 2.

To usurious contract, see "Usury," § 1.

Transfer of interest ground for abatement, see "Abatement and Revival," § 2.

In actions by or against particular classes of parties.

See "Executors and Administrators," § 6; "Husband and Wife," § 3.

Connecting carriers, see "Carriers," § 2.

In particular actions or proceedings.

See "Injunction," § 2; "Mandamus," § 3.

For construction of will, see "Wills," § 4.

On note, see "Bills and Notes," § 2.

Suits to set aside fraudulent conveyances, see "Fraudulent Conveyances," § 3.

§ 1. Plaintiffs.

In an action for damages to a horse shipped over defendant's line and for overcharges, judgment for plaintiff cannot be sustained where the horse in question and the overcharges were the property of another when suit was brought.—*Gulf, C. & S. F. R. Co. v. Bartlett* (Tex. Civ. App.) 56.

PARTITION.

§ 1. Actions for partition.

Where defendant proved adverse possession in an action for partition, the court in its discretion *held* entitled to retain the cause on its docket and allow plaintiff to establish her title by an action at law.—*Eagle v. Franklin* (Ark.) 1093.

An answer to a partition suit, alleging that defendant held possession of the land adversely to plaintiff, *held* to state a sufficient defense.—*Eagle v. Franklin* (Ark.) 1093.

A widow, electing to take under the statute, *held* entitled to maintain a suit for partition without waiting for five years from the date of the probate of her husband's will.—*Spratt v. Lawson* (Mo. Sup.) 642.

In trespass to try title and for partition, allegations in complaint *held* sufficient to authorize evidence that a certain defendant was liable to plaintiff for rent for the land in controversy.—*Ford v. Boone* (Tex. Civ. App.) 353.

PARTNERSHIP.

§ 1. Dissolution, settlement, and accounting.

A petition for the settlement of partnership accounts *held* to show the running of limitations from the time of a certain sale.—*Bluntzer v. Hirsch* (Tex. Civ. App.) 326.

PASSENGERS.

See "Carriers," §§ 4-7.

PAYMENT.

See "Accord and Satisfaction."

Of particular classes of obligations or liabilities.

See "Judgment," § 8; "Mortgages," § 5.

Price of land sold, see "Vendor and Purchaser."

§ 1. Recovery of payments.

Money paid to trustees of city public library from school taxes, pursuant to Ky. St. 1899, § 3210, before the statute was declared unconstitutional, may be recovered back by the board of

education of such city.—Board of Trustees of Public Library v. Board of Education (Ky.) 225.

PEDDLERS.

See "Hawkers and Peddlers."

PEDIGREE.

Declarations as evidence, see "Evidence," § 5.

PENALTIES.

Nonpayment of municipal tax, see "Municipal Corporations," § 9.

Violations of liquor laws, see "Intoxicating Liquors," § 6.

Violations of regulations relating to railroads, see "Railroads," § 4.

Violations of usury laws, see "Usury," § 2.

PENDENCY OF ACTION.

Effect as to property involved, see "Lis Pendens."

PEREMPTORY CHALLENGES.

To jurors, see "Jury," § 3.

PERJURY.

Character of witness, see "Witnesses," § 3.
Confessions as evidence, see "Criminal Law," § 14.

Continuance, see "Criminal Law," § 15.

Election between counts in indictment for, see "Indictment and Information," § 3.

Hearsay, see "Criminal Law," § 9.

Instructions, see "Criminal Law," § 21.

Parol evidence, see "Criminal Law," § 11.

Repugnancy in indictment for, see "Indictment and Information," § 2.

Service of list of jurors on defendant, see "Criminal Law," § 17.

§ 1. Offenses and responsibility therefor.

Witness falsely denying before grand jury knowledge of a fact material to the investigation *held* not entitled to defend charge of perjury on ground that the evidence would have been merely cumulative.—*State v. Faulkner* (Mo. Sup.) 116.

In a prosecution for perjury committed before a grand jury, fact that testimony assigned as false was given after the jury had instructed indictments to be drawn in the charge relative to which defendant was testifying *held* not to affect the materiality of such testimony.—*State v. Faulkner* (Mo. Sup.) 116.

Perjury may be predicated on testimony which, if true, would have been self-criminating.—*State v. Faulkner* (Mo. Sup.) 116.

Certain testimony of a witness before a grand jury investigating a charge of bribery *held* perjury.—*State v. Faulkner* (Mo. Sup.) 116.

Testimony before grand jury *held* material, so as to be a basis of perjury, though the jury had already determined to indict.—*State v. Lehman* (Mo. Sup.) 139.

The fact that a witness before a grand jury is compelled to testify concerning matters incriminating himself does not excuse him for testifying falsely as to such matters.—*State v. Lehman* (Mo. Sup.) 139.

The testimony on which a prosecution for perjury was predicated *held* material.—*McLeod v. State* (Tex. Cr. App.) 522.

§ 2. Prosecution and punishment.

In a prosecution for perjury, certain evidence *held* not to constitute a substantial variance

from the indictment.—*State v. Faulkner* (Mo. Sup.) 116.

In a prosecution for perjury committed before grand jury in denying the knowledge relative to existence of a bribe, fact of the bribery *held* material.—*State v. Faulkner* (Mo. Sup.) 116.

In a prosecution for perjury committed before a grand jury, *held* error to admit evidence establishing an agreement between the offerer of the bribe and member of the city council to bribe certain other members of the council.—*State v. Faulkner* (Mo. Sup.) 116.

Fact of the existence of a combination in legislative body to control legislation *held* not sufficient to establish the combination for corrupt purposes, so as to render members thereof responsible for, or show knowledge of, a corrupt bargain.—*State v. Faulkner* (Mo. Sup.) 116.

A prosecution for perjury cannot be based on the testimony of the accusing witness, unless corroborated.—*State v. Faulkner* (Mo. Sup.) 116.

In a prosecution for perjury, materiality of the evidence assigned as false *held* a question for the court.—*State v. Faulkner* (Mo. Sup.) 116.

In a prosecution for perjury, an instruction as to defendant's source of knowledge *held* such that it should have been given, subject to certain modification.—*State v. Faulkner* (Mo. Sup.) 116.

In a prosecution for perjury, an instruction *held* not cured by another instruction to the effect that what defendant had read in the newspaper would not amount to knowledge.—*State v. Faulkner* (Mo. Sup.) 116.

In a prosecution for perjury committed before a grand jury investigating a charge of bribery, an instruction that defendant should be acquitted, unless the offerer of the bribe was employed by the directors of an interested company, *held* properly refused.—*State v. Faulkner* (Mo. Sup.) 116.

In a prosecution for perjury, predicated on defendant's testimony in a civil suit that business in a certain saloon had been resumed in his name without his knowledge, defendant's affidavit that he had lost the license *held* admissible.—*McLeod v. State* (Tex. Cr. App.) 522.

Facts shown in a prosecution for perjury *held* to render certain testimony admissible.—*McLeod v. State* (Tex. Cr. App.) 522.

In a prosecution for perjury, predicated on testimony given at a civil trial, certain evidence *held* admissible to show defendant's connection with the civil suit.—*McLeod v. State* (Tex. Cr. App.) 522.

In a prosecution for perjury, predicated on defendant's testimony in a civil suit that business in a certain saloon had been resumed in his name without his knowledge, evidence of prior sales, etc., could only be considered as tending to show that defendant had knowledge of the resumption of business.—*McLeod v. State* (Tex. Cr. App.) 522.

In a prosecution for perjury, predicated on defendant's testimony in a civil suit that business in a certain saloon had been resumed in his name without his knowledge, *held* not necessary to show that the parties running the saloon were defendant's agents, or that they acted for defendant's agents.—*McLeod v. State* (Tex. Cr. App.) 522.

PERPETUITIES.

Under the law of New Hampshire a provision in a will of a testator *held* not to violate the rule against perpetuities.—*Hussey v. Sargent* (Ky.) 211.

PERSONAL INJURIES.

See "Negligence."

Damages for, see "Damages," §§ 3, 4.

From construction or maintenance of railroad, see "Railroads," § 3.

Harmless error in actions for, see "Appeal and Error," § 17.

Presentation of objections to evidence in action for personal injuries for purpose of review, see "Appeal and Error," § 4.

Survival of action for, see "Abatement and Revival," § 3.

To employé, see "Master and Servant," §§ 1-9.

To passenger, see "Carriers," § 4.

To person on or near railroad tracks, see "Railroads," § 8.

To persons on railroad trains, see "Railroads," § 8.

To traveler on highway, see "Municipal Corporations," § 8.

To traveler on highway crossing railroad, see "Railroads," § 7.

Trespass to the person, see "Trespass," § 1.

PHYSICAL EXAMINATION.

Of applicant for insurance, see "Insurance," § 13.

Of person injured, see "Damages," § 4.

PHYSICIANS AND SURGEONS.

Disclosure of communications, see "Witnesses," § 1.

Sale of liquors on physician's prescription, see "Intoxicating Liquors," § 5.

PLACE.

Of record of chattel mortgages, see "Chattel Mortgages," § 2.

PLEA.

In civil actions, see "Pleading," § 2.

In criminal prosecutions, see "Criminal Law," § 5.

PLEADING.

Applicability of instructions to pleadings, see "Trial," § 7.

Conformity of decree in equity to pleadings, see "Equity," § 2.

Necessity of exceptions to pleadings for purpose of review, see "Appeal and Error," § 5.

Presentation of objections to pleadings for purpose of review, see "Appeal and Error," § 4.

Presumptions as to, on appeal or error, see "Appeal and Error," § 15.

Review of discretion of court as to allowance of amendments to, see "Appeal and Error," §§ 12-17.

Allegations as to particular facts, acts, or transactions

See "Damages," § 4; "Estoppel," § 1; "Judgment," § 9.

Diverse citizenship see "Removal of Causes," § 1.

In actions by or against particular classes of parties.

See "Brokers," § 3; "Carriers," §§ 2, 4; "Corporations," § 3; "Master and Servant," § 7; "Railroads," §§ 3, 6, 7.

Beneficial associations, see "Insurance," § 13.

Connecting carriers, see "Carriers," § 2.

Heirs, see "Descent and Distribution," § 1.

In particular actions or proceedings.

See "Injunction," § 2; "Interpleader," § 2; "Equity," § 1; "Fraud," § 2; "Mandamus," § 3; "Negligence," § 3; "Partition," § 1; "Quieting Title," § 2; "Trespass to Try Title," § 2.

For compensation of broker, see "Brokers," § 3.

For loss of goods by carrier, see "Carriers," § 2.

For penalty for violation of liquor laws, see "Intoxicating Liquors," § 6.

For personal injuries, see "Carriers," § 4; "Master and Servant," § 7; "Railroads," §§ 3, 6, 7.

For wrongful attachment, see "Attachment," § 5.

Indictment or criminal information or complaint, see "Indictment and Information."

On benefit certificate, see "Insurance," § 13.

On draft, see "Bills and Notes," § 2.

On insurance policy, see "Insurance," § 12.

Pleas in criminal prosecutions, see "Criminal Law," § 5.

To enforce vendor's lien, see "Vendor and Purchaser," § 1.

To recover interest, see "Interest," § 1.

§ 1. Form and allegations in general.
The petition in an action on a contract for the sale of goods "f. o. b. cars" held not fatally defective for failure to allege the meaning of the quoted phrase.—*D. R. Vivion Mfg. Co. v. Robertson* (Mo. Sup.) 644.

An allegation in an answer of an insurance company held to state a mere conclusion of the pleader.—*Dezell v. Fidelity & Casualty Co.* (Mo. Sup.) 1102.

An allegation in a petition to recover back money paid on drafts held a mere conclusion.—*S. Blaisdell, Jr., Co. v. Citizens' Nat. Bank* (Tex. Sup.) 292.

An averment in a petition for the settlement of the partnership account held to state a mere conclusion of the pleader.—*Bluntzer v. Hirsch* (Tex. Civ. App.) 326.

§ 2. Plea or answer, cross complaint, and affidavit of defense.

An answer held insufficient as a general or special denial.—*Dezell v. Fidelity & Casualty Co.* (Mo. Sup.) 1102.

Under Act March 27, 1901 (Laws 1901, p. 31, c. 27), in an action against a connecting railroad for injuries resulting from plaintiff's ejection from its train, defendant's plea of privilege held to comply with rule requiring plea in abatement to give plaintiff a better writ.—*Texas & P. Ry. Co. v. Lynch* (Tex. Sup.) 486.

In trespass to try title by one whose title depended on a judgment in favor of the state for delinquent taxes, an answer seeking to set aside the sale under the judgment held not made in time.—*Ryon v. Davis* (Tex. Civ. App.) 59.

Answer in an action of trespass to try title held to plead the statute of limitations jointly and severally.—*Henning v. Wren* (Tex. Civ. App.) 905.

§ 3. Demurrer or exception.

Where, in a suit on a written contract, the contract shows that no cause of action exists, the court, on demurrer to the petition, will consider the exhibit.—*Gardner v. Continental Ins. Co.* (Ky.) 283.

A general demurrer setting up the plea of limitations to an action should be sustained, if it appears from the facts alleged that the action is barred, though special exceptions to particular allegations may not be well taken.—*Bluntzer v. Hirsch* (Tex. Civ. App.) 326.

§ 4. Amended and supplemental pleadings and repleader.

On a bill to enjoin a mortgage, plaintiff held entitled, under Rev. St. 1899, §§ 603, 606, to file an amended petition setting up a new equity entitling him to the injunction, though it arose after the filing of the original bill.—*Cohn v. Souders* (Mo. Sup.) 413.

A petition, defective for want of signature, held subject to amendment, and, when amended at the succeeding term, defendants having ap-

peared and answered, the case was properly tried at that term.—*Vitkovitch v. Kleinecke* (Tex. Civ. App.) 544.

§ 5. Defects and objections, waiver, and aid in permitting an amended petition held waived by pleading over.—*Cohn v. Souders* (Mo. Sup.) 413.

In an action against a town for injuries caused by a defective sidewalk, an allegation held sufficient, after verdict, as an allegation of knowledge of the existence of the defect.—*McLean v. Kansas City* (Mo. App.) 173.

Where no exception is made to the form or style of a pleading, it is sufficient to be considered.—*Baker v. Hamblen* (Tex. Civ. App.) 362.

PLEDGES.

Pledge of pig iron held valid, though the property pledged was left in possession of the pledgor's lessee.—*Kentucky Furnace Co.'s Trustees v. City Nat. Bank* (Ky.) 848.

Refusal of a bank to deliver property pledged, except on payment of claims not secured by the pledge, held to constitute a conversion of the property.—*Memphis City Bank v. Smith* (Tenn.) 1065.

A tender of the amount of a debt secured by a pledge to redeem the property held waived, where the pledgee refused to deliver, except on payment of other debts than those secured.—*Memphis City Bank v. Smith* (Tenn.) 1065.

The maker and sureties of a note secured by pledge held not entitled to a credit equal to the depreciation in value of the pledge between dates of maturity of note and institution of suit.—*Adoue & Lobit v. Hutches* (Tex. Civ. App.) 41.

POLICE POWER.

Of municipality, see "Municipal Corporations," § 6.

POLICY.

Of insurance, see "Insurance."

POLITICAL RIGHTS.

Suffrage, see "Elections."

POSSESSION.

See "Adverse Possession."

Of pledged property, see "Pledges."

To sustain action for partition, see "Partition," § 1.

POWERS.

Of attorney, see "Principal and Agent."

Of sale in chattel mortgages, see "Chattel Mortgages," § 6.

Of sale in mortgage, see "Mortgages," § 6.

§ 1. Construction and execution.

Where a deed by a devisee of a life estate with power of disposition in fee discloses that it is for a valuable consideration, and undertakes to convey in fee, it will be ascribed to the power, and not to the life estate.—*Underwood v. Cave* (Mo. Sup.) 451.

PRACTICE.

Procedure of particular courts, see "Courts."

In particular civil actions or proceedings.

See "Divorce," § 2; "Ejectment"; "Interpleader"; "Mandamus," § 3; "Replevin"; "Trespass to Try Title," § 2.

Condemnation proceedings, see "Eminent Domain," § 2.

Particular proceedings in actions.

See "Abatement and Revival"; "Appearance"; "Continuance"; "Costs"; "Damages," § 4; "Depositions"; "Evidence"; "Execution"; "Judgment"; "Jury"; "Limitation of Actions"; "Parties"; "Pleading"; "Reference"; "Removal of Causes"; "Trial"; "Venue."

Verdict, see "Trial," § 11.

Particular remedies in or incident to actions.

See "Attachment"; "Discovery"; "Garnishment"; "Injunction"; "Receivers."

Procedure in criminal prosecutions.

See "Criminal Law."

For violation of liquor laws, see "Intoxicating Liquors," § 7.

Procedure in exercise of special jurisdictions.

In equity, see "Equity."

In justices' courts, see "Justices of the Peace," § 1.

Procedure on review.

See "Appeal and Error"; "Exceptions, Bill of"; "Justices of the Peace," § 2; "New Trial."

PREFERENCES.

By carriers, see "Carriers," § 1.

In fraudulent conveyance, see "Fraudulent Conveyances," § 1.

PREJUDICE.

Ground for reversal in civil actions, see "Appeal and Error," § 17.

PRELIMINARY EXAMINATION.

On criminal charge, see "Criminal Law," § 4.

PREMIUMS.

For insurance, see "Insurance," § 6.

On loans by building and loan associations, see "Building and Loan Associations."

PRESCRIPTION.

Acquisition of rights, see "Adverse Possession," § 1.

PRESENTMENT.

Of claims against estate of decedent, see "Executors and Administrators," § 4.

PRESUMPTIONS.

On appeal in criminal prosecutions, see "Criminal Law," § 27.

On appeal or error, see "Appeal and Error," § 15.

PRIMARY ELECTIONS.

See "Elections," § 1.

PRINCIPAL AND AGENT.

See "Attorney and Client"; "Brokers."

Admissions by agent, see "Evidence," § 4.

Adverse possession by agents, see "Adverse Possession," § 1.

Insurance agents, see "Insurance," § 2.

§ 1. The relation.

A power of attorney with reference to a sale of land is not entitled to record in a county in which none of the land is situated.—Wren v. Howland (Tex. Civ. App.) 894.

§ 2. Rights and liabilities as to third persons.

In replevin for a piano sold defendant by plaintiff's agent, who took a note payable to himself and appropriated the proceeds, evidence held to sustain a verdict for defendant.—D. H. Baldwin & Co. v. Tucker (Ky.) 196.

Borrowing of money to pay freight on goods held within the scope of authority of a wholesaler's retail agent, so that a mortgage on the goods to secure such loan is valid as against the manufacturer.—Rankin v. McFarlane Carriage Co. (Ky.) 221.

An agent employed by the grantor in a deed of trust to collect the rents, who continued to collect the rents after sale under the trust deed to a third person was not a trespasser as against the purchaser.—Embry v. Galbreath (Tenn.) 1016.

An agent employed by the grantor in a deed of trust to collect the rents held unaffected by actual notice that the purchaser claimed the land and would hold the agent for the rents collected.—Embry v. Galbreath (Tenn.) 1016.

An agent employed by the grantor in a deed of trust to collect the rents held unaffected by the registration of the deed conveying the land to a third person on a sale under the trust deed.—Embry v. Galbreath (Tenn.) 1016.

An agent employed by the grantor in trust deed to collect the rents held not liable to the purchaser under the deed for the rents collected and paid over to the grantor after the sale.—Embry v. Galbreath (Tenn.) 1016.

PRINCIPAL AND SURETY.

Liabilities of sureties on bonds for performance of duties of office or trust, see "Guardian and Ward," § 5.

§ 1. Discharge of surety.

Where the wife of the maker of a note executed a trust deed to indemnify a surety, such deed held not to continue as to a renewal note.—Westbrook v. Belton Nat. Bank (Tex. Civ. App.) 842.

PRIORITIES.

Between landlord's lien for rent and mortgage, see "Landlord and Tenant," § 2.

Of mechanics' liens, see "Mechanics' Liens," § 1.

Of mortgages, see "Chattel Mortgages," § 3; "Mortgages," § 2.

Of vendor's liens, see "Vendor and Purchaser," § 1.

PRIVATE NUISANCE.

See "Nuisance," § 1.

PRIVILEGE.

Effect on limitation, see "Limitation of Actions," § 1.

Of witness as to testimony, see "Witnesses," § 2.

PRIVILEGED COMMUNICATIONS.

Defamatory communications, see "Libel and Slander," § 2.

Disclosure by witness, see "Witnesses," § 1.

PRIVITY.

Admissions by privies, see "Evidence," § 4.

PRIZE FIGHTING.

Injunction to restrain, see "Injunction," § 1.

Evidence examined, and held to show that a contest advertised to take place between cer-

tain persons would, if permitted, constitute a prize fight.—Commonwealth v. McGovern (Ky.) 261.

Where combatants engage in a prize fight, the fact that the reward will be equally divided between them does not legalize the transaction.—Commonwealth v. McGovern (Ky.) 261.

The use of gloves by combatants in a prize fight will not make the contest any less a violation of the statute against prize fighting.—Commonwealth v. McGovern (Ky.) 261.

PROBABLE CAUSE.

See "Malicious Prosecution," § 1.

PROBATE.

Of will, see "Wills," § 3.

PROCEEDS.

Of insurance policy, see "Insurance," § 11.

Of sale of infant's property, see "Infants," § 1.

PROCESS.

Effect of appearance, see "Appearance."

In action against foreign corporations, see "Corporations," § 6.

In action for taxes, see "Taxation," § 4.

Particular forms of writs or other process.

See "Execution"; "Garnishment"; "Injunction"; "Mandamus"; "Quo Warranto"; "Replevin."

PROHIBITION.

Of traffic in intoxicating liquors, see "Intoxicating Liquors."

PROMISSORY NOTES.

See "Bills and Notes."

PROPERTY.

See "Animals"; "Logs and Logging."

Adverse possession, see "Adverse Possession."

Constitutional guaranties of rights of property, see "Constitutional Law," § 4.

Dedication to public use, see "Dedication."

Subject to dower, see "Dower," § 1.

Taking for public use, see "Eminent Domain."

PROVINCE OF COURT AND JURY.

In civil actions, see "Trial," § 4.

In criminal prosecutions, see "Criminal Law," § 16.

PROVOCATION.

Evidence as to, see "Homicide," § 4.

PROXIMATE CAUSE.

Of death, see "Death," § 1.

Of personal injuries, see "Master and Servant," § 6; "Municipal Corporations," § 8; "Street Railroads," § 2.

PUBLIC AID.

To railroads, see "Railroads," § 2.

PUBLIC DEBT.

See "Counties," § 2; "Municipal Corporations," § 9; "Schools and School Districts," § 1.

PUBLIC IMPROVEMENTS.

By municipalities, see "Municipal Corporations," § 5.

PUBLIC LANDS.

§ 1. Survey and disposal of lands of United States.

Act Cong. Feb. 11, 1847 (9 Stat. 125, c. 8), *held* to allow assignments of the land warrants issued thereunder after the issuance thereof.—Johnson v. Fluetsch (Mo. Sup.) 1005.

One entering public land *held* affected with notice of defendant's prior equities therein.—Johnson v. Fluetsch (Mo. Sup.) 1005.

Assignee of land warrant *held* not responsible for failure of local office to return his warrant to the general land office.—Johnson v. Fluetsch (Mo. Sup.) 1005.

§ 2. Disposal of lands of the states.

The first grant of public lands by the state carries the fee, and is conclusive against the state and all claiming under junior grants.—Earnest v. Little River Land & Lumber Co. (Tenn.) 1122.

Primarily the title to land is vested absolutely in the state, and under a grant from the state passes to the first grantee.—Earnest v. Little River Land & Lumber Co. (Tenn.) 1122.

Under Batts' Ann. Civ. St. art. 4218fff, sale by purchaser of school lands to one not an actual settler on land sold *held* not to forfeit title thereto.—Nesting v. Terrell (Tex. Sup.) 485.

Under Batts' Ann. Civ. St. art. 4218fff, purchaser of school lands *held* entitled to sell to one not an actual settler on land sold.—Nesting v. Terrell (Tex. Sup.) 485.

Under Batts' Ann. Civ. St. art. 4218fff, purchaser of additional school lands *held* entitled to correct mistake in application.—Nesting v. Terrell (Tex. Sup.) 485.

A patent purporting to have been issued by virtue of a purchase and payment under a certain act establishes in the patentee at least a prima facie right to the land.—Burkhead v. Bush (Tex. Civ. App.) 67.

The benefits of Act April 18, 1890, and Act Feb. 23, 1900, relative to lands equitably belonging to the public free school fund, cannot avail one who, before that date, had become an actual settler and made application for such survey.—Burkhead v. Bush (Tex. Civ. App.) 67.

The Commissioner of the Land Office may set aside an unauthorized inadvertent attempt by him, under Rev. St. 1895, art. 4218l, to forfeit a purchase of land for an abandonment.—Johnson v. Bibb (Tex. Civ. App.) 71.

A sale to a substitute purchaser of public lands *held* valid, without regard to validity of original and prior substitute sales, though the first payment was made only by the original purchaser.—Johnson v. Bibb (Tex. Civ. App.) 71.

Gen. Laws 1899, p. 259, c. 150, *held* to validate a sale of public school lands, if invalid because made to a minor.—Johnson v. Bibb (Tex. Civ. App.) 71.

Sayles' Civ. St. 1897, arts. 4218f, 4218fff, relative to purchase of free school lands, authorizes persons owning and occupying lands other than those purchased from the state to purchase additional lands from the public domain, without limitation as to amount, character, or source of title of their other lands.—Roddy v. White (Tex. Civ. App.) 358.

Fact that insufficient obligation was given with application to purchase school land *held* immaterial, where proper obligation was afterwards filed.—Faucett v. Sheppard (Tex. Civ. App.) 538.

Application to purchase school land *held* not void for a certain irregularity.—*Faucett v. Sheppard* (Tex. Civ. App.) 538.

Sayles' Rev. Civ. St. art. 4167, which provides that railroads shall have the right of way through lands of the state, construed with Const. 1876, art. 7, §§ 2, 4, 5, does not include the public school lands.—*Texas Cent. Ry. Co. v. Bowman* (Tex. Civ. App.) 556.

Classification and appraisal of public lands before sale must not only be alleged, but proved; there being no presumption thereof.—*Thompson v. Gallagher* (Tex. Civ. App.) 567.

Under Acts 1900, c. 11, as amended by Acts 1901, c. 89, relating to school land, a purchaser of land which is not detached must comply with the conditions of actual settlement.—*Witcher v. Wiles* (Tex. Civ. App.) 889.

Under Acts 1901, c. 89, the execution of a bond for title by the purchaser of school land, on sale of it, *held* not an abandonment of the land by him, so as to subject it to another sale.—*Witcher v. Wiles* (Tex. Civ. App.) 889.

An application by an actual settler to purchase school land, though premature, *held* to give title against one who made an invalid application to purchase.—*Ford v. Brown* (Tex. Civ. App.) 893.

Plaintiff in trespass to try title *held* not precluded from questioning defendant's actual settlement on his home section, when he applied to purchase the land in controversy as additional land.—*Ford v. Brown* (Tex. Civ. App.) 893.

Evidence *held* sufficient to go to the jury whether public school land had not been reappraised and was not on the market when the commissioner awarded it to plaintiff.—*Bowerman v. Pope* (Tex. Civ. App.) 1093.

PUBLIC NUISANCE.

See "Nuisance," § 2.

PUBLIC SCHOOLS.

See "Schools and School Districts," § 1.

PUBLIC USE.

Dedication of property, see "Dedication."
Taking property for public use, see "Eminent Domain."

PUNISHMENT.

See "Pardon."
Fines, see "Fines."
For rape, see "Rape," § 1.
For violation of injunction, see "Injunction," § 3.

QUARANTINE.

Of diseased animals, see "Animals."
Of widow, see "Executors and Administrators," § 3.

QUESTIONS FOR JURY.

In criminal prosecutions, see "Criminal Law," § 16.

QUIETING TITLE.

§ 1. Right of action and defenses.

Under Rev. St. 1899, § 650, an action to quiet title can be maintained against a person claiming only a future or contingent interest in real property.—*Ball v. Woolfolk* (Mo. Sup.) 410.

§ 2. Proceedings and relief.

Under Rev. St. 1899, § 4205, where buildings had been sold to satisfy a mechanic's lien, it

was error in a subsequent action to deny the purchaser's right to remove them, except on the failure of the landowner to pay the amount due under the lien within 30 days.—*Wilson v. Lubke* (Mo. Sup.) 602.

QUO WARRANTO.

§ 1. Nature and grounds.

Quo warranto will not lie to prevent the violation of a custom of railroads having switch tracks in a city to deliver a consignment of goods from one track to another without making extra charge therefor.—*State ex inf. Crow v. Atchison, T. & S. F. Ry. Co.* (Mo. Sup.) 776.

The imposition of reconsignment charges by railroad companies *held* a matter of private concern, to prevent which quo warranto will not lie.—*State ex inf. Crow v. Atchison, T. & S. F. Ry. Co.* (Mo. Sup.) 776.

Under Rev. St. 1899, c. 12, arts. 2, 4, establishing a state railroad commission, etc., quo warranto will not lie to prevent railroad companies from making any alleged illegal reconsignment charges; the remedy provided by the statute being exclusive.—*State ex inf. Crow v. Atchison, T. & S. F. Ry. Co.* (Mo. Sup.) 776.

Remedy afforded by Interstate Commerce Law, §§ 1-9, 24 Stat. 379, 382 [U. S. Comp. St. 1901, pp. 3154, 3159], *held* to extend to the regulation of charges imposed by railroad companies for the transportation of consignments from one portion of a city to another at consignee's order, so as to exclude a review of the propriety of such charges by quo warranto in the state courts.—*State ex inf. Crow v. Atchison, T. & S. F. Ry. Co.* (Mo. Sup.) 776.

RAILROADS.

See "Street Railroads."

As employers, see "Master and Servant."
Carriage of goods and passengers, see "Carriers."

Constitutional guaranty against taking property without due process of law as applied to statute imposing penalty on railroads failing to keep right of way clear of undergrowth, see "Constitutional Law," § 4.

Exemption of railroad property from taxation, see "Taxation," § 2.

Presentation of objections to evidence in action for personal injuries for purpose of review, see "Appeal and Error," § 4.

§ 1. Railroad companies.

Under 2 Acts 1850-51, p. 444, c. 505, § 5, relating to interest on corporate stock, interest on stock *held* to begin to run from the date on which the bonds issued by the subscriber in payment therefor were delivered to the corporation.—*Louisville & N. R. Co. v. Hart County* (Ky.) 288; *Hart County v. Louisville & N. R. Co.*, *Id.*

§ 2. Public aid.

Under Acts 1851-52, p. 742, c. 429, § 15, and 1 Acts 1855-56, p. 188, c. 20, § 4, one paying taxes to defray the interest on county bonds issued in payment of corporate stock *held* entitled to an amount of stock equal to the tax receipt, together with declared dividends.—*Louisville & N. R. Co. v. Hart County* (Ky.) 288; *Hart County v. Louisville & N. R. Co.*, *Id.*

Certain evidence *held* to overcome the presumption that bonds issued in payment of corporate stock were delivered to the corporation the day they were dated.—*Louisville & N. R. Co. v. Hart County* (Ky.) 288; *Hart County v. Louisville & N. R. Co.*, *Id.*

§ 3. Construction, maintenance, and equipment.

A railroad *held* not liable for injuries sustained by one riding into a barb-wire fence on its

right of way.—*Bishop v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.) 1086.

The construction of a barb-wire fence by a railroad on its own land did not render it liable for injuries sustained by one accidentally riding into it.—*Bishop v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.) 1086.

In an action against a railroad for injuries sustained by riding into a barb-wire fence erected by defendant, an allegation of the petition *held* not to show prescriptive right of way in the public.—*Bishop v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.) 1086.

In an action against a railroad for injuries sustained by accidentally riding into a barb-wire fence erected by defendant, an averment of petition *held* to warrant an inference that it inclosed the right of way.—*Bishop v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.) 1086.

§ 4. Operation—Statutory, municipal, and official regulations.

Rev. St. 1899, § 2391, *held* not to give the state right to sue in its own name for penalty imposed by Rev. St. 1889, § 2614, on railroad failing to keep right of way clear of undergrowth to prevent escape of fire.—*McFarland v. Mississippi River & B. T. Ry. Co.* (Mo. Sup.) 152.

Under Rev. St. 1889, § 2614, the person injured by spreading of fire from railroad right of way *held* entitled to recover both the penalty imposed thereby and damages.—*McFarland v. Mississippi River & B. T. Ry. Co.* (Mo. Sup.) 152.

A city ordinance prohibiting the running of trains within the city limits at a speed exceeding six miles per hour *held* binding on the railway companies, as well as those operating their trains.—*Missouri, K. & T. Ry. Co. of Texas v. Owens* (Tex. Civ. App.) 579.

A railroad, which has erected a barb-wire fence on its right of way, *held* not required to clear underbrush, etc., from along the line of the fence, that it may be seen by travelers.—*Bishop v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.) 1086.

§ 5. — Companies and persons liable for injuries.

In an action for personal injuries, a peremptory instruction for defendant railroad *held* properly refused, where there was evidence that the employes in charge of its trains were not under sole control of another road, whose tracks defendant used.—*Garven v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 193.

In the absence of statutory authority to lease its tracks, a railroad company is liable for injuries caused by the negligence of the servants of another company operating its trains over the former's tracks under a lease.—*Missouri, K. & T. Ry. Co. of Texas v. Owens* (Tex. Civ. App.) 579.

§ 6. — Accidents to trains.

In an action against a railroad for injuries caused by the negligence of its employes, plaintiff *held* limited to grounds of negligence pleaded.—*Garven v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 193.

§ 7. — Accidents at crossings.

An instruction that, to recover for injuries sustained at a crossing, the plaintiff must show that the failure to give the statutory signals caused the horse to take fright and run away, *held* misleading.—*St. Louis, I. M. & S. Ry. Co. v. Boback* (Ark.) 473.

Plaintiff's action in jumping from her vehicle, and attempting to grasp the bridle and prevent her horse from running, when near a crossing, *held* not contributory negligence per se.—*St. Louis, I. M. & S. Ry. Co. v. Boback* (Ark.) 473.

Where plaintiff's horse became frightened at an approaching train near a crossing, the fact

that he ran away is not sufficient to show contributory negligence in driving him.—*St. Louis, I. M. & S. Ry. Co. v. Boback* (Ark.) 473.

An allegation in a petition that plaintiff's intestate was killed at or near a crossing construed to mean she was killed at a place other than the crossing.—*Davis' Adm'r v. Chesapeake & O. Ry. Co.* (Ky.) 275.

In an action against a railroad for injuries at a private crossing near a public crossing, the question of defendant's negligence in failing to give signals at the public crossing, on which plaintiff could rely, *held* not raised.—*Davis' Adm'r v. Chesapeake & O. Ry. Co.* (Ky.) 275.

A failure to slacken the speed of a train or to give signals at an approach to private crossings is not negligence.—*Davis' Adm'r v. Chesapeake & O. Ry. Co.* (Ky.) 275.

Rev. St. art. 4507, requires railroad to ring its bell, though train starts within 80 rods of a public crossing.—*Ft. Worth & R. G. Ry. Co. v. Greer* (Tex. Civ. App.) 552.

Where, in an action for injuries at a railroad crossing, the pleadings did not raise the issue of discovered peril, the submission of such issue was reversible error.—*Texas & P. Ry. Co. v. Knox* (Tex. Civ. App.) 543.

In an action for the death of plaintiff's decedent, caused by defendant's engine striking him at a crossing, defendant *held* entitled, under the evidence, to an instruction defining the care required of decedent.—*Texas & P. R. Co. v. Huber* (Tex. Civ. App.) 547.

In an action for injuries sustained by plaintiff at a crossing by reason of defendant's negligently running a hand car in front of his team, thereby frightening them, etc., certain evidence *held* to have been improperly excluded.—*Henze v. International & G. N. R. Co.* (Tex. Civ. App.) 822.

An instruction defining ordinary care criticised.—*Chicago, R. I. & T. Ry. Co. v. James* (Tex. Civ. App.) 930.

An instruction *held* to require too great a degree of care of those in charge of an engine in approaching a public crossing.—*Chicago, R. I. & T. Ry. Co. v. James* (Tex. Civ. App.) 930.

§ 8. — Injuries to persons on or near tracks.

Trespasser cannot rely on alleged negligence in failing to give signals on approaching crossing.—*Davis' Adm'r v. Chesapeake & O. Ry. Co.* (Ky.) 275.

In an action against a railroad for injuries to plaintiff's infant boy, evidence considered, and *held* insufficient to justify the submission of the issue of discovered peril.—*Texas & P. Ry. Co. v. Ball* (Tex. Sup.) 4.

In an action for injuries to a pedestrian on a railway track, a requested instruction as to the degree of care required by the parties *held* properly refused as argumentative.—*Missouri, K. & T. Ry. Co. of Texas v. Owens* (Tex. Civ. App.) 579.

In an action for injuries to a person on a railway track in a city street, evidence *held* insufficient to show plaintiff guilty of contributory negligence as matter of law.—*Missouri, K. & T. Ry. Co. of Texas v. Owens* (Tex. Civ. App.) 579.

Violation of a penal ordinance regulating speed of trains within the limits of a city *held* negligence per se.—*Missouri, K. & T. Ry. Co. of Texas v. Owens* (Tex. Civ. App.) 579.

§ 9. — Injuries to animals on or near tracks.

Evidence in case of a horse killed at a railroad crossing *held* to require submission of the question of contributory negligence of the per-

son in charge.—*Choctaw, O. & G. R. Co. v. Ingram* (Ark.) 3.

In action against railroad for killing a mule, charge on the duty of fencing if the injury occurred within a station yard *held* unnecessary.—*Southern Kansas Ry. Co. of Texas v. Cooper* (Tex. Civ. App.) 328.

In an action against a railroad for killing a mule, charge as to duty of railroad to fence its right of way corrected.—*Southern Kansas Ry. Co. of Texas v. Cooper* (Tex. Civ. App.) 328.

In an action against a railroad for killing a mule while within defendant's station yard, where it was not required to fence its tracks, plaintiff must prove negligence.—*Southern Kansas Ry. Co. of Texas v. Cooper* (Tex. Civ. App.) 328.

Maintenance by railroad of a place dangerous to stock *held* not to constitute negligence in law.—*Southern Kansas Ry. Co. of Texas v. Cooper* (Tex. Civ. App.) 328.

In action against railroad for killing mare left unhitched near the track, whether plaintiff was guilty of contributory negligence *held* to be for the jury.—*Texas Cent. R. Co. v. Harbison* (Tex. Civ. App.) 549.

In action against railroad for killing mare left unhitched near the track, evidence *held* insufficient to disclose negligence on the part of defendant.—*Texas Cent. R. Co. v. Harbison* (Tex. Civ. App.) 549.

§ 10. — Fires.

A certain instruction in an action against a railroad for damage by fire *held* not objectionable.—*McFarland v. Mississippi River & B. T. Ry. Co.* (Mo. Sup.) 152.

In an action against a railroad company for causing a fire, a charge on the burden of proving freedom from negligence *held* properly refused.—*Duckworth v. Ft. Worth & R. G. Ry. Co.* (Tex. Civ. App.) 913.

RAPE.

Competency of witnesses, see "Witnesses," § 1. Instructions as to testimony of accomplices, see "Criminal Law," § 21.

§ 1. Prosecution and punishment.

Death penalty *held* proper in rape case.—*Reyna v. State* (Tex. Cr. App.) 25.

RATE.

Of speed of trains, see "Railroads," §§ 4, 8.

RATIFICATION.

Of unauthorized act of broker, effect as to compensation, see "Brokers," § 2.

REAL ACTIONS.

See "Ejectment"; "Forcible Entry and Detainer," § 1; "Trespass to Try Title."

REAL-ESTATE AGENTS.

See "Brokers."

REASONABLE DOUBT.

Instructions as to, see "Criminal Law," § 21.

RECEIVERS.

Appointment in ejectment, see "Ejectment," § 3.

§ 1. Management and disposition of property.

A sale by decree of court of property of a corporation in the hands of a receiver passes the title free of the claims of all parties to the proceeding, except the particular claims declared in the decree not to be prejudiced.—*Scott v. Farmers' & Merchants' Nat. Bank* (Tex. Sup.) 7.

RECEIVING STOLEN GOODS.

Conduct of jury, see "Criminal Law," § 23. Declarations as evidence, see "Criminal Law," § 9. Evidence of acts and declarations of conspirators, see "Criminal Law," § 10.

RECITALS.

In municipal bonds, see "Municipal Corporations," § 9.

RECORDS.

As evidence, see "Evidence," § 7. Of chattel mortgages, see "Chattel Mortgages," § 2. Of cities, see "Municipal Corporations," § 1.

Of judicial proceedings.

See "Courts," § 2.

Transcript on appeal or writ of error, see "Appeal and Error," § 8; "Criminal Law," § 26.

Under Const. 1875, art. 9, § 2, Rev. St. 1899, § 9055, and Act Dec. 14, 1822 (1 Ter. Laws 1804-24, p. 989, c. 421) it is permissible for the recorder of St. Louis to remove his records to an addition included within the city since 1822.—*Babcock v. Hahn* (Mo. Sup.) 93.

Rev. St. 1899, § 9055, providing that the recorder shall keep his office and records at the "seat of justice" in each county, merely requires him to keep them at the "county seat," and not at the courthouse itself.—*Babcock v. Hahn* (Mo. Sup.) 93.

Accused *held* entitled to inspect public documents in hands of state, whether they were proceedings of an inquest, or to discover the murderer, under Code Cr. Proc. 1895, arts. 941, 942.—*Jenkins v. State* (Tex. Cr. App.) 312.

REDEMPTION.

From pledge, see "Pledges."

REFERENCE.

§ 1. Report and findings.

Exception to auditor's report in action for partnership accounting *held* not waived.—*Gresham v. Harcourt* (Tex. Civ. App.) 808.

REFORMATION OF INSTRUMENTS.

§ 1. Proceedings and relief.

Evidence *held* insufficient to warrant a correction of description in deed.—*Underwood v. Cave* (Mo. Sup.) 451.

Decree in suit for correction of description in deed *held* improper in not referring to correction of mistake.—*Underwood v. Cave* (Mo. Sup.) 451.

REFRESHING MEMORY.

Of witness, see "Witnesses," § 2.

REGISTRATION.

See "Records."

REHEARING.

See "New Trial."

RELEASE.

See "Accord and Satisfaction"; "Payment."
Of dower, see "Dower," § 2.

RELEVANCY.

Of evidence in civil actions, see "Evidence," § 2.
Of evidence in criminal prosecutions, see "Criminal Law," § 7.

REMAINDERS.

See "Life Estates."

REMAND.

Of cause on appeal or writ of error, see "Appeal and Error," § 18.

REMEDY AT LAW.

Effect of other remedy on right to quo warranto, see "Quo Warranto," § 1.
Effect on jurisdiction of equity, see "Injunction," § 1.

REMOVAL OF CAUSES.

Change of venue or place of trial, see "Venue," § 2.

§ 1. **Citizenship or alienage of parties.**
In suit in state court, *held* error to permit certain defendants to file petitions for removal and to approve their bonds thereon.—Stephenson's Adm'r v. Illinois Cent. R. Co. (Ky.) 260; Nichols v. Same, *Id.*

In an action against a foreign railroad corporation, an amended petition, tendered after filing of petition for removal, making a domestic corporation a party, *held* too late to prevent removal.—Davis' Adm'r v. Chesapeake & O. Ry. Co. (Ky.) 275.

To prevent the removal of an action for injuries against a foreign railroad by joining as defendants resident servants, the petition must state a good cause of action against the servants.—Davis' Adm'r v. Chesapeake & O. Ry. Co. (Ky.) 275.

Compliance by a foreign railroad corporation with Const. § 211, and Ky. St. 1890, § 841, *held* not to render the corporation a citizen of the state so as to prevent its removing actions instituted against it to a federal court.—Davis' Adm'r v. Chesapeake & O. Ry. Co. (Ky.) 275.

An action against two defendants *held* not removable to the federal court, on their joint petition averring that the controversy arises under the laws of the United States as to one of them alone.—Texas & P. R. Co. v. Huber (Tex. Civ. App.) 547.

§ 2. **Remand or dismissal of cause.**

Plaintiffs in action in state court, which had been removed to federal court and there dismissed on plaintiffs' motion, *held* to have lost their right to have the state court's action on the removal corrected.—Stephenson's Adm'r v. Illinois Cent. R. Co. (Ky.) 260; Nichols v. Same, *Id.*

Plaintiffs in action removed to federal court by defendants, plaintiffs having there obtained a dismissal, *held* entitled to commence another action for the same cause.—Stephenson's Adm'r v. Illinois Cent. R. Co. (Ky.) 260; Nichols v. Same, *Id.*

REMOVAL OF CLOUD.

See "Quieting Title."

RENT.

See "Landlord and Tenant," § 2.

REPEAL.

Of local option law, see "Intoxicating Liquors," § 2.

REPLEVIN.

§ 1. **Pleading and evidence.**
In an action to recover possession of certain cattle, certain testimony *held* irrelevant.—Word v. Kennon (Tex. Civ. App.) 365.

REPORT.

Of referee, see "Reference," § 1.

REPRESENTATIONS.

Operation and effect of, as ground of estoppel, see "Estoppel," § 1.

REQUESTS.

For findings, by court, see "Trial," § 12.
For instructions in civil actions, see "Trial," § 8.
For instructions in criminal prosecutions, see "Criminal Law," § 22.

RESCISSION.

Of contract for sale of goods, see "Sales," § 2.

RESERVATIONS.

In deeds, see "Deeds," § 2.

RES GESTÆ.

In civil actions, see "Evidence," § 2.

RES IPSA LOQUITUR.

See "Street Railroads," § 2.

RES JUDICATA.

See "Judgment," §§ 5, 6.

RESTRAINT OF TRADE.

Trusts and other combinations, see "Monopolies," § 1.

RESULTING TRUSTS.

See "Trusts," § 1.

REVENUE.

See "Taxation."

REVIEW.

See "Appeal and Error"; "Criminal Law," §§ 25-27; "Justices of the Peace," § 2.

REVOCATION.

Of agency of broker, see "Brokers," § 1.
Of indorsement of note, see "Bills and Notes," § 1.
Of power of sale in mortgage, see "Mortgages," § 6.

RISKS.

Assumed by employé, see "Master and Servant," §§ 5, 8, 9.
Within insurance policy, see "Insurance," § 8.

ROADS.

See "Highways."

Streets in cities, see "Municipal Corporations," §§ 7, 8.

SALES.

See "Vendor and Purchaser."

By hawkers or peddlers, see "Hawkers and Peddlers."

Of intoxicating liquors, see "Intoxicating Liquors."

Of property of decedent under order of court, see "Executors and Administrators," § 5.

Of property of infant under order of court, see "Guardian and Ward," § 3.

Of real property of decedent, see "Executors and Administrators," § 2.

Of trust property, see "Assignments for Benefit of Creditors," § 1.

On execution, see "Execution," § 3.

On foreclosure of mortgage, see "Chattel Mortgages," § 6; "Mortgages," §§ 6, 7.

Tax sales, see "Taxation," § 5.

§ 1. Construction of contract.

A contract to furnish piling for a railroad company during the year 1901 *held* to obligate it to order not less than 500 pieces in time to enable plaintiff to deliver it on or before June 1st.—*Reed v. Illinois Cent. R. Co. (Ky.)* 200.

Under a contract for the sale of certain manufactured articles, sellers *held* under no obligation to notify the buyer of increased price.—*D. R. Vivion Mfg. Co. v. Robertson (Mo. Sup.)* 644.

Under a contract for the sale of manufactured articles, buyer *held* not entitled to be relieved from paying an increased price provided for by the contract, because of the fact that the seller had on hand materials to manufacture the articles at the time of the increase of price.—*D. R. Vivion Mfg. Co. v. Robertson (Mo. Sup.)* 644.

§ 2. Modification or rescission of contract.

Under a contract for the sale of certain patented articles during an extended period of time, letter from the buyer to the seller *held* to justify the latter in terminating the contract.—*D. R. Vivion Mfg. Co. v. Robertson (Mo. Sup.)* 644.

A certain contract for the delivery of goods in esse *held* never to have been canceled.—*J. P. Gentry Co. v. Margolius & Co. (Tenn.)* 959.

§ 3. Performance of contract.

A contract of sale of a corn binder *held* to give the purchaser right to refuse to keep and pay for it, if for any reason he is not satisfied with it.—*McCormick v. Finch (Mo. App.)* 373.

Facts *held* not to show performance of a contract for the sale and delivery of rails.—*Lum & Fry v. Hale (Tex. Civ. App.)* 359.

§ 4. Operation and effect.

In letters confirming a sale, reference to Galveston *held* one of price only, and not as a place of delivery, and title passed on delivery of the wheat to the carrier.—*Chas. F. Orthwein's Sons v. Wichita Mill & Elevator Co. (Tex. Civ. App.)* 364.

In case of oral contract for sale of wheat, on delivery of the wheat to a carrier, and delivery of the bill of lading to the buyer, title vests in him, and transportation is at his risk.—*Chas. F. Orthwein's Sons v. Wichita Mill & Elevator Co. (Tex. Civ. App.)* 364.

§ 5. Remedies of buyer.

Buyer in a contract for the sale of personality *held* not entitled to recover for work done as part payment on the price.—*Day v. Farley (Mo. App.)* 177.

The measure of damages for the breach of a contract to deliver certain goods "during" a certain month is the difference between the contract price and market price on the last day of the month at the place of delivery.—*J. P. Gentry Co. v. Margolius & Co. (Tenn.)* 959.

In an action for breach of warranty of soundness of a horse, a charge that if, though warranted sound and proven unsound, the vendee could have discovered the defect on examination, the vendor was not liable, *held* error.—*McAfee v. Meadows (Tex. Civ. App.)* 813.

§ 6. Conditional sales.

Under the facts disclosed, *held*, that a vendee was a bona fide purchaser, as against claimant under an unrecorded conditional sale.—*Sanger v. Jesse French Piano & Organ Co. (Tex. Civ. App.)* 39.

SATISFACTION.

See "Accord and Satisfaction"; "Payment."

Of judgment, see "Judgment," § 8.

Of mortgage, see "Mortgages," § 5.

SCHOOLS AND SCHOOL DISTRICTS.

Forgery of teacher's certificate, see "Forgery." School lands, see "Public Lands," § 2.

§ 1. Public schools.

Under Ky. St. 1899, § 4464, alteration of petition for establishment of graded school district, after approval by trustees of one common school district, *held* fatal to proceedings.—*Waring v. Bertram (Ky.)* 222.

Neither teacher *held* entitled to pay, the one who taught not having a valid contract, and having had the other enjoined from teaching.—*Shepherd v. Gambill (Ky.)* 223.

Notice of a meeting of school trustees at "6 o'clock in the morning," given on the morning some of them met, *held* not sufficient.—*Shepherd v. Gambill (Ky.)* 223.

A school trustee *held* to have no right to exercise the functions of the office after his term had expired and his successor was appointed, pending his successor's qualifying the next day.—*Shepherd v. Gambill (Ky.)* 223.

An appointment to fill a vacancy in the office of school trustee, which will arise because of failure to hold a prior election, being made before the vacancy arises, is void.—*Shepherd v. Gambill (Ky.)* 223.

Const. art. 10, § 12, *held* to forbid a school district incurring an indebtedness exceeding 5 per cent. of the taxable property therein subject to taxation for school purposes.—*Thornburgh v. School Dist. No. 3 (Mo. Sup.)* 81.

Under Rev. St. 1879, § 7032, as amended by the act of 1881, records of school board *held* not to disclose authority to issue certain bonds.—*Thornburgh v. School Dist. No. 3 (Mo. Sup.)* 81.

Under Rev. St. 1890, § 9742, two organized school districts *held* authorized to absorb and obliterate another organized district.—*Meyers v. School Dist. No. 2, Tp. 29, Range 13 (Mo. App.)* 1120.

SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 3.

In criminal prosecutions, see "Criminal Law," § 8.

SEDUCTION.

§ 1. Criminal responsibility.

An instruction as to reasonable doubt as to chastity should be given on a prosecution for seduction through promise of marriage.—*Waltou v. State (Ark.)* 1.

The second clause in an instruction on a prosecution for seduction under promise of marriage, as to yielding because of the promise, *held* covered by the first clause, and therefore properly struck out.—*Walton v. State* (Ark.) 1.

While, on a prosecution for seduction, the previous chaste character of the female is presumed, such presumption is overcome by the presumption of defendant's innocence.—*Walton v. State* (Ark.) 1.

Previous chaste character of the female *held* an essential of seduction under promise of marriage, though not mentioned by Sand. & H. Dig. § 1900, and necessary to be alleged in the indictment.—*Walton v. State* (Ark.) 1.

An instruction on corroborative evidence in a prosecution for seduction *held* erroneous.—*Wisdom v. State* (Tex. Cr. App.) 22.

Charges in prosecution for seduction *held* to require a finding that prosecutrix was a virtuous female, and that defendant accomplished his purpose by seductive means.—*Wisdom v. State* (Tex. Cr. App.) 22.

An indictment for seduction *held* sufficient.—*Wisdom v. State* (Tex. Cr. App.) 22.

SELF-DEFENSE

See "Homicide," §§ 4, 7.

SELF-SERVING DECLARATIONS.

Admissibility in evidence, see "Evidence," § 5.

SEPARABLE CONTROVERSY.

Removal from state court, see "Removal of Causes," § 1.

SEPARATE ESTATE.

Of married women, see "Husband and Wife," § 2.

SEPARATION.

Of jury, see "Criminal Law," § 23.

SERVICES.

Of child, action for loss of, see "Parent and Child."

SET-OFF AND COUNTERCLAIM.

Against trustee in bankruptcy, see "Bankruptcy," § 1.

§ 1. Subject-matter.

In replevin for sawmill machinery, *held*, that defendant could recoup damages which he had suffered by loss of profit resulting from plaintiff's failure to carry out their agreement.—*Ramsey & Bro. v. Capshaw* (Ark.) 479.

SETTLEMENT.

See "Accord and Satisfaction"; "Payment."

By guardian of infant, see "Guardian and Ward," § 4.

Of bill of exceptions, see "Exceptions, Bill of," § 1.

SIGNALS.

By trains, see "Railroads," § 7.

SLANDER.

See "Libel and Slander."

SPECIAL LAWS.

See "Statutes," § 1.

SPECIFIC PERFORMANCE.

§ 1. Proceedings and relief.

Where a demurrer was improperly sustained to a cross-bill in an action for specific performance, appellate court, remanding cause for issue on the cross-bill, would not enter decree granting specific performance.—*Katzenberger v. Weaver* (Tenn.) 937.

Evidence in specific performance suit *held* insufficient to show one of the alleged parties participated in the contract.—*Kelly v. Short* (Tex. Civ. App.) 877.

Evidence in specific performance suit *held* insufficient to show the contract was not repudiated and mutually abandoned, but to conclusively show the contrary.—*Kelly v. Short* (Tex. Civ. App.) 877.

SPEED.

Of trains, see "Railroads," §§ 4, 8.

SPIRITUOUS LIQUORS.

See "Intoxicating Liquors."

SPLITTING CAUSES.

See "Action," § 2.

STARE DECISIS.

See "Courts," § 2.

STATEMENT.

By witness inconsistent with testimony, see "Witnesses," § 3.

Of case or facts for purpose of review, see "Appeal and Error," § 8; "Criminal Law," § 26.

STATES.

Courts, see "Courts."

Public lands, see "Public Lands," § 2.

STATUTES.

Provisions relating to particular subjects.

See "Carriers," § 1; "Descent and Distribution"; "Discovery," § 1; "Intoxicating Liquors"; "Mechanics' Liens"; "Quieting Title," § 1; "Railroads," § 4.

Fellow servants, see "Master and Servant," § 4.

Forfeitures of insurance, see "Insurance," § 6.

Salaries of judges, see "Judges," § 2.

Summoning jurors, see "Jury," § 2.

§ 1. General and special or local laws.

The statute providing for issuance of special venue on motion three days before trial *held* not special legislation, and not to make any invidious distinction in the case of the city of St. Louis.—*State v. Faulkner* (Mo. Sup.) 116.

St. Louis City Charter, art. 6, § 25, permitting a recovery of 15 per cent. interest on a tax bill for street improvements, when not paid within six months after demand, is not in conflict with Const. art. 4, § 53, prohibiting special laws.—*Seaboard Nat. Bank v. Woesten* (Mo. Sup.) 464.

The local option law (Rev. St. 1899, p. 765, art. 3, c. 22) is not in violation of the constitutional provision that all laws of a general nature shall be of uniform operation.—*Ex parte Handler* (Mo. Sup.) 920.

§ 2. Amendment, revision, and codification.

The constitutionality of Acts 1903, c. 43, amending Acts 1891, c. 52, without referring

to the title or substance of the amended act, held not aided by reference in the title to the sections of Shannon's Code.—*Memphis St. Ry. Co. v. State* (Tenn.) 730.

Acts 1908, c. 43, amending Acts 1891, c. 52, held to violate Const. art. 2, § 17, requiring that all acts amending former laws recite the title or substance of the law amended.—*Memphis St. Ry. Co. v. State* (Tenn.) 730.

STATUTES CONSTRUED.

UNITED STATES.		CRIMINAL CODE.		REVISED STATUTES 1899.	
CONSTITUTION.		§ 128		Page 765, ch. 22, art. 3 ...	
Amend. 14	152	STATUTES 1899.		Page 1553, ch. 91, art. 23,	
Amend. 14	1020	§ 317		§ 6566	
Art. 1, § 8, subsec. 3	1037	§ 496		Page 2488, St. Louis City	
Art. 4, § 2	1081	§ 548, 550		Charter, art. 3, § 28	
STATUTES AT LARGE.		§ 639		Page 2513, St. Louis City	
1847, Feb. 11, ch. 8, 9		§ 841		Charter, art. 6, § 25	
Stat. 125	1005	§ 1082		Page 2579	
1887, Feb. 4, ch. 104, 24		§ 1202		Pages 2582, 2583, §§ 18,	
Stat. 379, 382 [U. S.		§ 1289		30	
Comp. St. 1901, pp.		§ 1834		Ch. 12, arts. 2, 4	
3154-3159]	776	§ 1840		§ 575	
1898, July 1, ch. 541, §§		§ 2022		§ 663, 666	
576, 68, 30 Stat. 560,		§ 2087		§ 650	
565 [U. S. Comp. St.		§ 2557, 2558		§ 809, 810	
1901, pp. 3443, 3450]	1053	§ 3045		§ 819, 866	
COMPILED STATUTES		§ 3058		§ 1024, 1025	
1901.		§ 3059, 3063		1026	
Pages 3154-3159	776	§ 3210		1080	
Pages 3443, 3450	1053	§ 3392		§ 1112-1115	
ARKANSAS.		§ 4129, 4131, 4148, 4151,		1362	
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§ 2103	853	§ 4464		2619	
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§ 348	855	5		3162	
§ 1643, 1660	851	1851-52, p. 742, ch. 429, §		3404	
1717	584	15		3643	
1887	929	1855-56, p. 188, ch. 20, §		3791	
1900	1	4		4161	
2321	853	1869, p. 463, ch. 1578		4205	
4766	854	MISSOURI.		4276	
5872	470	CONSTITUTION 1820.		4335	
7234	1081	Art. 13, § 8		4339	
LAWS.		CONSTITUTION 1865.		4495	
1881, p. 140	585	Art. 1, § 1, par. 17		4659	
1889, p. 43, ch. 34	725	CONSTITUTION 1875.		4679	
1895, p. 86	585	Art. 2, §§ 10, 28		4924-4926, 4935	
1897, p. 47, No. 37	853	Art. 4, § 53		5222	
KENTUCKY.		Art. 9, § 2		6566	
CONSTITUTION.		Art. 9, § 7		8048	
§ 144	239	Art. 10, § 12		8331	
§ 164	280	REVISED STATUTES 1835.		§ 8983-8985	
§ 180	225	Page 342, § 14		9055	
§ 211	275	REVISED STATUTES 1879.		9378	
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§ 285	222	§ 7032. Amended by Laws		§ 9742	
§ 490, 491	232	1881, p. 200		CITY CHARTERS.	
CIVIL CODE OF PRAC-		REVISED STATUTES 1889.		Kansas, p. 86, art. 9, § 32	
TICE.		§ 2614		St. Louis, art. 3, § 28.	
§ 51	203	§ 3318		Rev. St. 1899, p. 2488	
§ 134	219	4525		St. Louis, art. 6, § 25.	
§ 317	233	4532		Rev. St. 1899, p. 2513	
§ 432	272	4535		LAWS.	
		5856		1851, p. 201	
		5859. Amended by Laws		1853, p. 82	
		1895, p. 197		1881, p. 200	
		§ 8839		1804-24, p. 989, ch. 421	
				1893, p. 189, § 5	
				1895, p. 197	
				1897, p. 208, § 1	
				NEBRASKA.	
				CODE OF CIVIL PRO-	
				CEDURE.	
				§ 848	

TENNESSEE.

CONSTITUTION.

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Art. 2, § 29	1061
Art. 6, § 7	1061
Art. 6, § 10	1012

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§ 3543	1043
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SHANNON'S CODE.

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1819, ch. 28, § 1	1122
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1870, p. 135, ch. 86	1061
1877, p. 37, ch. 23, Amended by Laws 1887, p. 293, ch. 167; Laws 1899, p. 474, ch. 221; Laws 1903, p. 5, ch. 2	1020
1887, p. 293, ch. 167, Amended by Laws 1899, p. 474, ch. 221	1020
1891, p. 135, ch. 52, Amended by Laws 1903, p. 75, ch. 43	730
1893, p. 205, ch. 99	1061
1899, p. 474, ch. 221	1020
1901, p. 247, ch. 140	1061
1901, p. 329, ch. 174, § 27	1037
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Arts. 647, 649, 707	305
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§ 1. Establishment, construction, and maintenance.

Stipulation in a contract of sale of property of one street railway to another held not to afford the beneficiaries under the stipulation a vendor's lien on the property for damages resulting from a breach.—*Scott v. Farmers' & Merchants' Nat. Bank* (Tex. Sup.) 7.

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§ 2. Regulation and operation.

By accepting St. Louis Ordinance No. 19,393, defendant agreed to be bound by all the ordinances relating to street railroads.—*Campbell v. St. Louis & Suburban Ry. Co.* (Mo. Sup.) 86.

St. Louis Ordinance No. 15,954, granting to defendant a franchise to construct its line over certain streets, etc., held not in violation of City Charter, art. 3, § 28, relating to ordinances in conflict with prior ordinances.—*Campbell v. St. Louis & Suburban Ry. Co.* (Mo. Sup.) 86.

An ordinance showing an agreement by a street railway to be bound by other ordinances held relevant in an action against the company.—*Campbell v. St. Louis & Suburban Ry. Co.* (Mo. Sup.) 86.

Whether a boy should have stopped to look and listen for a street car before driving onto a crossing held for the jury.—*Campbell v. St. Louis & Suburban Ry. Co.* (Mo. Sup.) 86.

In an action against a street railway for negligent death, the question of contributory negli-

gence *held* to be for the jury.—*Campbell v. St. Louis & Suburban Ry. Co.* (Mo. Sup.) 86.

Under the evidence *held* proper to refuse an instruction as to a street railroad's liability for negligence, notwithstanding the contributory negligence of plaintiff's decedent.—*Campbell v. St. Louis & Suburban Ry. Co.* (Mo. Sup.) 86.

Under the evidence, *held* proper to refuse a particular instruction as to a street railroad's liability for a crossing accident.—*Campbell v. St. Louis & Suburban Ry. Co.* (Mo. Sup.) 86.

Under the evidence, *held* error to instruct that a motorman was bound by an ordinance to stop on the first appearance of danger to a person on the tracks.—*Campbell v. St. Louis & Suburban Ry. Co.* (Mo. Sup.) 86.

Where a plaintiff, injured by collision with a street car at a crossing, saw the car coming half a block away, the motorman's negligence in failing to sound the gong *held* immaterial.—*Murray v. St. Louis Transit Co.* (Mo. Sup.) 611.

Evidence of witnesses, in a position to have heard a street railway gong if it had been sounded, that they did not hear it, *held* to justify a finding that the bell was not sounded.—*Murray v. St. Louis Transit Co.* (Mo. Sup.) 611.

In an action for injuries in a collision with a street car, an instruction on plaintiff's contributory negligence *held* erroneously refused.—*Murray v. St. Louis Transit Co.* (Mo. Sup.) 611.

In an action for injuries in a collision with a street car, an instruction requiring plaintiff to use ordinary care for his own safety, and defining the term "ordinary care," *held* not to justify a refusal of an instruction on plaintiff's duty to look and listen.—*Murray v. St. Louis Transit Co.* (Mo. Sup.) 611.

In an action against a street railway company for killing a pedestrian at a street crossing, evidence *held* to show as a matter of law that decedent was guilty of contributory negligence.—*Moore v. Lindell Ry. Co.* (Mo. Sup.) 672.

The nature of the contributory negligence of a decedent, killed by a street car, sufficient to bar a recovery, notwithstanding the negligence of the street railway company, defined.—*Moore v. Lindell Ry. Co.* (Mo. Sup.) 672.

In an action against a street railroad company for injuries caused by being struck by a car while attempting to cross the track, plaintiff's contributory negligence was not fatal to recovery under the doctrine of discovered peril.—*Moore v. St. Louis Transit Co.* (Mo. App.) 699.

In an action by one injured while attempting to cross street car tracks, evidence considered, and *held* to require submission to the jury of the issue as to whether failure to stop the car in time to avoid injury to plaintiff was due to the operation of the car at a reckless rate of speed.—*Moore v. St. Louis Transit Co.* (Mo. App.) 699.

In an action against a street railway company by a person injured while crossing the track, evidence considered, and *held* to require submission to the jury of the issue as to whether plaintiff was guilty of contributory negligence.—*Moore v. St. Louis Transit Co.* (Mo. App.) 699.

A street car company is under obligation to use the highest degree of care in constructing and maintaining its electric wires, so as to avoid injuring persons in the streets.—*Memphis St. Ry. Co. v. Kartright* (Tenn.) 719.

Evidence in action against a street railroad company for injury from fall of trolley wire *held* to sustain finding of negligence.—*Memphis St. Ry. Co. v. Kartright* (Tenn.) 719.

The doctrine of *res ipsa loquitur* applies to the fall of a street car company's trolley wire,

caused by a stroke from a deranged trolley pole.—*Memphis St. Ry. Co. v. Kartright* (Tenn.) 719.

It is not negligence as a matter of law for a person driving on a street in the daytime under ordinary circumstances to fail to look and listen for street cars.—*Memphis St. Ry. Co. v. Riddick* (Tenn.) 924.

In an action against street railway for injuries to driver of vehicle on account of defective track, the appearance on the trial of a certain fact not pleaded *held* not to justify an instruction as to proximate cause.—*Shelton v. Northern Texas Traction Co.* (Tex. Civ. App.) 338.

A street railway *held* not relieved from liability for injuries to driver of a vehicle, resulting from defective track, by reason of concurrent negligence of another road.—*Shelton v. Northern Texas Traction Co.* (Tex. Civ. App.) 338.

STREETS.

See "Highways"; "Municipal Corporations," §§ 5, 7, 8.

SUBLETTING.

Of demised premises, see "Landlord and Tenant," § 1.

SUBSCRIPTIONS.

To corporate stock, see "Corporations," § 1.

SUBSTITUTION.

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See "Action."

SUMMARY PROCEEDINGS.

Collection of taxes, see "Taxation," § 4.

SUNDAY.

Indictment for Sabbath-breaking *held* bad for not negating exception in the statute.—*Halliburton v. State* (Ark.) 929.

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See "Courts," § 5.

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See "Waters and Water Courses," § 1.

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Of devisees or legatees, see "Wills," § 4.

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Of attorney, see "Attorney and Client," § 1.
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See "Licenses," § 1.

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Of property employed in commerce, see "Commerce."

Payment of taxes to sustain adverse possession, see "Adverse Possession," § 1.

§ 1. Constitutional requirements and restrictions.

Acts 1901, p. 329, c. 174, § 27, imposing a tax on capital of merchants invested in their business, *held* not discriminative as against a foreign corporation.—*American Steel & Wire Co. v. Speed* (Tenn.) 1037.

§ 2. Liability of persons and property.

A foreign corporation, sending goods to an agent in Tennessee to be used in filling orders, *held* a merchant, within meaning of Acts 1901, p. 329, c. 174, § 27, imposing a tax on capital of merchants invested in their business.—*American Steel & Wire Co. v. Speed* (Tenn.) 1037.

Act March 10, 1875 (Sp. Laws 1875, p. 69, c. 49), exempting property of a railroad from taxation in aid of construction, *held* constitutional.—*State v. Colorado Bridge Co.* (Tex. Civ. App.) 818.

Exemption of railroad from taxation in aid of its construction, under Act March 10, 1875 (Sp. Laws 1875, p. 69, c. 49), *held* not forfeited.—*State v. Colorado Bridge Co.* (Tex. Civ. App.) 818.

§ 3. Levy and assessment.

A proviso in an order appointing deputy assessors under Acts 25th Gen. Assem. p. 10, c. 5, § 12, *held* mere surplusage, and not to vitiate the order.—*McLennan County v. Frost* (Tex. Civ. App.) 876.

§ 4. Collection and enforcement against persons or personal property.

Recital in sheriff's deed conveying land sold on execution under judgment for delinquent taxes against the "unknown heirs" of a particular person *held* to show that the proceeding was properly instituted in accordance with Rev. St. 1899, § 580, providing for publication of process against unknown defendants.—*Wall v. Holladay-Klotz Land & Lumber Co.* (Mo. Sup.) 385.

Under Act July 4, 1879, Laws 1895, p. 60, c. 3, § 1, and Rev. St. 1895, relative to the running of limitations against claims for taxes, such claims, after the act of 1895, *held* not barred.—*Greenlaw v. City of Dallas* (Tex. Civ. App.) 812.

§ 5. Sale of land for nonpayment of tax.

An execution sale of several tracts of land in gross for taxes for which a judgment of foreclosure in gross has been rendered is not void.—*Ryon v. Davis* (Tex. Civ. App.) 59.

In trespass to try title by one whose title depended on a judgment in favor of the state for delinquent taxes, an answer seeking to set aside the sale under the judgment could not be sustained as a collateral attack on the sale, unless it is void.—*Ryon v. Davis* (Tex. Civ. App.) 59.

In trespass to try title by one whose title depended on a judgment in favor of the state for delinquent taxes, an answer seeking to set aside the sale under the judgment *held* not a direct attack.—*Ryon v. Davis* (Tex. Civ. App.) 59.

§ 6. Tax titles.

Recital in sheriff's deed conveying land sold on execution under judgment for delinquent taxes against the "heirs" of a particular person *held* to show that the judgment was void because the proceedings failed to name the heirs, so that the order of publication of process could be procured under Rev. St. 1899, § 575.—*Wall v. Holladay-Klotz Land & Lumber Co.* (Mo. Sup.) 385.

A judgment for the sale of land for delinquent taxes should withhold the writ of possession until the expiration of the time for redemption.—*Ryon v. Davis* (Tex. Civ. App.) 59.

TAXATION OF COSTS.

See "Costs," § 1.

TEACHERS.

See "Schools and School Districts," § 1.

TELEGRAPHS AND TELEPHONES.

§ 1. Regulation and operation.

In action for delay in delivering telegram, company, in absence of notice, *held* not liable for mental anguish from brother's failure to reach funeral of sister's child in time to comfort sister.—*Western Union Tel. Co. v. Wilson* (Tex. Sup.) 482.

In action for delay in delivering telegram, company, in absence of notice, *held* not liable for mental anguish arising from uncle's failure to reach niece's funeral.—*Western Union Tel. Co. v. Wilson* (Tex. Sup.) 482.

Damages laid and proven in an action against a telegraph company for negligent delay in delivering a message *held* not such as arose naturally from a breach of contract to transmit the message.—*Western Union Tel. Co. v. McFadden* (Tex. Civ. App.) 352.

Where a telegram was not repeated, *held*, under the contract, the company was not liable for error in transmission, unless due to want of ordinary care.—*Western Union Tel. Co. v. Brown* (Tex. Civ. App.) 359.

Rejection of evidence as to how an error in transmitting a telegram could occur *held* error, notwithstanding an admission of counsel.—*Western Union Tel. Co. v. Brown* (Tex. Civ. App.) 359.

In an action for delay in delivery of telegram, certain cross-examination of plaintiff on the issue of mental anguish *held* improperly excluded.—*Western Union Tel. Co. v. Simmons* (Tex. Civ. App.) 822.

In an action against a telegraph company for failure to properly deliver a death message, certain evidence *held* admissible to show that, had it been promptly delivered, the addressee could have given it to the plaintiff in time.—*Western Union Tel. Co. v. Crawford* (Tex. Civ. App.) 843.

In an action for failure to promptly deliver a death message, the filing of suit and the issuance of citation within 90 days of the time telegram was sent *held* to obviate necessity of plaintiff's presenting written claim against defendant company within that time.—*Western Union Tel. Co. v. Crawford* (Tex. Civ. App.) 843.

In an action against a telegraph company for failure to promptly deliver a death message, plaintiff *held* not negligent in not telegraphing request for postponement of funeral.—*Western Union Tel. Co. v. Crawford* (Tex. Civ. App.) 843.

TERMS.

Of judges, powers after expiration of, see "Judges," § 2.
Of leases, see "Landlord and Tenant," § 1.

TESTAMENT.

See "Wills."

TESTAMENTARY CAPACITY.

See "Wills," § 1.

TESTAMENTARY POWERS.

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Title necessary to maintain particular actions.
See "Ejectment," § 1; "Trespass to Try Title," § 1; "Partition," § 1.

TORTS.

By employes, see "Master and Servant," § 10.
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Causing death, see "Death," § 1.
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See "Conspiracy," § 1; "Forcible Entry and Detainer," § 1; "Fraud"; "Libel and Slander"; "Malicious Prosecution"; "Negligence"; "Nuisance"; "Trespass"; "Trove and Conversion."

Civil damages from sale of liquors, see "Intoxicating Liquors," § 8.

TOWNS.

See "Counties"; "Schools and School Districts," § 1.

TRANSCRIPTS.

Of record for purpose of review, see "Criminal Law," § 28.

TRANSITORY ACTIONS.

See "Venue," § 1.

TREES.

See "Logs and Logging."

TRESPASS.

Ejection of trespasser, see "Carriers," § 6.
Injuries to trespassers, see "Railroads," § 8.

§ 1. Acts constituting trespass and liability therefor.

In an action by a boy of 12 for an assault committed on him while playing on one of defendant's cars, *held* improper to instruct that defendant was authorized to "drive" the boy away.—*Emmons v. Quade* (Mo. Sup.) 103.

Where plaintiff was playing in one of defendant's cars, defendant's acts in frightening him by threats and attempting to imprison him in the car *held* to have constituted an unlawful assault, for which defendant was liable.—*Emmons v. Quade* (Mo. Sup.) 103.

§ 2. Actions.

In action for assault committed on plaintiff while playing in one of defendant's cars, the use of the word "negligently" in the petition *held* not to tender the issue of negligence and warrant instructions thereon for defendant.—*Emmons v. Quade* (Mo. Sup.) 103.

In an action for an assault committed on plaintiff while playing in defendant's car, instructions on contributory negligence *held* erroneous.—*Emmons v. Quade* (Mo. Sup.) 103.

In an action for assault, on evidence that defendant attempted to imprison plaintiff in a car in which he was playing, an instruction that defendant was authorized to drive him away *held* inapplicable.—*Emmons v. Quade* (Mo. Sup.) 103.

In an action by a trespasser for an unlawful assault on his person, committed while he was playing in defendant's car, an instruction submitting the issue of plaintiff's negligence *held* erroneous.—*Emmons v. Quade* (Mo. Sup.) 103.

§ 3. Criminal responsibility.

Conviction for trespass *held* not sustained for failure to show that the land on which it was committed belonged to the corporation named in the indictment.—*Jeter v. State* (Ark.) 929.

In a prosecution under Acts 25th Leg. p. 53, c. 55, § 1, making it a misdemeanor to gather pecan nuts on inclosed lands of another, instruction *held* not on the weight of the evidence.—*Haynie v. State* (Tex. Cr. App.) 24.

An information drawn under Acts 25th Leg. p. 53, § 1, making a gathering of pecan nuts on inclosed lands of another a misdemeanor, *held* sufficient.—*Haynie v. State* (Tex. Cr. App.) 24.

The fact that a fence was down at some place does not constitute defense to a prosecution under Acts 25th Leg. p. 53, c. 55, § 1, making it a misdemeanor to gather pecan nuts on inclosed lands of another.—*Haynie v. State* (Tex. Cr. App.) 24.

In a prosecution for violating Acts 25th Leg. p. 53, c. 55, relative to gathering pecan nuts, charge *held* to correctly define inclosed land.—*Haynie v. State* (Tex. Cr. App.) 24.

A mill dam is an inclosure, within the meaning of Acts 25th Leg. p. 53, c. 55, § 1, making it a misdemeanor to gather pecan nuts on inclosed lands of another.—*Haynie v. State* (Tex. Cr. App.) 24.

TRESPASS TO TRY TITLE.

See "Ejectment."

Appealability of judgment in, not final as to all parties, see "Appeal and Error," § 2.

Competency of witnesses, see "Witnesses," § 1.
Harmless error in, see "Appeal and Error," § 17.

Impeachment of witnesses, see "Witnesses," § 3.

Review of evidence in, as dependent on presentation of question by record, see "Appeal and Error," § 8.

§ 1. Right of action and defenses.

In trespass to try title, question whether a certain title bond conveyed the legal or equitable title *held* immaterial.—Tenzler v. Tyrrell (Tex. Civ. App.) 57.

In trespass to try title, defendants could not be regarded as innocent purchasers of the land in controversy, where one deed forming a part of their claim of title was absolutely void.—Wren v. Howland (Tex. Civ. App.) 894.

§ 2. Proceedings.

In trespass to try title, objections to a certified copy of a title bond, on the ground that it was a copy of a copy, *held* without merit.—Tenzler v. Tyrrell (Tex. Civ. App.) 57.

In trespass to try title, a claim that defendants should have been confined to the issue of res judicata *held* untenable.—Tenzler v. Tyrrell (Tex. Civ. App.) 57.

A bond for title *held* sufficient to support a plea of three years' limitations as against the obligor.—Tenzler v. Tyrrell (Tex. Civ. App.) 57.

In trespass to try title, findings that the parties claimed from common source and that defendants were innocent purchasers justified judgment for defendants.—Conner v. Downs (Tex. Civ. App.) 335.

In trespass to try title, a void deed under which defendants claim may be put in evidence by plaintiffs to show common source of title.—Wren v. Howland (Tex. Civ. App.) 894.

TRIAL.

See "New Trial"; "Reference"; "Witnesses." Contributory negligence of passenger as question for jury, see "Carriers," § 5.

Harmless error in instructions, see "Appeal and Error," § 17; "Criminal Law," § 27; "Homicide," § 8.

Harmless error in submission of issues to jury, see "Appeal and Error," § 17.

Instructions as to contributory negligence of passenger, see "Carriers," § 5.

Instructions as to damages, see "Damages," § 4.

Presentation of objections to instructions for purpose of review, see "Appeal and Error," § 4.

Review of instructions as dependent on presentation of question by record, see "Appeal and Error," § 8; "Criminal Law," § 26.

Trial of right to property levied on, see "Attachment," § 4; "Execution," § 2.

Proceedings incident to trials.

See "Continuance."

Place of trial, see "Venue," § 2.

Right to trial by jury, see "Jury," § 1.

Summoning and impaneling jury, see "Jury," § 2.

Trial of particular civil actions or proceedings.

See "Fraud," § 2; "Libel and Slander," § 3; "Trespass," § 2.

Against assignee for creditors, see "Assignments for Benefit of Creditors," § 1.

Against bank, see "Banks and Banking," § 1.

For breach of warranty, see "Sales," § 5.

For causing death, see "Death," § 1.

For compensation of brokers, see "Brokers," § 3.

For delay in carriage of live stock, see "Carriers," § 3.

For fires caused by operation of railroad, see "Railroads," § 10.

For injuries to animals caused by operation of railroad, see "Railroads," § 9.

For injuries to property in exercise of power of eminent domain, see "Eminent Domain," § 3.

For loss of passenger's baggage, see "Carriers," § 7.

For personal injuries, see "Carriers," § 4; "Highways," § 2; "Master and Servant," §

9; "Municipal Corporations," § 8; "Railroads," §§ 7, 8; "Street Railroads," § 2. For wrongful ejectment of passenger, see "Carriers," § 6.

On champertous contract, see "Champerty and Maintenance."

On insurance policy, see "Insurance," § 12.

On liquor dealer's bond, see "Intoxicating Liquors," § 3.

Suits to set aside fraudulent conveyances, see "Fraudulent Conveyances," § 3.

Trespass to try title to real property, see "Trespass to Try Title."

Trial of particular criminal prosecutions.

See "Embezzlement"; "Larceny," § 1; "Perjury," § 2; "Seduction," § 1; "Trespass," § 3.

Criminal prosecutions, see "Criminal Law," §§ 13, 16; "Homicide," §§ 6, 7.

For obstruction of highway, see "Highways," § 2.

For violation of liquor laws, see "Intoxicating Liquors," § 7.

§ 1. Reception of evidence.

Hearsay testimony, admitted without objection, must be considered.—Meyer v. Christopher (Mo. Sup.) 750; Christopher v. Meyer, Id.

Under Shannon's Code, § 5599, a witness who would be liable to contribute to a recovery obtained by plaintiff, etc., *held* properly permitted to testify, notwithstanding he remained in the courtroom during the trial after witnesses had been excluded under the rule.—Adolf v. Irby & Gilleland (Tenn.) 710.

A fact may be proved by hearsay evidence not objected to.—Western Union Tel. Co. v. Brown (Tex. Civ. App.) 359.

An objection to the introduction of a statement in a deed as a whole is not sufficient to raise the question of the admissibility of a specific part of the statement.—Wren v. Howland (Tex. Civ. App.) 894.

§ 2. Arguments and conduct of counsel.

Counsel's reference in argument to defendant's witnesses, in effect that, if they had not testified that the whistle was blown, they would have been discharged, *held* improper.—St. Louis, I. M. & S. Ry. Co. v. Boback (Ark.) 473.

Where plaintiff was severely injured, and the jury allowed her only \$1,000, remarks of counsel on the question of damages *held* not cause for reversal.—St. Louis, I. M. & S. Ry. Co. v. Boback (Ark.) 473.

Remarks of plaintiff's counsel as to the attendance of a witness *held* not prejudicial to defendant, where the jury were instructed not to consider anything as to witness' absence or presence.—International & G. N. R. Co. v. Anchonda (Tex. Civ. App.) 557.

Misconstruction of appellate court's opinion in former appeal, in arguing to jury, *held* error.—Somes v. Ainsworth (Tex. Civ. App.) 839.

§ 3. Taking case or question from jury.

In the determination of defendant's demurrer to plaintiff's evidence the defendant's evidence cannot be regarded.—Chinn v. Chicago & A. Ry. Co. (Mo. App.) 375.

§ 4. Instructions to jury—Province of court and jury in general.

Assuming existence of an accepted fact in the instructions is not prejudicial error.—McLean v. Kansas City (Mo. App.) 173.

In action by servant for injuries, an instruction *held* erroneous as assuming a disputed fact.—Harwell v. Southern Furniture Co. (Tex. Civ. App.) 52.

In a suit to recover horses, an instruction assuming there was no sale to defendant *held* not erroneous.—Word v. Kennon (Tex. Civ. App.) 334.

Instruction, in action by real estate brokers against another broker for their share of commissions, *held* not objectionable as assuming the existence of the contract claimed by plaintiffs.—*Blake v. Austin* (Tex. Civ. App.) 571.

Where there was no issue as to two propositions in an action by plaintiff for injuries by being struck by a train, it was not error to assume such proposition as true in the charge.—*Missouri, K. & T. Ry. Co. of Texas v. Owens* (Tex. Civ. App.) 579.

In an action against an assignee for creditors for breach of trust, charge *held* erroneous as being on the evidence and on the legal effect of one circumstance of the transaction.—*Nabours v. McCord* (Tex. Civ. App.) 827.

§ 5. — Necessity and subject-matter.

A submission only of the question of adverse possession in an action for injuries to possession of land *held* a finding by the court that plaintiff had a better paper title to the land.—*Holliday-Koltz Land & Lumber Co. v. Markham* (Mo. App.) 1121.

§ 6. — Form, requisites, and sufficiency.

Defendant in a civil action cannot complain of the trial court's action in stating plaintiff's theory in the charge, when a correct statement of defendant's theory was also given.—*Memphis St. Ry. Co. v. Shaw* (Tenn.) 713.

Where there was an irreconcilable conflict in the evidence, it was error to require the jury to reconcile such conflict.—*Houston & T. C. R. Co. v. Bell* (Tex. Sup.) 484.

In action against railroad for injuries to servant, an instruction given at plaintiff's request on question whether plaintiff, in the exercise of ordinary care, should have had a surgical operation performed, *held* proper.—*Missouri, K. & T. Ry. Co. of Texas v. Schilling* (Tex. Civ. App.) 64.

A repetition in the instructions of the rule as to preponderance of the evidence *held* not to mislead the jury.—*Sonka v. Sonka* (Tex. Civ. App.) 325.

§ 7. — Applicability to pleadings and evidence.

In an action against an initial carrier for damages to cattle in transit, a certain charge *held* not warranted by the evidence.—*101 Live Stock Co. v. Kansas City, M. & B. R. Co.* (Mo. App.) 782.

A charge on an issue not raised is reversible error, unless it appears to have been harmless.—*Harwell v. Southern Furniture Co.* (Tex. Civ. App.) 52.

In an action by a servant for injuries, an instruction *held* erroneous, as predicated on issues not raised.—*Harwell v. Southern Furniture Co.* (Tex. Civ. App.) 52.

An instruction is properly refused, where the evidence is not sufficient to raise the issue embraced in it.—*Missouri, K. & T. Ry. Co. of Texas v. Schilling* (Tex. Civ. App.) 64.

In an action by the vendee of a horse for breach of a warranty of soundness, a charge that if it was injured by ill care, etc., to find for defendant, *held* error.—*McAfee v. Meadows* (Tex. Civ. App.) 813.

In an action for injuries to a brakeman by the breaking of a brakestaff, an instruction on defendant's failure to inspect *held* properly refused.—*International & G. N. R. Co. v. Collins* (Tex. Civ. App.) 814.

§ 8. — Requests or prayers.

Requested instructions, covered by the main charge, are properly refused.—*Haller v. City of St. Louis* (Mo. Sup.) 613; *Texas & P. Ry. Co. v. Knox* (Tex. Civ. App.) 543; *Missouri, K. & T. Ry. Co. of Texas v. Owens* (Tex. Civ. App.)

579; *Missouri, K. & T. Ry. Co. of Texas v. McFarland* (Tex. Civ. App.) 811; *Gulf, C. & S. F. Ry. Co. v. Roane* (Tex. Civ. App.) 845.

Under Civ. Code Prac. § 317, relating to instructions, the duty of the court in giving instructions defined.—*Louisville & N. R. Co. v. Harrod* (Ky.) 233.

A refused instruction on contributory negligence in an action against a street railroad for a crossing accident *held* not covered by instruction given.—*Campbell v. St. Louis & Suburban Ry. Co.* (Mo. Sup.) 86.

Declaration of law as to testamentary capacity *held* properly refused, in view of declaration made.—*Lorts v. Wash* (Mo. Sup.) 95.

Where the court sufficiently defined adverse possession in an instruction given, it was not error for it to refuse a requested instruction on such subject.—*Holliday-Koltz Land & Lumber Co. v. Markham* (Mo. App.) 1121.

It is not error to refuse requested charges, which, though proper on one issue, embrace instructions on other subjects which are improper.—*Cranfill v. Hayden* (Tex. Civ. App.) 573.

Where a charge given at a party's request embraced the substance of other requested charges, the party cannot complain of the court's refusal to give the latter.—*Texas & Ft. S. R. Co. v. Hartnett* (Tex. Civ. App.) 800.

Where defendant failed to request additional charges, it cannot complain on appeal of omissions in the charge given.—*International & G. N. R. Co. v. Collins* (Tex. Civ. App.) 814.

A party desiring an additional instruction should request it.—*Western Union Tel. Co. v. Crawford* (Tex. Civ. App.) 843.

§ 9. — Construction and operation.

Error in plaintiff's instruction, to find for her if a loose plank in the sidewalk rendered it "unsafe and defective," *held* cured by the instruction given for defendant.—*Squiers v. Kansas City* (Mo. App.) 194.

In an action for injuries to possession of land, defendant *held* not prejudiced by an instruction directing the jury not to consider an entry with intent to cut and remove timber as evidence of adverse possession.—*Holliday-Koltz Land & Lumber Co. v. Markham* (Mo. App.) 1121.

An erroneous charge as to the weight of material evidence *held* not rendered harmless by other parts of the charge.—*Missouri, K. & T. Ry. Co. of Texas v. Meek* (Tex. Civ. App.) 317.

In an action against a street railway for injuries to driver of vehicle on account of defective track, an erroneous charge *held* not relieved by another charge.—*Shelton v. Northern Texas Traction Co.* (Tex. Civ. App.) 338.

In an action for injuries and mental anguish suffered by plaintiff in being separated from her children, an instruction authorizing a recovery, regardless of the defendant's knowledge of relationship, *held* not prejudicial, when considered with entire charge.—*International & G. N. R. Co. v. Anchonda* (Tex. Civ. App.) 557.

In an action for breach of warranty of soundness of horse, the fact that issues excluded in a charge were submitted elsewhere *held* not to cure the error.—*McAfee v. Meadows* (Tex. Civ. App.) 813.

§ 10. Custody, conduct, and deliberations of jury.

Facts *held* not to show that the amount of the verdict in an action for personal injuries was arrived at improperly.—*Moore v. Southwest Missouri Electric Ry. Co.* (Mo. App.) 176.

In suit to restrain erection of combustible building in established fire limits, verdict for plaintiffs would not be disturbed because of certain statements by juror after termination

of the trial.—*Chimine v. Baker* (Tex. Civ. App.) 330.

§ 11. Verdict.

Where jury found for plaintiffs in disregard of instruction to find against one of them, defendants could not complain because the court conformed the judgment to what must have been the intention of the jury.—*Chimine v. Baker* (Tex. Civ. App.) 330.

Inconsistency in the special findings in action by section foreman for injuries *held* not such as to warrant reversal of judgment in his favor.—*Texas Cent. R. Co. v. Bender* (Tex. Civ. App.) 561.

§ 12. Trial by court.

An appellant will not be heard to complain of an omission to find on an issue on which no request for a finding was made.—*Tenzler v. Tyrrell* (Tex. Civ. App.) 57.

TRIAL OF RIGHT OF PROPERTY.

See "Attachment," § 4; "Execution," § 2.

TROVER AND CONVERSION.

§ 1. Actions.

Where plaintiff had possession of goods, and delivered them to railroad for shipment to herself, and they were attached by defendant in a suit against another, plaintiff's possession gave her *prima facie* right to recover in conversion.—*Ilosencranz v. Swofford Bros. Dry Goods Co.* (Mo. Sup.) 445.

TRUSTEE PROCESS.

See "Garnishment."

TRUSTS.

Charitable trusts, see "Charities."

Combinations to monopolize trade, see "Monopolies," § 1.

Conveyances in trust for creditors, see "Assignments for Benefit of Creditors."

Trust deeds, see "Chattel Mortgages"; "Mortgages."

§ 1. Creation, existence, and validity.

Where land bought by husband is conveyed to wife unreservedly, the conveyance is *prima facie* intended as provision for or settlement on wife, and not as a resulting trust in husband's favor.—*Viers v. Viers* (Mo. Sup.) 395.

Parol evidence to overcome presumption that conveyance of land purchased by husband and conveyed to wife was intended as a settlement on her, and not a resulting trust in his favor, must be clear, strong, and unequivocal.—*Viers v. Viers* (Mo. Sup.) 395.

Evidence *held* insufficient to show that conveyance to wife of land purchased by husband was intended to create a resulting trust in his favor.—*Viers v. Viers* (Mo. Sup.) 395.

§ 2. Construction and operation.

A deed of trust conveying the property of a married woman construed, and *held* to require the trustee's consent to a conveyance of her property, evidenced by the trustee's signature to such conveyance.—*Colyar v. Wheeler* (Tenn.) 1089.

§ 3. Management and disposal of trust property.

A bill by a trustee for instructions may propound questions involving, not only his duty, but also the determination as to the title of him and others.—*Read v. Citizens' St. R. Co.* (Tenn.) 1056.

A postnuptial settlement *held* to create an active trust, imposing on the trustee the duty

of preserving the wife's property for her sole use during coverture.—*Colyar v. Wheeler* (Tenn.) 1089.

§ 4. Establishment and enforcement of trust.

On a suit to enforce an express trust based on a verbal contract, *held*, that proof of the contract must be clear and satisfactory.—*Kelly v. Short* (Tex. Civ. App.) 877.

ULTRA VIRES.

Acts of corporations, see "Corporations," § 3.

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UNLAWFUL DETAINER.

See "Forcible Entry and Detainer."

USURY.

See "Building and Loan Associations."

§ 1. Usurious contracts and transactions.

Where contract for compounding interest was valid in its terms, no presumptions of illegality could be indulged against it.—*Hillsboro Oil Co. v. Citizens' Nat. Bank* (Tex. Civ. App.) 336.

A contract for the compounding of interest *held* not usurious.—*Hillsboro Oil Co. v. Citizens' Nat. Bank* (Tex. Civ. App.) 336.

An agreement for the purchase of land *held* vitiated by usurious notes given for the purchase price of other land taken in exchange therefor.—*Webb v. Galveston & H. Inv. Co.* (Tex. Civ. App.) 355.

§ 2. Penalties and forfeitures.

Under Rev. St. 1895, art. 3106, a corporation to whom usurious notes were indorsed *held* alone liable for the penalty for collecting usurious interest.—*Webb v. Galveston & H. Inv. Co.* (Tex. Civ. App.) 355.

Under Rev. St. 1895, art. 3106, a person, though laboring under disabilities, *held* entitled to recover no greater penalty than double the amount of usurious interest paid within two years.—*Webb v. Galveston & H. Inv. Co.* (Tex. Civ. App.) 355.

In an action to recover the penalty for collecting usurious interest on notes, the good faith of a purchaser of the note *held* not to arise.—*Webb v. Galveston & H. Inv. Co.* (Tex. Civ. App.) 355.

VACATION.

Of mortgage foreclosure sale, see "Mortgages," § 7.

Powers of judges in vacation, see "Judges," § 2.

VALUE.

Limits of jurisdiction, see "Courts," § 3.

Of homestead, see "Homestead," § 1.

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Levy of tax on, by municipal corporation, see "Licenses," § 1.

VENDOR AND PURCHASER.

See "Sales."

Purchasers at sale on execution, see "Execution," § 3.

Specific performance of contract, see "Specific Performance."

§ 1/2. Performance of contract.

Under the terms of an agreement by which a purchase-money note for realty was to be retained by a third person until certain notes secured by a prior trust deed were produced by the vendor, the latter *held* entitled to the purchase-money note on the granting of a decree declaring the trust deed satisfied.—*Meyer v. Christopher* (Mo. Sup.) 750; *Christopher v. Meyer*, *Id.*

§ 1. Remedies of vendor.

Where the date of assignment of notes for the purchase money of land for which a vendor's lien was reserved was not shown, on a question of priority of liens, the presumption would be that the assignment was on the date of the notes.—*Maas v. Tacquard's Ex'rs* (Tex. Civ. App.) 350.

A deed by a purchaser of land, who at the time had paid only part of the purchase money, but who afterwards paid the balance, *held* to pass to the grantees title to the entire land.—*Ford v. Boone* (Tex. Civ. App.) 353.

In an action on a note and to foreclose a vendor's lien on land for which it was given, brought by an indorsee, evidence that the payee's attorney assured plaintiff that the transaction was a bona fide sale *held* admissible.—*Cochran v. Siegfried* (Tex. Civ. App.) 542.

VENIRE.

Special venire, see "Jury," § 2.

VENUE.

Of action for wrongful ejectment of passenger, see "Carriers," § 1.

Of criminal prosecutions, see "Criminal Law," § 2.

§ 1. Nature or subject of action.

In an action on a note payable in a particular county, defendant cannot plead his privilege to be sued in another county.—*Fenn v. Roach & Co.* (Tex. Civ. App.) 361.

When there are distinct causes of action of such a nature that they may be joined in the same suit, venue as to one of them will confer venue as to the other.—*First Nat. Bank v. Valenta* (Tex. Civ. App.) 1087.

§ 2. Change of venue or place of trial.

Denial of change of venue in disbarment proceedings *held* erroneous under Rev. St. 1899, § 819.—*State ex rel. Scott v. Smith* (Mo. Sup.) 586.

VERDICT.

In civil actions, see "Trial," § 11.

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Operation and effect as curing defects in pleadings, see "Pleading," § 5.

Review on appeal or writ of error, see "Appeal and Error," § 16.

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Of objections to particular acts or proceedings.

See "Appearance," "Criminal Law," § 16; "Pleading," § 5.

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WATERS AND WATER COURSES.

See "Drains."

§ 1. Surface waters.

The measure of damages in an action for successive overflows of land stated.—*Houston & T. C. R. Co. v. Lensing* (Tex. Civ. App.) 826.

WAYS.

Public ways, see "Highways"; "Municipal Corporations," §§ 7, 8.

WEIGHTS AND MEASURES.

Laws 1899, p. 264, c. 155, providing for the erection of a public weigher, etc., *held* not to prevent a person engaged in storing cotton, not acting as a factor or commission merchant, from weighing cotton for his customers.—*Galt v. Holder* (Tex. Civ. App.) 568.

WIDOWS.

Adverse possession by, see "Adverse Possession," § 1.

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WILLS.

See "Descent and Distribution"; "Executors and Administrators."

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Construction and execution of powers, see "Powers," § 1.

Construction and execution of trusts, see "Trusts."

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Restrictions on perpetuities, see "Perpetuities."

§ 1. Testamentary capacity.

Declaration of law as to testamentary capacity *held* properly refused, as embodying too severe a test.—*Lorts v. Wash* (Mo. Sup.) 95.

§ 2. Requisites and validity.

The validity of a will disposing of personal property only is determined by the law of the state of the testator's domicile.—*Hussey v. Sargent* (Ky.) 211.

A deed from father to son *held* in the nature of a testamentary disposition of the land, and not to pass a present interest therein.—*Griffin v. McIntosh* (Mo. Sup.) 677.

Facts *held* insufficient to show delivery of a deed with intent on the part of the grantors to vest a present interest in the grantee.—*Griffin v. McIntosh* (Mo. Sup.) 677.

A deed which was in effect a testamentary disposition of the property could not operate as a will, where it was not attested as such.—*Griffin v. McIntosh* (Mo. Sup.) 677.

§ 3. Probate, establishment, and annulment.

It is not necessary, in a will contest case, that the will should be proved by the testimony of all of the subscribing witnesses.—*Lorts v. Wash* (Mo. Sup.) 95.

In an action to establish a lost will, an instruction that, if the will was not found among plaintiff's effects, it would be presumed that she had revoked the same, and that the burden of proof was on plaintiff to overcome such presumption, *held* correct.—*Hamilton v. Crowe* (Mo. Sup.) 389.

Where, in an action to establish an alleged lost will, testatrix's physician had testified to a part of a conversation with her, he was properly allowed to testify to the remainder on cross-examination.—*Hamilton v. Crowe* (Mo. Sup.) 389.

One seeking to contest will *held* to have had no such interest as to entitle him so to do.—*Ligon v. Hawkes* (Tenn.) 1072.

§ 4. Construction.

A will construed, and *held* to bequeath to the testator's grandchildren the income of a certain part of his estate, and also the principal thereof.—*Hussey v. Sargent* (Ky.) 211.

A will construed, and *held*, that the word "survivors," in a bequest to certain daughters or their "survivors," applied only to the daughters.—*Dodge v. Sherwood* (Mo. Sup.) 417.

Will devising realty to testator's wife construed, and *held* to give her power of disposition in fee.—*Underwood v. Cave* (Mo. Sup.) 451.

Will devising real estate to testator's wife construed, and *held* to vest in her only estate for life.—*Underwood v. Cave* (Mo. Sup.) 451.

A devise to testator's grandchildren on the death of their respective parents *held* to relate to the death of the latter before testator's death.—*Katzenberger v. Weaver* (Tenn.) 937.

In a bill to enforce specific performance of a contract to convey devised real estate, certain parties *held* proper parties defendant to defendant's cross-bill.—*Katzenberger v. Weaver* (Tenn.) 937.

§ 5. Rights and liabilities of devisees and legatees.

A widow's agreement to take under her husband's will *held* not to prevent her from electing to take under the statute, notwithstanding Rev. St. 1899, § 4335, which authorizes a married woman to make contracts.—*Spratt v. Lawson* (Mo. Sup.) 642.

A widow *held* not estopped from renouncing the provisions made for her in her husband's will, and electing to take under the statute.—*Spratt v. Lawson* (Mo. Sup.) 642.

Under Shannon's Code, §§ 4030, 4231, a will *held* not to render a policy on testator's life, made payable to his executors, subject to the claims of testator's creditors.—*Cooper v. Wright* (Tenn.) 1049.

WITNESSES.

See "Depositions"; "Evidence."

Absence of, as ground of continuance, see "Continuance"; "Criminal Law," § 15.

Comments on, by counsel, see "Trial," § 2.

Harmless error in rulings on questions to, see "Appeal and Error," § 17.

Perjury, see "Perjury."

Testimony of accomplices, see "Criminal Law," § 13.

§ 1. Competency.

The rule privileging communications between attorney and client *held* to exclude only those passing in professional confidence.—*State v. Faulkner* (Mo. Sup.) 116.

Communications by client to attorney in attempting to procure his services in securing a bribe *held* not privileged.—*State v. Faulkner* (Mo. Sup.) 116.

Communications made by a client to attorney, before commission of a crime, and for purpose of being helped in its commission, are not privileged.—*State v. Faulkner* (Mo. Sup.) 116.

Rev. St. 1899, § 4659, *held* not to affect the exceptions to the rule excluding communications between attorney and client.—*State v. Faulkner* (Mo. Sup.) 116.

Evidence of testatrix's physician that he asked her if she had made a will, and her reply in the negative, *held* not privileged.—*Hamilton v. Crowe* (Mo. Sup.) 389.

Evidence of a physician as to a conversation with testatrix relative to the making of a will *held* not privileged.—*Hamilton v. Crowe* (Mo. Sup.) 389.

Under Rev. St. 1899, § 4659, a physician *held* prohibited from testifying as to conversations had with a patient.—*State v. Kennedy* (Mo. Sup.) 979.

In a prosecution for rape of a child seven years old, she was competent to testify.—*Reyna v. State* (Tex. Cr. App.) 25.

In trespass to try title, certain declarations made by a landowner *held* inadmissible, under Rev. St. art. 2302.—*Tenzler v. Tyrrell* (Tex. Civ. App.) 57.

Plaintiff *held* to have waived bar of "privilege" to a communication testified to by defendant's counsel by failing to object to other testimony relative thereto.—*Shelton v. Northern Texas Traction Co.* (Tex. Civ. App.) 338.

§ 2. Examination.

A witness, called upon to testify to self-incriminating evidence, if his privilege is refused, may decline to testify, and, if imprisoned, seek redress by habeas corpus, or save his exceptions and obtain a reversal.—*State v. Faulkner* (Mo. Sup.) 116.

The right of a witness to refuse to give self-incriminating evidence is a personal privilege, which he may waive; and it will be held waived if he voluntarily answers.—*State v. Faulkner* (Mo. Sup.) 116.

In a prosecution for patricide, a witness is properly allowed to refresh his memory by a copy transcribed from his stenographic notes, taken on a former hearing.—*Connell v. State* (Tex. Cr. App.) 512.

In questioning witness on redirect examination, repetition of his answer to a question asked him on cross-examination *held* not error.—*International & G. N. R. Co. v. Collins* (Tex. Civ. App.) 814.

In an action for injuries, refusal to strike the nonresponsive part of a witness' answer, intended to repel an insinuation implied by the question, *held* not error.—*International & G. N. R. Co. v. Collins* (Tex. Civ. App.) 814.

In an action for injuries, questions asked of an alleged expert *held* not objectionable as leading.—*International & G. N. R. Co. v. Collins* (Tex. Civ. App.) 814.

Defendant *held* entitled, on cross-examination of plaintiff's witness, to inquire as to certain

facts, though contradictory to other testimony given by the witness.—*Shain Packing Co. v. Burrus* (Tex. Civ. App.) 838.

§ 3. Credibility, impeachment, contradiction, and corroboration.

In prosecution for homicide, accused's witness *held* impeachable by contradictory statement.—*Locklin v. State* (Tex. Cr. App.) 305.

Witnesses in a criminal prosecution cannot be impeached by showing that their reputations for morality and honesty are bad.—*Locklin v. State* (Tex. Cr. App.) 305.

A witness cannot be impeached as to his statement of his belief as to who committed the crime.—*Jenkins v. State* (Tex. Cr. App.) 312.

In prosecution for homicide, accused witness *held* subject to impeachment as to material statements made.—*Jenkins v. State* (Tex. Cr. App.) 312.

In a prosecution for homicide, where accused's witness testified to an alibi in favor of an accomplice, the state may show on cross-examination that the witness had made contradictory statements.—*Jenkins v. State* (Tex. Cr. App.) 312.

In murder prosecution, predicate for impeachment of witness, testifying to friendly relations between accused and decedent, *held* sufficiently laid.—*Connell v. State* (Tex. Cr. App.) 512.

Impeachment of accused's witness in murder prosecution, testifying to friendly relations between parties, *held* not objectionable as on collateral issue.—*Connell v. State* (Tex. Cr. App.) 512.

In a prosecution for perjury, the court did not err in permitting the prosecution to ask a witness for his defense, who was a gambler, what his occupation was.—*McLeod v. State* (Tex. Cr. App.) 522.

In trespass to try title, certain evidence to show that the mental capacity and faculties of recollection of a witness were impaired *held*

admissible.—*Wren v. Howland* (Tex. Civ. App.) 894.

A witness cannot be impeached by showing indictments of perjury pending against him, except on cross-examination.—*Casey-Swasey Co. v. Virginia State Ins. Co.* (Tex. Civ. App.) 911.

A party offering a witness may not impeach his character.—*Casey-Swasey Co. v. Virginia State Ins. Co.* (Tex. Civ. App.) 911.

In an action on a fire policy, certain cross-examination of a witness for plaintiff and of plaintiff for himself *held* proper, as affecting their credibility.—*McCarty v. Hartford Fire Ins. Co.* (Tex. Civ. App.) 934.

In an action on a fire policy, certain cross-examination of witness for plaintiff *held* proper as affecting her credibility.—*McCarty v. Hartford Fire Ins. Co.* (Tex. Civ. App.) 934.

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9	58	427	133	58	708	240	58	610	342	59	5	475	59	512	583
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21	58	420	151	58	520	261	58	694	363	59	16	493	59	745	612
29	58	437	154	58	521	265	58	910	369	59	25	498	59	751	616
31	58	446	163	58	591	265	59	328	372	59	30	504	59	758	624
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84	70	891	198	70	815	292	71	182	401	71	680	465	71	1005	562	71	1000
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